COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss SUPERIOR COURT

HUANG, et al.,

Plaintiffs,

v.

LEO BARTOLINI, JR., DAVID EAGLE, AND PAUL DREPANOS, as members of the TOWN OF SOUTHBOROUGH BOARD OF APPEALS, and PARK CENTRAL, LLC, and WILLIAM A. DEPIETRI,
Defendants.

CIVIL ACTION NO. 16-01359-B

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PLAINTIFFS' POST-TRIAL BRIEF

INTRODUCTION

The evidence at trial demonstrated that the Southborough Zoning Board of Appeals (the "Board" or "ZBA") exceeded its authority and acted in an arbitrary and capricious manner by granting the application of Park Central, LLC and William Depietri ("Depietri" or the "applicant") for a comprehensive permit of an *integrated* mega-project under G.L. c. 40B.

> I'm talking -- The overall site is 100 acres. So that's how we look at it. Sometimes you got to go in and lose money on one phase to get the infrastructure to make money on the next phase. They don't all have to be profitable. If this was a standard 13-acre site and we had no other land around it, yes, we would want it to be profitable. This is one piece of a big puzzle. And we're doing this to get the infrastructure in. Who cares if it loses money?

Testimony of William Depietri, Tr. Day 9 at 39:4-11 (Depietri).[1]

In a headlong rush to close the public hearing on August 24, 2016, less than 10 days after

[1] Citations to the trial transcripts appear in the following format: Day [#] at Page:lines. The following dates correspond to the twelve days of trial: Day 1 (January 13); Day 2 (January 14); Day 3 (February 1); Day 4 (February 2); Day 5 (February 8); Day 6 (February 18); Day 7 (February 25); Day 8 (March 9); Day 9 (March 22); Day 10 (March 23); Day 11 (March 24); and

receiving revised plans from the applicant that had been promised months earlier, the Board voted to approve the proposed combined project of 338 new residential units—only 45 of which will be affordable and 158 of which are market rate townhomes—in addition to the future development of a hotel, an assisted living facility, and new office space. The Board granted this approval despite the fact that the Park Central Project Site (the "Site") lacks any semblance of safe and adequate access. The evidence at trial demonstrated that the approved project would create hazardous traffic conditions that will endanger the health and safety of the Plaintiffs.

Defendants admitted that the proposed project creates more than 3,200 new daily traffic trips that must be routed via a proposed new connector road onto Flagg Road and the adjacent network of narrow residential neighborhood roads, all of which have been designated as Scenic Roads by the town under G.L. c. 40, § 15C. The connector road as proposed would be located less than 300 feet from the intersection of Route 9 West and Flagg Road and in very close proximity to the southern end of an existing culvert on Flagg Road. The roadway at the culvert is so narrow that cars often must stop to allow oncoming traffic to pass. Indeed, the DPW director testified that the DPW did not even stripe the pavement over the culvert with a centerline because the roadway there is too narrow. Tr. Day 2 at 55-56 (Galligan). Defendants' own witnesses testified that recommended safety mitigation measures cannot be implemented. *See, e.g.,* Ex. 60. And the mitigation funding that the Board *invited Depietri to set*, a paltry $25,000, was nowhere close to what would be necessary to address the traffic and safety issues that would be created by the project.

In addition to the Board's complete failure to require the applicant to ensure that the project as proposed would not endanger the safety of the community, the Board's decision was also fatally tainted. Specifically, the evidence at trial demonstrated that the applicant employed the

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Day 12 (April 1).

tactic of threatening Town officials he viewed as potentially unfriendly with litigation, even eliminating a sitting Board member from participation. The Board members who did participate had undisclosed conflicts of interest, willfully failed to follow established procedures, and engaged in *ex parte* communications with the applicant. Additionally, the Board's timetable for voting was driven not by receipt of all required information, but rather by the fact that one Board member's move out of town disqualified him from serving on the Board.

For all of these reasons, the Board's decision must be annulled.

ARGUMENT

I. THE DECISION SHOULD BE ANNULLED BECAUSE THE PARK CENTRAL PROJECT LACKS SAFE AND ADEQUATE ACCESS AND FAILS TO PROTECT THE HEALTH AND SAFETY OF THE PLAINTIFFS.

A. It Was Arbitrary and Capricious to Allow a Left Turn on Flagg.

Park Central proposes to direct commercial traffic and all residential traffic from the approved new 338 residential unit project onto the connector road because MassDOT will not allow that new traffic to exit from the only existing point of access, Park Central Drive. Tr. Day 8 at 198-199 (Depietri); Exs. 1, 3, 16, 39. The proposed project will generate more than three thousand new daily traffic trips on Flagg Road.[2] The evidence at trial demonstrated that nobody believed it was a good idea to allow that volume of traffic to access Flagg and turn left, cross over the narrow culvert, and proceed into the surrounding neighborhood. In a 2013 study, MassDOT explicitly recognized the problematic nature of the Site's only access, Park Central Drive, due to its proximity to the 495 North on-ramp.[3] As a result, MassDOT recommended a

[2] Defendants' attempts to minimize this number at trial missed the mark. Whether the trips are exiting the connector road onto Flagg or are returning to the connector road from Flagg, the total for new daily trips remains the same.

[3] Everyone—even the applicant himself—recognized that the Site was landlocked. Tr. Day 9 at 114. All previous attempts at development had failed due to MassDOT's limitation on access to Route 9. Tr. Day 10 at 107-108.

connector road to Flagg, but prohibited left turns from that proposed connector, thus directing all new traffic south on Flagg and back to Route 9. Tr. Day 8 at 193-195 (Depietri); Ex. 26; Ex. 2, pp. 95-96. At the beginning of the Public Hearing, even Depietri proposed that all traffic accessing Flagg be permitted to turn right only, acknowledging that allowing left turns would introduce too much traffic to Flagg. Tr. Day 8 at 188-192 (Depietri); Ex. 2, p. 89 of 193 "Proposed 180 Unit 40B Project." As a result of those concerns, Depietri agreed to eliminate the left turn onto Flagg from the connector road.[4] *Id.* Following the Board's Decision, the Southborough Board of Selectmen voted to disallow access from Park Central onto Flagg Road because such access clearly introduced safety hazards on Flagg. Ex. 36; Tr. Day 11 at 67.

The evidence proves that the Board's decision to ignore the safety issues created by allowing left turns from the connector road onto Flagg was arbitrary and capricious. Simply put, the Board had no traffic safety justification for allowing left turns onto Flagg, crossing over the narrow culvert, and introducing significant new traffic onto the narrow and winding residential roadways. The only explanation for the Board's decision was to assist the connected developer in marketing the new residences and maximizing his profit.

The applicant attempted to use the 6-abutter settlement to justify the introduction of significant new traffic on Flagg, but the evidence shows that the Site's extreme access problem was created by the applicant itself. Depietri and Park Central simply bargained away their other proposed access points, calculating that they could use their appeasement of just six abutters on Tara and Bantry to claim that they had satisfied the concerns of the neighborhood at large. Ex. 48; Tr. Day 8 at 161-163 (Depietri).

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[4] In an October 16, 2013 letter to Michael Busby of MassHousing, Depietri stated, "During the first public meeting we were attentive to both neighborhood and official comment about the impact the development would have on traffic and safety in the area, and accordingly modified the traffic pattern as reflected on the attached revised plan." Tr. Day 8 at 186 (Depietri); Ex. 40; Ex. 2,

The Board's attempt to address the safety issue on Flagg with the eleventh-hour inclusion of a 7:00 a.m. to 9:00 a.m. time restriction for left turns further demonstrates the arbitrariness of the Board's conduct. Specifically, the Board voted to approve that condition despite being advised by the Chief of Police, Ken Paulhus, that he wanted to "emphatically state that the Police Department would be opposed" to this condition because it would be "unenforceable," and "would lead to much confusion and frustration along with a safety issue of expectations that cars would not be coming northerly at that time." Ex. 32. Indeed, Chief Paulhus testified that he was "very opposed" to the condition and stated that it would create an "extreme safety issue" on Flagg Road. Tr. Day 5 at 137:6, 149:4-5. The Board provided no response to Chief Paulhus and included the condition in the Decision over his emphatic opposition. *Id.* at 138.

B. <u>The Board Failed to Address Legitimate Health and Safety Concerns Regarding Traffic Safety.</u>

The Board was provided substantial evidence during the course of the public hearing that there are existing traffic safety problems on the roadways in the vicinity of the project site. Specifically, the Board was presented with a Road Safety Study conducted by its own peer review consultant that identified numerous safety deficiencies on Flagg and Deerfoot Roads. Ex. 17. The deficiencies on Flagg included road width as narrow as fifteen feet (15'), lack of clear zones, lack of sidewalks, and the narrow culvert in close proximity to the proposed access road. Ex. 17 at 2. The Study also noted that the section of Flagg between the proposed access road and Blackthorn Drive had a crash rate in excess of state averages for minor collector streets. Ex. 17 at 9. The Road Safety Study included a number of proposed measures for improving the safety of Flagg and Deerfoot Roads, including replacing the existing culvert, installing sidewalks where possible, relocating a stone wall at the Flagg and Blackthorn Drive intersection, installing speed humps in

the area between the proposed access road and Blackthorn, and realigning the Flagg /Deerfoot intersection (including installing Rectangular Rapid Flashing Beacons). Ex. 17 at 21-24.

The estimated cost of all the safety measures the Study recommended in May of 2016 was $1,500,000. Tr. Day 5 at 49 (DeGray). Despite that, the only condition the Board imposed that even remotely addressed traffic safety was Special Condition #3, which required the applicant to contribute only $25,000 for the design and construction of traffic calming measures such as "sipped humps, sidewalks, street lighting and signage" on Flagg Road. Ex. 1. Since then, the Town has striped much of Flagg (except in the areas where the narrow roadway width does not allow two-way traffic) and has installed dynamic speed signs near the culvert, which has effectively exhausted the entire $25,000 contribution required by the Board. Tr. Day 2, at 55-56. However, no evidence was introduced to show that these minimal measures have alleviated the safety problems on Flagg Road. Tr. Day 7 at 85 (Cram); Tr. Day 5 at 44-45 (DeGray).

It is well-established that traffic safety is a legitimate issue of local concern that can override the local need for more affordable housing. *See, Lexington Woods, LLC v. Waltham Zoning Bd. of Appeals*, No. 02-36, slip op. at 20 (Mass. Housing Appeals Comm., February 1, 2005) (copy attached hereto as Exhibit 1); *O.I.B. Corp. v. Braintree Bd. of Appeals*, No. 03-15, slip op. at 10 (Mass. Housing Appeals Comm, March 27, 2006) (copy attached hereto as Exhibit 2). While a Board may not require a 40B applicant to correct existing problems with municipal infrastructure, it may require the applicant "to mitigate specific traffic problems that the new development will cause on roads in the immediate vicinity of the site." *Hilltop Preserve Ltd. Part. v. Walpole Bd. of Appeals*, No. 00-11, slip op. (Mass. Housing Appeals Comm., April 10, 2002) (copy attached hereto as Exhibit 3). It was within the Board's authority to impose conditions addressing the traffic safety issues, which the Board failed to do. *Id.*; *citing MacGibbon v. Board of Appeals of Duxbury*, 369 Mass. 512 (1976). The sole condition the Board imposed for

mitigation was woefully inadequate to address the safety concerns raised both by the residents and the Board's traffic expert.

Whether or not the Board could have required the applicant to pay the full cost of the necessary traffic safety improvements (which, given the scope of the increased impacts, the applicant clearly could have been required to fund the full cost), the Board should have, at minimum, imposed a condition prohibiting the commencement of construction on the Project until the essential safety upgrades had been completed. *See, Peppercorn Village Realty Trust v. Hopkinton Board of Appeals*, No. 02-02, slip op. (Mass. Housing Appeals Comm., January 26, 2004) (determining that when a Board denied a connection to the municipal water system due to a lack of capacity, the appropriate measure was to place the applicant on a waiting list until sufficient capacity was developed) (copy attached hereto as Exhibit 4). The Board's decision ignores the substantial and well-documented local concerns regarding traffic safety on Flagg and Deerfoot Roads, and therefore it is not consistent with local needs.

The Board's decision was also fatally defective in that it failed to require the applicant to provide analysis of the impacts to two of the neighborhood roads, Lovers Lane and Lynbrook Road, that would also bear the burden of new traffic. It also failed to include any conditions to address the impacts to those roadways. Ex. 1. The evidence demonstrated that Lovers Lane looks more like a bike path than a road in several places, *see* Ex. 116, and that all the neighborhood roads, including Lovers and Lynbrook, are heavily utilized by children and adults walking, running, and riding their bikes. The Plaintiffs testified that Lovers Lane and Lynbrook Road are cut-through streets and are used more frequently when Route 9 experiences backups. Tr. Day 5 at 92, 166-167 (Keyes); Tr. Day 8 at 113, 115 (Herczeg). The Town's DPW Director, acting as a witness for the applicant, acknowledged that she was aware that Lovers Lane and Lynbrook Road are used by many people as a cut-through to Route 30. Tr. Day 2, at 41 (Galligan). The DPW

Director stated that Lovers Lane is a "road that needs a lot of work." Tr. Day 2, at 40.

Even the applicant's own traffic expert acknowledged that Lovers and Lynbrook had existing traffic safety problems, and that anything beyond a minimal increase would exacerbate those problems. Tr. Day 3 at 64 (Dandrade). The applicant's traffic consultant presented "a real-time GPS study" in an attempt to support his contention that Lovers and Lynbrook would have only minimal traffic increases. Ex. 65. This "study," however, was conducted during a low-traffic holiday week during which no back-up on Route 9 was documented or observed. Tr. Day 4 at 12 (Dandrade). The "study" was also conducted only during the p.m. peak hour, even though it is the peak a.m. hour during which projected queues at the Flagg Road/Route 9 intersection are more than twice as long. *Id.* at 9-10; Ex. 65. Without evidence of a backup on Route 9, the "study" shows that motorists who opted to take Lovers to Lynbrook Road would have driven approximately five (5) minutes longer than if they proceeded south on Flagg Road to Route 9. Ex. 65; Tr. Day 7 at 63 (Cram). Thus, the evidence shows that even an average backup on Route 9 would likely result in motorists choosing the alternative route of Lovers to Lynbrook, a likelihood made all the more feasible with real-time GPS traffic apps.[5] Tr. Day 6 at 34-35 (Keyes). The Board's complete failure to consider the safety impacts to Lovers and Lynbrook is alone grounds for the reversal of the Board's decision, as it represents a valid health and safety concern that the Board willfully ignored.

The Court must overturn a board's decision when "no rational view of the facts the court has found supports the board's conclusion." *Wendy's*, supra at 383, 909 N.E.2d 1161, *quoting*

[5] The traffic study submitted on behalf of the applicant shows that peak delays at the Flagg Road/Route 9 intersection will be 196.7 seconds in the a.m. peak hour, eliminating more than three (3) minutes of the difference between the Flagg Road to Route 9 route and the Flagg Road to Lover's Lane/Lynbrook Road route (since there was no evidence of any backup at the time the GPS study was conducted). Ex. 14, page 32 (Table 10). This table does not factor in backups associated with vehicle accidents on Route 9, which would eliminate any remaining difference

Britton, supra at 74–75, 794 N.E.2d 1198. Deference is not appropriate when the reasons given by the board lacked "substantial basis in fact" and were in reality "mere pretexts for arbitrary action or veils for reasons not related to the purposes of the zoning law." *Vazza Props., Inc. v. City Council of Woburn*, 1 Mass. App. 308, 312 (1973); *Shirley Wayside Ltd. P'ship v. Bd. of Appeals of Shirley*, 461 Mass. 469 (2012). Here, the Board approved the application despite a valid and clearly articulated health and safety concern that had not been addressed by conditions in the Board's decision. *Reynolds v. Zoning Bd. of Appeals of Stow*, 88 Mass. App. Ct. 339, 350 (2015). The Board completely failed to ensure that the necessary safety upgrades to Flagg and Deerfoot that even its own consultant recognized were necessary to be in place before the applicant introduced a *minimum* of 483 additional daily trips onto an unsafe roadway system. The Board also failed to require any study whatsoever of the safety impacts to Lovers and Lynbrook, despite the deficiencies of these roadways being clearly articulated during the course of the Board's hearing. Accordingly, "it is unreasonable to conclude that the local need for affordable housing outweighs the health concerns of existing abutters." *Id.*

Because the Board failed to properly address these obvious health and safety concerns, the comprehensive permit must be overturned.

II. THE BOARD'S RUSH TO CLOSE THE HEARING AND VOTE TO APPROVE THE DECISION WITHOUT DELIBERATION WAS ARBITRARY AND CAPRICIOUS.

On August 24, 2016, at approximately 10:20 p.m.—over the objections of residents, the Planning Board, the Conservation Commission, and the Chair of the Board of Selectmen—the Board voted, without discussion, to close the public hearing. *See* Exs. 52; 30, 33, 34; Tr. Day 10 at 49-52. At that moment, there was a resident still standing at the podium and a queue of others waiting to provide comment. Tr. Day 10 at 49-52. After taking a recess that lasted until 11:12

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between the two routes.

p.m., the Board then voted—with no deliberation—to approve the application and to sign the proposed written decision that had been submitted to the Board the same day but not made available to the public. *Id.*; Exs. 1, 52. The Board was so eager to sign the Decision that it had to be prompted by the applicant's attorney, Catanzaro, to move to approve the permit application first. Tr. Day 10 at 52.

The Board closed the hearing in the face of an outcry by both Town officials and residents that a vote was premature. Specifically, when the Board announced just days earlier that it might vote at that segment of the public hearing, the Planning Board, the Conservation Commission, and the Chair of the Board of Selectmen urged it to keep the hearing open beyond August 24th. Park Central had already executed a written agreement to extend the proceedings until at least August 31, 2016. Ex. 134. Thus, Board member Eagle had to acknowledge at trial that, as Chair Pro Tem, he could have scheduled an additional segment of the public hearing the following week. Tr. Day 10 at 41:5-8. He also admitted that he could have requested that the applicant agree to an extension *beyond* August 31. *Id.* at 41:11-24.

Instead of continuing the hearing or requesting an extension, however, Eagle stated during the hearing that he was concerned about Depietri's "due process rights," and that he believed Depietri was entitled to a "180-day review." *Id.* at 43:5-11. At trial, Eagle conceded that he did not understand that the 180-day timeline for review of 40B applications that he cited as a reason in support of the applicant's desire to close the hearing presumes that the applicant has made timely submissions of materials requested by the Board. *Id.* at 44:21 to 45:7. He also admitted that the Board had granted multiple extensions at the request of the Depietri. *Id.* at 44:13-20. *See* 760 CMR § 56.05(3). In short, the evidence at trial was overwhelming that the 180-day timeline referenced by Eagle provided no justification for closing the public hearing.

After closing the public hearing, the regulations require the Board to render a decision

within 40 days. *See* 760 CMR § 56.05(8). Eagle testified that he did not know how long a period the Board was afforded before it was required to render a decision or how long the Board had to record the decision with the town clerk after it did so. Tr. Day 10 at 60-62. With Eagle acting as Chair, the Board chose not to avail itself of the opportunity to deliberate, signed the Decision that night, and filed it with the town clerk the very next day, August 25th. Eagle did not disclose to anyone that earlier that day he had executed all documents necessary to relinquish his declaration of homestead and sell his Southborough residence, ending both his residency and his qualification to serve as a member of the Board. Ex. 119.

The evidence demonstrated that the real reason the Board rushed the close of the hearing, voted to approve the application, and signed the Decision on August 24th was because Eagle was moving out of town. In fact, Eagle himself acknowledged this. At the Board's meeting on August 3, 2016, after Bartolini was removed as Chair by the Board of Selectmen, Eagle was asked whether he would serve as Chair for purposes of Park Central. Eagle responded: "I don't think I can." Tr. Day 9 at 151-152. He knew that his house was on the market (and likely under agreement with the closing date set) at the time. Tr. Day 10 at 64, 73:18 to 74:21; Exs. 119, 120. He also understood that he could not serve as a board member if he was not a Southborough resident. Tr. Day 10 at 72:18-24. In fact, he sent a letter of resignation less than a week after the Board's vote. Tr. Day 10 at 73; Ex. 46.

Before closing the public hearing, the Board received letters from the Conservation Commission, the Planning Board, and a member of the Board of Selectmen urging the ZBA not to close the hearing because significant information was still outstanding, and the application was not ready for a vote. Exs. 30, 33, 34; *see also* Ex. 29. Revised plans that were promised months earlier were not provided by Park Central until August 15. Ex. 3; Tr. Day 10 at p. 160. The evidence at trial demonstrated that the rushed closure of the public hearing and the Board's

precipitous vote to approve the application and execute a decision the same night deprived the Planning Board and the Conservation Commission the opportunity to review the revised plans and to provide meaningful comment or make recommendations.[6] Tr. Day 11 at 38-39; 52, 62-63; 82

In sum, the evidence at trial demonstrated that Eagle was no longer a Southborough resident on the night of the 24th, which disqualified him from serving on the Board. Tr. Day 10 at 67-73; Exs. 119-120; Ex. 46; *see also*, Tr. Day 11 at 10:9 to 12:14 (Yazdani testimony).[7] Because Eagle was disqualified from voting, only two Board members remained. In addition to the arbitrariness of closing the hearing on the 24th, the lack of quorum provides a separate and independent basis upon which the Decision should be annulled.[8]

III. THE DECISION SHOULD BE ANNULLED BECAUSE THE HEARING WAS TAINTED BY PROCEDURAL IRREGULARITIES, IMPROPER CONDUCT, AND CONFLICTS OF INTEREST.

Requirements for a fair trial and a fair tribunal extend beyond the confines of a formal court. *Hall v. Thayer*, 105 Mass. 219, 221 (1870); *Thomajanian v. Odabshian*, 272 Mass. 19, 23 (1930). The SJC has applied due process principles to other situations in which decision makers are deciding the rights of parties before it. *See, e.g.*, *Police Comm'r of Boston v. West Roxbury*

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[6] While the Board was not required to incorporate all recommendations of the other Boards, it was required to take those recommendations into consideration. *See* 760 CMR § 56.05(8) ("In making its decision, the Board shall take into consideration the recommendations of Local Boards, but shall not be required to adopt same.") (Emphasis supplied).

[7] Southborough resident Dr. Magid Yazdani attended the Board of Selectmen's meeting on August 23, 2016 and handed each member of the Board a photograph of the large moving truck that had been in Eagle's driveway the previous weekend, asking the Board members whether Eagle's move out of Southborough was the real reason the Board was scheduling the vote for the following evening. Tr. Day 11 at 11-13; 55.

[8] In the absence of a quorum, the Board lacked the authority to proceed with a public hearing. *Sesnovich v. Board of Appeal of Boston*, 313 Mass. 393, 398 (1943) ("The requirement of the presence of a quorum of the board is not merely procedural. It relates to the jurisdiction of the board. Consequently, the absence of a quorum cannot be waived by the interested parties.")

District Court, 368 Mass. 501, 507 (1975) (concluding that civil service hearing officer should not have presided because he was not "disinterested," and therefore decision was annulled despite the fact that the hearing was fair with no showing of bias). It has long been held that zoning boards are adjudicatory, quasi-judicial bodies. *Mullin v. Planning Board of Brewster*, 17 Mass. App. Ct. 139, 142-43 (1983); *Colemen v. Board of Appeal of Boston*, 281 Mass. 112, 115 (1932). In contrast to judges, local board members are allowed to be cognizant of community opinion and concerns, provided that this awareness does not outweigh hearing the actual evidence. *Valentine v. Rent Control Board of Cambridge*, 29 Mass. App. Ct. 60, 73. In this case, the public hearing process was fatally tainted by biased Board members who engaged in improper conduct and utterly failed to base their decision on the information submitted during the public hearing. *See Crocket v. Snow*, 258 Mass. 133, 136 (1927) (judges must decide cases only upon the evidence, general knowledge and common experience, and may not "rightly act upon private information."); *Thomajanian*, 272 Mass. At 24 (one cannot "guard too sedulously every appearance of impartiality.").

A. <u>The Board Engaged in Improper *Ex Parte* Contact with the Applicant</u>.

Improper participation by a member of a Board acting in a quasi-judicial capacity constitutes a procedural defect; what is to be avoided is "suspicion or suggestion of action motivated in part by private interest." *Albano v. Selectmen of S. Hadley*, 341 Mass. 494, 496 (1960); *Board of Selectmen of Barnstable v. ABCC*, 373 Mass. 708, 713 (1977) (faulty procedure vitiated the result).

In addition to rushing the conclusion of the public hearing because of his move, Eagle also admitted that he engaged in *ex parte* communications with the applicant at the last minute to insert various conditions into the proposed decision. Ex. 31 (August 22, 2016, 9:10 p.m. email from David Eagle to Angelo Catanzaro, Esq.); Tr. Day 10 at 88-89. Most of the conditions set forth in

Eagle's *ex parte* communication—including the left-turn time restriction and the invitation for Depietri to set a "reasonable amount" for mitigation[9]—were incorporated into the Board's Decision. Ex. 31; Ex. 1 at 22. Eagle testified that he understood that Catanzaro represented Depietri and Park Central during the application process (Tr. Day 9 at 156:18-21; 157:4-6); and that the Board was represented by its own counsel, Attorney Cipriano (Tr. Day 9 at 158:1-10). Although he initially denied contacting Depietri or his representatives directly to recommend a mitigation amount (Tr. Day 10 at 85:3-7), Eagle admitted doing so after being confronted with his *ex parte* email communication (Ex. 31; Tr. Day 10 at 85:14 thru 89:22). Depietri testified that he discussed those conditions after receipt of the email and that he approved them. Tr. Day 9 at 49-50. Eagle further testified that he was aware of the requirements of the Massachusetts Open Meeting Law, but he still sent the email directly to Catanzaro outside of the public hearing. *Id.* at 86:19 to 87:1; and 89:3-11.

Eagle's *ex parte* communication was intended to expedite the hearing process because he was moving out of town. That deprived the residents of Southborough from receiving a fair and open hearing process. *Rousseau v. Building Inspector of Framingham*, 349 Mass. 31, 36-37, 206 N.E.2d 399 (1965), quoting from *Kane v. Board of Appeals of Medford*, 273 Mass. at 104, 173 N.E. 1. ("The design of the zoning law requires 'such full notice as shall enable all those interested to know what is projected and to have opportunity to protest, and as shall insure fair presentation and consideration of all aspects of the proposed modification.'"); *see also Pozzi v. Belmont ZBA*, No. 928271, 1993 WL 818645 (Mass. Super. 1993) (a zoning board may not consider extra-record evidence or have *ex parte* communications, which violates G.L. c. 40A and "principals of fundamental fairness."). It was arbitrary and capricious for the Board to prioritize the interests of

[9] At the beginning of the hearing process, Depietri proposed to provide $540,000 in mitigation funding. He pulled the offer when the town invoked the safe harbor provision for c. 40B and stated

the applicant and one of its members over the interests of the town. The Decision should be annulled.

B. The Proceedings Were Fatally Infected by Conflicts of Interest.

Although there exists a presumption that adjudicators are unbiased, that presumption can be overcome "by a showing of conflict of interest or some other specific reason for disqualification." *Schweiker v. McClure*, 456 U.S. 188, 195 (1982). In this case, two of the three voting Board members—both of whom had previously voted in favor of granting Depietri a variance to convert his Oregon Road development from a 40B to a market rate development (Tr. Day 9 at 101-102)--had documented business connections to him. Tr. Day 9 at 71-72, 95-96, 137, 141-142, 144 (Depietri); Tr. Day 10 at 14 (Eagle). Eagle and Depietri also served together on the Southborough Economic Development Team at the time that Depietri was preparing and submitting his application for the comprehensive permit. Tr. Day 8 at 170-175; Tr. Day 9 at 159-160. Depietri testified that the purpose of the Team was to "assist businesses in town with the permitting process," including ZBA review. Tr. Day 8 at 171.

Depietri testified that he both rented and purchased Eagle Leasing Co. storage and mobile office trailers for use on his various construction sites, both before, after, and even during the Park Central permitting process--transactions for which he gave dubious and conflicting explanations. Tr. Day 9 at 88-100; Tr. Day 10 at 14. Eagle clearly knew the Conflict-of-Interest Law required his recusal—or at a minimum, disclosure to his appointing authority. In 2016, Eagle recused himself from participating as a Board member in an application filed by Ken's Foods because Ken's rented equipment from Eagle Leasing. Tr. Day 10 at 9-10; Ex. 117.

With respect to Bartolini, because of his well-known and long-standing business ties to Depietri, he executed several conflict-of-interest disclosures. In doing so, however, he provided

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that he would not give the town "one red cent." Tr. Day 9 at 57-58.

incomplete and inaccurate information and failed and to follow the required procedure of filing the disclosures with his appointing authority, the Board of Selectmen. Ex. 132, p. 2, 3, 5, 6, 8 (appointed municipal officials should file with their appointing authority). Moreover, Bartolini's disclosures concerned only Depietri's rental of Bartolini's self-storage facilities. They failed to mention Bartolini's family-owned site work company, which could potentially benefit handsomely from the "extensive site work" that the 100-acre Park Central site would require. Tr. Day 9 at 42 (Depietri) ("extensive amount of sitework") and 75.

The evidence showed that Depietri was a local developer who used his connections, influence, and even threats of litigation to assemble a Board of his own choosing, a tactic he has used in Southborough and at least one other municipality. Tr. Day 9 at 127. Specifically, Depietri threatened to sue Ed Estella, a sitting member of the Board, just before the opening of the public hearing. Mr. Estella recused himself. Tr. Day 9 at 59-63. He used the same tactic to threaten another Board member, Deborah Demuria, in 2016. *Id.* at 64-66 (arguing he was entitled to an unbiased forum and that her presence would "taint" the process). Depietri used the same tactic in a previous project, threatening Sam Stivers, a sitting Board member whom he viewed as potentially unfavorable, and demanding that he recuse himself before the public hearing had even begun. Tr. Day 9 at 101-102. The fact that Depietri successfully composed a Board of his choosing was conclusively demonstrated by his decision to continue with a Board that had less than the 4 members the local bylaw required for a quorum, instead of having a new Board reconstituted. Tr. Day 9 at 116. When the Board fell below four members it could have been reconstituted and the hearing could have proceeded without starting anew. Tr. Day 1 at 133-134 (Marchant). The public hearing process, chaired by conflicted members Bartolini and then Eagle, was essentially a sham designed to rubber stamp Depietri's lucrative market rate town house development with minimal oversight by any other board. The Decision should be annulled.

C. The Public Hearing Process was Rife with Rushed Decisions and Procedural Irregularities that Render the Board's Decision Incurably Defective.

The evidence demonstrated that after the Board granted Depietri a use variance to construct 158 market rate town homes, Depietri realized that there were still several provisions of Southborough's code with which he could not comply without losing many of those lucrative residential units. Additionally, review of those provisions would not be conducted by Depietri's hand selected Zoning Board, but rather by the Planning Board, whose chair had raised several legitimate and serious questions about the Zoning Board's process. Thus, in February of 2016, more than two years into the public hearing process, Depietri filed a slew of requests for waivers with the Zoning Board at 2:40 p.m. on February 24, 2016. Tr. Day 10 at 135; Tr. Day 11 at 61-63, 75 *et seq*. Those waiver requests sought to obviate the need for both compliance with several Code provisions, and meaningful review of the market rate town house development by both the Planning Board and the Conservation Commission. Tr. Day 10 at 135, et seq. (Morris); Tr. Day 11 at 75-81 (Possemato). Like the rush to issue the final decision on August 24, the Board rushed to rubber stamp Depietri's waiver requests before they could generate scrutiny on the very day the requests were filed, even though the agenda failed to inform residents that requested waivers would be considered. Tr. Day 10 at 139 (Morris). The Board approved the waivers against the advice of town counsel before the Planning Board and Conservation could even comment on the requests. Tr. Day 11 at 61-63.

The waivers were necessary because the 40B project was really just the trojan horse that the applicant used to transport his lucrative market rate town home development onto the site. The 40B development will, pursuant to the statute and its regulations, have 45 apartments available at reduced rental rates in perpetuity, and the statute's profitability restrictions will apply to it. The regulations promulgated under 40B contemplate allowing ancillary *non-residential* components, such as the wastewater treatment plant. Pursuant to 760 CMR 56.02, the definition for a 40B

"Project may contain ancillary commercial, institutional, or other non-residential uses, so long as the non-residential elements of the Project are planned and designed to (a) complement the primary residential uses, and (b) help foster vibrant, workable, livable, and attractive neighborhoods consistent with applicable local land use plans . . . ." Section 56.08 governing amendments and waivers allows for the waiver of any provision of 760 CMR 56 except for 760 CMR 56.02. Thus, the Board purported to approve the market rate townhouse development as part of the 40B permit approval as an ancillary *residential* project in violation of the 40B regulations, based on its "waivers" of regulations that apply to all market rate development (except commercial or industrial development that is ancillary to affordable housing) that are under the purview of the Planning Board and the Conservation commission. That was illegal and improper.

In addition to the rushed waivers, the "final" plans--which were still not detailed enough to perform site plan review--were promised "within weeks" in June of 2016 but not submitted until August 15, 2016. Tr. Day 10 at 160-163, 164-167. The Planning Board did submit some comments when it realized the ZBA was plowing ahead with the vote on the 24th, but the ZBA did not take those comments into consideration. *Id.* at 165. These many procedural irregularities cannot be ignored, and the resulting decision must be annulled.

IV. PLAINTIFFS ARE AGGRIEVED BY THE DECISION.

Plaintiff Yan Huang testified that all traffic turning left from the proposed connector road onto Flagg must pass in front of his house. Tr. Day 8 at 86-87. Mr. Huang's property is located approximately two hundred feet north of the culvert on Flagg Road. *Id.* at 31.[10] The lot and driveway are steeply sloped toward Flagg Road and visibility from the driveway to the north is blocked by a large tree. *Id.* at 30-31. Mr. Huang testified that he frequently drives and walks on Flagg and that he walks with his children in strollers up Flagg to the playground at Neary School.

[10] Mr. Huang measured the width of the pavement at the culvert at less than thirteen feet after a

Id. at 32-33. Because there are no shoulders or sidewalks, Mr. Huang and his family must walk in the roadway. *Id.* at 35-36. Mr. Huang is particularly concerned about the danger to him and his family that will result from the increase in traffic in front of his house and at various "pinch points" on Flagg, where there will be many more instances of cars passing each other than currently exist. *Id.* at 50-56.

Plaintiff Ben Keyes has lived in Southborough for more than 35 years. Tr. Day 5 at 76. Mr. Keyes is the co-director of the L'Abri Fellowship, a non-denominational Christian study center and community; he testified on behalf of L'Abri and for himself personally. *Id.* at 82-83. L'Abri owns the property located at 43 Lovers Lane and 49 Lynbrook Road. *Id.* at 77. In order to carry out its mission, L'Abri requires a calm atmosphere for students to reflect, pray, and study. *Id.* at 88-89. There is a substantial amount of outdoor activity at L'Abri and interaction between the properties on Lovers and Lynbrook. *Id.* at 89-90. Students make use of the roads for walking, jogging, conversations, and listening to lectures. *Id.* at 166. Personally, Mr. Keyes often walks with his wife on Lovers Lane and Flagg and his children bike or jog on the roads. *Id.* at 90-91. Mr. Keyes testified that Lovers and Lynbrook are often used as a cut-through to access Route 30 (*Id.* at 92), and he believed that a significant amount of increased traffic from the proposed project will turn left on Flagg and make use of Lovers and Lynbrook, endangering his family and the students of L'Abri. *Id.* at 165-169. Mr. Keyes testified that he was particularly concerned that the applicant never included Lovers Lane and Lynbrook Road in any traffic studies submitted to the Board. Tr. Day 6 at 36. Based on his observations and experience as a long-time neighborhood resident, he testified that the increased traffic generated by the project would create very dangerous conditions. *Id.* at 33:18 to 36:20.

Plaintiff Linda Perkins testified that the proposed emergency access for the project through

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snowstorm in early February. Ex. 110; Tr. Day 8 at 43-44.

Blackthorn Drive runs right next to her home at 1 Tara Road. Tr. Day 6 at 113. Ms. Perkins testified that she and her family use Blackthorn and Flagg many times a day for driving, walking, and cycling. *Id.* at 114, 132-133. She provided evidence that any increased traffic on Flagg would endanger the safety of students, like her son, who have to walk home from the bus stops on Flagg Road. *Id.* at 128-132 and Ex. 103. She noted that there are more than 25 days in the school year that the late bus drops off students on Flagg Road after sunset. *Id.* at 131. In addition to the harm she will suffer from increased traffic caused by the project, Ms. Perkins testified that she has multiple sclerosis and that she is "distraught" that the construction of the project in close proximity to her home will cause her to have a debilitating exacerbation of her condition. *Id.* at 139.

Plaintiff Attila Herczeg testified that he drives on Lovers Lane on a daily basis and that he and his wife walk frequently on Lovers, Lynbrook, and Flagg. Tr. Day 8 at 102-104. Based on his observations living in Southborough for more than twenty-five years, he explained that people use Lovers Lane to Lynbrook to Route 30 whenever there is any backup of traffic on Flagg. *Id.* at 115. He testified that the threat of injury on Lovers will rise significantly due to increased traffic if the project is approved. *Id.* at 114. He further testified that he has experienced several traffic incidents on Lovers and Flagg and the increased traffic volume from the project will result in more dangerous conditions due to the blind turns and narrowness of the roads. *Id.* at 118-119. Mr. Herczeg also testified that he is concerned about the down-wind effects his property will suffer from the water and sewage treatment plants proposed to be built by Park Central in close proximity to his property. *Id.* at 22.

A. <u>Defendants Failed to Rebut the Plaintiff's Presumption of Standing</u>.

The five Plaintiffs, Yan Huang (75 Flagg Road), Linda Perkins (1 Tara Road), Attila Herczeg (4 Jacobs Lane), Matthew Brownell (8 Jacobs Lane), and L'Abri Fellowship/Ben Keyes

(43 Lovers Lane and 49 Lynbrook Road), are all direct abutters to the proposed project and enjoy a presumption of standing as aggrieved parties. *Standerwick v. Zoning Bd. of Appeals of Andover*, 447 Mass. 20, 33 (2006), *citing Marashlian v. Zoning Bd. of Appeals of Newburyport*, 421 Mass. 719, 721 (1996). It is well settled law in Massachusetts that only one plaintiff needs to have standing in order for an appeal to proceed. *Save the Bay, Inc. v. Dep't of Public Utilities*, 366 Mass. 667, 674-675 (1975).[11] In challenges to comprehensive permits issued under G.L. c. 40B, the "protection of the safety and health of the town's residents, development of improved site and building design, and preservation of open space" are all interests that the statute intends to protect. *Standerwick v. Zoning Bd. of Appeals of Andover*, 447 Mass. 20, 30 (2006), *citing* G.L. c. 40B, § 20.[12] An abutter's concerns of increased traffic and threats to safety as a result of a development are "legitimately within the scope of the zoning laws." *Marashlian v. Zoning Bd. of Appeals of Newburyport*, 421 Mass. 719, 721 (1996), *citing Circle Lounge & Grille, Inc. v. Board of Appeals of Boston,* 324 Mass. 427, 427 (1949). Even slight increases in traffic after construction have been held sufficient to make the plaintiffs aggrieved. *Id.* at 723.

Defendants offered no evidence at trial to challenge the Plaintiffs' standing. *See, e.g., Schiffenhaus v. Kline*, 79 Mass. App. 600 (2011) (defendants offered no evidence that the project

[11] "It is not necessary for the judge to determine that *all* of the plaintiffs had standing. The fact that only *one* of the plaintiffs was an aggrieved person is sufficient to permit an appeal from the board's decision." *Murray v. Board of Appeals of Barnstable*, 22 Mass. App. Ct. 473, 476 n.7 (1986) (emphasis in original), citing *Save the Bay, Inc. v. Dep't of Public Utilities*, 366 Mass. 667, 674-675 (1975); *see also, Jepson v. Zoning Bd. of Appeals of Ipswich*, 450 Mass. 81, 92 (2007) (a 40B appeal in which the SJC noted that "it is only necessary to determine that one plaintiff has standing to challenge the board's action"). Here, all of the Plaintiffs have standing.

[12] *See also* Southborough 40B Regulations at ¶ 1.0: "The Town strives to provide affordable housing for all residents, and recognizes the need for a diversity of housing options for all. At the same time, the need for affordable housing must be considered within the context of such issues as public health and safety, promotion of improved site and building design, neighborhood and open space preservation and support for both larger and smaller affordable housing development projects."

would not adversely affect traffic on what the judge described as "this constrained, narrow, twisting road over which the [p]laintiffs need to pass."). Instead, Defendants introduced a number of photographs that show the local roadways as narrow and lined with mature trees and stone walls that proved Plaintiffs' concerns that the project will create and exacerbate unsafe conditions for the Plaintiffs on the subject roadways.[13] *See, e.g.*, Exs. 92-99, 107, 112, 115. Where a defendant "fails to offer evidence warranting a finding contrary to the presumed fact, the presumption of aggrievement is not rebutted, the abutter is deemed to have standing, and the case proceeds on the merits." *81 Spooner Rd., LLC v. Zoning Bd. of Appeals of Brookline*, 461 Mass. 692, 701 (2012), *citing Marinelli v. Board of Appeals of Stoughton*, 440 Mass. 255, 258 (2003); *Watros*, 421 Mass. at 111 (where no evidence presented to rebut presumption of standing, plaintiffs entitled to rely entirely on presumed status as aggrieved parties).

B. Plaintiffs Established Particularized Harm Due to Traffic Safety Issues Caused by the Proposed Project.

During the course of the trial, the Plaintiffs put forth evidence showing that the Project will be a significant volume traffic generator, with projected daily vehicle trips of 3,222 trips. Ex. 14. The applicant's traffic engineer projected that fifteen percent (15%) of these vehicle trips will head north from John Boland Drive onto Flagg Road, towards Route 30. Even using the applicant's conservative estimate[14] of fifteen percent (15%) of the traffic heading north on Flagg Road, this would result in an additional 483 vehicle trips per day. Ex. 14. Plaintiffs' traffic expert projected that a more realistic projection, however, would be that at least twenty percent (20%) to

[13] The Court is also aware of the narrowness of the roads from the view that was taken in this case on January 22, 2021.

[14] Defendants' estimate that only 15% of vehicles would turn left on Flagg was the most conservative of multiple estimates regarding left turning trips onto Flagg. *Contrast* Ex. 9 p. 17, Table 5 *and* Ex. 6 at 21-22 (31% and 27% of A.M. and P.M. peak hour trips, respectively, would turn left from the site toward Route 30); *and* Ex. 7 at 22-23 (31% and 27% of A.M. and P.M. peak hour trips, respectively, would turn left from the site toward Route 30); *and* Ex. 69 (23% from

twenty-five percent (25%) of the vehicles exiting John Boland Drive would head north on Flagg Road. Tr. Day 7 at 66 (Cram). This would result in an increase of traffic heading north on Flagg Road between 644 vehicle trips to 805 vehicle trips. Any one of these figures obviously represents a substantial increase in the amount of traffic on Flagg Road and also on the side roads leading to alternative routes, such as Deerfoot Road, Lynbrook Road and Lovers Lane.

The portion of Flagg Road between John Boland Drive and Blackthorn Drive was identified by the Board's peer review consultant as an area of particular concern. He testified that the local roadway system was not intended to serve notable amounts of traffic. Tr. Day 5 at 14 (DeGray). This is why the original plan for the connector road was for it to be right turn only, a proposal the Board's peer review consultant supported. Ex. 69 at 4. The reason for this is, among other safety concerns, Flagg Road narrows to 17.5 feet between John Boland Drive and Blackthorn Drive and drops to as low as 15 feet south of the culvert. Ex. 17 at 10. As noted above, Mr. Huang resides at 75 Flagg Road, located between the proposed John Boland Drive and Blackthorn Drive. Tr. Day 7 at 70 (Cram). The increased traffic over this section of John Boland Drive presents a significant safety concern that directly impacts Mr. Huang in a manner that is special and different than the rest of the community, and is, in and of itself, sufficient to establish standing for all Plaintiffs.

Further, the applicant's traffic engineer did not bother to study Lovers Lane and/or Lynbrook Road, despite being informed that these streets are frequently used as cut throughs to access Route 495 during the frequent occasions when Route 9 is backed up. Tr. Day 3 at 64 (Dandrade). The applicant's traffic expert acknowledged that the narrowness of Lovers Lane (as narrow as twelve feet (12') in some areas) and Lynbrook Road (as narrow as sixteen feet (16') in some areas) constitutes an existing traffic safety concern. *Id.* at 64. The applicant's traffic expert

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Route 30 to Flagg and 21% to Route 30 from Flagg).

also acknowledged that the use of these roadways for anything other than a negligible amount of traffic would exacerbate these existing safety concerns. *Id.*

In addition, the applicant's engineer also acknowledged that the Project would increase the queuing at the Flagg Road/Route 9 intersection from fifty-nine feet (59') under existing conditions to three hundred and forty-six feet (346') under build conditions. Ex. 14; Tr. Day 3 at 90-91 (Dandrade). The construction of the Project will increase the use of Lynbrook Road and Lovers Lane for cut-through traffic, not only from the residents-customers of the Project, but also from other vehicles seeking an alternative route away from the Route 9 congestion. This increase in traffic will have significant negative safety impacts upon the Plaintiffs that live on or use Lovers Lane and/or Lynbrook Road, including Ben Keyes, 43 Lovers Lane, and Attila Herczeg, 4 Jacobs Lane, and the students of L'Abri Fellowship. *See*, *Butler v. City of Waltham*, 63 Mass. App. Ct. 435, 438-439 (2005).

CONCLUSION

The Board's Decision should be annulled and the application for the comprehensive permit should be denied. The evidence at trial was clear that the increased volume of traffic that will be introduced by the proposed project will create serious traffic safety issues on Flagg and the neighboring road system and endanger the health and safety of the Plaintiffs and neighboring residents. The evidence was also clear that the public hearing was tainted by improper motive to close the public hearing, by improper conduct of the Board including *ex parte* communications with the applicant, by conflicts, by procedural irregularity, and by lack of quorum. This is not a case involving one or two minor deficiencies. At a minimum, the Board's conduct rises to the level of gross negligence.

Plaintiffs respectfully request that the Court annul the Decision and award them their costs under G.L. c. 40A, § 17.

Respectfully submitted, Plaintiffs,

YAN HUANG, et al.,

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Dated: June 4, 2021

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of this document upon counsel for the Defendants by e-mail on June 4, 2021.

/s/ Daniel J. Pasquarello

EXHIBIT 1

2005 MA. HAC. 02-36 (MA.HOUS.APP.COM.), 2005 WL 4930783

Housing Appeals Committee

Commonwealth of Massachusetts

Lexington Woods, LLC Appellant
v.
Waltham Zoning Board of Appeals Appellee

No. 02-36
February 1, 2005

DECISION

**1 This is an appeal pursuant to G.L. c. 40B, §§ 20-23, and 760 CMR §§ 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, §§ 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 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.

*2 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 by 760 CMR 31.01(1)(a). Pre-Hearing Order, § 1.4.

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 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.

***3 C. Site Control**

****2** 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, § 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, 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 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. ***4** 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 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

**3 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 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.

*5 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 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

**4 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 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 the Board's motion on this basis is denied. In any event, in this instance, where the ***6** 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, § § 20, 23; 760 CMR 31.06(6). 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*

****5** 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 §§ 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 §§ 20, *et seq.* and 760 CMR 31.00, *et seq.* Pre-Hearing Order, § 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 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 ***7** 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. 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.

**6 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 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.

*8 **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. [1] See Exh. 4. The Board's expert road design and traffic engineer testified that these regulations are well thought-out and apply industry standards for safety; thus a road constructed in accordance with *9 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 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.

**7 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 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 ***10** 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 grade standards for local streets and that the leveling area of the driveway near Lexington Street is satisfactory.[2] Tr. V, 5, 88, 92.

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.[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[4] testified that Steams 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; ***11** 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 Steams Hill Road, both of which have steeper grades than the access roadway. Tr. IV, 39.

****8** The record is unclear regarding when the other steep roadways in Waltham were built. Evidence in the 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 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 [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 ***12** emergency vehicle turnaround. Tr. I, 93; Exh. 7. He also stated that 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.

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.

****9** The project engineer testified that snow would be 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 "[p]resumably 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 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 ***13** 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. [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 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. [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 mph, rather than the design speed of 30 mph for residential roads set out in the City regulations. [8] Tr. I, 110; II, 124; III, 14, 20; V, 37; Exh. 4.

**10 *14 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. Ill, 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 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. [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 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.

*15 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. Tr. V, 37, 92-93.

**11 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. [10] Tr. II, 154. Although several witnesses testified about the likelihood of 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 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 ***16** 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 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 "[i]t'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 congested and speeding traffic, and limited sight distances. Tr. IV, 13, 28-29.

****12** 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 ***17** 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 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, 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. [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.

**13 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 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 *18 2,000 feet, was apparently approved in about 2002. [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. [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 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, "[e]ach such design must 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.

**14 *19 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 "[f]or these concerns to be considered as

defect in this proposal, it must 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 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 ***20** 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. [14]

****15** 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 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 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.

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.

***21 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 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.

**16 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. [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 *22 vicinity of the entrance to the development. [16] Tr. 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 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 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.

**17 Removal of ledge and vegetation in the area of the outcropping on the property would improve sight distances from 240 to 400 feet. Tr. I, 75-76; II, 100; V, 134; Exh. 7, p. 1. *23 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 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; 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.

**18 *24 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 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 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 ***25** 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 to deny a comprehensive permit.

3. Storm water management system

****19** 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 riot 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. 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; ***26** 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. Tr. I, 89-90.

***27** 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. [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, § 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, § I5A; and 4) compliance with the state procurement law, G.L. c. 30B. The Board argues that without the 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.

**20 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 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 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.

**21 *28 While not disputing that it would be preferable 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 presented. Accordingly the Board's decision denying the request for a comprehensive permit is affirmed.

***29** This decision may be reviewed in accordance with the provisions of G.L. c. 40B, § 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

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

Footnotes

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.

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.

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.

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.

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.

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.

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

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.

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.

2005 MA. HAC. 02-36 (MA.HOUS.APP.COM.), 2005 WL 4930783

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EXHIBIT 2

2006 MA. HAC. 03-15 (MA.HOUS.APP.COM.), 2006 WL 3520369

Housing Appeals Committee

Commonwealth of Massachusetts

O.I.B. Corporation, Appellant

v.

Braintree Board of Appeals, Appellee

No. 03-15

March 27, 2006

DECISION

I. PROCEDURAL HISTORY

**1 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, §§ 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, ¶ 20; 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. [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). [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).

*3 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. [3] Following the presentation of evidence, counsel submitted post-hearing briefs.

II. FACTUAL OVERVIEW

**2 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 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, ¶4.

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

The requirement in § 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. *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 *5 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.

**3 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 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.[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 *6 design. [6] See Pre-Hearing Order, § IV-3.

A. Stormwater Management

The Board has raised a number of issues regarding the design of the stormwater management system. [7] There is concern because the system will discharge into a conservation and recreation area that is subject to flooding. Exh. 51, ¶¶ 2-5; Tr. IV, 42-45, 47. This concern is understandable since the design is aggressive. For instance, the 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, ¶ 11 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 system into full compliance. Exh. 43, ¶ 32, 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, ¶ 7. The Board has not gone beyond this, however, and drawn our attention to any local bylaw or other requirement pertaining tostormwater. *7 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. [8] 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

**4 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, ¶ 4. The senior engineer for the town water and sewer department testified that "blasting is by its nature somewhat unpredictable," and that "[e]xcessive vibration from the *8 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, ¶ 4. 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 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, "[t]he 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, "[t]he 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 requirements will be complied with fully, no local concern has been raised that would outweigh the regional need for housing.

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 ***9** existing houses on Liberty Street. [9] Exh. 4-A, sheet 2; 42, ¶ 5. 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. [10] Exh. 42, ¶. 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 ways separated by a 16-foot-wide mountable landscaped island, which complies with the Braintree Subdivision Rules for Type 3 roadways. Exh. 42, ¶ 8, 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, ¶ 11. The roadways are both cul-de-sacs, one 1,550 feet long, and the other 1,250 feet long. Exh. 42, ¶ 6.

****5** 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, ¶¶ 5, 11, 14; also see Exh. 54, ¶¶ 2.

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, ¶ 6. The ***10** Braintree deputy fire chief joined in this opinion. [11] 4, 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, ¶ 6. 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 straight forward, 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, 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, ¶ 6; 47, ¶ 8; cf. Exh. 54, ¶ 5 (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, ¶ 5; cf. Tr. IV. 101. No design has been provided that is specific enough for the Board to respond to or for us to evaluate in a meaningful way, and thus we conclude ***11** that the proposal before us does not include secondary access. [12]

Braintree subdivision regulations limit the length of cul-de-sacs to 400 feet. [13] This evidences a concern 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. [14] But approximately one hundred units of housing will be located beyond the standard established by the town, some as far a 1,500 feet from Liberty Street. Based upon our evaluation 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.

***12 V. CONCLUSION**

****6** 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, § 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

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

Footnotes

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 issue 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), § 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 the three jurisdictional requirements found in 760 CMR 31.01(1), namely that the developer controls the site. Pre-Hearingh Order (Sep. 15, 2005), § II-3.

4 NEF proposals receiving project eligibility determination after July 22, 2002 have 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 (See. 15, 2005), § 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, ¶ 6; 55, ¶ 2. 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 ¶. 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 is geophysics and geology, respectively. Exh. 43-A; 55, ¶ 6.

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.

9 Liberty Street is an undivided, suburban road approximately 25 feet wide. Exh. 42 ¶ 5.

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, ¶ 5.

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, ¶ 3. This is not disputed by the developer's expert, though his opinion was clearly that this would be a minimal inconvenience. Exh. 54, ¶¶ 4, 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).

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, ¶ 6. Emergency access is less of an issue with Type 3 roadways, that is, boulevards. But the developer cannot avail itself of the less stringent requirement 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, ¶ 6; 42, ¶ 8.

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.

2006 MA. HAC. 03-15 (MA.HOUS.APP.COM.), 2006 WL 3520369

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EXHIBIT 3

2002 MA. HAC. 00-11 (MA.HOUS.APP.COM.), 2002 WL 34082289

Housing Appeals Committee

Commonwealth of Massachusetts

Hilltop Preserve Ltd. Partnership, Appellant
v.
Walpole Board of Appeals, Appellee

No. 00-11
April 10, 2002

DECISION

I. PROCEDURAL HISTORY

**1 On March 16, 2000, the Hilltop Preserve Limited Partnership submitted an application to the Walpole Zoning Board of Appeals for a Comprehensive Permit pursuant to G.L. c. 40B, §§ 20-23 to build mixed-income affordable rental housing near Route 1 in Walpole, to be financed under the Massachusetts Housing Finance Agency (MHFA) 80/20 or the Expanding Rental Affordability (ERA) program. After due notice and public hearings, the Board unanimously denied the permit on October 4, 2000. From this decision the developer appealed to the Housing Appeals Committee. The Committee held a conference of counsel, conducted a site visit, and held six days of de novo evidentiary hearing, with *2 witnesses sworn, full rights of cross-examination, and a verbatim transcript. [1] Following the presentation of evidence, counsel submitted post-hearing briefs.

II. FACTUAL BACKGROUND

The developer proposes to build a 300-unit apartment complex on a 42-acre site off Hilltop Drive and Pine Street in Walpole at the Foxborough town line. The apartments will be directly south of the strip of land bordering Route 1 that has been reserved for commercial use. See Exh. 5, sheet 5. Route 1 is a divided, four-lane highway, and in this location runs generally east-west. It can fairly be described as "a commercial strip," though in this area, at least half of the lots along the highway are undeveloped. Board's Brief, p. 25; Exh. 27; Tr. I, 41-44. The site is generally shaped like the letter "U," with the upper, northern portions abutting the highway. As a result of the earlier proceedings before the Board, in order to an accommodate to the town's interest in preserving commercial uses along the highway, four acres at the top of the U directly adjacent to Route I have been set aside by the developer for future commercial development. Tr. I, 34-35, 61; Exh. 7, p. 4.

*3 The bottom of the U is formed by the shoreline of a large pond, Ganawatte Farm Pond. The housing will be built in the middle part of the U, on the central, 20-acre portion of the site, which is separated from the pond by several acres of wetlands and six acres of upland, open-space buffer. Tr. I, 33, 35.

Inside the U is an area which is not controlled by the developer, and which was subdivided some time ago into approximately a dozen lots—three abutting Route 1 and the remainder located on a short cul-de-sac, Sunset Drive. Sunset Drive was intended as a residential subdivision, though only two houses have been built. Exh. 5; Tr. I, 27.

When the application was filed in March 2000, nearly all of the site and Sunset Drive were zoned as a Rural Residence (RR) district, though the portions along Route 1 and Pine Street were within a Limited Manufacturing (LM) district. Pre-Hearing

Order, § 1-7. In May 2000, the town enacted a zoning change. The only areas affected by the change were the proposed development site and the lots it surrounds on Sunset Drive. These areas are now zoned Limited Manufacturing, which permits a wide variety of manufacturing, retail, professional, and other commercial uses. Pre-Hearing Order, § I-8; Exh. 16; Tr. I, 54.

**2 The proposed development consists of thirteen three-story buildings with one-, two-, and three-bedroom apartments. Tr. I, 58-59. There will also be a swimming pool, a tot lot, two tennis courts, and a clubhouse, which will contain common facilities for the residents and management offices. Exh. 5; Tr. I, 59.

*4 **III. ISSUES**

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 generally 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 housing. 760 CMR 31.06(6); also see *Hanover v. Housing Appeals Committee*, 363 Mass. 339, 365, 294 N.E.2d 393, 412 (1973); *Hamilton Housing Authority v. Hamilton*, No. 86-21, slip op. at 11 (Mass. Housing Appeals Committee Dec. 15, 1988). As will be seen, our analysis of each of the local concerns raised by the Board leads us to conclude that the Board has failed to meet its burden.

This case is somewhat unusual, however, in that each of the local concerns raises, to one degree or another, the question of adequacy of existing municipal services. That is, though town counsel was skilled in presenting the Board's evidence so as to focus attention on this particular proposal, that could not disguise a much more general concern on the part of the Board that it is difficult for existing municipal services to accommodate the demands of large multifamily developments.

There can be no doubt that in Walpole, as in any number of towns, ongoing development is stretching municipal services to their limits. Any additional burden on services, whether from affordable housing or other development, is problematic. Therefore, it comes as no surprise that much of the testimony presented by the town in this case *5 implicitly raises the argument that the Board's denial of a comprehensive permit should be upheld because of the inadequacy of municipal services, that is, because of the difficulty the town faces in expanding these services in the face of unabating demand. Though we fully appreciate the difficulties of municipal finance, that argument has been presented frequently since the Comprehensive Permit Law was enacted over thirty years ago, and it has found little favor under the statute and our regulations. And because this issue is complicated and often misunderstood, before we address. the particular facts before us, we believe it is useful to review the law of municipal services, particularly as applied to subdivision approval and special permits.[2]

A. Municipal Services in a Traditional Land Use Context

**3 Early court cases addressed services, particularly water supply, in general terms. "Provision for an ample supply of water for the use of those who dwell or do business in crowded centers of population is manifestly a public utility of first importance." *Loring v. Commissioners of Boston*, 264 Mass. 460, 464, 163 N.E. 82, 84 (1928). "[T]he ... landowner had a right to a supply of water, which it was the duty of the city as the operator of a public utility [citing *Loring*] to furnish on the same terms on which it furnished water to others." *B. & B. Amusement Enterprises, Inc. v. City of Boston*, 297 Mass. 307, 308, 8 N.E.2d 788, 789 (1937).

Later court cases began to differentiate between the role of planning boards and the role of water and sewer commissions. The role of planning boards under the Subdivision *6 Control Law, Chapter 41, § 81K, et seq. is to ensure that appropriate infrastructure is provided when subdivisions are created. Thus, even where "there was an acute shortage of water and lack of water pressure ... and ... a fire hazard had been created," the Court stated that "the Legislature, by the subdivision control law ...,

thus far has not given to planning boards the power unconditionally to disapprove a subdivision plan because its execution would impose new demands upon a community's existing water supply." *Daley Construction, Inc. v. Planning Board of Randolph*, 340 Mass. 149, 156, 163 N.E.2d 27, 31 (1959). But the Court noted that the record did not present the question of "whether, once the plan is approved, the owners of the lots ... can later compel the provision to their premises of their share of the available town or water company water."

The *Daley* analysis was extended in *Baker v. Planning Board of Framingham*, 353 Mass. 141, 144-145, 228 N.E.2d 831, 833 (1967) in the context of sewer and drainage services. The Court held that the planning board had no power to deny subdivision approval where proposed sewage and surface drainage installations met established local requirements, even though the town would incur the additional expense of construction of a sewer pump station and rerouting of drainage water.

But more critical to our inquiry into municipal services is the role of water and sewer commissions, which are the bodies that authorize the actual connection of new developments to existing services. In *Rounds v. Board of Water & Sewer Commissioners of Wilmington*, 347 Mass. 40, 44, 46, 196 N.E.2d 209, 212-214 (1964), the Court provided general guidance concerning the factual decisions that must be made with regard to both water connections and *7 service extensions. It noted that "[a] town water system ... is obliged to furnish water to each prospective customer 'on the same terms on which it [furnishes] water to others' (see *B. & B. Amusement Enterprises, Inc. v. City of Boston* ...), but it does not follow that all prospective customers are similarly situated so that the same terms must be applied to all of them. Prospective customers whose demands for water necessitate extensions of existing systems may stand on a different basis .... A municipality ... is permitted to exercise a reasonable and fair discretion in determining whether and upon what terms to make extensions of its lines." In *Clark v. Board of Water & Sewer Commissioners of Norwood*, 353 Mass. 708, 710-711, 234 N.E.2d 893, 895 (1968), the Court stated that "if the connection would at once overload the sewer and risk serious flooding and danger of injury to persons and property, immediate [connection to the sewer] would not be required .... The sewer commissioners, [however], are not empowered to postpone presently sought connections to give precedence to connections contemplated for the future .... Reasonable sewer capacity being shown to serve the petitioners' buildings, they had a right to the connections."

**4 Off-site municipal roadways present issues that are slightly different from those presented by water and sewer services. But the courts have been similarly circumspect in construing the power of a planning board under the Subdivision Control Law, and yet have left room to address the practical need to address off-site problems, at least in a limited way. Thus, in *8 *Mac-Rich Realty Construction Co. v. Planning Board of Southborough*, 4 Mass. App. Ct. 79, 341 N.E.2d 916, 920 (1976), the Appeals Court stated, in dictum, "An otherwise proper subdivision plan may not be disapproved on the grounds that the subdivision will adversely affect traffic patterns or municipal services in the community as a whole. [citing *Daley*, supra]. " But the Supreme Judicial Court, in *North Landers Corp. v. Planning Board of Falmouth*, 382 Mass. 432, 437 n.6, 416 N.E.2d 934, 938 n.6 (1981), held that the adequacy of a public way adjacent to a proposed development could properly be considered (without deciding, however, whether inadequacy of the public way alone would justify disapproval of the subdivision). The board's power was narrowly confined to issues that it had precisely regulated. Thus, a board may not require improvements to a state highway where subdivision regulations authorize it to require improvements only to streets and ways. *Sullivan v. Planning Board of Acton*, 38 Mass. App. Ct. 918, 920, 645 N.E.2d 703 (1995)(rescript); also see *North Landers Corp. v. Planning Board of Falmouth, supra; Castle Estates, Inc. v. Park and Planning Board of Medfield*, 344 Mass. 329, 334, 182 N.E.2d 540, 545 (1962). And yet where a developer had offered to mitigate inadequacies in the public way, it was within the authority of the board to impose conditions requiring those traffic improvements. *Miles v. Planning Board of Millbury*, 29 Mass. App. Ct. 951, 954, 558 N.E.2d 1150, 1153 (1990)(rescript), rev. den. 408 Mass. 1104, 562 N.E.2d 90.

Early cases involving special permits under the Zoning Act are somewhat similar to those under the Subdivision Control Law. In *Weld v. Board of Appeals of Gloucester*, 345 Mass. 376, 379, 187 N.E.2d 854 (1963), the Court held that permit conditions requiring later determinations rendered a decision advisory and therefore invalid, but it implied that conditions requiring off-site road improvements—if specific enough—would be proper. In *MacGibbon v. Board of Appeals of Duxbury*, 369 Mass. 512,

340 N.E.2d 487, 492 (1976), *rehearing den.* 369 Mass. 523, 344 N.E.2d 523, the Court found that concern about erosion was not grounds for outright denial of the special permit because "[t]he board [[had] the power to order ... conditions [that would mitigate erosion of on-site fill and adjoining upland]."

**5 *9 When the Zoning Act was substantially revised in 1975, a specific provision was added regarding special permits that allow an increase in density. The board may require the developer, "as a condition for the grant of said permit, [[to] provide certain open space, ... traffic or pedestrian improvements, installation of solar energy systems, ... or other amenities." G.L. c. 40A, § 9, para. 2. At the same time, the existing, general power of local boards to impose design conditions on special permits remained clear. G.L. c. 40A, § 9, para. 1; also see *V.S.H. Realty, Inc. v. Zoning Board of Appeals of Plymouth*, 30 Mass. App. Ct. 530, 533, 570 N.E.2d 1044, 1045 (1991). There are no reported cases, however, that clarify to what extent a board may require off-site improvements when no density bonus is being sought. [3]

To summarize, two things emerge from the above analysis of municipal services in a traditional land use context. First, in the case of special permits, the legislature chose to explicitly authorize the permitting authority to condition the permit on the provision of infrastructure improvements by the developer when the proposal takes advantage of a density bonus. G.L. c. 40A, § 9. Second, in the absence of such explicit provision for other proposals in the Zoning Act or for any proposal under the Subdivision Control Law, off-site improvements are generally not required unless agreed to by the developer, although in some fact-dependent situations, courts have made exceptions and approved conditions requiring such work.

***10 B. Municipal Services in the Context of the Comprehensive Permit Law**

It might be argued as a matter of public policy that because comprehensive permits typically involve density increases as certain special permits do, boards of appeals should have the power to require developers to make off-site improvements. There is an equally strong, or stronger argument, however, that such a rule would be a barrier to the construction of affordable housing. But where possible this Committee demurs at setting public policy. The Comprehensive Permit Law was enacted by the legislature without a provision authorizing the requiring of off-site improvement of municipal services. Further, the law stated in our regulations and precedents is clear. The regulations provide that the difficulties in providing municipal services should not stand in the way of the development of affordable housing. Specifically, they state clearly that the denial of a comprehensive permit may be upheld based upon the inadequacy of municipal services or infrastructure only if the Board proves that installation of adequate services is not technically feasible or is not financially feasible due to unusual geographical or environmental circumstances. 760 CMR 31.06(8). [4]

**6 But the nature of municipal services—from public water supply to schools, for instance—varies greatly, as do the facts surrounding different proposed developments and the availability of services in particular locations. For certain types of municipal services, our regulation applies straightforwardly. But for others, notably water and sewer services *11 and roadways, while the general principle in the regulation that the town must provide municipal services usually applies, in certain cases, based upon careful factual analysis, we have fashioned a narrow exception within the regulation. Therefore, before we review the facts in the case before us, it is useful to examine how different types of services are dealt with under the Comprehensive Permit Law.

1. Schools - School budgets are constantly in flux, and in all school districts, teacher hiring, classroom sizes, and catchment boundaries for particular schools are adjusted to account for changes in population. Thus, our rulings have been uniform. Three of our earliest cases addressed the issue. In *Interfaith Housing Corp. v. Gardner*, No. 72-05, slip op. at 14 (Mass. Housing Appeals Committee Feb. 13, 1974), where the local schools were overcrowded and the high school had lost its accreditation, we said, "... the legislature felt that existing needs for low and moderate income housing were so overriding as to have priority over the admittedly pressing problem of overcrowded schools." In *Wilson Street Trust v. Norwood*, No. 71-06, slip op. at 25

(Mass. Housing Appeals Committee Feb. 13, 1974), *aff'd*, No. 112304 Eq. (Norfolk Super. Ct. May 7, 1975), we said, "the impact on the school system is not a ground under the statute to support a denial of a comprehensive permit." And in *Woodcrest Village Assoc. v. Maynard*, No. 72-13, slip op. at 27 (Mass. Housing Appeals Committee memorandum Feb. 13, 1974), *aff'd*, 370 Mass. 64, 345 N.E.2d 382 (1976), we concluded that "... the statute does not recognize [inadequate school facilities, rising costs, and the exacerbation of these problems by additional schoolchildren] as sufficient grounds for denial of a comprehensive permit." In *Georgetown Housing Auth. v. Georgetown*, No. 87-08, slip op. at 12 (Mass. Housing Appeals Committee June 15, 1988), a case involving the cost of both schools and other town services, we stated the principle more *12 broadly: "We have ruled in other cases that the requirement for a town to provide municipal services is imposed upon it by law. The Town cannot use its duty to provide such services as a basis for denying or restricting a Comprehensive Permit. The cost of necessary municipal services is simply *not* an element of the concept of consistency with local needs." Also see *Millhaus Trust of Upton v. Upton*, No. 74-08, slip op. at 7 (Mass. Housing Appeals Committee July 8, 1975); *Haverhill Green Assoc. Ltd. Partnership v. Haverhill*, No. 87-14, slip op. at 33 (Mass. Housing Appeals Committee Sep. 15, 1988), *aff'd*, No. 88-5861 (Suffolk Super. Ct. Nov. 28, 1989); *Silver Tree Ltd. Partnership v. Taunton*, No. 86-19, slip op. at 33 (Mass. Housing Appeals Committee Oct. 19, 1988), *aff'd*, No. 88-6435E (Suffolk Super. Ct. May 10, 1989).

7 **2. Emergency services — Police, firefighting, and emergency medical services present issues that are very similar to school services. In fact, in many cases, towns are less immediately concerned with the additional drain on emergency services caused by new development. Because of class size limitations, even a handful of new students may require a direct, measurable outlay of resources to hire a new teacher, but new households do not create any such immediate effect on emergency service personnel needs. Instead, they increase the pressure on resources in an incremental way, and it is perhaps for this reason that rarely in our cases have towns argued that affordable housing should not be permitted since it would requiring the hiring of additional emergency personnel.

One difference between emergency services and school services is that the *location* of new development may affect the availability of emergency services. That is, particularly if emergency services are provided from one central location, development at the outskirts of town may strain services in the sense that response times may lengthen. But even though the *13 housing may be "at such distance from the center of Town, [that] there will be delays in police and fire services reaching [the site], ... [the] duty of supplying adequate fire and police services is a municipal duty which the town must supply as it does to other residents ...." *Line Street Assoc. v. Southampton*, No. 83-06, skip op. at 5-7 (Mass. Housing Appeals Committee Nov. 22, 1985), *aff'd sub nom. Houle v. Housing Appeals Committee*, No. 85-472 (Hampshire Super. Ct. Jan. 2, 1987). Also see discussion in section II-C(1)(b)???????, infra.

3. Roadways - Quite different from school services and emergency services is the roadway infrastructure that a town provides for its residents. But on the townwide level, affordable housing creates incremental pressure on the townwide roadway infrastructure, just as it does on schools, and the costs associated with that can no more be used to justify denial of a comprehensive permit than can the costs of schools. *Merrimack Meadows Corp. v. Tewksbury*, No. 87-10, slip op. at 33 (Mass. Housing Appeals Committee Aug. 23, 1988)("There is no evidence that the Town has done anything to limit or control [traffic] growth. It is simply not realistic for the Town to start to address the overall problems in the Route 133 corridor by denying this application ...").

Further, the town cannot require the developer to remedy existing traffic problems even if they are in the area where the proposed development is located. *Mapleleaf Development Assoc. v. Haverhill*, No. 88-14, slip op. at 22 (Mass. Housing Appeals Committee Jan. 27, 1993)("The city cannot point to a bad situation which it is under a duty to remedy as a ground for denying a comprehensive permit ..."); *Silver Tree Ltd. Partnership v. Taunton*, No. 86-19, slip op. at 24-26 (Mass. Housing Appeals Committee Oct. 19, 1988), *aff'd*, No. 88-6435E (Suffolk Super. Ct. May 10, 1989)(developer's offer of limited roadway *14 improvements cannot be used to impose upon him the burden of a major realignment of bridge approaches); also see *Medway Housing Auth. v. Medway*, No. 82-07, slip op. at 22, 26 (Mass. Housing Appeals Committee Mar. 28, 1983) (off-site sidewalks);

Sheridan Development Co. v. Tewksbury, No. 89-46, slip op. at 6 (Mass. Housing Appeals Committee Jan. 16, 1991)(existing off-site traffic hazard).

**8 The exception within our regulation, however, is that a developer may properly be required to mitigate specific traffic problems that the new development will cause on roads in the immediate vicinity of the site.[5] *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 36-37 (Mass. Housing Appeals Committee June 25, 1992). As is clear from the lengthy discussion in *Westborough*, when mitigation is necessary, it frequently addresses existing problems as well. Thus, a detailed factual analysis is necessary to apportion the costs of mitigation between the problems caused by the new development and existing problems. See *CMA, Inc. v. Westborough, supra*, slip op. at 37.

4. Water and Sewer - Water and sewer services present issues quite similar to traffic, though sometimes more complex. Again, the developer cannot be expected to address townwide inadequacies. *Millhaus Trust of Upton v Upton*, No. 74-08, slip op. at 20-21 (Mass. Housing Appeals Committee July 8, 1975)(possible inadequacies of water supply *15 not justification for denial of comprehensive permit where the entire town would benefit from various needed improvements, in regard to which the town has been derelict).

Similarly, the town cannot require the developer to remedy existing infrastructure problems even if they are in the area where the proposed development is located. *North Attleborough, Dexter Street L.L.C. v.*, No. 00-01, slip op. at 17 (Mass. Housing Appeals Committee Jul. 12, 2000)(partial sewer blockage and manhole surcharging problem unaddressed for fifteen years may not be used as the basis for denial of permit); *Franklin Commons Ltd. Partnership v. Franklin*, No. 00-09, slip op. at 15 (Mass. Housing Appeals Committee Sep. 27, 2001)(long-standing sewer capacity problems related to inflow and infiltration not sufficient justification for denial of permit).

What may properly be required of the developer is that it provide limited off-site water or sewer services or mitigate specific problems if necessitated by the new development itself. This is the clear implication, if not the holding, of one of our earliest cases, *Woodcrest Village Assoc. v. Maynard*, No. 72-13, slip op. at 18-19 (Mass. Housing Appeals Committee memorandum Feb. 13, 1974), *aff'd*, 370 Mass. 64, 345 N.E.2d 382 (1976)(developer agreed to construct 2,000 feet of sewer). It is also consistent with our holding with regard to traffic in *CMA, Inc. v. Westborough, supra*, slip op. at 36. And, as discussed above with regard to traffic, sorting out what mitigation is required because of the proposed development and what is necessitated by existing problems requires detailed factual analysis.[6]

***16 C. The Board has not satisfied its burden of proving a local health and safety concern that outweighs the regional need for housing.**

**9 The local concerns raised by the Board, as enumerated in the Pre-Hearing Order, are the adequacy of the sprinkler system proposed for the development, the adequacy of emergency access, the adequacy of water supply for fire protection and for domestic use, the adequacy of sewer service, and pedestrian safety. Pre-Hearing Order, § II-C(2). We will address each, grouping them into four slightly different categories.

1. Fire Protection

a. Water supply at the site is adequate for fire protection.

Water for both fire protection and domestic use will be supplied to the development by the Walpole municipal water system. The developer maintains that the water supply to the site is adequate, and the town disputes this. Water for fire protection must be sufficient to supply both sprinkler systems in the buildings and the needs of firefighters who arrive at the scene of a

fire. (All of the buildings in the proposed development will be built with an integrated ""fire protection package," that is, they will have automatic fire detection devices, sprinkler systems, and alarm systems. Tr. I, 126. The Board also maintains that the development should be built to a sprinkler system standard higher than that required by the Massachusetts State Building Code; see section III-C(1)(b), below.)

The developer presented testimony from Bob Cummings, a well-qualified, expert, professional engineer, who specializes in sprinkler and alarm systems. Tr. I, 120-126, 133. Mr. Cummings undertook an analysis of water needs and availability for the proposed development. Tr. I, 134-137; II, 31-52; see Exh. 14.

***17** Beginning his analysis of the need for water on the National Fire Protection Association requirements for the sprinkler system, he determined that the maximum demand would be 328.9 gallons per minute (gpm) at 54.3 pounds per square inch (psi)(including 100 gallons per minute additional "hose stream" for firefighters to use—typically from within the building on a fire partially suppressed by the sprinklers). Tr. II, 31-34, 36, 42, 95. He then reviewed results of the water flow tests performed using hydrants located on Route 1 at the site and on Pine Street at the intersection of Route 1, just north of the site. See Exh. 12, 5, 13; Tr. II, 43-49. The test at Pine Street showed static pressure of 58 psi and 505 gpm flow with residual pressure of 42 psi. The test on Route 1 showed static pressure of 63 psi and 995 gpm flow with residual pressure of 54 psi. Tr. II, 43-44, 49; Exh. 12. Using the location with the higher pressure and flow—Route 1—Mr. Cummings calculated that at the 54.3 psi pressure required for the combined sprinkler/hose stream demand, 995 gpm would be available, leaving an excess of roughly 670 gpm at 54.3 psi. Exh. 28; Tr. II, 50-52, 61. This, in his opinion, was more than adequate for fire protection. Tr. II, 53. (There was no indication in testimony of how many gallons per minute this excess would be equivalent to at 20 psi, though clearly it would be more than 670 gpm.)

****10** The Walpole fire chief, who is also highly qualified in terms of both academic credentials and practical experience, approached the problem differently, and testified that both using the Iowa Formula and his own experience, 3,600 to 4,000 gpm at 20 psi would be necessary. Tr. III, 116. His opinion was based on the assumption that the building would not be sprinklered. Tr. III, 172.

Finding common ground between different approaches used by different experts is never easy. It can be helpful to examine independent standards such as those used by the ***18** Insurance Services Office, Inc. (ISO) in its classification system, which provides guidance in setting private insurance rates. See Exh. 31. Thought these standards are in no way binding, they are sometimes illuminating.

For fire insurance purposes, the ISO calculates flows at 20 psi. Exh. 31, at p. HPLP 3006. The fire chief testified and Exhibit 14 clearly shows that 2,200 gpm are available at 20 psi.[7] Tr. III, 170, 172; Exh. 14, at p. HPLP 1826 (upper right corner). Mr. Cummings testified that ISO standards for needed flow for an *unsprinklered* building the size of the proposed buildings are 2,200 to 4,000 gpm at 20 psi. Tr. II, 97. Presumably a sprinklered building would require less flow, though not significantly less in the worst case scenario, that is, if the sprinklers fail to contain the fire and the entire building burns. But in that case, the excess flow of 670 gpm at 54 psi plus the 100 gpm ""hose stream" would be available to the firefighters. Though it is not clear how much this flow represents at 20 psi—the availability of this excess is consistent with Mr. Cummings' testimony that there is adequate water supply for fire protection.

We accept Mr. Cumming's conclusion, and find that the Board has not rebutted it.

Finally, even if we had found that water service was inadequate here, if that situation resulted from a townwide problem or an existing infrastructure problem, then under our law and regulations the town would be obligated to find a remedy rather than deny the comprehensive permit. In this case, there has been no proof by the town that installation of ***19** adequate services it

is not technically or financially feasible, nor that there is a specific water service problem caused by the proposed development. See 760 CMR 31.06(8); *Millhaus Trust of Upton v Upton*, No. 74-08, slip op. at 20-21 (Mass. Housing Appeals Committee July 8, 1.975); and discussion in section III-B(4), above. In fact, part of the case presented by the Board was that an additional problem in fighting fires was that in the case of a fire that could not be extinguished for several hours, an insufficient volume of water might be available due to storage problems in the town water system. We discuss the storage issue in more detail in section III-B(2), below, but if this were in fact true, it would certainly not be a problem specific to this site, but rather an existing, widespread or townwide problem that the municipality would be under an obligation to remedy. [8] See Tr. III, 189-190, 193; Exh. 25, p. HPLP 1791.

b. Adequate fire fighting services can and will be supplied to the proposed housing.

****11** The location in which this housing development is proposed is unusual. For everyday access, its location near a major commercial highway is ideal for an automobile-oriented apartment complex. Residents and visitors can come and go easily, and traffic and visual impacts on neighbors are minimized. Tr. I, 30. But because this development is at the edge of town, access for emergency services is less than ideal.

The primary concern articulated by the town is that the site's location is inherently ***20** unacceptable for the proposed housing due to the length of time required for fire apparatus to respond to a fire. The crux of the problem, however, lies with the inadequacy of the townwide emergency response system. [9] The Walpole fire chief testified that the town's system of response from a single central location is "an extremely ineffective way to run the business," and that not only is fire response in Walpole inadequate in comparison to surrounding towns, but that it also prevents the town from doing fire prevention. Tr. III, 36, 41-42, 143-149, 212-216, 244-245. But, as discussed in section III-B(2), above, the inadequacy of townwide emergency services is not justification for denial of a comprehensive permit. [10] 760 CMR 31.06(8); *Line Street Assoc. v. Southampton*, No. 83-06, skip op. at 5-7 (Mass. Housing Appeals Committee Nov. 22, 1985), *aff'd sub nom. Houle v. Housing Appeals Committee*, No. 85-472 (Hampshire Super. Ct. Jan. 2, 1987) (even though the housing may be "at such distance from the center of Town, [that] there will be delays in police and fire services reaching [the site], ... [the] duty of supplying adequate fire and police services is a municipal duty which the town must supply as it does to other residents ....").

***21** Related to fire response times are concerns about the sprinkler system in the buildings, since such systems are designed to suppress fires quickly and control or limit the spread of the fire while firefighters are en route. The developer proved that the proposed fire protection system has been designed to comply with accepted safety standards, and it has provided the sprinkler system required by the Massachusetts State Building Code. Tr. I, 137-146; Tr. II, 18-21; Exh. 14; see particularly 780 CMR §§ 310.4, 503.1 (Table 503), 904.7, 906.2.2 (Massachusetts State Building Code). The Board argues, however, that if this housing is built, the sprinkler system should be designed to the NFPA 13 standard rather than the NFPA 13R [11] standard, that is, that the developer should be required to meet a higher sprinkler system standard than that required by the state building code.

****12** There can be no doubt that in most fire situations, the primary purpose of a sprinkler system is to slow the spread of a fire and thus lengthen the effective response time. Tr. I, 7. On the surface, the NFPA 13 system would seem to provide a significant amount of additional protection for residents. In addition to the normal sprinkler heads in living units, hallways, and stairwells, sprinkler heads would be placed in uninhabited areas, such as attics spaces. Tr. I, 147-148, 151-152. For fires starting in those areas, the enhanced system might add to the effective response time. [12] But in apartment buildings, the vast majority of all fires —and an even greater number of fires resulting in injury or death—start in inhabited areas. Exh. 29; also see Tr. I, 150, 153. Thus, the NFPA 13 system, which is designed ***22** principally to provide property protection, does not provide significantly more life protection in an apartment than does the residential, NFPA 13R system. Tr. I, 150; II, 8. We find that the Board has not proven that protection in such limited circumstances justifies the installation of the NFPA 13 system. [13] And, in addition,

we are very reluctant to impose building code requirements on affordable housing that could not be imposed on market rate housing. Such requirements obviously raise the costs of construction, and the purpose of the Comprehensive Permit Law is to eliminate barriers to the construction of affordable housing. It is only truly exceptional circumstances, which have not been proven here, that would justify deviating from the policy stated in the Comprehensive Permit Law that local requirements be "applied as equally as possible to both subsidized and unsubsidized housing." G.L. c. 40B, § 20.

The Board also argues that the proposed development is isolated by Route 1, and attempts to portray the highway as a nearly impenetrable barrier, which might prevent firefighters from reaching the proposed housing. A large stadium used for professional football games and concerts is located on Route 1 in Foxborough, approximately a mile south of the site. Undoubtedly, there is very heavy traffic on the highway for about two hours before and after particularly large events at the stadium, which occur approximately 20 times per year. Tr. III, 131-132. But state police officers control the highway and intersections during these events, and we have not been convinced that emergency vehicles are unable to pass through the intersection of Route 1 and Pine Street. See Tr. Ill, 63-69, 126-128; Exh. ***23** 26. In addition, there are already a number of residences in the same area, including the recent, partially built Ganawatte Farms subdivision. Tr. I, 37-38; II, 133; III, 124, 201; IV, 176; also see Tr. I, 43-44, 111, 158-167. And, the catastrophe that the Board conjures up is too remote a possibility to justify the denial of a comprehensive permit. See *Silver Tree Ltd. Partnership v. Taunton*, No. 86-19, slip op. at 24-25 (Mass. Housing Appeals Committee Oct. 19, 1988)(possibility that a 100-year storm might flood a street on both sides and cut off a peninsula is speculative).

****13** Finally, the Board presented evidence to show that provision of emergency services is not financially feasible. The Walpole town administrator testified that budget constraints may require reductions in public safety personnel, and that there is no possibility of opening a fire station in south Walpole. Tr. VI, 16-17. But our discussion of emergency services, above, has assumed that there would be no fire station in south Walpole, and we have seen no proof as to how personnel reductions might affect the specific housing development that is before us. Under the facts presented here, even though the housing site is on the south side of Route 1 at the town line, the Board has not sustained its burden of proving that "installation ... of services ... is not technically or financially feasible ... due to unusual ... physical circumstances ...." See 760 CMR 31.06(9), Pre-Hearing Order, § II-D(5), Tr. VI, 13.

c. Access to the site for medical emergencies is adequate.

Little time was spent during the hearing on medical emergencies, which pose problems similar to, but of even less concern than fires. Residents of these apartments are the same distance or even slightly closer to emergency services than residents, of the new Ganawatte Farm subdivision. Assuming that the first response when a medical emergency call is received is by fire apparatus, the response time would be the same. Tr. II, 30. And, ***24** apartment residents are arguably at a slight advantage in any case since they have more neighbors close at hand who may offer assistance than do those who live in single-family homes. To prohibit the construction of affordable housing based upon inadequate medical emergency response time would violate the Comprehensive Permit Law's injunction that local requirements are to be "applied as equally as possible to both subsidized and unsubsidized housing." G.L. c. 40B, § 20.

2. Townwide Water Supply

In addition to the testimony of the fire chief with regard to the adequacy of water supply for firefighting specifically at the site (see II-B(1)(a), above), the Board also presented evidence from a registered professional civil engineer concerning the overall, townwide water supply in Walpole. In particular, it argues that townwide storage capacity affects water availability for both general use and for firefighting.

Walpole draws its water from its own wells, and accounts for variations in short-term supply and usage by maintaining several large storage tanks. Tr. V, 13-15. There has been at least some water supply deficiency since 1987, when the town began adding

new wells. Tr. V, 65; VI, 33-34; Exh. 25, p. HPLP 1791, 1806. In particular, there are water quality problems and lack of storage capacity that make it difficult to respond to high mid-summer demand and routine maintenance needs. Tr. V. 29-30, 35, 45-48, 59. There is not, however, an emergency situation that has resulted in water being unavailable or the town needing to place a moratorium on water connections. Tr. V., 73, 77-78, 110-111. It is fair to say, however, that at present water shortages are likely during dry summer months. For example, the town imposed an outdoor water restriction in 1999, though this is quite common in towns in the vicinity of Walpole. Tr. VI, 105-107.

**14 *25 The Board's expert testified that there is adequate water available in the aquifer below the town, and that in fact the amount of water available to be drawn from wells in 1999 exceeded the average daily demand by about 40%. Tr. V, 112-113, 185, 67. But because of expected increases in demand, that expert believes that there will be serious deficits by 2010 and 2020. Tr. V, 28, 109-110. It is quite clear, however, that such deficits are not inevitable, but have been projected so that the town can plan to meet future needs. Tr. VI, 108. In fact, the town has plans for rehabilitating wells, for building a new storage tank, and for implementing leak detection and water conservation programs. Tr. V, 46-49, 59, 182-183. This work is likely to be completed in 2004. Tr. V, 58, 62; VI, 96. Because of this situation, the Board "has not suggested that the insufficiency ... should stand as a permanent bar to construction" of the proposed development, but rather that it be delayed until the water system improvements have been made. Board's Brief, p. 29 (filed Jun. 25, 2001).

The developer's expert forcefully challenges the conclusions that the Board relies upon. He points to a conceded calculation error, as well as a number of disagreements over methodology. Tr. V, 91, 95, 102, 130-131; VI, 97-98, 114-115, 118, 145-147, 155, 158-159; Exh. 46-50; cf. Tr. V, 190-193. He concludes that both water demands and resulting supply deficits were overestimated. Tr. VI, 87. Further, from 1997 until 2000, the South Walpole storage tank never dropped below its normal operating water level. Tr. VI, 110-112. Taking all of the relevant factors into consideration, he believes that the town does not need to build the planned additional storage tank. Tr. VI, 156.

On balance, we find the presentation by the developer's expert regarding water supply to be the more credible. And particularly since the town is moving ahead with plans to rehabilitate wells and increase storage capacity, we find that the Board has not sustained its *26 burden of proving that the water supply is so inadequate so as to constitute a local concern which outweighs the regional need for housing.

Finally, any inadequacy in water supply is an existing townwide problem. See, e.g., Tr. V, 29-30, 44; Exh. 25, p. HPLP 1791, 1806. This cannot justify the denial of the comprehensive permit. 760 CMR 31.06(8); *Millhaus Trust of Upton v Upton*, No. 74-08, slip op. at 20-21 (Mass. Housing Appeals Committee July 8, 1975); also see discussion in section III-B(4), above.

3. Sewer

The developer proposes that sewage flow by gravity within the site to a privately-owned pump station (which will have a holding tank and 24-hour maintenance), and then be pumped by force main to connect to an existing town sewer at the intersection of Route 1 and Pine Street. Tr. II, 119-125, 155; Exh. 5, sheet 6. There is currently no sewer main along Route 1, though such a main was recommended in the town's 2000 Master Sewer Plan. Tr. II, 121; VI, 33; Exh. 17, 19. The Board argues that the developer's plan is inconsistent with the town's sewer master plan, that it will use an inordinate amount of future capacity, that it will perhaps cause surcharging of the existing system, and that therefore the comprehensive permit should be denied. [14]

**15 We will address the sewer master plan in general first. A sewer master plan is a planning tool which attempts to anticipate the sewer needs of future development; its purpose is not to control development, nor does it impose specific requirements on new development. Tr. 2, 140-141, 158; Tr. IV, 10-11, 127-128. It must be contrasted with aZoning Master *27 plan. If the town's zoning bylaw is consistent with a master plan, then together they actually control development in the town. Under some

circumstances, when such a master plan provides sufficiently for affordable housing, we will give it deference. See *Harbor Glen Assoc. v. Hingham*, No. 80-06, slip op. at 12-14 (Mass. Housing Appeals Committee Aug. 20, 1982); *KSM Trust v. Pembroke*, No. 91-02, slip op. at 5-8 (Mass. Housing Appeals Committee Nov. 18, 1991). Obviously, when it makes technical and financial sense, a developer should attempt to conform to the town's sewer master plan. But such a plan may not be used as a barrier to the development of affordable housing. We understand that at some indefinite time in the future the town hopes to be able to install a sewer main along Route 1, and as a result would prefer that no new development take place in this area until that service is available. But that is not justification for preventing the proposed development from taking advantage of the practical alternative of connecting by force main to the existing sewer at the intersection of Route 1 and Pine Street.

The Board also argues that under any design scenario, the construction of the proposed 300 units greatly exceeds the growth projections upon which the sewer master plan was based. Specifically, the master plan assumed that 85 additional single-family homes (or 340 bedrooms) would be added each year. [15] Tr. IV, 44. To place this projection in context, calculations from the Master Sewer Plan show 6,309 developed lots and 3,916 undeveloped ***28** lots in Walpole (whose 2000 population was 22,912). Exh. 17, pp. HPLP 2032-2044; also see Tr. IV, 129-130; V, 86. Of the developed lots, 3,539 currently have municipal sewer service. *Id.* We believe that in essence the town's argument is the one we rejected in *Millhaus Trust of Upton v. Upton, supra*, namely that the proposal overburdens the townwide sewer system as a whole. Under the Comprehensive Permit Law, it is not sufficient to simply point to the fact that a large multi-family affordable housing proposal was not anticipated in the master plan. 760 CMR 31.06(8); see discussion in section II-B(4), above.

Moving beyond planning issues to specific design concerns raised by the town, we credit the testimony of the developer's expert witness, James Colantonia, a registered professional engineer with prior experience working in the town of Walpole. Tr. II, 103, 108-110. The proposed approach is consistent with industry standards, and in fact has some advantages over a purely gravity fed system. Tr. II, 129-131, 151. In general, force mains are common in Walpole, which has many public and private pump stations, with three in the immediate area of the site and additional stations proposed for the future. Tr. II, 133, 137-138; Exh. 19: Exh. 17, p. HPLP 2088. Specifically, the town is concerned that the system has not yet been designed to the point of providing full construction drawings, and that there is the potential for it to cause surcharging of the municipal system, perhaps requiring upgrading of downstream sewer mains. Tr. IV, 40-43, 46.

****16** The design of the on-site pumping station with a holding tank is straightforward, and final construction drawings need not be provided at this time. Tr. II, 151; see *Oxford Housing Auth. v. Oxford*, No. 90-12, slip op. at 4-5 (Mass. Housing Appeals Committee Nov. 18, 1991). The problem of possible surcharging is minimized by the use of a pumping system. While flows in the parts of the municipal system that are fed by gravity tend to peak ***29** at the same time—at the times of day when domestic usage is highest—the holding tank permits the release of sewage from the proposed development to be timed for intervals when more capacity is available in the municipal system. Tr. II, 142. The Board's expert conceded this. Tr. IV, 48, 110-112. The Board has not established a concern with the sewer design sufficient to outweigh the need for affordable housing. See Tr. IV, 120.

Finally, even if improvements to the municipal sewer infrastructure were essential, we find that the possible lack of downstream capacity is not a problem specific to this development, but rather, an existing infrastucture shortcoming that the town is obligated to remedy. E.g., Tr. IV, 97-98; see 760 CMR 31.06(8); *Dexter Street L.L.C. v. North Attleborough*, No. 00-01, slip op. at 17 (Mass. Housing Appeals Committee Jul. 12, 2000); *Franklin Commons Ltd. Partnership v. Franklin*, No. 00-09, slip op. at 15 (Mass. Housing Appeals Committee Sep. 27, 2001); and discussion in section III-B(4), above.

4. Pedestrian Safety

The Board also raised the concern that there are not adequate pedestrian facilities along Route 1 and for crossing Route 1. The sidewalks within the proposed development are adequate, although as proposed they would not connect with either Route 1 or Pine Street. Exh. 5; Tr. III, 197.

There are currently no sidewalks along Route 1. Tr. III, 198; IV, 162. Though it is unclear to what extent people desire to walk along the highway, there are already several existing uses that are just as likely to need pedestrian access as the proposed housing. An amusement center, a dormitory that will house young people at the Iorio skating facility, and a new preschool are all located on Route 1, and football fans routinely walk along the highway to and from the stadium. Tr. III, 198-199, 204, 207-208; IV, 165, 163, 198; Exh. *30 39. The intersection nearest the proposed housing is that of Route 1 and Pine Street. It currently has traffic signals, but no crosswalks; other intersections on Route 1 do have crosswalks, and crosswalks could be added at this location. Tr. III, 130, 198; IV, 168-170. Finally, as part of infrastructure improvements related to the construction of a new stadium, sidewalks will be extended on both sides of Route 1, at least as far as the Foxborough/Walpole town line, and perhaps as far as the proposed development. Tr. III, 202-203.

**17 Pedestrian access is an existing problem, which will not be exacerbated by the proposed development, and is not grounds for denial of the comprehensive permit. *Sheridan Development Co. v. Tewksbury*, No. 89-46, slip op. at 6 (Mass. Housing Appeals Committee Jan. 16, 1991); also see cases cited in section III-B(3), above. If pedestrian controls at the intersection do not exist when the stadium-related improvements are completed, they should be installed at the developer's expense, and in any case the developer should extend the sidewalks within the development to provide access to both Route 1 and Pine Street. See conditions in sections IV-2(b), IV-2(c), below.

IV. 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 Walpole 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.

*31 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 shall be constructed as shown on drawings entitled "The Preserve," dated March 15, 2000, revised August 18, 2000 signed and stamped by Harold William Moore, P.E. (Exhibit 5).

(b) Sidewalks within the development shall be extended to both Route 1 and Pine Street.

(c) If pedestrian controls at the intersection of Route 1 and Pine Street do not exist when stadium-related sidewalk improvements are completed, the developer shall pay for installation of such controls if approved by the town.

(d) The developer shall apply, pursuant to. usual town procedures, for water and sewer connection permits. Such permits shall be issued pursuant to 760 CMR 31.09(3) upon payment of established fees in effect at the time of the developer's original application to the Board (including the usual required contribution to an infiltration/inflow reduction program, if any), reduced by the proportion that affordable units are in relation to total housing units.

(e) The developer shall install the sewage holding tank described at Tr. II, 155, which shall be subject town review and approval pursuant to 760 CMR 31.09(3).

3. Should the Board fail to carry out this order within thirty days, then, pursuant to G.L. c. 40B, § 23 and 760 CMR 31.09(1), this decision shall for all purposes be deemed the action of the Board.

*32 4. 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:

**18 (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 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 the Board or 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) 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.

(e) 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.

*33 This decision may be reviewed in accordance with the provisions of G.L. c. 40B, § 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

Werner Lohe
Chairman
Joseph P. Henefield
Marion V. McEttrick
Mark Siegenthaler
Frances C. Volkmann

Footnotes

1 The Committee issued a joint Pre-Hearing Order (Jan. 10, 2001), agreed to by the parties. In it, the parties stipulated that the developer satisfies two of the three jurisdictional requirements found in 760 CMR 31.01(1), that is, that it is a limited dividend organization and that it controls the site. Pre-Hearing Order, §§ 1-3, 1-4. Whether the proposal is fundable pursuant to 760 CMR 31.01(1)(c) remained at issue. But by choosing not to brief this question, the Board has conceded that the introduction into evidence of a project eligibility or site approval letter from the Massachusetts

Housing Finance Agency (MassHousing) has satisfied this third requirement. See *Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85, 653 N.E.2d 595, 598 (1995); also see Pre-Hearing Order, § II-C(1)(a). In any case, we find that the MassHousing letter of June 20, 2000 (Exh. 2), updated September 11, 2000 (Exh. 3), established that the proposal is fundable. 760 CMR 31.01(2)(f).

The Board also conceded that Walpole has not met any of the statutory minima defined in G.L. c. 40B, § 20 (e.g., that 10% of its housing stock be subsidized housing; see 760 CMR 31.04), thus foreclosing the defense that its decision is consistent with local needs as a matter of law pursuant to that section. Pre-Hearing Order, §§ I-2.

2 With regard to issues on which the Comprehensive Permit Law and regulations are silent, we frequently look to precedents from traditional land use law for guidance. See *Northern Middlesex Housing Assoc. v. Billerica*, No. 89-48, slip op. at 9 (Mass. Housing Appeals Committee Dec. 3, 1992), *aff'd* No. 93-0067-D (Suffolk Super. Ct. May 17, 1994). Even when that is not the case, such precedents provide useful background for our analysis.

3 Such conditions would also be subject to the "rational nexus" and ""rough proportionality" limitations related to uncompensated takings under the U.S. Constitution. See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309 (1994).

4 760 CMR 31.06(8) provides: "In the case of either a denial or an approval with conditions, if the denial or conditions are based upon the inadequacy of existing municipal services or infrastructure, the Board shall have the burden of proving that the installation of services adequate to meet local needs is not technically or financially feasible. Financial feasibility may be considered only where there is evidence of unusual topographical, environmental, or other physical circumstances which make the installation of the needed service prohibitively costly."

5 This is common practice for development under traditional land use controls as well. See *Miles v. Planning Board of Millbury*, 29 Mass.App.Ct. 951, 558 N.E.2d 1150, 1153 (1990), rev. den. 408 Mass. 1104, 562 N.E.2d 90 (conditions formalizing the developer's offer to improve an adjoining public way are within the authority of the board). We believe that where the developer does not offer such mitigation, under the Comprehensive Permit Law it may be required. An exception to this rule may be if the town has no history of requiring traffic mitigation when approving traditional development.

In *Stuborn v. Barnstable*, No. 98-01, slip op. at 20, n.14 (Mass. Housing Appeals Committee Mar. 5, 1999), we indicated that it may also be permissible for a board to impose certain unusual on-site requirements, such as public access.

6 In exceptional factual circumstances where there are no practical solutions to the problem the proposal presents, the permit may be denied. This appears to be the holding in *Berkshire East Assoc. v. Huntington*, No. 80-14, slip op. at 19-23 (Mass. Housing Appeals Committee June 1, 1982), and is consistent with the "technical feasibility" provision of 760 CMR 31.06(8). Assuming that the water problems in *Huntington* were not specifically related to the proposed housing, if mitigation had been technically and financially feasible, the town should have been required to provide the services.

7 Exhibit 31 (at p. HPLP 3006) shows figures used by the ISO for both needed and available flows in various locations in Walpole. The *needed* flow figures are not particularly helpful since they range from 750 gpm at 20 psi to 6000 gpm at 20 psi, and for a "Rte 1@ Pine" test location they simply indicate the needed flow as "info only." The available flow at that location is shown as only 850 gpm at 20 psi. But it seems likely that this test was done at the Pine Street location where the developer's consultants also found lower pressure, since this 850-gpm figure is consistent with the graphic representation of pressure for "Test 1" on page HPLP 1825 of Exhibit 14.

8 There was testimony that since the area in which the site is located is supplied by booster pumps and the central area of Walpole has excess storage capacity, improvements in those pumps could remedy the situation. Tr. V, 122, 123, 126; also see Tr. VI, 124-126. Other improvements are also being undertaken by the town. See section III-B(???), below; also see Tr. V, 46-49, 59, 182-183.

9 The developer also argues convincingly that the Board's unwavering focus on response time is misplaced. The fire protection system design is based on an integrated system of detection, alarm, and fire suppression. When the system detects a fire (even in an attic, where there are heat sensors), an alarm will sound both in the building and the fire department, and if the fire is in an inhabited location, the fire will be suppressed to give residents additional time to

get out of the building safely. Tr. II, 11. Such a system provides an added margin of safety since it does not rely on an uncertain manual alarm and unpredictable response time by the fire department. Tr. II, 9, 12, 25.

10 The Board makes the interesting argument that because of the number of units in this distant location, there is an increased probability of fire apparatus being far from the scene of a second, nearly simultaneous alarm. This is undoubtedly true. And, if we could infer a coherent plan to locate housing in central areas of the town and leave outlying areas truly rural, this might bear consideration. But the Board has not shown that any such comprehensive plan exists in Walpole, and in fact, subdivisions of single-family homes are scattered in what appears to be quite random fashion throughout the town. Exh. 38. Thus, where the Board has not proven a nexus between a reasonably well implemented, townwide development plan and fire safety concerns, we will not consider the location of this development per se to be a legitimate local concern.

11 The NFPA 13R (National Fire Protection Association, 13-Residential) standard was developed as a less comprehensive and therefore less costly version of the NFPA 13 standard in order to encourage more widespread use of sprinkler systems in residential buildings Tr. I, 150.

12 This cannot be said conclusively, however, because even with the NFPA 13R system, the heat sensors in some locations, e.g., the attic would send an alarm to the Fire Department. See Tr. II, 11.

13 There was also testimony from both experts about the added protection provided by the sprinklers in closets and bathrooms required in the NFPA 13 system. See, e.g., Tr. II, 66, 72-73; II, 112. We find that the Board has not sustained its burden in proving that these offer a significant advantage.

14 Neither party has proposed, in the context of this hearing, that the developer install a gravity sewer system, apparently because of the great expense involved. See Tr. II, 159: IV, 88, 133-137; Board's Brief, pp. 32-33.

15 Testimony indicated that there is townwide restriction limiting new development to 85 homes per year. The bylaw or regulation that contains this restriction was not offered into evidence, nor was the restriction itself put forward in evidence or argument as an independent justification for denying the comprehensive permit. Therefore, we do not consider it.

2002 MA. HAC. 00-11 (MA.HOUS.APP.COM.), 2002 WL 34082289

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EXHIBIT 4

2004 MA. HAC. 02-02 (MA.HOUS.APP.COM.), 2004 WL 5052501

Housing Appeals Committee

Commonwealth of Massachusetts

Peppercorn Village Realty Trust Appellant
v.
Hopkinton Board of Appeals, Appellee

No. 02-02
January 26, 2004

DECISION

**1 The central issue in this case involves a problem that is increasingly common in Eastern Massachusetts—that of limited water supply. We conclude that although there is a water shortage in Hopkinton, the town must supply municipal water to an affordable housing development on the same terms it supplies water to other users.

I. PROCEDURAL HISTORY

On February 23, 2001, Peppercorn Village Realty Trust submitted an application to the Hopkinton Zoning Board of Appeals for a Comprehensive Permit pursuant to G.L. c. 40B, §§ 20-23 to build mixed-income affordable elderly housing off School Street in Hopkinton. The housing is to be financed under the Federal Home Loan Bank of Boston's New England Fund (NEF). After due notice and public hearings, by decision filed with the town clerk on January 16, 2002, the Board unanimously granted a permit to build 56 units of *2 housing subject to a number of conditions. The most significant of the conditions was that water for domestic use be provided on the site, rather than from the municipal water supply, as proposed by the developer. Alleging that this condition and others rendered the proposal uneconomic and represented treatment unequal to that afforded to undsubsidized housing, the developer appealed to the Housing Appeals Committee.

The Committee conducted a site visit, held a six-day, de novo hearing, with witnesses sworn, full rights of cross examination, and a verbatim transcript. Following the presentation of evidence, counsel submitted post-hearing briefs.

A. Jurisdiction

To be eligible for a comprehensive permit and to maintain an appeal before the Housing Appeals Committee three jurisdictional requirements must be met. The project must be fundable under an affordable housing program, the developer must be a limited dividend organization, and it must control the site. [1] 760 CMR 31.01(1). In granting the permit, the Board has acknowledged that the developer has met these requirements. Also see Exh. 2, pp. 5-6; Exh. 1, unnumbered page following p. 9 (Norwood Cooperative Bank Project Eligibility Letter of February 21, 2001); Exh. 1, p. 5; Exh. 27; Exh. 34, sec. g.

B. Motion to Intervene

The owners of Amato Farm, which abuts the proposed development site, moved to intervene in the proceedings before the Committee. No ruling on their motion was made during the hearing, but they were granted the status of amici curiae, and through counsel were permitted to participate fully in the hearing, examining witnesses, presenting argument, and *3 submitting a

brief. The evidence received during the hearing shows, however, that they may be substantially and specifically affected by the outcome of this case. See 760 CMR 30.04(2). Specifically, the decision as to whether to supply water to the proposed development from the municipal water supply or from on-site wells will substantially affect their farming practices, namely, practices with regard to the application of pesticides. Therefore, their motion to intervene is granted.

II. FACTUAL BACKGROUND

**2 Peppercorn Village Realty Trust initially proposed to build 64 condominium units for residents aged 55 or older on a 27.7-acre parcel of land on School Street in Hopkinton. Exh. 1. During the local hearing, the proposal was reduced to 56 units in three-unit buildings. The site is in an agricultural zoning district, and has 685 feet of frontage on School Street, which is a rural road. Exh. 2, p. 9. Across School Street, the zoning is for single-family homes on 60,000-square-foot lots. Tr. I, 55. Abutting the site to the north is Pinecrest Village, a 64-unit low or moderate income housing condominium development built a little more than ten years ago. Exh. 2, p. 9; Tr. I, 53-54; VI, 126. To the south and east is the Amato Farm, a 140-acre farm on which fruits and vegetables are grown. Exh. 2, p. 9, Tr. V, 7-8.

The town of Hopkinton's municipal water supply is strained. The town is served by five wells, pumping at 65% capacity. Stip., ¶ 1.[2] They operate under a state-imposed withdrawal limit of 940,000 gallons per day (gpd), which was imposed in 2001 and extends until August 31, 2006. Stip., ¶ 2, 11. In 2001, Hopkinton withdrew approximately 865,000 gpd. Stip., ¶ 3. And in that year, it approved domestic water connections to 20 newly-constructed *4 single-family homes. Hopkinton expects 25 to 40 additional new single-family homes to be built and connected to town water (if available), each using 440 gpd. Stip., ¶ 8. Stip., p¶ 5. Additional new users with total use of about 88,000 gpd are expected to be connected to the system. Stip. ¶ 3.

The Town of Ashland is currently building a water treatment plant to serve Ashland and Hopkinton, and water was expected to be received by Hopkinton in the summer of 2002. Stip., ¶ 9. Under an agreement between the towns, Hopkinton is entitled to draw an average of 500,000 gpd to a maximum of 1,000,000 gallons on any given day. Stip., ¶ 9. Hopkinton expects to use this new water source to rest, repair, or replace existing wells that have been operating at excessive levels. Stip., ¶ 9.

A municipal water main in School Street ends at the corner of the proposed development site, within a few feet of the site. Stip., ¶ 6; Exh. 22. The development will use 8,400 gpd. Stip., ¶ 11.

III. ECONOMIC EFFECT OF THE CONDITIONS

In every case, the ultimate question before the Committee is whether the decision of the Board is consistent with local needs. 760 CMR 31.05. In a case in which the Board has granted a comprehensive permit with conditions, however, the Appellant most commonly takes advantage of the shifting burden of proof under the Committee's regulations. That is, the developer may prove that the conditions in aggregate make construction and operation of the housing ""uneconomic." See 760 CMR 31.06(3); *Walega v. Acushnet*, No. 89-17, slip op. at 8 (Mass. Housing Appeals Committee Nov. 14, 1990). Specifically, it must prove that "the conditions imposed ... make it impossible to proceed ... and still realize a reasonable return as *5 defined by the applicable subsidizing agency ...." 760 CMR 31.06(3)(b); also see G.L. c. 40B, § 20. If the developer meets this burden, the burden then shifts to the Board to prove "first that there is a valid health, safety, environmental, design, open space, or other local concern which supports the conditions, and then that such concern outweighs the regional housing need." 760 CMR 31.06(7). If the condition is based upon inadequacy of existing municipal services and it is technically feasible to provide the services, then the burden upon the Board is still higher, namely to introduce "evidence of unusual topographical, environmental, or other physical circumstances which make the installation of the needed service prohibitively costly." 760 CMR 31.06(8).[3]

***6 A. The Developer has Not Proven that the Condition Requiring a Single-Source Water Supply or Other Conditions Make Building or Operation of the Housing Uneconomic.**

****3** Three possible ways in which water for domestic use could be supplied to the proposed housing have been considered. The development could be connected to the existing municipal water system. Individual wells could be drilled for each condominium unit. Or, a single well could be drilled for the development, creating a small public water system. The developer originally proposed connection to the municipal system, but was willing to consider individual wells. Exh. 1, p. 6; Tr. I, 77-78. The Board, however, in Condition 36 of its decision required the new, single-well, public water system. Exh. 2, p. 31 (Condition 36). During the *de novo* hearing before this Committee, the developer placed before us its original proposal for connection to the municipal water supply. It is only this proposal and the Board's alternative of a single well that we will consider. The multiple-well approach presents many significant obstacles, which is why it is not favored by the developer and why the Board has explicitly rejected the idea.[4] Exh. 2, pp. 30-31 (Condition 36); also see Board's Brief, p. 49 (filed Feb. 19, 2003); see, e.g., Tr. II, 137; IV, 46; V, 52, 56; VI, 34, 118.

***7** As the Board concedes, a single-well system must comply with Department of Environmental Protection (DEP) Drinking Water Regulations and Guidelines and Policies for Public Water Systems. Exh. 2, p. 31 (Condition 36); also see 310 CMR 22.02 (definition of "public water system"), 310 CMR 22.21(a). The regulations require that the proponent determine a Zone I protective area around the well, that the zone be owned or controlled by the supplier of the water, and current and future land uses within the Zone I are limited to those directly related to the provision of public drinking water or will have no significant adverse impact on water quality." 310 CMR 22.21(b); also see 310 CMR 22.02 (definition of "public water system").

The developer argues that the Zone I would require elimination of some of the proposed units from the plans, making the entire proposal uneconomic. Specifically, based upon the daily pumping rate of the single well that would be necessary to supply water to the development, the Zone I would be a circle with a radius of 238.6 feet. Tr. I, 90. Under DEP regulations and guidelines, no structures or pavement could be placed in this area. Tr. I, 88. Wherever the well might be placed on the development site, the Zone I would extend across about two thirds of the width of the site. Exh. 26; Tr. I, 87-88. Since housing units are spread throughout the site, this would require elimination of a number of units from the current design. (The developer's site engineer testified that "a minimum of 12 to 14 units" would be lost. Tr. III, 23; also see Tr. I, 92. He had not thoroughly analyzed options for reconfiguring the site, however. Tr. II, 145-146; III, 25. Nevertheless, he believed that if the site were substantially redesigned, fewer units could be eliminated. Tr. III, 24.)

****4** Even if we assume that the condition requiring a single-well water supply will result in the loss of a minimum of 12 to 14 units, however, the developer did not sustain its burden ***8** of proving that the condition makes the project uneconomic. There was no testimony to establish the exact financial implications of the loss of units; the project may still be profitable at 42 or 44 units.

The developer also alleged that several other conditions (see below) have negative economic effects. Similarly, however, it did not introduce evidence to quantify those effects. For instance, there was testimony from the developer's expert that the sewage disposal technology required by the Board would cost between $600,00 and $1,200,000, and a response from the Board's engineer that an alternative technology would cost only $180,000. Tr. I, 114; II, 123; VI, 61. But the exact relationship of these costs to overall project finances was not made clear.

B. The Developer has Not Proven that it is Impossible to Comply with the Condition Requiring a Single-Source Water Supply

The developer also appears to argue that it is legally and factually impossible to provide a single-well water supply. If that were proven, we would consider the condition uneconomic per se, and require the Board to justify it. If the Board established a legitimate local concern outweighing the regional housing need, we would then consider whether there was any alternative means of protecting the local concern. 760 CMR 31.06(7), 31.06(9).

In this regard, the developer correctly points out that, in addition to the Zone I, DEP is likely to recognize a larger, 750-foot-radius Zone II Interim Wellhead Protection Area. Such an area would extend well beyond the boundaries of the site to both the north and the south, specifically, onto the Amato Farm. Exh. 26. The Department of Food and Agriculture has identified pesticides and herbicides that constitute a threat to groundwater, and regulates their use in 333 CMR 12.00. It seems likely that DEP would determine that use of these chemicals ***9** would constitute a threat to water quality and therefore require delineation of a Zone II. 310 CMR 22.21(l)(b), 22.21(l)(i); Tr. I, 93. The Zone II need not be owned or controlled by the water supplier, but it is also subject to use restrictions, though less onerous than in the Zone I. Clearly, certain pesticides and herbicides commonly used on the neighboring Amato Farm should not be used in a Zone II, and certainly not without an Integrated Pest Management program. Tr. V, 10-12, 46; see 333 CMR 12.03(1). From the evidence presented during the hearing, it is unclear whether DEP would decline to approve a well where there is chemical use in the Zone II, whether the farm would be required to stop using certain chemicals and growing certain crops, or whether monitoring of water quality would be sufficient. [5]

Though it is clear that use of a single-well water supply would be very problematic, the developer has not met its burden of proving that it is impossible to provide such a source.

IV. UNEQUAL TREATMENT

****5** The developer's failure to meet its burden on the question of economics, however, does not dispose of the water supply issue or other issues raised by the conditions imposed. The developer is also entitled to take advantage of the provision in the law and our regulations require local rules to be applied equally to subsidized housing and unsubsidized housing.

***10** A. Municipal Water Supply

Like most towns, Hopkinton normally makes water available to new residences that are constructed on land that abuts a water main. It does not provide water to new residences not on a water main. Although technically it is a simple matter to provide a connection to an existing water main in School Street, which ends at the corner of the site, the Board maintains that no such connection should be allowed. [6] See Exh. 22. The developer interprets this position on the part of the Board as a definitive determination "that under no circumstances [should] Peppercorn Village ever receive municipal water," and argues that instead, it should be permitted to connect immediately to the municipal water system—since anything less would represent unequal treatment as compared to unsubsidized housing. See Appellant's Brief, p. 14.

We should note at the outset that in support of its position, the Board has frequently simply referred to the rules of the Hopkinton Water Department. It points to provisions that prohibit all extensions of water mains, even those of just a few feet, and that permit no more than one house per lot to tie into the municipal system. Exh. 2, p. 29 (Condition 35); Exh. 23, pp. 36-37 (§ 13); Tr. III, 83. Simply referring to these rules, however, gains the Board nothing, since they are exactly the sort of local restrictions that the Comprehensive Permit Law was enacted to address. There can be no question that under the proper circumstances, the Board or this Committee can override the water department rules. *Board of Appeals of Maynard v. Housing Appeals Committee*, 370 Mass. 64, 68-69, 345 N.E.2d 382, 385-386 (1976).

***11** The Comprehensive Permit Law provides that "[local] requirements... shall be consistent with local needs... if [they] are applied as equally as possible to both subsidized and unsubsidized housing." G.L.c.40B, § 20. "In the case of either a denial or

an approval with conditions, the applicant may prove that local requirements or regulations have not been applied as equally as possible to subsidized and unsubsidized housing." 760 CMR 31.06(4) This requirement of equal treatment is consistent with precedents that municipal services are generally to be provided to all consumers on an equal basis. See *Rounds v. Board of Water and Sewer Commissioners of Wilmington*, 347 Mass. 40, 44, 196 N.E.2d 209, 212-214 (194); *Clark v. Board of Water & Sewer Commissioners of Norwood*, 353 Mass. 708, 710-711, 234 N.E.2d 893, 895 (1968).

An analysis of what constitutes equal or unequal treatment, however, is complicated. The developer relies partly on the Hopkinton Master Plan, which lists as one of its goals as to "provide sewer and water to the industrially zoned areas of Lumber Street, South Street, and Elmwood Park." [7] Exh. 25, p. 38 (Goal 7(a)). But this argument fails since under the Comprehensive Permit Law and our regulations, subsidized housing must receive equal treatment as compared to unsubsidized housing, not industrial or commercial uses. G.L.c.40B, § 20; 760 CMR 31.06(4).

**6 The developer also relies on testimony that 40 units of housing in the Sanctuary Lane housing development were recently given access to municipal water. Tr. VI, 129. In that case there was a water main abutting the property so that no extension was required. But the Water Department rule that only one house per lot be connected to town water would have *12 prevented a connection, and the Board overrode the requirement. Tr. VI, 146-147. Once again, however, the developer's comparison is inapposite. It is not a comparison to unsubsidized housing. Sanctuary Lane is subsidized housing built under the Comprehensive Permit Law. Not only does this not meet the technical requirement of the statute and regulations, but in addition, we believe that as a matter of policy a board of appeals should not be bound to waive a local requirement for all comprehensive permit applications simply because it has chosen to waive it in one particular situation.

Far more compelling is the developer's argument that town water has been made available to single-family homes after the time that the developer applied for a comprehensive permit (in February 2001). That is, 20 newly constructed homes were provided with water in 2001, and provision of water to a total of 25 to 40 such homes was anticipated roughly through the end of 2002. Stip., ¶¶ 5, 3(4). But we are reluctant to draw the conclusion that the developer would have us draw—that this proves that there is no water shortage and Peppercorn Village should immediately be allowed to connect to the water system. Rather, the circumstances presented here call for a more nuanced approach.

It appears very likely from the evidence that the water shortage in Hopkinton is significant enough that the town should both take action to improve the situation and consider limiting or even prohibiting all new connections in the meantime. [8] See, e.g., Tr. III, 75, 115-117, 127-129; IV, 49; VI, 127; Exh. 25, p.69; Stip., ¶¶ 1-11. We will not speculate as to whether the water system was on the verge of a crisis as this case developed or whether *13 it was because a rather large affordable housing development was proposed that town officials finally recognized a crisis. But in either case, if the shortage is as severe as it appears, then under the equal treatment provisions of the Comprehensive Permit Law the town should certainly not be allowed to permit connections by single-family homes, while at the same time using the shortage to justify not permitting subsidized housing developments.

The most appropriate step for the town to take would be to impose a temporary water connection moratorium under its broad power to act for the protection of the public health, safety, or welfare. [9] *See Hamel v. Board of Health of Edgartown*, 40 Mass. App. Ct. 420, 664 N.E.2d 1199 (1996); *Sturges v. Town of Chilmark*, 380 Mass. 246, 252-260, 402 N.E.2d 1346, 1350-1355 (1980); *Collura v. Town of Arlington*, 367 Mass. 881, 885???, 329 N.E.2d 733, 736?? (1975). This would give it time to plan and implement solutions to the water shortage in a way that would be fair to all.

**7 This Committee does not have the power to require the town to impose a moratorium. But it does have the power to require connections for the affordable housing development to be approved. Therefore, we will order this development be placed on a waiting list for receipt of town water, and if and when other residential or commercial users are permitted to connect to the municipal system, this development must be permitted to connect. [10] We *14 expect that, because of the water shortage, rather

than connect the 64 units of affordable housing, the town will, formally or informally impose a moratorium on all residential and commercial connections. [11] It is then likely to continue to investigate new sources of water, and when they are obtained, provide water to the Peppercorn Village pursuant to the waiting list. If we are wrong in our assessment of the water shortage, and the town continues to allow water connections, then the affordable housing development will move forward promptly, as it should under the equal treatment provision of Chapter 40B. In either case, Peppercorn Village will take its appropriate place on the list with all other development proposals in Hopkinton.

B. Open Space

Condition 15 of the Board's decision requires that 30% of the site (i.e., 8.3 acres of the entire 27.7-acre site) be preserved in perpetuity as open space in its natural state. This requirement is based upon a Hopkinton bylaw that applies to senior housing developments. Exh. 29, §§ 210-105.1B(5), 210-105.3B(18).

The development proposal includes an extensive vegetated buffer inside the perimeter of the site. It is typically 80 feet wide or more. Exh. 3, sheet 2; Tr. III, 30; VI, 140. This area, together with two large oval areas in the center of the site formed by loops in the project's roadway, was referred to on plans and in the hearing as the "non-irrigated area." ***15** The non-irrigated area includes naturally wooded areas, constructed stormwater detention areas, and a large septic leaching area, and comprises 14.9 acres or more than 50% of the site. Tr. I, 124, 128. The developer's expert did not know the size of the wooded area, that is, the entire area excluding the detention ponds and leaching field. Tr. I, 129; III, 43.

There was no showing that the open space requirement was applied unequally to this development in comparison to non-subsidized housing. We therefore uphold it.

Two of the Board's experts testified that they believed more open space could be created through design changes, and we believe that even excluding the non-contiguous inner ovals, the 8.3-acre requirement can be met by making slight modifications to the broad buffer at the perimeter of the site. One serious impediment, the need to cut trees and disturb land to drill wells, has been eliminated since we have ruled that public water is to be provided. And by moving buffer boundary slightly closer to buildings or even making minor modifications in building locations, additional space, if necessary, can be gained. [12] If compliance with this condition can be accomplished in no other way, then the developer can remove several of the housing units to preserve more open space.

****8** ***16** The developer should prepare carefully drawn plans distinguishing between areas disturbed during construction of detention areas, leaching fields, and other infrastructure and the non-disturbed buffer area, in which there will be no cutting of trees or construction of any infrastructure, including underground pipes. This area must comprise 8.3 acres and be preserved in perpetuity.

V. MISCELLANEOUS CONDITIONS

As noted above, the developer did not establish that the conditions imposed by the Board make construction of its proposal uneconomic. As a result, our review of those conditions is limited to two sorts of analysis. First, we may review conditions if the developer has introduced evidence that they involve local requirements that have not been applied equally to affordable housing and non-subsidized housing. It is under this alternate statutory standard that we considered the conditions concerning water supply and open space, above.

Second, we may engage in a much more limited review of conditions to ensure that they have some bona fide basis. That is, while the Comprehensive Permit Law specifically instructs us to order the "board to modify or remove any... condition [that

makes the proposal uneconomic]," it provides no similar guidance for situations such as we have here, where the conditions do not render the proposal uneconomic. G.L. c. 40B, § 23; also see 760 CMR 31.08(1). Certainly, the overall legislative intent of the statute is to minimize state intrusion into local prerogatives, and any bona fide condition should be upheld. See *17 *Cooperative Alliance of Massachusetts v. Taunton Zoning Board of Appeals*, No. 90-05, slip op. at 8, n.12 (Mass. Housing Appeals Committee Apr. 2, 1992). But, as we noted in *Archstone Communities Trust v. Woburn*, No. 01-07, slip op. at 20 (Mass. Housing Appeals Committee, June 11, 2003), the principle of deference to local prerogatives "should not be invoked to permit the local Board to act unreasonably. Even with regard to special permits issued under the Zoning Act (G.L. c. 40A, § 9), where the local board is given far more deference than under Chapter 40B, it "must act fairly and reasonably...." *MacGibbon v. Board of Appeals of Duxbury*, 356 Mass. 635, 638, 255 N.E.2d 347 (1970); also see *Building Comm'r of Franklin v. Dispatch Communications of New England, Inc.*, 45 Mass.App.Ct. 709, 725 N.E.2d 1059 (2000), rev. den. 431 Mass. 1104, 733 N.E.2d 125 (2000). Thus, special permit conditions "founded [only] on broad considerations of the general public welfare" are beyond the authority of the local board. *Middlesex & Boston St. Railway Co. v. Board of Aldermen of Newton*, 371 Mass. 849, 857-858, 359 N.E.2d 1279 (1977)." Thus, in making its decision and imposing conditions, the Board must focus on legitimate health, safety, and environmental concerns expressed in G.L. c. 40B, § 23and 760 CMR 31.06(2). (6), and (7). "Conditions unrelated to the concerns cognizable under c. 40B, unreasonably or arbitrarily imposed, or based on legally untenable grounds should not be allowed to stand." *Archstone Communities Trust v. Woburn, supra*, slip op. at 20-21. Also see *MacGibbon v. Board of Appeals of Duxbury, supra* at 639 ("The decision [denying a special permit] cannot be disturbed unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary."). We will defer to the local board in questionable cases, but, particularly when the board has not articulated a reasonable factual or legal justification for a condition, we will modify or eliminate it.

***18 A. Subdivision Standards for Roadways (Conditions 2(i) & 14)**

***9** The Board explicitly waived two aspects of the Hopkinton Subdivision Rules and Regulations, namely, the requirement that the roadway be designed for possible connection to streets on adjoining properties and the requirement concerning minimum roadway centerline radius and sight distance. Exh. 2, p. 27 (Condition 30). In addition, the parties stipulated that the width of the roadway: it will generally be 25 feet wide, but only 17 feet wide in the oneway segments at the entrance and in the center of the site. Tr. II, 84-85; IV, 148. [13]

The developer has also agreed to use either vertical or sloped granite curbing where necessary to prevent damage from snowplows and to provide granite gutter mouths at all catchbasins. Tr. I, 141-142. The Board's expert civil engineer testified as to the value of granite curbing and also that the Subdivision Rules and Regulations would require such curbing only on approximately 20 to 30 percent of the roadway. Tr. V, 163; also see TR. VI, 68-70. Thus, with regard to curbing, the Board has clearly articulated a justification for the condition imposed that goes well beyond showing a bona fide basis, and we uphold it.

B. Subdivision Standards for Drainage Pipes (Condition 10)

Hopkinton Subdivisions Rules and Regulations require reinforced concrete stormwater drainage pipes. Tr. I, 139. During the hearing, the Board's expert recommended that concrete pipes be used under all roadways, but that plastic pipe be permitted in other ***19** locations. Tr. V, 207; also see Tr. VI, 76-78. This condition is also clearly bona fide, and we therefore uphold it, as modified to permit plastic pipe in non-roadway locations. [14]

C. Trees (Conditions 10, 45, 48, & 57)

The Board's legitimate concern about trees on the site was not developed clearly during the hearing. Nevertheless, it was presented with sufficient specificity that under the limited standard of review that applies here, we uphold the conditions, subject to the following clarifications.

First, the subdivision requirement that street trees be planted every 40 feet may be imposed unless the parties agree upon an alternate plan. See Tr. I, 145; also see Tr. VI, 86-8.

Second, the Board's requirement that cutting of trees be kept to a minimum is certainly reasonable, and was not seriously challenged by the developer. Therefore, Conditions 45 and 48 are upheld.

Finally, although the developer submitted reasonably detailed plans concerning tree removal and stone wall alteration along School Street, since the town has designated the street as a scenic road, the Board included greater protections in Condition 57. See Tr. II, 19; Exh. 3, sheet 2; Exh 2, p. 35 (Condition 57). In its brief (at p. 23), the Board has proposed revisions to Condition 57. We uphold the condition as revised. See § VI-2(a), below.

***20 D. Detention Basin Side Slopes (Condition 38)**

The Board waived its requirement in Condition 38 that the slopes of the sides of detention basins be no greater than 4 to 1; instead they will be permitted to be 3 to 1 or less. Board's Brief, pp. 6-7.

E. Community Center (Condition 7)

****10** The only disagreement about constructing a community center on site, as required by Condition 7, arises from the need to provide it with a public water supply. The developer has agreed to build the community center if municipal water service is provided to the development, and therefore this question is moot.

F. Sprinklers (Condition 7 & 51)

Two conditions, 7 and 51 require automatic fire suppression systems. The principle piece of evidence regarding this issue is a letter from the Hopkinton Fire Chief, who did not testify. The letter apparently responds to an earlier design, which included eight buildings with four or more dwelling units. It notes that G.L. c. 148, § 26*I requires* sprinklers in the eight large buildings, and then goes on *request* sprinklers in units in the smaller clusters as well. The proposal has since been redesigned so that all of the clusters are three units or smaller. Thus, it is clear that state law does not require sprinklers, and the Board has not drawn our attention to any similar, uniformly applied local requirement. We therefore eliminate the sprinkler requirement as one unreasonably imposed with no legal justification.

***21 G. Sewage Disposal (Condition 33)**

Condition 33 requires that the development's sewage disposal system comply with the State Environmental Code, Title 5 (314 CMR 15.000). [15] Because the Board anticipated that one or more wells would be drilled on the site, it also required compliance with the state's Ground Water Quality Standards (314 CMR 6.00). Inclusion of these requirements in the Board's decision is unnecessary, since any and all housing proposed under the Comprehensive Permit Law must comply with all state laws. Though we leave the final factual and legal judgments with regard to septic disposal in the hands of the appropriate state environmental regulators, we note that it appears that the Ground Water Quality Standards will not be applied to this development. Even the Board's expert civil engineer agreed that compliance issues related to those standards would "vanish" if municipal water was supplied, as we have ordered in this decision. Tr. IV, 37-38.

H. Local Preference (Condition 9)

Condition 9 contains the common provision that preference in the initial sale of units be given to local residents and members of minority groups. The only aspect of the condition that was challenged by the developer—the requirement that this preference be perpetuated by deed restriction—has been waived by the Board. Board's Brief, p. 6.

***22 I. Subsequent Approvals (Conditions 2, 31, 34,[16] & 57)**

In a number of places in its decision, the Board requires the developer to appear in the future—either before itself or other municipal boards—for further review and approval. Such a "condition subsequent" undermines the entire purpose of a single, expeditious comprehensive permit and is improper. *Hastings Village, Inc. v. Wellesley*, No. 95-05, slip op. at 33-34 (Mass. Housing Appeals Committee Jan. 8, 1998), *aff'd* No. 00-P-245 (Mass.App.Ct. Apr. 25, 2002); Owens v. Belmont, No. 89-21, slip op. at 13-14 (Mass. Housing Appeals Committee Jun. 25, 1992); also see 760 CMR 31.09(3).

****11** Some of the Board's conditions, however, merely require submission and approval of additional plans concerning issues that were not addressed in the preliminary plans submitted with the comprehensive permit application. For instance, Condition 55 requires submission of plans concerning stockpiling of earth during construction to ensure compliance with the town's Earth Removal Bylaw. Such requirements, so long as they do not require further hearing and approval by the Board, but rather entail only approval by the town official who customarily reviews such plans, are appropriate.

J. Bonding (Condition 27)

The Board also required that the construction of infrastructure be secured by one of the methods described in G.L. c. 41, § 81U. The parties stipulated that so long as the developer may choose among the statutory options, this condition should remain in effect. Tr. VI, 103-105. We therefore rule that Condition 27 is proper.

***23 VI. CONCLUSION AND ORDER**

Based upon review of the entire record and upon the findings of fact and discussion above, the Housing Appeals Committee affirms the granting of a comprehensive permit by the Hopkinton Board of Appeals, but concludes that certain of the conditions imposed in the Board's decision are requirement that have not been applied as equally as possible to subsidized and unsubsidized housing or are otherwise unsupportable under G.L. c. 40B, §§ 20-23. The Board is directed to issue an amended comprehensive permit for construction of 56 homeownership units as provided in the text of this decision and in the conditions below.
1. The comprehensive permit shall conform to the comprehensive permit filed with the town clerk on January 16, 2002 (Exhibit 2) except as provided in this decision.

2. Comprehensive permit conditions shall be modified or added as follows:
(a) Scenic Road - Condition 57 shall be modified as follows (see § V-C, above):
School Street has been designated a scenic road by the Town. The Applicant must, therefore, designate on the ground by flagging those trees greater than 4 inches in diameter or any stone walls which will be affected by the construction of the Project. The Applicant shall advise the Town Tree Warden after the trees and stone walls have been flagged and the Tree Warden shall either approve the proposal or disapprove the proposal and offer an alternative plan for such removal as will enable the Applicant to complete the Project. In the event any trees over 4 inches in diameter must be removed, the Applicant must plant an equivalent number of trees along School Street or elsewhere on the site as determined by the Tree Warden, to compensate for the lost trees. Any stones which may be required to be removed from stone walls must not be removed froe the site but must be used

to enhance other sections of the stone walls on the site. Only those trees and portions of stone walls necessary for construction of the new entrance driveways and to ensure site sight distances should be altered or removed.

**12 *24 3. The Hopkinton Water Department shall immediately place the proposed development on a waiting list for receipt of town water, and if and when other residential or commercial users are permitted to connect to the municipal system, this development shall be permitted to connect. The development's position on the waiting list should be determined by the date of its application to the Board for a comprehensive permit.

4. 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 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 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 the Board or 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) 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.

(e) The Board shall take such further steps as may be necessary to formalize the comprehensive permit for recording or other purposes, and to insure that a building *25 permit is issued to the applicant, without undue delay, upon presentation to the building inspector or building department of construction plans which conform to the comprehensive permit and the Massachusetts Uniform Building Code.

5. Should the Board fail to carry out this order within thirty days, then, pursuant to G.L. c. 40B, § 23 and 760 CMR 31.09(1), this decision shall for all purposes be deemed the action of the Board.

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

Housing Appeals Committee

Werner Lohe
Chairman
Joseph P. Henefield
Marion V. McEttrick

Frances C. Volkmann

Footnotes

1 Neither has the Board asserted that Hopkinton has met any of the statutory minima defined in G.L. c. 40B, § 20 (e.g., that 10% of its housing stock is subsidized housing; see 760 CMR 31.04). Also see Exh. 2, p.4.

2 Stipulation of the parties (filed May 21, 2002).

3 We have always held that a comprehensive permit may not be denied due to inadequacy of municipal services. *Milhaus Trust of Upton v. Upton*, No. 74-08, slip op. at 20-21 (Mass. Housing Appeals Committee Jul. 8, 1975). This is based upon not only the Comprehensive Permit Law itself, but also the general principle that the services such as water service are public utilities that must be provided by towns on an equal basis. See *Loring v. Commissioners of Boston*, 264 Mass. 460, 464, 163 N.E. 82, 84 (1928); *B&B Amusement Enterprises, Inc. v. City of Boston*, 297 Mass. 307, 308, 8 N.E.2d 788, 789 (1937); *Daley Construction, Inc. v. Planning Board of Randolph*, 340 Mass. 149, 156, 163 N.E.2d 27, 31 (1959); *Baker v. Planning Board of Framingham*, 353 Mass. 141, 144-145, 228 N.E.2d 831, 833 (1967); *Hilltop Preserve Ltd. Partnership v. Walpole*, No. 00-01 (Mass. Housing Appeals Committee Apr. 10, 2002). The only exception to our rule is found in 760 CMR 31.06(8), which provides that if the Board's decision is "based upon the inadequacy of existing municipal services or infrastructure, the Board shall have the burden of proving that the installation of services... is not technically or financially feasible. Financial feasibility may be considered only where there is evidence of unusual topographical, environmental, or other physical circumstances which make the installation of the needed service prohibitively costly." If the Board had denied the comprehensive permit in this case, its failure in this case to introduce evidence to meet this heavy burden would be sufficient to justify our ordering it to grant the permit and provide water service. But since the permit was granted, before this burden will be placed upon the Board, the developer must first prove that the condition requiring that the service be provided privately renders the project uneconomic.

4 It is also probably true that if the housing development itself were completely redesigned, the units could be clustered in a way that would preserve the number of units but allow space for a single, open, undeveloped well protection area (Zone I) around it. This would address not only the water issue, but also some of the Board's concerns about open space (see below). But on the other hand, it might raise fire safety and many other issues. It is because of these difficult-to-analyze ramifications, the unintended consequences of any major redesign, that we will not consider it. As under most land use permitting procedures, under Chapter 40B the developer has a right to put a particular proposal before the Board or this Committee for approval or denial rather than for redesign. *Hastings Village, Inc. v. Wellesley*, No. 95-05, slip op. at 17 (Mass. Housing Appeals Committee Jan. 8, 1998), *affd* No. 00-P-245 (Mass.App.Ct. Apr. 25, 2002)(2002 WL 731689); *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 24 (Mass. Housing Appeals Committee June 25, 1992).

5 None of the parties have argued that the Amatos should change their farming methods or stop farming.

6 The prohibition extends only to connection for use of water for domestic purposes; a connection to provide water for firefighting using hydrants located on the site will be permitted. Exh. 2, p. 29 (Condition 35).

7 There was contradictory testimony from the Hopkinton water and sewer manager, who had served in that capacity for two and a half years. When asked if the town policy was to extend water mains to encourage industrial development, he testified, "Not since I've been in charge of it." Tr. II, 86.

8 If this is in fact true, both residential and commercial water connections should be prohibited, particularly since commercial establishments typically use large amounts of water. See, e.g., Stip., ¶ 5, 3. Conversely, if the town were prepared to permit commercial connections, then the water shortage could not be severe.

9 Local officials' authority to act to protect the town water supply is contained in various statutory provisions, including G.L. c. 40, §§ 39A, 41A, 42 and c. 41 § 69B. In addition, the town may petition the Department of Environmental Protection for a declaration of a state of water emergency pursuant to the Mass. Water Management Act, G.L. c. 21G, §§

15-17. Moratoriums on issuance of water withdrawal permits are specifically provided for in G.L. c. 21G, § 17(5). Such moratoriums, since ordered by a state department, presumably cannot be overridden by the Comprehensive Permit Law.

10 Since the law allows "a single application to build... housing in lieu of separate applications to the applicable local boards," this development's position on the waiting list should be determined by the date of its application to the Board for a comprehensive permit. G.L. c. 40B, § 21.

11 In effect, our ruling here is quite similar to the conclusion we would have reached on the same facts if the Board's decision had been based on an existing moratorium. *Franklin Commons v. Franklin*, No. 00-09, slip op. at 13-16 (Mass. Housing Appeals Committee Sep. 27, 2001) is an example of our approach to moratoriums. There, we found that localized sewer capacity problems, particularly when apparently insufficient to justify a sewer moratorium, were not grounds for denial of a comprehensive permit. Here, unlike the *Franklin Commons* case, we have found sufficient factual support for a reasonable town-imposed moratorium. Looked at another way, our decision today stands for the proposition that if the only issue raised by a Board is a townwide water shortage, then that shortage cannot justify the denial or conditioning of a comprehensive permit unless the town has imposed or is willing to impose a townwide moratorium on water connections.

12 There is some ambiguity as to whether the buffer area qualifies as contiguous open space under the bylaw. The bylaw requires only that the open space "*generally* occur as a single contiguous area." Exh. 29, § 210-105.3B(18)(emphasis added). A narrow, 15-foot-wide buffer required under another section of the zoning bylaw probably would not qualify. See Tr. III, 30. It is likely that Hopkinton would normally interpret its bylaw to require the open space here to be both fully contiguous and non-circumferential. But since Chapter 40B permits such local concerns to be weighed against the regional need for housing, if the requisite open space can only be provided around the perimeter or in a way that is not completely contiguous, that would be a small accommodation to permit the affordable housing to be built. In any case, we find that the broad buffer proposed here satisfies the bylaw requirement. The buffer need not be uniformly wide, but the septic leaching field and stormwater detention basins should be reconfigured sufficiently to make it as wide as possible at the rear of the site. The additional bylaw requirement that significant natural features be preserved is easily met since the evidence shows that there are none on the site other than the overall wooded landscape. See Tr. IV, 45, 84.

13 There was also testimony concerning the angle at which the northern portion of the development's roadway will intersect with School Street. The Subdivision Rules and Regulations permit an angle of no less than 60 degrees, while the preliminary plans show an angle of 58 degrees. This is a minor point that should be resolved in the final construction plans. See Tr. I, 140-141; II, 80-81; VI, 68-70. In fact, the Board conceded that a 58-degree angle would be acceptable, subject to review of final plans. Board's Brief, pp. 26-27.

14 An additional minor point was raised concerning standards for catchbasin placement. The developer was concerned that catchbasins would be required at all "point[s] of curvature and tangency" of the roadway. Tr. I, 142. The Board clearly took a reasonable approach to this issue and it, too, can be resolved when final construction plans are prepared. See Tr. VI, 79-81. Similarly, the Board has agreed to permit sidewalks to provided as shown on the preliminary plans subject to the normal final review of constructions plans by the local official who routinely approves such drawings. Board's Brief, p. 29; also see 760 CMR 31.09(3).

15 The regulations of the Hopkinton Board of Health simply incorporate all of Title 5. Exh. 13, P.3; Tr. IV, 14.

16 One of the more serious issues raised by a condition subsequent is the possibility of sewage breakout into a stormwater detention basin. See Exh. 2, p. 29 (Condition 34). The Board, however, waived this issue by choosing not to brief it. *Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85, 653 N.E.2d 595, 598 (1995). And, in any case, we are confident that any possible design flaws will be caught in the Title 5 review process. See § V-G, above.

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