COMMONWEALTH OF MASSACHUSETTS

HOUSING APPEALS COMMITTEE

SIMON HILL, LLC

v.

NORWELL ZONING BOARD OF APPEALS

No. 2009-07

DECISION

October 13, 2011

TABLE OF CONTENTS

Appellant's Counsel
Christopher R. Agostino, Esq.
Jonathan Braverman, Esq.
Baker, Braverman & Barbadoro, P.C.
50 Braintree Hill Park, Suite 108
Braintree, MA 02184

Board's Counsel
Robert W. Galvin, Esq.
Robert E. Galvin, Esq.
Galvin & Galvin, Esq.
10 Enterprise Street, Suite 3
Duxbury, MA 02332

Interveners' Counsel
Jonathan D. Witten, Esq.
Barbara M. Huggins, Esq.
Huggins and Witten, LLC
156 Duck Hill Road
Duxbury, MA 02332

Appellant's Witnesses
John J. Sullivan
Bradley McKenzie, P.E.
F. Giles Ham, P.E.
Craig S. Chartier
Mary Rimmer

Board's Witnesses
Abigail Hardy
Alan Leveillee
Andrew McKown
T. Andrew Reardon
Thomas Houston
Todd Thomas
John R. McInnis
Lois S. Barbour

Interveners' Witnesses
Thomas Graefe
Kimberly Lehman
Neil Price

COMMONWEALTH OF MASSACHUSETTS

HOUSING APPEALS COMMITTEE

SIMON HILL, LLC Appellant	)	
v.	)	No. 2009-07
NORWELL ZONING BOARD OF APPEALS, Appellee	)	

DECISION

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

I. PROCEDURAL HISTORY

On July 1, 2008, Simon Hill submitted an application to the Board for a comprehensive permit to construct 84 townhouse style condominium units on a parcel consisting of approximately 29 acres off Prospect Street in Norwell. Exhs. 2, 3. Construction of the housing development, to be known as Simon Hill Village, is proposed to be financed under the Housing Starts Program of the Massachusetts Housing Finance

Agency (MassHousing) or the New England Fund of the Federal Home Loan Bank of Boston (NEF). Pre-Hearing Order, § II, ¶ 3; Exh. 1. The Board conducted 17 days of hearing between July 22, 2008 and June 29, 2009. During the hearing, Simon Hill voluntarily reduced the number of proposed units from 84 to 80 units, with a total of 213 bedrooms. Simon Hill requested that the Board close the hearing and render a decision on April 1, 2009. Exhs. 2, pp. 1-4; 48(L); Simon Hill brief, p. 5.

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

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

Following a pre-hearing conference, and pursuant to 760 CMR 56.06(7)(d)(3), the parties negotiated a Pre-Hearing Order, and thereafter submitted pre-filed testimony. The developer submitted with its prefiled rebuttal testimony a Notice of Project Change modifying the design of Road A, and adding a tennis court and swimming pool. In response the Board filed a motion to remand on the ground that the developer proposed substantial changes to the project. The presiding officer denied the motion, ruling that the Notice of Project Change would be treated as proposed mitigation. Thereafter, on behalf of the Committee, the presiding officer conducted a *de novo* hearing, including prefiled testimony from 16 witnesses, a site visit, four days of evidentiary sessions to permit cross-examination of 11 of those witnesses, and the filing of post-hearing briefs. During the hearing the presiding officer granted the Board's motion to strike a portion of Mr. Sullivan's prefiled

testimony. The Board also moved for a directed decision/involuntary dismissal on the issue of site control, as well for dismissal on the ground that Simon Hill failed to meet its initial burden with respect to economics. The motions were taken under advisement.[1] The Interveners requested the issuance of a proposed decision pursuant to 760 CMR 56.06(7)(9).

II. FACTUAL OVERVIEW

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

Simon Hill received a determination of project eligibility pursuant to 760 CMR 56.04 under the Housing Starts Program of MassHousing and the NEF. Exh. 1; Pre-Hearing Order, § II, ¶ 3. The Town of Norwell has not satisfied any of the statutory minima defined in sentence two of the definition of "consistent with local needs" in G.L. c. 40B, § 20. Pre-Hearing Order, § II, ¶ 2.

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

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

public roadway. Exhs. 3(4); 6 (Sheets 1, 2, 9); 14. The internal roadway for the development consists of the main road, "Road A," which begins at the Prospect Street entrance to the development and runs approximately 2120 feet in length through the "neck" to the rear of the Simon Hill section, where it ends in a cul-de-sac. Branching from Road A, at a perpendicular angle, Road C, approximately 700 feet in length, serves most of the units in the Prospect Street section. Road D, branching from Road A in the Simon Hill section, serves 4 units and the tennis court and pool. Road A provides the only access into the project site. The Interveners reside on Simon Hill Road in two of the single family homes abutting the project site. Exhs. 6 (Sheets 9-13); 6F-A; 69, ¶ 6; 74.

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

III. PRELIMINARY ISSUES

A. Site Control

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

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

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

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

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

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

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

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

On this record, we find that the comprehensive permit is not final. The Board has not demonstrated that the 90-day period in the purchase and sale agreement commenced with the filing of the Board's comprehensive permit. Therefore, the Board has not met its burden to demonstrate that the purchase and sale agreement has expired, and its motion to dismiss is denied. See *Haskins Way, LLC v. Middleborough*, No. 09-08, slip op. at 4 (Mass. Housing

Appeals Committee Mar. 28, 2011) (when board has granted comprehensive permit, Committee typically would not expect control of development site to be in question).[3]

B. Intervention by Abutters

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

To the extent the Interveners were aggrieved by the Board's issuance of the comprehensive permit, they had recourse to appeal the decision pursuant to G.L. c. 40A, § 17. G.L. c. 40B, § 21; *Standerwick v. Zoning Board of Appeals of Andover*, 447 Mass. 20, 26, 28 (2006). The Interveners were granted leave to participate with respect to the impact of

---

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

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

waivers of local bylaws and regulations which they identified as relevant to the alleged potential effects of 1) groundwater mounding on their properties rendering their septic systems noncompliant with Title 5 and causing flooding in their basements; and 2) effluent breakout from the project's wastewater disposal system onto the ground surface or into the system, resulting in associated hydraulic and public health impacts to the Interveners' basements and septic systems. They were permitted to argue in support of conditions of the decision that were imposed pursuant to those local requirements to protect their property. The presiding officer properly limited the Interveners' participation. Their renewed motion is denied.

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

IV. ECONOMIC EFFECT OF BOARD'S DECISION

Pursuant to G.L. c. 40B, § 23, "If the committee finds ... that the decision of the board [both] makes [the project] uneconomic and is not consistent with local needs, it shall order such board to modify or remove" the offending conditions and requirements. The burdens of proof are set forth in the Committee's regulations. Initially, the developer has the burden of proving that "the conditions and/or requirements considered in aggregate make the building or operation of the Project Uneconomic." 760 CMR 56.07(1)(c)(1); 56.07(2)(a)(3). Also see *Walega v. Acushnet*, No. 89-17, slip op. at 8 (Mass. Housing Appeals Committee Nov. 14, 1990). Specifically, the developer must prove that the conditions imposed make it "impossible ... to proceed and still realize a reasonable return...." 760 CMR 56.02 (Uneconomic); G. L. c. 40B, § 20. If the developer proves that the decision makes the project uneconomic, the burden then shifts to the Board to prove that there is a valid local concern which supports such conditions and that such local concern outweighs the regional need for affordable housing. 760 CMR 56.07(1)(c)(2); 56.07(2)(b)(3).

A. Appellant's Presentation

1. Challenged Conditions and Requirements

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

the decision's conditions and unwaived local regulations, in the aggregate, effectively reduce the number of units that could actually be constructed.

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

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

Finally, Simon Hill argues that the number, repetitiveness and conflicting nature of the conditions, in the aggregate, impose a significant administrative burden on the developer. Simon Hill argues, citing *Norwell Washington, LLC v. Norwell,* No. 06-07 (Mass. Housing Appeals Committee Mar. 13, 2007 Enforcement Order), that the sheer number of conditions, particularly those that require redundant submissions to various town boards and personnel, render the project *per se* uneconomic because the risk and uncertainty associated with the conditions could lead to work stoppages and delay that will cause incalculable damage to the

project's finances. It argues that the conditions must be viewed in the aggregate, because otherwise "a town could block any project by imposing a laundry list of relatively inexpensive conditions, none of which alone would make the project uneconomic." *Walega v. Acushnet, supra,* No. 87-17, slip op. at 7-8.

2. Projected Return on Total Costs

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

The *pro forma* applied the Committee's historical methodology -- the Return on Total Costs (ROTC) analysis (total sales less total development costs, or when calculated as a percentage, total return divided by total development costs). See, e.g., *Rising Tide Development, LLC v. Sherborn,* No. 03-24, slip op. at 4 (Mass. Housing Appeals Committee Mar. 27, 2006); *Rising Tide Development, LLC v. Lexington,* No. 03-05, slip op. at 11 (Mass. Housing Appeals Committee June 14, 2005).

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

B. Board's Criticisms

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

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

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

The Board also criticizes Mr. Sullivan's support of his *pro forma.* It points out that Mr. Sullivan stated he had no specific figures for the infrastructure costs for his modified

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

project, and that he had not consulted RS Means or other similar data in connection with his estimate. Tr. II, 79-80. Based on this testimony, the Board argues that the evidence of the *pro forma* is at best speculative and inherently unreliable, and possibly untrue. Mr. Sullivan admitted that he has not acted as the expert witness on the financial aspects of other projects in which he was the developer. Tr. II, 78. The Board also argues that the developer never provided a *pro forma* demonstrating that an 84 or 80 unit project was economically feasible.

Finally, the Board criticizes the sufficiency of Mr. Sullivan's evidence concerning the economic effect of individual conditions on the proposed project, such as the buffer zone, for which he testified that he "hadn't looked at" whether that condition, in and of itself rendered the project uneconomic. Tr. II, 88. See Tr. II, 109,113,122-123, 125-128, 137. Mr. Sullivan emphasized, however, that although very few of these conditions on their own would render the project uneconomic, "when you take them in total you look at the way the conditions are regulated, I am really concerned about the impact of needless delay." Tr. II, 100, 122-123, 137.

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

C. Conclusion Regarding Economics

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

1. Reduction in Project Size

With regard to the economic impact of the Board's decision, the Board has focused more on the trees than the forest. The opinion of Mr. McKenzie that the project size will be dramatically reduced by the Board's decision is credible. The primary factor affecting the

economics of the project, as presented by the developer, is the limitation on the length of Road A, precluding development beyond the neck in the Simon Hill section of the site. The project plans, Exhibit 6, depict 52 units in this area. This factor alone eliminated 52 units proposed to be constructed in that area, leaving the 28 units originally proposed in the Prospect Street section.

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

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

2. *Pro Forma* Presentation

Under Committee precedent, a return on total development costs of 15% is considered the minimum for finding that a project is economic for a limited dividend organization. See *Autumnwood, LLC v. Sandwich,* No. 05-06, slip op. at 3 and n.2 (Mass.

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

Housing Appeals Committee Mar. 8, 2010); Exh. 51. Simon Hill argues that since Mr. Sullivan testified that the return on total development costs for the project as conditioned is a loss, the project has been shown to be uneconomic as conditioned.

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

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

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

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

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

3. Uneconomic Presumption

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

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

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

4. Aggregate Economic Impact

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

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

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

V. LOCAL CONCERNS

Since the developer has sustained its initial burden on economic issues, the burden shifts to the Board to prove, with respect to those conditions and requirements challenged on

---

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

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

A. Single Access Design and Safety

1. Background

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

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

---

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

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

2. Project Design

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

The neck of the parcel, which connects the two portions of the project site, is a narrow stretch of land abutted by neighboring properties. The neck begins at 978 feet. It varies in width from 32 feet at the west end to 48 feet at the east. Road A is 22 feet wide before and beyond the neck and 24 feet wide within the neck. The upper portion of the road beyond the neck begins at approximately 1200 feet from Prospect Street. Just beyond the

neck, Road A also increases to a 6% grade and curves to the left. Immediately beyond the neck, 15 perpendicular driveways for individual units in the Simon Hill section intersect Road A on both sides of the roadway up to the intersection with Road D, with virtually no open areas. These driveways provide stacked parking with interior garage parking behind the exterior parking space. The only parking available in the Simon Hill section other than within these driveways is located on Road D, where approximately 10 parking spaces are planned. Exhs. 6, Sheets 9-13; 20; 61, ¶¶ 36-41; 68, ¶ 9. See Exhs. 8, 9.

The private roads in the project will be lined by Cape Cod berms. Exh. 6, Sheet 20. Since this area is within the Aquifer Protection District, Norwell regulations prohibit stockpiling salt on the site, but do not prevent use of salt or other de-icing material to treat the roadway in winter. Tr. III, 89-90; Exh. 18, § 4360(e). The maximum grade planned for Road A, 6% just beyond the neck, is the maximum grade permitted by Norwell subdivision standards. Simon Hill proposes to install sprinkler systems in all of the proposed units. Exhs. 6; Sheets 9-13; 23, p. 39, § 7A.13; 54, ¶ 7; 68, ¶ 11; 69, ¶ 7; 70, ¶ 5.

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

3. Board's Concerns

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

Condition 35(a). The Board contends that these elements all increase the risk of a road blockage, endangering the health and safety of the residents.

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

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

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

Fire Truck equipped with advanced life saving equipment, an Ambulance and customarily the police." Exh. 59, ¶ 12-13.

4. Appellant's Response

The developer's engineer, Mr. McKenzie, testified that the length of Road A alone does not create a safety hazard, and there is no universally recognized design standard for the length of dead end roads; rather each road design must be reviewed based on its own characteristics. Exh. 68, ¶ 10. He also noted that Norwell's subdivision regulations allow a 6% grade for both straight and curved roadways. Exhs. 68, ¶ 9; 53, ¶ 14; 23, §§ 7A.13, 7A.16. He also testified that Simon Hill proposed 11-foot travel lanes through most of the site and 12-foot travel lanes through the neck of Road A, and that it is not possible to increase the width of the lanes to 13 feet through the neck given the property lines. He stated that the roadway width should not be a concern since Prospect Street, which is a main collector road, varies in width from 18 to 22 feet, with travel lanes with widths varying from 10 to 11 feet wide. Exhs. 53, ¶ 15; 68, ¶ 9; Exhs. 8, 9.

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

The developer's traffic expert, Mr. Ham, also testified that guidelines established by the American Association of State Highway and Transportation Officials (AASHTO) indicate that a maximum grade of 7 or 8 percent is acceptable for a design speed of 30 miles

per hour, appropriate for Road A, and that a 6% grade is within its generally recognized design standard. Exh. 54, ¶ 7.

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

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

5. Conclusion Regarding Single Access Road

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

Unlike *Wenham,* and more like *Braintree* and *Waltham,* the sole access to the rear 52 units is the long roadway, complicated by the narrow neck, crowded layout of perpendicular driveways beyond the neck, limited additional roadway parking, snow and ice accumulation and other issues. In *Braintree, supra,* No. 03-15, slip op. at 11, n.13, the Committee noted

that emergency access is less of an issue with boulevards. However, the increased safety with boulevards is less applicable here, since the divided roadway would not extend through the neck. In the neck itself, which is narrow and without shoulders, and beyond the neck, where the driveways are congested alongside the roadway, a downed tree or motor vehicle crash could block the entire access.

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

B. Wetlands Concerns

1. Wetlands Delineation

The Board argues that the developer did not identify all state and local resource areas and criticizes Simon Hill for not allowing the Norwell Conservation Commission to identify

---

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

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

preliminarily the boundaries of all local and state wetlands resource areas on the site or mitigate against impacts which the Commission believes to exist on the site. See Exhs. 56, ¶¶ 4-7; 56(C); 38. Based on the Commission's Order of Resource Area Delineation (ORAD) dated January 22, 2009, and a DEP letter dated July 28, 2009 preparatory to the issuance of a Superseding Order of Resource Area Delineation, the site contains Bordering Vegetated Wetlands, an intermittent stream, and isolated vegetated wetlands. Exhs. 56(B); 56(D).

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

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

Ms. Rimmer, the wetlands scientist engaged by Simon Hill, conducted site visits to delineate vegetated wetland resources on the site. She acknowledged that only a portion of the banks to the intermittent stream was delineated for the ORAD, but stated that the remaining resources are interior to the bordering vegetated wetlands whose boundaries were approved as part of the ORAD and by the DEP under a Superseding Order of Resource Area Delineation. She stated further that no work is proposed that would alter the banks to the stream in areas where the bank was not delineated, and the delineation of the interior banks would not affect the buffer zone depicted on the site plans.

Ms. Rimmer also testified that the site does not contain Land under Water Resource. While she acknowledged that Bordering Land Subject to Flooding was not delineated, she noted that the hydrologic study to delineate the resource would be conducted as part of the developer's Notice of Intent filing. Finally, Ms. Rimmer noted that the DEP disagreed with

the Commission regarding the flagging of the B-series isolated vegetated wetlands and determined the F-series wetlands to be bordering, rather than isolated. She stated that the developer incorporated these changes into its site plans. She also stated, based on her site visits and DEP Mass GIS data, that she did not expect the site contains characteristics necessary to support vernal pools. Exh. 71, pp. 2-5; Tr. II, 36.

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

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

The testimony of Ms. Rimmer, an experienced wetland scientist who examined the site, is credible, and more credible than that of Ms. Hardy. We accept her determination of wetlands on the project site. Her testimony regarding the developer's commitment to

---

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

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

complying with state requirements for these resource areas is also credible. The Board has not demonstrated a local concern that outweighs the need for affordable housing with regard to further delineation of local wetland resources for this project. Accordingly, Conditions 40 through 45, and other conditions regarding local resource protection shall be MODIFIED to conform to this decision.[11]

2. Stormwater Effects on Wetlands

The Interveners argue that Simon Hill failed to provide the location and layout of required compensatory flood storage areas. They cite testimony of the Board's engineer, Mr. Houston, that the embankment for stormwater basin P-P1.1 encroaches on the 100-year floodplain and will displace water and require the provision of compensatory flood storage under both DEP stormwater management regulations and the Norwell Wetlands Rules and Regulations, § 8.3.0. Norwell's regulations allow the Conservation Commission to require a compensatory flood storage volume greater than the 1 to 1 ratio required by state regulations. Mr. Houston suggests that the extent of compensatory flood storage required is dependent on the accurate delineation of the 100-year flood elevations, which the developer did not provide. Exhs 26, § 8.3.0; 61, ¶¶ 15-16.

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

Simon Hill argues that the Board has not demonstrated a local concern regarding stormwater management. Since Simon Hill will be required to submit a Notice of Intent to

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

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

3. Norwell 50-Foot No-Build Zone

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

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

---

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

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

Norwell's designation of a local no-disturb zone surrounding wetland resources as a resource itself is not unusual. See, e.g., *Hopkinton, supra,* No. 00-05, slip op. at 18; *Rising Tide Development, LLC v. Sherborn, supra,* No. 03-24, slip op. at 25. The importance of buffers generally is described in the WPA regulations, 310 CMR 10.00. Indeed, the Town conservation agent, Ms. Hardy, is correct that the necessity of a buffer zone to protect wetlands is widely accepted among the scientific community. See Exh. 56, ¶ 10. Under the WPA regulations, a Notice of Intent is required for certain activities within 100 feet of certain designated resource areas, including bordering vegetated wetlands. 310 CMR 10.02(1). As support for the more stringent local buffer requirement, Ms. Hardy cited a study finding that "the removal of 20% of the forest cover on lands within ...1000 [meters] of a wetland appears to have approximately the same impact on herptile and mammal species richness as the loss of 50% of the wetland proper." Exh. 56, ¶ 10. She stated it was her opinion and that of the Commission that the placement of structures and impervious features close to the wetlands increases the volume of stormwater runoff and pollution to the wetlands, threatening the interests protected under the WPA and the interests of water quality, wildlife, sedimentation control, rare plant and animal species, fish/shellfish habitat and erosion control specifically protected by the Norwell wetland protection bylaw. She and the Commission had recommended that the Board not waive the 50-foot buffer in the bylaw requirement. Exh. 56, ¶¶ 12-13; Exh. 39. However, Ms. Hardy's testimony assumed the developer had the burden of demonstrating no adverse impact on the wetland, whereas the burden is on the Board in this proceeding. See Exh. 56, ¶ 10.

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

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

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

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

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

Mr. Houston also raised a concern that the water surface elevation of basin P3.2 would exceed the elevation of the nearby on-site roadways, and the developer has not shown suitable replication for its proposed and approved wetlands crossing. Exh. 61, ¶¶ 47-48. With regard to Basin P3.2, Mr. McKenzie pointed out that Mr. Houston erroneously identified catch basins that are not designed to discharge into that basin, and stated it will not overtop Road A as Mr. Houston suggested. Exh. 68, ¶ 20. He also stated that the details of the wetlands replication area are not yet necessary because there is sufficient area west of the proposed wetlands crossing to accommodate a bordering vegetated wetland replication area. Exh. 68, ¶ 19.

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

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

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

C. Groundwater Mounding

In Condition 70 of its decision, the Board requires that "the increase in groundwater elevation due to mounding caused by the Soil Absorption System (SAS) shall be limited to one foot at the property line, which is good engineering practice and necessary to address any impact to abutting residences." Exh. 2. The Board argues that "mounded groundwater emanating from the leaching system [or] soil absorption system, and/or stormwater basins

facilities which are designed to infiltrate water must be limited in order to preclude any detrimental impact to abutting property owners and their septic systems and that imposition of such a condition was a legitimate local concern." Board brief, p. 38, citing Exhs. 66; 61, ¶¶ 57-63. The Board's argument focuses, however, on the requirements of the DEP, which the developer has acknowledged it will be bound to follow.

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

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

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

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

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

regulated locally previously. *9 North Walker Street Development, Inc. v. Rehoboth*, No. 99-03, slip op. at 9-10 (Mass. Housing Appeals Committee June 1, 2003), *remanded on other grounds*, No. CV2003-0767 (Bristol Super. Ct. Dec. 28, 2004). See *Lever Development, LLC v. West Boylston,* No. 04-10, slip op. at 10 (Mass. Housing Appeals Committee Dec. 10, 2007); *Hamlet Development Corp. v. Hopedale*, No. 90-03, slip op. at 8-15 (Mass. Housing Appeals Committee Jan. 23, 1992); *Walega v. Acushnet*, *supra,* No. 89-17, slip op. at 5-7.

1. Wastewater Effects on Groundwater Mounding

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

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

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

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

2. Stormwater Effects on Groundwater Mounding

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

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

3. Conclusion Regarding Groundwater Mounding

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

plans to address the effects of increased groundwater mounding. Condition 70 shall be MODIFIED to provide this requirement, and any conditions relating to groundwater mounding shall be MODIFIED to be consistent with this decision.

D. Wastewater Treatment System in Aquifer Protection District

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

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

Second, the Interveners point out that the certificate was issued after the Board issued its decision, and therefore argue that the Board was not privy to the requirements contained in the letter. However, to the extent that the Board should comply with the suggestion in the MEPA certificate, it has already acted for the Water Department for the purpose of the comprehensive permit hearing; thus the necessary consultation has taken place. Even though

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

the Board was not aware of the language of the certificate, its decision discusses the APD and reaches a resolution. Moreover, the language of the certificate appears not to constitute a mandate to the developer to comply with the APD regulations, but rather seems to encourage the type of consultation and review that has taken place to resolve the issue.

Finally, the Interveners' suggestion that the wastewater disposal system proposed by the developer is the type prohibited within the APD is not supported by the language of the bylaw or the facts. The Interveners argue that Zoning Bylaw § 4360's prohibition of "[n]on-sanitary treatment or disposal works that are subject to 314 CMR 4.00 and 5.00 ..." in the APD applies to the proposed wastewater treatment. Exh. 18, § 4360(r). However, under § 4390 of the bylaw governing the APD, the term "non-sanitary treatment or disposal works" is defined as "Wastewater discharge from industrial and commercial facilities containing wastes from any activity other than the collection of sanitary sewage, including but not limited to, activities specified in the Standard Industrial Classified Codes set forth in 310 CMR 15.004(6)." Exh. 18, § 4390. See Exh. 68, ¶ 16.

Based on the record, we find that the proposed wastewater disposal system is not a commercial system within the definition of § 4390. Therefore, the Interveners' arguments that the developer is proposing a prohibited system are without merit. Indeed, the Board's partial waiver of § 4300 in its decision evidences an assumption that this system would qualify by special permit, as the Board noted that under 760 CMR 56.05(7), waivers were not required from special permit requirements, but it nevertheless waived the special permit requirements "as is necessary to allow operation of the proposed on-site wastewater treatment plant." Exhs. 2(B), p. 6; 18, § 4300 (Aquifer Protection District).

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

E. Water Quality and Safety

1. Monitoring of Water Quality

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

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

2. Looped Water Distribution System

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

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

As above, the Board's focus on economics does not prove its case. On the record before us, the Board has not adequately demonstrated a legitimate local concern with regard to the need for a looped water main system for this project that outweighs the need for affordable housing. See *Groton Housing Authority v. Groton,* No. 91-07, slip op. at 10

(Mass. Housing Appeals Committee Sept. 19, 1991) (Board failed to sustain its burden of proving that an unlooped water supply system will cause a health, safety, environmental, or other hazard). Cf. *Lexington Woods, supra,* No. 02-36, slip op at 19. The requirement for a looped water main shall be STRUCK.

F. Archaeological Concerns

During the Board's proceeding, the Norwell Historical Commission reported to the Board that a Native American artifact was found during the site walk, and stated that the site had a high to moderate archaeological sensitivity to contain Native American sites. Exhs. 2(A), p. 4; 13; 57, ¶ 7. The Board argues that following the Historical Commission's submission of this information to the Massachusetts Historical Commission (MHC), that Commission issued a written recommendation to the Secretary of Environmental Affairs. It recommended that an "intensive (locational) archaeological survey (950 CMR 70) be conducted for the project." Exh. 49. The Board notes in its brief that the recommended survey had not been conducted by Simon Hill as of the hearing before the presiding officer.

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

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

G. Other Conditions Challenged as Unsupported by Local Concerns

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

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

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

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

Condition 72, regarding the definition of bedrooms. Since the Board has not demonstrated a valid local concern that outweighs the need for affordable housing with

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

regard to this condition, the first sentence is RETAINED and the condition shall be otherwise STRUCK, except for a provision defining bedrooms consistent with Title 5.

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

VI. CONDITIONS CHALLENGED AS OUTSIDE BOARD'S AUTHORITY

Since the Board's power under Chapter 40B derives from, and is generally no greater than, that collectively possessed by other local boards, conditions relating to programmatic issues, such as project funding, regulatory and financial documents and sale of affordable units, as well as certain other requirements, may be reviewed by this Committee to determine whether they are beyond the power of a board to impose or otherwise intrude impermissibly into areas of direct programmatic concern to state or federal funding and regulatory authorities. The Committee has the authority to strike or modify conditions that fall outside G.L. c. 40B, § 21.[18] *Zoning Board of Appeals of Amesbury v. Housing Appeals Committee,* 457 Mass. 748, 762 (2010).

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

A. Matters within Authority of Subsidizing Agency

Simon Hill argues that the Board has imposed improper conditions that purport to regulate matters within the sole responsibility of the subsidizing agency for the project. Specifically, it identifies Conditions 15 through 26 and 33. Pre-Hearing Order, § IV, ¶¶ 3, 4.

---

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

Simon Hill brief, p. 36. The Board did not address this issue in its brief. In *Amesbury,* the Court stated:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Conditions Subsequent Relating to Post-Permit Review

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

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

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

During the hearing, Ms. Barbour, Chair of the Board testified that the Board's practice is to delegate the approval of the final plans to a peer reviewer or construction monitor and that this individual would get "everything." Tr. III, 147, 153. The Board suggests this is consistent with the Committee's expectation for other Boards, citing *LeBlanc v. Amesbury,* No. 06-08, slip op. at 22 (Mass. Housing Appeals Committee May 12, 2008).

---

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

Although the Board's chair testified that language it its decision providing that state review shall be conducted by the Board may be interpreted to mean review is to be performed by the Board's agent or designee, the language of the permit expressly provides for the Board itself to conduct review and approval. Moreover, on the record it is clear that Board action will require public meetings under open meeting law requirements, which would add to the cost and delay of the project. Tr. II, 194-195; III, 36-38.

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

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

In addition, the comprehensive permit shall be MODIFIED in the following respects:

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

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

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

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

---

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

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

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

VII. PEER REVIEW FEES

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

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

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

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

Charges for the independent study by McKown Associates, LLC on soil stability issues, for a total of $2,543.56. Exh. 48(K). The developer argues this work was

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

inappropriate because Simon Hill did not submit any technical information on soil stability or construction methods. Exhs. 2(A), File Inventory, pp. 1-10; 53, ¶ 12. It also argues that this study was beyond the scope of preliminary planning.

Charges for PSC's services for general representation as a Chapter 40B consultant, which Simon Hill argues was an attempt to "end-run" the Committee's regulations prohibiting a Board from charging applicants for legal fees, and violated G.L. c. 44, § 53G. See 760 CMR 56.05(5)(a). Simon Hill argues that the PSC invoice should be adjusted down to $6,400, the amount quoted for two iterations of review of all technical aspects of Simon Hill's design. Exh. 16. Simon Hill argues that any work performed beyond this amount was excessive, contrasting the $33,513.96 bill with the original $6,400 contract. Exhs. 15, 16, 48(K).

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

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

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

Hill argues that the Board's regulations suggest otherwise, and requests a protective order limiting these fee requirements.

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

VIII. CONCLUSION AND ORDER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Housing Appeals Committee

Issued: October 13, 2011

Werner Lohe

Carol A. Gloff

Joseph P. Henefield

Theodore M. Hess-Mahan

James G. Stockard, Jr.

Shelagh A. Ellman-Pearl, Presiding Officer