

**COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE**

HERRING BROOK MEADOW, LLC

v.

SCITUATE ZONING BOARD OF APPEALS

No. 07-15

DECISION

May 26, 2010

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Appellant's Counsel

Janet R. Stearns, Esq.
John T. Smolak, Esq.
Smolak & Vaughan, LLP
21 High Street, Suite 301
North Andover, MA 01845

Richard A. Nysten, Jr., Esq.
Lynch DeSimone & Nysten LLP
12 Post Office Square, Suite 600
Boston, MA 02109

Board's Counsel

Jason R. Talerma, Esq., Of Counsel
Blatman, Bobrowski & Mead, LLC
2 Milliston Road, Suite 2G
Millis, MA 02054

Intervener's Counsel

Jonathan D. Witten, Esq.
Barbara Huggins, Esq.
Daley & Witten, LLC
156 Duck Hill Road
Duxbury, MA 02332

Appellant's Witnesses

John Connery
Roderick Gaskell
Steven D. Gioiosa, P.E.
Christian Huntress
Gary McNaughton
James R. Motzkin
David H. O'Sullivan

Board's Witnesses

Neil Duggan
Laura Harbottle
Lisa McIntosh
Arthur Allen, III

Intervener's Witness

Gloria Hollstein

COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

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HERRING BROOK MEADOW, LLC,)	
)	
Appellant)	
)	
v.)	No. 07-15
)	
SCITUATE 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 Herring Brook Meadow, LLC (Herring Brook), from a decision of the Scituate Zoning Board of Appeals denying a comprehensive permit with respect to property located in Scituate, Massachusetts. For the reasons set forth below, the decision of the Board is set aside and a comprehensive permit is ordered to be issued by the Board consistent with this decision.

I. PROCEDURAL HISTORY AND BACKGROUND

On November 8, 2006, Herring Brook submitted an application to the Board for a comprehensive permit for the construction of 60 garden style condominium units on approximately 15 acres at 126 and 132 Chief Justice Cushing Highway in Scituate. Exhs. 3A; 74, ¶ 14; 47 (15.34 acres); but see Pre-Hearing Order, § II, ¶ 4. Also see Exhs. 1-2. The project is to be financed under the Housing Starts Program of the Massachusetts Housing Finance Agency (MassHousing) or the New England Fund Program (NEF) of the Federal Home Loan Bank of Boston. Exh. 1.

The Board's public hearing on the application began on November 29, 2006 and continued on January 3, March 22, May 24, June 12, August 2, October 4, and November 1, 2007. At the November 1 hearing session, the Board closed the public hearing. Exh. 2, p. 2.

On October 22, 2007, Herring Brook filed an appeal for constructive grant or constructive denial with the Committee on the ground that the Board had failed to close the hearing and otherwise timely act on its application. By decision filed with the town clerk on November 9, 2007, the Board subsequently denied Herring Brook's application for a comprehensive permit. Pre-Hearing Order, § II, ¶ 1; Exh. 2.

The Board moved to dismiss the appeal on the ground that Herring Brook provided insufficient information to the Board. A group, the "Citizens for the Preservation of Herring Brook," sought to intervene in the appeal. The presiding officer granted the motion to intervene of certain of the individual neighbors and denied intervention to the remaining individuals, but allowed the members of the Citizens' Group to participate as Interested Persons. She also denied the Board's motion to dismiss and granted Herring Brook's motion to amend the initial pleading. The presiding officer granted leave to Massachusetts State Representative Frank M. Hynes, who represented Scituate, to participate as an Interested Person.¹ Following a pre-hearing conference, the parties submitted pre-filed direct testimony and Herring Brook filed pre-filed rebuttal testimony.

On July 16, 2009, the Committee's *de novo* evidentiary hearing commenced in Scituate, with sworn cross-examination and a site visit conducted by the presiding officer. The evidentiary hearing continued in Boston at the Committee's offices on July 17, 29 and 30, 2009. Following the submission of transcripts, Herring Brook, the Board and the Interveners filed their post-hearing memoranda.

II. FACTUAL OVERVIEW

The developer proposes the construction of 60 residential ownership condominium units in three buildings. Pre-Hearing Order, § II, ¶ 2; Exhs. 3A; 4. The project site includes

1. Subsequently, the presiding officer allowed Rep. James N. Cantwell, his successor, to replace Rep. Hynes as Interested Person, after the conclusion of the latter's term in the Massachusetts Legislature.

two parcels totaling approximately 15 acres at 125 and 132 Chief Justice Cushing Highway, which is state highway route 3A. One parcel, approximately one acre, contains a single family house intended to be taken down. On the remainder of the site formerly were located a farm house and a cultivated cornfield bordering an abandoned railroad bed, which is now owned by the Scituate Conservation Commission. Exh. 22, *Proposed Open Space and MA Wetlands Protection Act Compliance Measures (Open Space)*, §§ 1, 2, p. 3. The project site is mainly open space made up of large meadow where the former cornfield existed, as well as a maritime forest community, and salt marsh bordering First Herring Brook, a tidal estuary. First Herring Brook flows through a breach in the railroad embankment, where it becomes Herring River, flowing into the North River which then opens into Massachusetts Bay and the Atlantic Ocean. The North River is a state-designated Scenic River. Exh. 22, *Stormwater Flood Analysis & Mitigation (Stormwater)*, pp. 2-4; Exhs. 2; 3A; 74, ¶ 14; 81, ¶ 4. The site has a clear view to the Driftway Park conservation land to the east.

The property is largely on the site of the former Watson Farm in the A-1 residential district (1 acre lot zoning) and various designated environmental protection overlay zoning districts: the Saltmarsh and Tideland Conservation District, the Flood Plain and Watershed Protection District, the North River Scenic Corridor and a Zone II Well-Head protection area. The site also includes an area designated as priority and estimated habitat for rare species by the Natural Heritage and Endangered Species Program (NHESP) of the Massachusetts Division of Fisheries and Wildlife. Exhs. 2, p. 5; 3A; 65 (Zoning Bylaws, §§ 460, 470); 81, ¶¶ 6-7; 74, ¶ 14. No work is proposed in the following areas protected under the Massachusetts Wetlands Protection Act (WPA) or the NHESP: salt marsh, state bordering vegetated wetlands or their buffer zones, priority habitat, estimated habitat or vernal pools. Of the upper edge of the Riverfront Area, 1.65% will be regraded and kept as open space. Exh. 22, *Open Space*, § 3.20, p. 6; 22, *Notice of Intent (NOI)*, ¶ A.6.

Herring Brook proposes to construct three buildings, two containing 21 units and one containing 18 units, clustered near Route 3A. The developed portion of the property will be approximately 4 acres (25% of the site); the remainder will be open space. The developer proposes to transfer to the Town approximately 1.49 acres of upland maritime habitat along

the north boundary of the property, including an existing gravel way, and to place an additional 4.58 acres, currently constituting meadow, under a permanent conservation easement. Exhs. 74, ¶ 14; 22, *NOI*, ¶ A.6.; 22, *Open Space*, § 1, p. 2, § 2, p. 5.

The site elevation ranges from a peak elevation of 24 feet at the southwest corner near Route 3A where the developed area begins to between 10 and 7.4 feet in the area where one of the buildings and a parking lot will be constructed. Exhs. 81, ¶ 5; 2, p. 4; 3A; 80, ¶ 8. Eleven feet is the base flood elevation under the Federal Emergency Management Administration and for Land Subject to Coastal Storm Flowage (LSCSF). Exhs. 81, ¶ 5; 87, ¶ 2. Consequently, portions of the site are subject to significant periodic flooding, primarily from coastal storm surge flow. Coastal storms have caused surges reaching several feet high on the project site and the neighboring property. Additionally, rainstorms cause flooding, largely flowing into a depression centrally located on the site, identified as Isolated Land Subject to Flooding, or ILSF, as well as on the neighboring property. Exhs. 22, *Stormwater*, § 2.30, pp. 4-6; 2, pp. 4-5; 84, ¶¶ 4, 6-7; 87, ¶¶ 2-3.² Located within the ILSF depression is an area with a significant stand of *Phragmites australis*, identified as an “Isolated Phragmites pocket” on the developer’s Existing Conditions & Wetlands Resource Areas Plan. Exh. 3A, Sheet 2. To accommodate the project, the developer proposes to fill and relocate the ILSF providing more storage capacity in the new location. Exh. 75, ¶ 12B. The lowest slab elevation of the proposed buildings is 13.5 feet, 2½ feet above the base elevation for LSCSF. Exhs. 74, ¶ 34; 87, ¶ 2. The developer also plans to improve the wildlife habitat and vegetation in the relocated ILSF. Exhs. 86, ¶ 34; 9, Attach. B, D.

2. During the hearing, the presiding officer accepted unsworn oral and written statements from Representative Cantwell and individual members of the Citizens’ Group as Interested Persons. Since these individuals are not parties to the proceeding, the members of Citizens’ Group were not permitted to introduce evidence into the record on their own behalf. The Board and Interveners, who share some of their interests, were, however, in a position to introduce evidence on the issue of flooding, including any photographs they deemed relevant, and to the extent the Interested Persons complain that they were not allowed to submit photographs of flooding, their recourse would have been to suggest the introduction of those exhibits through Board and Intervener counsel in the course of the hearing. Furthermore, a photograph depicting flooding on the site, which one of the members of Citizens’ Group sought to have included, was admitted into evidence. Exh. 71. See. Tr. I, 5-13, 63, 92.

The developer proposes that the housing will be serviced by municipal water and by an on-site private wastewater treatment facility for which it has received a final Groundwater Discharge Permit from the Massachusetts Department of Environmental Protection (DEP). DEP has also issued a Final Order of Conditions regarding the planned construction activity on the site and addressing the wetlands and resource areas governed by the Wetlands Protection Act, as well as DEP stormwater management requirements. Pre-Hearing Order, § II, ¶¶ 5-6; Exh. 64. The Scituate Conservation Commission issued to Herring Brook an Order of Resource Area Delineation (ORAD) dated November 16, 2004, which, by its terms, expired on November 15, 2007. Exh. 81, ¶ 10c. Additional facts specific to the disputed issues are addressed below in the discussions of those issues.

III. BURDENS OF PROOF

A. Appellant's Burden of Proof

1. Project Eligibility Requirements

To be eligible to proceed on a comprehensive permit application before the Board or to bring an appeal before the Housing Appeals Committee, Herring Brook was obligated to fulfill three requirements under 760 CMR 31.01(1).³ Although it reserved its rights to raise these issues in the hearing, see Pre-Hearing Order § IV, ¶ 1; Exh. 2, pp. 1-2, the Board has not pursued them and did not address them at all in its brief. Herring Brook's manager testified that the developer will become a limited dividend organization for the purpose of G.L. c. 40B, § 20 and 760 CMR 31.01(1)(a). Exh. 78, ¶¶ 9, 10. Herring Brook has received a determination of project eligibility from the Massachusetts Housing Finance Agency (MassHousing) under the Housing Starts Program and the New England Fund Program of the Federal Home Loan Bank of Boston. Exhs. 1; 78, ¶ 11. This determination establishes

3. At the time Herring Brook brought its appeal, 760 CMR 30.00 and 31.00 governed comprehensive permit appeals pursuant to G.L. c. 40B. Effective February 22, 2008, the Department of Housing and Community Development (DHCD) promulgated a revised regulation, 760 CMR 56.00, which, by its terms, superseded 760 CMR 30.00 and 31.00 in most respects. However, since the issuance of the project eligibility letter preceded the promulgation of 760 CMR 56.00, the former regulation, 760 CMR 31.01(1), applies to the project eligibility requirements. See 760 CMR 56.08(3)(c), 56.04(1), 56.04(4).

compliance with the fundability requirement of 760 CMR 31.01(1)(b). Herring Brook also has established site control pursuant to 760 CMR 31.01(1)(c) for the purposes of this proceeding. Exhs. 78, ¶¶ 4, 7-8; 56.

2. Federal or State Requirements or Generally Recognized Standards

When the Board has denied a comprehensive permit, the central question before the Committee is whether the decision of the Board is consistent with local needs. G.L. c. 40B, § 20. Under the Committee's regulations, a developer "may establish a *prima facie* case by proving, with respect to only those aspects of the Project which are in dispute (which shall be limited, in the case of a Pre-Hearing Order, to contested issues identified therein), that its proposal complies with federal or state statutes or regulations, or with generally recognized standards as to matters of health, safety, the environment, design, open space, or other matters of Local Concern." 760 CMR 56.07(2)(a)2.

The record shows that Herring Brook has met its *prima facie* burden with regard to the issues in dispute -- local wetlands protection requirements, as demonstrated in particular by the DEP Final Order of Conditions and the Army Corps of Engineers determination (Exhs. 9, 13, 18, 22, 54, 64, 74, 75); Scituate master planning, including any incorporated smart growth and sustainable development concepts, as demonstrated in particular by the direct testimony of Mr. Connery (Exhs. 1, 68, 69, 73); see *28 Clay Street Middleborough LLC v. Middleborough*, No. 08-06, slip op. at 13 (Mass. Housing Appeals Committee Sept. 28, 2009); *Stuborn Ltd. Partnership v. Barnstable*, No. 98-01, slip op. at 4 (Mass. Housing Appeals Committee Sept. 18, 2002);⁴ and flooding and inundation on interveners' properties, as demonstrated in particular by the DEP Final Order of Conditions and Groundwater Discharge Permit (Exh. 54, 64, 74, 75). Also see generally, Exhs. 3A, 9, 13, 18, 22, 27, 54, 64, 73-79.

4. The Smart Growth Principles for the Boston Metropolitan Area Planning Council, Exh. 68, and the Commonwealth of Massachusetts Sustainable Development Principles, Exh. 69, are not, of themselves, local requirements. Neither are they enacted state requirements. To the extent Scituate has incorporated these principles in its local rules, compliance with the foregoing standards would satisfy a developer's *prima facie* burden.

The Board argues that Herring Brook was also required, as part of its *prima facie* case under 760 CMR 56.07(2)(a)2., to demonstrate compliance with local wetlands requirements, because, they assert, it had not timely sought a waiver of those requirements. Their arguments are wrong because 1) they have misinterpreted the requirements of the regulation regarding the Appellant's *prima facie* case; 2) the developer adequately preserved its waiver rights; and 3) even if Herring Brook were required to demonstrate compliance with non-waived local wetlands requirements, it has done so.

First, regarding their interpretation of the Comprehensive Permit regulation, § 56.07(2)(a)2. states the developer must show its proposal complies with "federal or state statutes or regulations, or with generally recognized standards as to matters of health, safety, the environment, design, open space, *or other matters of Local Concern.*" (Emphasis added.) The Board argues that the italicized language demonstrates the developer must show compliance with local requirements for which it has not sought a waiver. Their interpretation of the regulation is incorrect. A careful reading of this provision leads to only one conclusion, that the italicized phrase adds a general residual category in addition to the stated "matters of health, safety, the environment, design, open space." This is evident from the parallel use of the word "matters." Moreover, the reading sought by the developer's opponents is obviously strained.⁵ It ignores the fact that "matters of local concern" do not constitute a legal standard, such as the federal or state statutes or regulations, nor are they even a general standard for compliance such as "generally recognized standards as to matters of health, safety,..."

Second, even if the developer were required to demonstrate compliance with non-waived local requirements as part of its *prima facie* case, Herring Brook has adequately preserved any rights to seek waivers: At the time of the developer's application to the Board, the ORAD delineating the portions of the site subject to the local wetlands requirements was

5. Their interpretation would require the sentence to read as follows: A developer "may establish a *prima facie* case by proving, with respect to only those aspects of the Project which are in dispute ..., that its proposal complies with federal or state statutes or regulations, or with generally recognized standards *or other matters of Local Concern* [as to matters of health, safety, the environment, design, open space....]." (Emphasis added.)

still in effect. The ORAD did not identify the wetlands the Board and the Interveners seek to rely on to oppose this project, and therefore, no proof regarding the “Phragmites pocket” now in dispute was necessary. Herring Brook expected that it would not need a waiver of local wetlands requirements because it took the position that no violation of local wetlands requirements would be involved. Indeed, the ORAD had not identified any local wetlands. Exh. 22. In addition, Herring Brook included in its list of waivers in the comprehensive permit application a statement that it would amend the list.⁶ Also, it is undisputed that during this proceeding the developer requested a waiver, and the presiding officer gave it leave to pursue a waiver in the event the Committee determined that the phragmites area within the Isolated Land Subject to Flooding constituted locally regulated wetlands. Tr. I, 94. The arguments that the waiver request is untimely are not supported.⁷ Since the developer is permitted to seek a waiver from the Committee, it need not establish compliance with the local wetlands rules at issue. See *Zoning Board of Appeals of Groton v. Housing Appeals Committee*, 451 Mass. 35, 40 (2008).

Finally, and most importantly, with regard to compliance with local wetlands rules, the developer has submitted sufficient evidence to establish a *prima facie* case that no local wetlands would be affected. The Appellant submitted exhibits and testimony to show that the area in dispute -- that portion of the ILSF on which phragmites and purple loosestrife are located -- does not constitute wetlands under local rules and regulations, including in particular, the Town Conservation Commission’s ORAD issued in 2004. The ORAD was in effect on the date Herring Brook applied for a comprehensive permit and only expired on November 15, 2007, after the Board had issued its denial of the comprehensive permit.

6. Herring Brook noted in its comprehensive permit application that if any specific exceptions had not been listed, it would promptly amend the list. Exh. 7, § 1. Additionally, the application contains a general statement that the “applicant also seeks waivers from the applicability of such other sections of the Zoning Bylaws, Planning Board Rules and Regulations, Board of Health Rules and Regulations, Scituate Wetlands Protection Bylaw and Regulations, and/or such other local by-laws, rules and regulations that would otherwise be applicable to this development.” Exh. 7, § 9.

7. The parties are mistaken to the extent they argue that Herring Brook has already been granted a waiver. The presiding officer allowed the developer to request a waiver of local regulations if a determination is made that the phragmites area constitutes locally regulated wetlands. Tr. I, 94.

Under 760 CMR 56.02 (definition of Local Requirements and Regulations), the ORAD constitutes a determination that controls the delineation of resource areas for this proceeding and therefore establishes sufficient evidence that the area has no jurisdictional wetlands.⁸ Exhs. 22 (ORAD); 74. In addition, the developer submitted evidence based on the nature of the wetlands indicator plants, the hydrology of the site, the disturbed soils, and the lack of substantial hydric soils to support a *prima facie* finding that the area in question does not constitute wetlands under Scituate bylaws and regulations. See, e.g., Exhs. 9, 13, 18, 22, 54, 64, 66, 67, 74, 75.

B. Board's Burden of Proof

Once the Appellant has demonstrated that its proposal complies with state or federal requirements or with generally recognized standards, the burden then shifts to the Board to prove that there is a valid health, safety, environmental, design, open space or other local concern that supports the denial of a comprehensive permit, *and* that such concern outweighs the regional need for low or moderate income housing. 760 CMR 56.07(2)(a)2. and 56.07(2)(b)2; see G.L. c. 40B, §§ 20, 23. Also see *Hilltop Preserve Ltd. Partnership v. Walpole*, No. 00-11, slip op. at 4 (Mass. Housing Appeals Committee Apr. 10, 2002), citing *Board of Appeals of Hanover v. Housing Appeals Committee*, 363 Mass. 339, 365 (1973).

A board may show conclusively that its decision was consistent with local needs by proving that one or more of the grounds in 760 CMR 56.03(1) has been satisfied. Although the Board preserved the right to raise as a defense that it had achieved any of the statutory minima in G.L. c. 40B, § 20, also see 760 CMR 56.03(3), it presented no evidence in this regard. The fact that Scituate does not meet the statutory minima or other grounds in 760 CMR 56.03(1) regarding affordable housing establishes a rebuttable presumption that a substantial regional housing need outweighs local concerns. 760 CMR 56.07(3)(a). See G.L. c. 40B, § 20. The failure to meet statutory minimum housing obligations “will provide compelling evidence that the regional need for housing does in fact outweigh the objections

8. Section 56.02 states: “Local Requirements and Regulations – mean 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

to the proposal.” *Hanover, supra*, 363 Mass. 339, 367. Also see *Woburn Board of Appeals v. Housing Appeals Committee*, 66 Mass. App. Ct. 1109 (2006), *further appellate review denied*, *Board of Appeals of Woburn v. Housing Appeals Committee*, 447 Mass. 1107 (2006).

IV. LOCAL CONCERNS

A. Scituate Wetlands Requirements

The primary issue in this appeal concerns the applicability of local Scituate wetlands requirements. The parties dispute whether locally regulated wetlands exist in a central area of the project site located within a delineated Isolated Land Subject to Flooding (ILSF), which would be relocated to accommodate the construction of one of the buildings and a parking lot. The question concerns whether this area, characterized by the presence of phragmites and purple loosestrife, constitutes Isolated Vegetated Wetlands (IVW) under the Scituate Wetlands Regulation (SWR). The area in question has been determined by DEP and the U.S. Army Corps of Engineers (ACOE) not to constitute wetlands under their respective jurisdictions.

If the area does constitute wetlands, local regulations also protect as resource areas a 50-foot no disturb zone and a 100-foot buffer zone. Exhs. 66, 67. In this case, it would be necessary to assess both whether locally defined wetlands present a local concern and whether the project’s impact on a wetland resource presents a local concern, such that development on the site is precluded or requires conditions to address the concerns. The Board and Intervener have the burden of proving both the existence of such a local concern and that it outweighs the need for affordable housing. The factual history of this issue is important to the question.

1. History of Wetlands Determinations

a. Order of Resource Area Delineation by Scituate Conservation Commission

In 2004, as part of the design process for this project, the developer submitted to the Scituate Conservation Commission an Abbreviated Notice of Resource Area Delineation

ordinances, by-laws, codes, and regulations, in each case which are in effect on the date of the Project’s application to the Board.”

(ANRAD) prepared by its engineering consultant, SITEC Environmental, to establish the extent of wetland resource areas. See Exhs. 74, ¶ 19; 22.⁹ The BSC Group, an independent consultant engaged by the Commission to evaluate Herring Brook's delineation, concurred that the Wetlands Resource Areas Plan as revised indicated the correct wetland field delineation on the site, including proper delineation of the ILSF, as well as the inland bank delineating the First Herring Brook, the 200-foot Riverfront area, state Bordering Vegetated Wetlands and Land Subject to Coastal Storm Flowage. Exh. 22, BSC Oct. 18, 2004 memo. See Exhs. 18, p. 5; 74, ¶ 19.

On November 16, 2004, the Commission issued an Order of Resource Area Delineation (ORAD) under the Wetland Protection Act and the Scituate Wetlands Bylaw, approving the Existing Conditions - Wetlands Resource Area Plan dated August 9, 2004 and revised October 12, 2004. The ORAD was to be effective for three years. It states: "The Conservation Commission has determined the following...: Accurate: The boundaries described on the referenced plan(s) above and in the Abbreviated Notice of Resource Area Delineation are accurately drawn for the following resource area(s) ... North River Scenic River Corridor, saltmarsh, riverfront area, land subject to coastal storm flowage, isolated land subject to flooding." Exh. 22, ORAD, p. 2.

b. Order of Conditions by Scituate Conservation Commission

Following the developer's submission of its comprehensive permit application on November 8, 2006, it sought an order of conditions from the Commission in connection with this project. Subsequently in 2007, questions about the delineation of the ILSF arose. In the Commission's Order of Conditions dated May 17, 2007 conditionally approving the project as then proposed, the Commission stated that data concerning the flooding elevation of the ILSF as delineated in the ORAD warranted revisiting the ORAD.¹⁰ Exh. 14. Subsequently,

9. SITEC was retained to provide site planning, civil and environmental engineering, wetlands science and permitting services for Herring Brook. Exh. 74, ¶ 13.

10. Condition No. 74 states: "ILSF: The project proponents state a proposed alteration of 12.665 s.f. of Isolated Land Subject to Flooding (ILSF) delineated to a contour elevation of 7 feet. The ILSF is locally significant to flood control and storm damage prevention, particularly with respect to adjacent properties. Additional information submitted during the hearing process does not specifically tie the limit of flooding to the 7 foot elevation; a flooding level of between 7 to 8 feet has

the developer and the Town's consultant, BSC Group, reached agreement on a revised contour elevation increasing the size of the ILSF, which Herring Brook incorporated into its plans. Exh. 10, p. 3.

c. DEP Superseding and Final Orders of Conditions

Herring Brook appealed the conditions in the Commission's May 17, 2007 Order of Conditions to the DEP. The plan attached to its Notice of Intent indicates the existence of a small area of isolated vegetated wetlands, subject to the Scituate Wetlands Bylaw only, as located overlapping a small area of the ILSF near the dug channel through the stonewall and adjacent to the Hollstein property. Exh. 22, Existing Conditions and Wetland Resource Areas Plan, Sheet 2. Also see Exh. 3. However, Herring Brook had noted in correspondence to the Commission that since the ORAD was in effect, "wetlands resource areas regulated only under the Scituate wetlands bylaw are not subject to Commission review under this NOI. For this reason, the subject wetlands resource areas listed in the SITEC Opens [sic] Space and Wetlands Report under subsection 3.10 'Wetlands Resource Areas' on page 6 *do not include IVW.*" Exh. 18, p. 6. (Emphasis in original.) See Exh. 22. DEP noted in its Superseding Order of Conditions dated November 17, 2008:

During the appeal process an issue raised was whether the area designated as ILSF was actually Bordering Vegetated Wetland (BVW) as defined at 310 CMR 10.55. The applicant has submitted additional documentation to show that the area does not contain at least 50% of wetland indicator species. In addition, on June 20, 2008 Department personnel, in the presence of a Conservation Commission member performed soil pit analysis to determine the presence or lack of hydric soils. With the exception of an area near the stone wall property line, the Department did not encounter characteristics of hydric soils. The Department has determined the area does not qualify as BVW. However, the area does qualify as ILSF delineated by the 7.4 foot contour which is based upon an overflow elevation.

Exh. 53, pp. 1-2. At the suggestion of DEP staff during the foregoing review, the developer sought the determination of the U.S. Army Corps of Engineers (ACOE) of the status of the

been represented by the proponent and supported by testimony by abutting property owners. The Commission views that the data presented during the public hearing process regarding the ILSF constitutes sufficiently new data to warrant revisiting the Order of Resource Area Delineation (Order) previously issued by the Commission." Exh. 14.

ILSF under federal wetlands regulations. Exh. 74, ¶ 16. In a letter dated October 24, 2007, the ACOE determined no federal wetlands existed on the project site. Exh. 13.

Following the issuance of the Superseding Order of Conditions, the developer, the Commission and several abutters, including Ms. Hollstein and the Daileaders, entered into a settlement agreement which was incorporated into a Final Order of Conditions adopted by the DEP in a Final Decision dated March 27, 2009. The Settlement Agreement explicitly left open the issue of the existence of IVW under local wetlands bylaws and regulations.¹¹ As did the Superseding Order of Conditions, the Final Order of Conditions requires the removal of phragmites.¹² Exhs. 53; 64, Condition 23; 86, ¶ 31B.

d. MEPA Review

Herring Brook also submitted an Environmental Notification Form (Exh. 25) to the Massachusetts Secretary of Energy and Environmental Affairs on January 18, 2008, with an attached report describing assessments of flooding and wetlands issues (Exh. 9). The Secretary issued a certificate on March 7, 2008, that further MEPA study of environmental issues was not required as the potential impacts of this project did not warrant the preparation of an EIR. Exhs. 74, ¶ 17; 27.

2. Scituate Wetlands Bylaw and Regulations

The Scituate Wetlands Bylaw does not define wetlands. The Scituate Wetlands Regulation (SWR) provides a definition of vegetated wetlands, similar to that in the DEP wetlands regulations, 310 CMR 10.55 (Bordering Vegetated Wetlands), and also refers to the Massachusetts Wetlands Protection Act (WPA) for guidance in evaluating the characteristics

11. While the DEP found this area not to constitute wetlands under the Wetlands Protection Act, its final order of conditions explicitly did not preclude argument in this proceeding “as to the existence or non-existence of hydric soils or other wetland indicators on the subject property.” Exh. 64, Settlement Agreement, p. 4, ¶ 2. The Final Order of Conditions approved the project to proceed.

12. Condition 23 states: “Attachment D contains a protocol for prevention of invasive plant community re-establishment which includes mechanically removing the Phragmites rhizome root system from the topsoil. If this method is used the applicant is responsible for on-going invasive species control. Annual reports documenting the success of invasive species control shall be submitted to the Department and Scituate Conservation Commission. Exh. 64.

of vegetated wetlands, although it includes in its definition areas that do not border on open bodies of water, as required by the WPA:

Vegetated Wetland: are freshwater wetlands which do or do not border on creeks, rivers, streams, ponds and lakes, and may be isolated. The types of freshwater wetlands are wet meadows, marshes, swamps, and bogs. They exist where soils are saturated and/or inundated by water such that they support a predominance of wetland indicator plants. The ground and surface water regime and the vegetational community which occur in each type of freshwater wetland are specified in M.G.L. c. 131 s. 40.

The boundary of Vegetated Wetlands is the line within which *50% or more of the vegetational community consists of wetland indicator plants and saturated or inundated conditions exist*. Wetland indicator plants shall include but not necessarily be limited to those plant species identified in the Act....

Exh. 67, SWR § 10.04. (Emphasis added). See Exh. 66. Also see Exhs. 83, ¶ 12; 74, ¶¶ 36-39. Compare 310 CMR 10.55(2)(a) and (c). Thus wetlands exist in an area in which:

- 1) 50% or more of the vegetational community consists of wetlands indicator plants; and
- 2) saturated or inundated conditions exist. The regulation further provides that “[a]reas containing a predominance of wetland indicator plants are **presumed** to indicate the presence of saturated or inundated conditions.” Exh. 67, SWR § 10.04(1). See 310 CMR 10.55(2)(c)1. The SWR specifies that:

[w]hen the boundary is not presumed accurate as described in 310 CMR 10.55(2)(c)1a. through 1c. or to overcome the presumption, credible evidence shall be submitted by a competent source demonstrating that the boundary of Bordering Vegetated Wetlands is the line within which 50% or more of the vegetational community consists of wetland indicator plants and saturated or inundated conditions exist. The issuing authority must evaluate vegetation and indicators of saturated or inundated conditions if submitted by a credible source, or may require credible evidence of saturated or inundated conditions sufficient to support wetland indicator plants, such evidence shall include one or more of the following:

- (a) groundwater, including the capillary fringe, within a major portion of the root zone;
- (b) observation of prolonged or frequent flowing or standing surface water;
- (c) characteristics of hydric soils.

Exh. 67, SWR § 10.04(2). See 310 CMR 10.55(2)(c)2. The identification of wetland indicator plants and the determination of saturated or inundated conditions are made by reference to the WPA, which states:

The term “freshwater wetlands”, as used in this section, shall mean wet meadows, marshes, swamps, bogs, areas *where groundwater, flowing or standing surface water or ice provide a significant part of the supporting substrate for a plant community for at least five months of the year*; emergent and submergent plant communities in inland waters; that portion of any bank which touches any inland waters.¹³

G.L. c. 131, § 40 (Emphasis added). Although the Board’s and developer’s experts agreed that the area in question is a “wet meadow,” they disagree regarding the criteria for inundation of a wet meadow under the statute: the WPA states that in wet meadows “ground water is at the surface for a significant part of the growing season and near the surface throughout the year...” G.L. c. 131, § 40. See Tr. III, 174; IV, 115; Exhs. 74, ¶ 37; 86, ¶ 10C. The parties disagree about the interpretation of the Town and state regulations and statute, particularly regarding the manner and extent by which the characteristics of wetlands indicator plants, inundated conditions and hydric soils, respectively, factor into the determination of wetlands. For example, although the SWR indicates that a predominance of wetlands indicator plants constitutes a presumption of the presence of wetlands, Herring Brook’s expert testified that these wetlands plants, phragmites and purple loosestrife, also occur in uplands, and particularly with disturbed soils, such as an agricultural site, and therefore other factors should be considered, particularly the presence of hydric soils. Exhs. 86, ¶¶ 16, 31C; 86D; 86E.

In interpreting the Scituate regulation and the WPA and its regulations, the parties referred to a non-binding guidance document published by DEP entitled “Delineating Bordering Vegetated Wetlands under the Massachusetts Wetlands Protection Act” (DEP

13. Although the Board suggests that the five-month requirement refers to the amount of time plants must be growing, a construction of the sentence makes clear that five months refers to the duration for which a water source must provide a part of the supporting substrate for a plant community, i.e., must be saturated. A careful reading of this provision leads to the conclusion that the phrase “for at least five months of the year,” represents a period of time and therefore modifies the verb “provide” in the sentence, rather than the preceding prepositional phrase. Exh. 86, ¶ 10C.

Handbook). Exh. 86E (also found in part at Exhs. 82B, 83B). Although the DEP Handbook confirms the Scituate regulatory presumption by stating that “[v]egetation may be used as the sole criteria for delineating BVWs in the vast majority of cases,” Exh. 86E, p. 20, it is clear that other factors for determining wetlands are important, particularly the presence of wetlands (hydric) soils. Exh. 86E, p. 5. Also see DEP Wetland Program Policy 95-1: *Bordering Vegetated Wetland Delineation Criteria & Methodology*, which states that “[t]he wetlands hydrology criteria can be met if hydric soils are present within the observation plot.” Exh. 72.

3. Evidence of Vegetated Wetlands

The Board argues that since the ORAD has expired, it is no longer relevant. However, since the ORAD was in force at the time of the filing of the comprehensive permit application, and indeed, only expired after the Board issued its decision, its delineation of local resource areas controls for the purposes of this proceeding. Nevertheless, both parties have introduced evidence regarding the vegetation, level of soil saturation, and soil characteristics within the disputed area since the date of the ORAD to prove the existence or not of the wetlands. As shown below, even if the ORAD were not controlling as a matter of law, the evidence in the record warrants the same conclusion.

a. The Board’s Case

The Board argues that an Isolated Vegetated Wetland (IVW) exists within the ILSF because the phragmites area contains 50% phragmites and purple loosestrife, and because it has shown sufficient inundated or saturated conditions to find wetlands.¹⁴ The Board bases its opinion on the testimony of its soil and wetlands scientist, Mr. Arthur Allen, III, who has worked with the DEP in interpretation of soils for wetland delineation, and its wetland specialist, Ms. Lisa McIntosh, who has participated as consultant to the Board regarding wetlands since 2007. Exhs. 83, ¶ 5; 82, ¶ 4. They submitted testimony regarding observations made at the site in February and May 2009. Although they did not perform a

14. The Intervener supports the Board’s contention that the phragmites area is an IVW.

delineation of wetlands, they assessed the central area of the site containing the Phragmites pocket within the ILSF.

During his visit to the site in February 2009, Mr. Allen observed stained leaves and inundated, although partially frozen, soil conditions. He performed roughly 40 soil auger borings and tested for hydric soils. Of the 40 borings, he observed hydric soils at only three isolated points, one on the border of the Hollstein property and the two others north and west of the Phragmites pocket. He concluded that generally the soils he observed largely failed to meet the definition of hydric soils, since they lacked the classic criteria of gray, depleted or mottled sub-surface layers, which he found to be surprising. Exh. 83, ¶¶ 15, 16, 23; Tr. III, 158-160. See Exh. 86, ¶ 14.¹⁵ Mr. Allen also observed a large depression containing dried remnants of purple loosestrife and phragmites, wetlands indicator species, during this visit. Exhs. 83, ¶ 15; 82, ¶ 17.

In his May 18, 2009 visit to the site, Mr. Allen took seven auger borings and observed an average depth to groundwater in each of the holes of 8.7 inches; only one of the holes did not fill with water to within 12 inches of the surface. Based on National Weather Service records, he found that no significant precipitation had occurred since May 7, and therefore concluded that those borings established a duration of saturation of seven out of 21 days, set out in the DEP Handbook. Exhs. 83, ¶ 18, 19; 83C; Tr. III, 227-229. Mr. Allen testified that the ACOE and industry standard for determining the existence of wetlands hydrology is the presence of groundwater within 12 inches of the surface for as little as 7 to 21 days during the growing season. Exh. 83, ¶ 19, citing the DEP Handbook, Exh. 83B, pp. 5, 35.

Ms. McIntosh testified that she observed isolated phragmites within the ILSF during her February visit, stating that the “thickness of the stand was indicative of an area within

15. In his prefiled testimony, Mr. Allen only referred to the locations as “several key locations.” Exh. 83, ¶ 16. On cross-examination, he stated that he found hydric soils in three areas, one right on the border of Ms. Hollstein’s property and the others north and west of the Phragmites pocket. However, when he took borings right around the phragmites, he did not find hydric soils in those holes. Tr. III, 158-160. Herring Brook’s expert, Mr. Gaskell, who accompanied him, identified the locations where Mr. Allen found hydric soils as two isolated points on the project site, one within and one adjacent to the ILSF. Exh. 86, ¶ 14. Ms. McIntosh concurred regarding two locations, agreeing one was by Ms. Hollstein’s property and another was north of the phragmites patch, which she thought would be within the area she approximated as IVW. Tr. IV, 137-138.

which 50% or more of all vegetation is wetland indicators.” Exh. 82, ¶ 17. She confirmed her tentative opinion during her visit to the site in May. Exh. 82, ¶ 18; Tr. IV, 50-51, 92; Exh. 3A, sheet 2. At that visit, she observed, in addition to a large monoculture of phragmites growing robustly, other wetland indicator species surrounding the phragmites, including purple loosestrife, sensitive fern, and rushes. She stated those indicator species are rebounding and expected to expand throughout the area. Exh. 82, ¶ 18. She did not identify the location of the plants on field data forms, but stated that “the size of the area is actually quite large, appearing to extend beyond the borders of the *Phragmites* stand and potentially corresponding generally with the entire ILSF area....” Exh. 82, ¶ 18.

Ms. McIntosh also observed Mr. Allen’s borings, which she said supported her findings. Exh. 82, ¶¶ 14-18. She obtained an aerial photograph of the site from the Massachusetts Geographic Information System (MassGIS) Wetland data layer. Exh. 82, ¶ 7. Based on her observation of the plant life and Mr. Allen’s borings, as well as the aerial photograph, she prepared a plan overlaid on the MassGIS aerial photograph indicating an approximation of the area she characterized as an IVW, which she stated was, conservatively, about 11,604 square feet. Tr. IV, 68. She also included an approximation of related 50- and 100-foot buffers. Exh. 82C. She drew the area based on her recollection of observations during site visits and aerial photographs. Tr. IV, 63-65. She said she also relied on a SITEC plan depicting the ILSF area that shows a depression of approximately 12,665 square feet on the site corresponding to the one she and Mr. Allen found. Exhs. 22, sheet 2; 83, ¶ 15; 82, ¶ 17; 82C. Ms. McIntosh also stated that the protrusions on the plan she drew are based on information from aerial photographs showing changes of the vegetation and flooding. She could not determine the type of vegetation depicted on the aerial photograph, but could only observe difference shades of vegetation. Tr. IV, 135. She used no field maps or data points to establish her boundaries and acknowledged that it was an approximation, and she could not estimate the degree of accuracy. Tr. IV, 62, 75-79. Neither of the Board’s witnesses

reported their findings on DEP field data forms.¹⁶ Based on their observations, both of the Board's witnesses gave the opinion that the disputed area constitutes IVW.

b. The Developer's Case

The developer's wetlands expert, Roderick C. Gaskell, is a former Massachusetts DEP Director of the Wetlands and Waterways Program, who has extensive experience reviewing projects under the WPA and for developing regulations under that Act. Exh. 74, ¶ 9. He has extensive experience working with the SWR and has served as peer review consultant for the Commission regarding projects filed by other applicants. Exh. 86, ¶ 3. He acted as SITEC project manager for this project and provided evidence of observations of the disputed area made over more than four years. Exh. 74, ¶ 13. He examined the plant life in the area, as well as subsurface soil probes in 2004, 2007, 2008, and most recently in 2009. He observed the evaluation by the Army Corps of Engineers scientist in October 2007. Both he and the ACOE expert reported their observations on DEP field data forms recording specific observations of the extent and type of plant life, the location and extent of soil saturation, and the nature of subsurface soils. Exhs. 74, ¶¶ 18-21, 38; 86, ¶ 10. He gave the opinion, based on his review, that there was no dominance of wetland indicator plants and no evidence of adequate soil inundation or hydric soils to warrant a finding of wetlands. He also relied on the independent opinions of the ACOE scientist and the Board's consultant, BSC Group, in connection with the ANRAD review.¹⁷ Exh. 86, ¶ 23B.

Mr. Gaskell agreed that the phragmites stand itself exceeded the 50% requirement that is determinative for the existence of vegetated wetlands. Exh. 86, ¶ 30. The plans submitted by Herring Brook also indicate a significant patch of phragmites. Exh. 3A, sheet 2. However, he stated that this was not dispositive because phragmites in disturbed settings

16. The Intervener, Ms. Gloria Hollstein, testified as a lay person regarding her observations of the flooding conditions and plant life on the project site over a period of years. She stated that she observed purple loosestrife growing on the southern part of the project site and had observed mowing and tree removal on the site in the fall of 2003 and 2004. Exh. 84, ¶¶ 9, 12; Tr. II, 114-117.

17. The various existing conditions plans contain different characterizations of the ILSF. Exhibit 3, sheet 2, revised September 17, 2007, contains the notification and delineation of IVW near the stone wall bordering the neighboring Hollstein Property (not the area of the Phragmites pocket). The April 23, 2008, revision to Exh. 3A added the Phragmites pocket.

is not a reliable indicator of wetland hydrology. See Exhs. 86, ¶ 30A; 86D (M. Marks, et al., “*Phragmites australis* (*P. communis*) Threats, Management, and Monitoring,” *Natural Areas Journal*, Vol. 14(4), 1994, pp. 285-287). With regard to the presence of phragmites and purple loosestrife, Mr. Gaskell testified:

these are wetland indicator plants that are highly opportunistic species that invade altered sites such as this Property. Because of the alterations, particularly with respect to Phragmites, these plant species by themselves, are unreliable indicators of wetlands. It is well established that Phragmites is an invasive nuisance species that forms dense monocultures with little wildlife value. It establishes rhizome and root systems that often extend over 6 feet deep to reach groundwater. For this reason the Superseding Order of Conditions issued by MA DEP approving the Project as proposed includes a condition requiring the removal of the thick stand of Phragmites and Purple Loosestrife....

Exh. 86, ¶ 13. See Exh. 64. He also criticized Ms. McIntosh’s evidence because she did not identify whether other wetland plants exceeded the 50% cover requirement. Exh. 86, ¶ 30. In June 2009, he revisited the areas he studied in April 2008 to verify Ms. McIntosh’s findings regarding wetland plant indicators. He found that in those areas outside the phragmites in the center of the ILSF, the dominant plant cover is made up of upland plant species. Exh. 86, ¶ 30; Exh. 86B.

Mr. Gaskell testified that, based on his documented analysis of soil conditions, recorded on DEP field data forms, groundwater does not remain near the surface for close to five months within the ILSF; rather, the area experiences seasonal flooding. Exhs. 74, ¶¶ 21, 37; 86, ¶ 10. He observed that the agricultural activity and mowing had churned the top 18” to 24” of soil and the sub soil has remained undisturbed. Exh. 86, ¶ 9. He therefore believed it necessary to evaluate the presence of hydric soils. Hydric mineral soils “contain less than 20-30 percent organic matter and are made up primarily of sand, silt, and clay, with varying amounts of gravel, cobbles, and stones” and “are typically characterized by low-chroma colors....” Exh. 86E, p. 27. Mr. Gaskell stated that, “[h]ydric soil indicators generally require many years to develop. As a result soils are good indicators of the long-term hydrology of an area. And once developed, the physical indicators of saturated conditions persist even after the hydrology of an area has been altered. Hydric soil indicators are especially useful for delineating wetlands where the vegetation has been altered....” Tr. III,

15-16, by, for example, wetlands violations, lawns, golf courses and cultivated areas. Exhs. 86E, pp. 21, 71; 86, ¶ 10E. The DEP Handbook states:

Since the presence of wetland plants (hydrophytes) and wetland soils (hydric soils) are the most reliable indicators of the hydrology of an area, under natural conditions they are more useful for delimiting BVW boundaries than hydrology itself. Other features, such as water marks on trees and water-stained leaves, also are indicators of hydrology. However, it is often difficult to determine the duration or frequency of saturation from these indicators. DEP recommends that all available information be used when evaluating hydrology.

Exh. 86E, p. 5.¹⁸

When Mr. Gaskell accompanied Mr. Allen on his February 2009 visit to the site, he observed two locations on the site at which the Board's expert found hydric soils. Mr. Gaskell testified that they were two very small isolated areas, and only one was within the ILSF. Exh. 86, ¶ 14. One of the two areas was where SITEC and the DEP had also previously "documented the existence of clearly developed hydric soil features along the old stone wall separating the Property from the Hollstein property to the south. This is where hydric soils are expected to be, since this is the lowest point of the Property." Exh. 86, ¶ 14. The ACOE scientist confirmed Mr. Gaskell's findings regarding a lack of hydric soils. Exh. 13. Mr. Gaskell discounted Mr. Allen's suggestion that salt water from storm flow masked hydric soil conditions on the property, because if so, then these conditions should have also been masked at the stone wall location, where hydric soils were found. He also pointed out that, other than the Phragmites pocket, the ILSF has an herbaceous plant cover that will not survive periodic saltwater inundation. He also noted that Mr. Allen's source for stating that salt in soils can influence soil development referred to soils located in arid and semi-arid climates, unlike New England soils. Exh. 86, ¶ 14. He believed hydric soils found were

18. The DEP Handbook also states: "There are a number of ways to determine whether wetland hydrology is present at the site. Wetland plants ... generally are very reliable indicators of long-term hydrology. However, the wetlands regulations specify that at certain sites, additional indicators of hydrology may be used to determine a BVW boundary. Wetland soils (hydric soils) are also considered very reliable indicators of long-term wetland hydrology. Other indicators, such as water marks on trees and water-stained leaves, may be used to determine the presence of wetland hydrology. However, due to the seasonal or temporal nature of these features, they should be carefully considered with other indicators." Exh. 86E, p. 22.

anomalies since the dominant characteristic of the undisturbed sub soils throughout the ILSF are of non-hydric, upland soils. Exh. 74, ¶ 38; 86, ¶ 14.

c. Discussion

The Board and Intervener argue that Herring Brook has the burden to show the absence of wetlands. However, the burden of proving a local concern that outweighs the need for affordable housing rests with the Board, not the developer. Therefore, the Board has the burden to establish that there are wetlands on the site governed by the Scituate local rules. The Board also argues that the evidence submitted by its witnesses is adequate to determine whether a resource area was present and that they did not have to delineate the exact boundaries of the IVW. Tr. IV, 82. Even assuming that a precise delineation may not have been necessary for their purposes, the general evidence submitted by their witnesses was weak and less credible than the testimony of the developer's witness, supported by detailed data and reports.

The Board argues that under the Scituate bylaw and regulations, the finding of dominant wetland indicator plants establishes a presumption that the soils are inundated, and consequently that the area constitutes a wetland resource. Although under the SWR, the presence of wetland indicator plants, such as phragmites and purple loosestrife, raises a presumption of the existence of IVW, other evidence rebuts the presumption. First, the evidence of dominance of wetland indicator plants applies only within the area specifically covered by phragmites; it does not apply to the surrounding area dominated by upland plants, as Mr. Gaskell testified. Exh. 86, ¶¶ 30-31. His detailed evidence, supported by field data forms, is more credible than that of the Board's witnesses and Ms. Hollstein, regarding the plant life. Moreover, the invasive nature of the phragmites and the DEP requirement of their removal within disputed area, further weaken the evidential value their presence should lend to establishing the existence of wetlands. Exh. 64. Finally, the evidence regarding the degree of inundation and the substantial lack of hydric soils on this site contradicts a finding of wetlands. Thus, Herring Brook provided evidence to rebut the presumption of wetlands from the dominance of phragmites on the site.

In addition to her lack of support through use of DEP field data forms or more detailed information, Ms. McIntosh's approximations based on aerial photographs are not

credible evidence of the existence or extent of an IVW. Exh. 86, ¶¶ 30-32. She based her opinion on an extremely general and undocumented approximate depiction of the area she claimed to be IVW. She provided neither an actual delineation, nor documentation of the proportion of types of plant life in the disputed area. Tr. IV, 95. Nor did she rely on specific data for her drawing approximating the area she considered to be wetlands. See Exh. 82C. Therefore, her evidence does not support a finding regarding the existence or extent of wetlands.

Regarding soil saturation, the Board proved only that inundation had occurred for a period of 7 to 21 days, and periodically, which is inadequate to demonstrate the existence of wetlands. Mr. Allen's testimony that saturated conditions of seven to 21 days constitutes an industry standard is not credible. First, the reference in the DEP Handbook he used only states that "[t]he length of saturation needed to produce anaerobic conditions varies among wetlands and is dependent, in part, on soil type. As a general rule, anaerobic conditions can develop in as little as 7 to 21 days of saturation during the growing season." Exh. 83B, p. 5. Under this rule, Mr. Allen's soil borings provide evidence of saturation, but do not require a finding of inundated conditions, particularly in light of the statutory requirement of saturation for five months and water near the surface throughout the year for wet meadows. G.L. c. 131, § 40. The DEP Handbook, as a non-binding guidance document, must be read in light of the language of the WPA. See note 13, *supra*. The developer's expert testified that the area did not receive saturation for five months of the year. While Mr. Allen's evidence of saturation is credible, it is insufficient to demonstrate soil inundation for five months of the year. Moreover, Ms. Hollstein's general lay testimony is contradicted by Mr. Gaskell's expert opinion, which is more credible and was supported by the findings of the ACOE scientist, and the Commission's consultant in 2004. Exh. 86, ¶¶ 23, 27.

Finally, the evaluation of the existence of hydric soils plays an important role in this analysis. Herring Brook argues that the indicia cited by the Board are insufficient to find wetlands and therefore the soils should also be examined to determine if they support wetlands. In particular, it emphasizes that the history of agricultural use requires examination of the soils, since disturbed soils, such as this plowed agricultural land, tend to

host invasive non-native species such as phragmites. Here, the predominant lack of hydric soils was inconsistent with a finding of wetlands. Mr. Allen was surprised by the lack of hydric soils and offered a theory for their absence – that the lack of hydric soils could result from inundation by ocean storms, and saltwater. Mr. Gaskell persuasively testified that if salt water was masking hydric soil conditions on the property, then it should also have masked hydric soils where they were found, such as near the stonewall boundary of Ms. Hollstein’s property. Additionally, he stated that the soils of New England do not match the conditions under which, in Mr. Allen’s theory, salt water would mask hydric soils.

Based on the nature of the particular plants in the area, the lack of credible evidence of inundation of the area for the statutory time period and the lack of hydric soils, the evidence establishes that the area in question does not constitute wetlands. Therefore, for the foregoing reasons, the evidence shows that the area is not isolated vegetated wetlands, and the Board has failed to prove that the area is subject to local jurisdiction.

d. Balancing

Even if the Committee were to find that IVW are present on the site, their presence would then only raise a local concern to be balanced against the need for affordable housing. Since Scituate does not meet the statutory minima or standards of progress in affordable housing in 760 CMR 56.03(1), the Board must overcome the presumption that a substantial regional housing need outweighs the local concerns in this case. 760 CMR 56.07(3)(a). See *Hanover, supra*, 363 Mass. 339, 367 (failure to meet statutory minimum provides “compelling evidence that the regional need for housing does in fact outweigh the objections to the proposal”). The presumption squarely places on the Board the obligation to demonstrate the importance of its local concerns.

The Board argues that under local regulation, the alleged IVW borders another resource and therefore would actually constitute a bordering vegetated wetland within a water resource protection district, where no destruction is permitted. Exh. 67, SWR 10.12(a)(4); Tr. III, 209-211; IV, 27. Therefore, it argues, the protection of the wetland resource requires denial of the project. Moreover, the Board argues that if replication is allowed, it must be only as a last resort when the developer has shown no alternative to exist since the SWR states that “[t]he justification for the destruction of a wetland must be clear and convincing

that there is no available alternative.” (Emphasis in original.) Exh. 67, SWR § 10.12(a)(2). Finally, the Board argues that it should decide in the first instance whether the local wetlands requirements should be waived and that the Committee cannot waive local wetlands requirements if Board did not have a chance to do so below. Therefore, it requests that the Committee remand the matter to the Board.

The Board’s arguments ignore the burdens of proof that apply in this proceeding. Additionally, the Board’s argument that it has not had an opportunity to decide the wetlands issue in the first instance is unpersuasive, most particularly in light of the ORAD issued by the Commission which was in effect during the Board proceeding. This project represents a lengthy effort by the developer to permit an affordable housing project. Herring Brook started seeking permits in 2004 and designed this project to comply with the WPA and its statutory interests. Exhs. 74, 86. The developer has obtained the state and federal approvals required for the project. No work is being performed in federal isolated or bordering vegetated wetlands. Exh. 86, ¶ 2; Exh. 13.

The existence of wetlands by itself does not establish a significant local concern. The nature and importance of a local concern in this instance would be grounded in the purpose of the Town’s expansion of the WPA wetlands definition and the interests the wetlands are intended to protect. The Scituate Wetlands Bylaw identified the purposes of the protection of wetlands resources as: public or private water supply, groundwater, fisheries, shellfish and wildlife habitat, flood control and prevention of storm damage and water pollution. Exh. 66. The SWR requires that alteration of an area for new replication will have no adverse effect on flood protection, protection of private or public water supply, wildlife habitat, other protective vegetation and/or adjacent properties and habitats. In addition the replicated area should be the same type of wetland in form and vegetative composition and hydrologically connected to the filled, dredged, or destroyed wetland. Exh. 67, SWR §§ 10.12(a)(6) and (a)(7). See Tr. IV, 26-27. The Board argues that the stricter protections afforded this area must be addressed.

Assuming, arguendo, that IVW (or BVW) are present, the stringent procedural requirements of the local wetlands regulations – the burden of proof and requirement to show

no alternative available – bear on the importance of the issue to the town. They do not establish the burden of proof in this Chapter 40B proceeding. Since the definition of IVW exists only as a local, not state, requirement, the Board must show the local concern that warrants expanding the definition of protected resource areas beyond that identified by the WPA. The Board must also show how the concerns set out in the local regulation apply to the facts of this case – how the specific interests identified in the Scituate bylaw are important at this site. The Board and Intervener did not address the need for expanding on the state definition of wetlands and did not present concrete evidence to show that the interests reflected in the bylaw would be affected by the filling and relocating of the ILSF area. Therefore, the Board failed to establish a local concern based on the existence of locally defined wetlands.

As to the specific interests in the bylaw, the Board’s witnesses agreed that the flood control and storm damage prevention functions of wetlands were addressed by the ILSF replication. Tr. III, 200; Tr. IV, 12-13. Ms. McIntosh also stated that protection of shellfish and fisheries is inapplicable at this site. Tr. IV, 113. Regarding the protection of public and private water supplies and groundwater, and pollution prevention, Ms. McIntosh only provided extremely general statements based on the language of the bylaw regarding the *possible* impacts of alteration, without certainty or testimony that this area did perform these functions. Exh. 82, ¶ 23; Tr. IV, 48, 104, 113. The Board’s evidence regarding the function of a buffer zone in general similarly did not address this role with respect to the site. Exh. 67, § 10.05(a); Tr. IV, 41-42; III, 127; Exhs. 83, ¶ 25; 82, ¶ 22; 86, ¶ 32. Regarding the protection of wildlife habitat interests, although Ms. McIntosh stated with more certainty that these interests “will be impacted” with fill of this area, Tr. IV, 113, she focused on the protection of the American woodcock, which had been observed on the site. However, the evidence regarding the improvement in wildlife habitat from the replication of the ILSF by providing woody shrubs and meadow mix that will enhance the wildlife habitat function of the area credibly resolves any concern raised here. Tr. IV, 114-115; Exh. 82D, 82, ¶ 24; 86, ¶ 34.

The developer argues that the ILSF serves the necessary and relevant functions of the IVW and therefore its replication, with the replacement of the phragmites and purple loosestrife, will satisfy all local concerns. Mr. Gaskell and the developer's exhibits amply demonstrate that the relocated ILSF will address flood control and prevention of storm damage and that the replacement plantings will enhance the wildlife habitat. Exh. 86, ¶¶ 33-34; Exh. 9, Attach. B, D. The evidence submitted by Herring Brook establishes that the relocated area will address the concerns of the bylaw and SWR that were raised by the parties. See Exhs. 3A; 9, Attach B, D; 86B.; Exh. 86, ¶¶ 33-34. This case is distinguished from *Princeton Development, Inc. v. Bedford*, No. 01-19, slip op. at 10-15 (Mass. Housing Appeals Committee Sept. 20, 2005), in which the wetlands at issue approached 1½ acres, and the Board's experts' testimony regarding the local concerns and impact of relocating the wetlands was un rebutted.

Moreover, as Mr. Gaskell testified, Scituate's actions undercut its argument that the environmental sensitivity of the area is paramount. Scituate approved construction of a fire station in the floodplain, including a waiver of the 500-foot buffer restriction. It also approved a single family home subdivision in a vegetated wetland. Exh. 74, ¶¶ 35, 42. The Town Planner, Ms. Harbottle, acknowledged that construction of a fire station was approved within the floodplain zoning district. Tr. I, 180-182.

For the foregoing reasons, the Board and Intervener have not demonstrated a local concern regarding wetlands that outweighs the need for affordable housing.

B. Town of Scituate Master Planning

1. Standard for Evaluating Town Planning

In its decisions, the Committee has given careful consideration to a municipality's comprehensive planning efforts in determining consistency with local needs under G.L. c. 40B, §§ 20-23. See *Harbor Glen Associates v. Hingham*, No. 80-06, slip op. at 6-16 (Mass. Housing Appeals Committee Aug. 20, 1982); *KSM Trust v. Pembroke*, No. 91-02, slip op. at 5-8 (Mass. Housing Appeals Committee Nov. 18, 1991); *Stuborn Ltd. Partnership v. Barnstable*, *supra*, No. 98-01, slip op. at 4-14; also see 760 CMR 56.07(3)(g). In *Pembroke*, the Committee held that a municipality's long-term municipal planning

interests—when expressed in a *bona fide*, effective master plan or comprehensive plan—may be a sufficiently substantial local concern to outweigh the regional need for affordable housing. *Pembroke, supra* at 5-8. Also see *Stuborn, supra* at 5-6. See 760 CMR 56.07(3)(g). Goals of smart growth and sustainable development may form part of municipal planning, although the Smart Growth Principles for the Boston Metropolitan Area Planning Council, Exh. 68, and the Commonwealth of Massachusetts Sustainable Development Principles, Exh. 69, are not of themselves, local requirements. See note 4, *supra*.

The Committee evaluates the master plan in effect at the time of the developer's application to the Board. 760 CMR 56.02 (Local Requirements and Regulations); *Paragon Residential Properties, LLC v. Brookline*, No. 04-16, slip op. at 45 (Mass. Housing Appeals Committee Mar. 26, 2007); *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). See *Castle Estates, Inc. v. Park and Planning Bd. of Medfield*, 344 Mass. 329, 334 (1962).

The Board must present sufficient evidence concerning its master planning to meet a three-part test: 1) Is the plan *bona fide*? (Was it legitimately adopted, and, more importantly, does it continue to function as a viable planning tool in the town?); 2) Does the plan promote affordable housing? and 3) Has the plan been implemented in the area of the site? If any of these questions is answered in the negative, the Committee will not consider the plan in reaching its decision. *Stuborn, supra* at 5-6. If, however, a plan passes these tests, its requirements or recommendations will not automatically determine the outcome of the issue. The Committee then must analyze the master plan and its relationship to the proposed affordable housing. First, the answers to the three questions determine the amount of weight accorded the plan. *Id.* at 6. Of particular importance in determining how much weight should be given to the plan are the second and third questions, and specifically whether the housing element of the master plan (or a subsidiary affordable housing plan) has actually shown results – resulting in the construction of a substantial amount of affordable housing.

28 Clay Street Middleborough LLC v. Middleborough, supra, No. 08-06, slip op. at 12. See *Stuborn, supra* at 6 n.5.

Then in evaluating whether “the provisions of the plan are unnecessarily restrictive as applied specifically to the proposed project,” the Committee examines whether the proposed housing actually would undermine the plan to a significant degree. *Stuborn, supra* at 6. Thus, if the project is inconsistent with the plan’s goals, the Committee is still required to balance the weight to be given to the plan’s goals against the regional need for affordable housing:

[W]e consider the totality of the [municipality’s] planning interests, and determine whether those interests are sufficient to outweigh the regional need for affordable housing. The comprehensive plan is added to the [municipality’s] side of the scale, and the strength of the plan itself, the extent to which it has actually been implemented, and the extent to which it encourages affordable housing all lend weight to the [municipality’s] argument that local planning concerns with regard to a particular proposal outweigh the regional need for housing.

Stuborn, supra at 6. This analysis is very similar, if not identical, to the normal balancing of local concerns against the regional need for housing.

2. Scituate’s Planning Documents

The Scituate Master Plan was approved by the Town in 2004. The Board relies on two components as demonstrating the local concerns at issue here: the Land Use and Growth Management Element and the Housing Element.¹⁹ The overarching goal of the former is “[t]o guide residential and commercial growth in order to preserve the town’s inherent character, protect sensitive environmental and cultural resources, avoid overburdening town infrastructure and services, and provide balance between multiple land uses.” Exh. 70, *Land Use*, p. 2. This Element of the Master Plan notes that about 19 percent of the town is open

19. The Board also makes reference to the Town’s Housing Production Plan, approved by DHCD in April 2009, after the Board issued its decision, and during the pre-hearing phase of this appeal. Exh. 85-2, 85, ¶ 12. The HPP has no bearing on the Town’s planning for the purpose of this appeal. 760 CMR 56.03(1); 56.05(2); 56.02 (Local Requirements and Regulations). See, e.g., *Hollis Hills, LLC v. Lunenburg*, No. 07-13, slip op. at 27 (Mass. Housing Appeals Committee Dec. 4, 2009); *Paragon Residential Properties, LLC v. Brookline, supra*, No. 04-16, slip op. at 45; *Weston Development Group v. Hopkinton*, No. 00-05, slip op. at 8-11 (Mass. Housing Appeals Committee May 26, 2004); *Northern Middlesex Housing Associates v. Billerica, supra*, No. 89-48, slip op. at 11.

space potentially developable under current zoning. The Master Plan also recognizes as an important objective to plan for changes brought by the impact of the Greenbush Village extension of the commuter rail. Exh. 70, *Land Use*, p. 3. The Master Plan provides guiding principles to be reflected in zoning and planning, including limiting development in sensitive environmental areas; preserving Scituate's coastline, water views and natural resources; making strategic infrastructure investments; reinvigorating the harbor; increasing density; encouraging mixed use in village centers and diversity of housing types; making Greenbush and North Scituate attractive and enjoyable places; keeping development in scale; creating attractive gateways to the Town; and linking assets of the Town. Exh. 70, *Land Use*, pp. 13-15.²⁰ In particular, the Master Plan encourages development in existing village centers rather than in outlying surrounding areas. Exh. 80, ¶ 10. The Business and Commercial Development subsection of the Land Use Element notes that concentrating development would enable the town to protect open space and natural resources elsewhere in town, which it characterizes as smart growth. Exh. 80, ¶ 11. The Plan also indicates that multi-family housing is allowed in the Business Zoning Districts, noting that Greenbush and North Scituate in particular, as small villages with proximity to transit, afford "excellent locations for multifamily residential development." Exh. 70, *Land Use*, pp. 9, 13-15.

In addition the Land Use Element includes Recommendation LU-8, "Encourage Diversity of Housing Types," which proposes requiring from 10 to 15% affordable units for all multi-family developments in the Business Districts with a density below 10,000 sq. ft., and suggests further density increases could be achieved by special permit if rental units were provided or other desirable criteria were met. LU-8 also recommends other measures to encourage affordable units, including a density bonus for single family or multi-family developments, if, for example, 10-15% of the units were affordable. Exh. 17, *Land Use*, pp. 18-19.

20. The Master Plan also notes that the "town may want to allow higher density for open space subdivisions where the development includes some units that will be deed-restricted as affordable housing, when open space of particular value to the community is obtained or some other public benefit is provided," suggesting use of a special permit process to do this. Exh. 70, *Land Use*, p. 8.

The Housing Element of the Master Plan recognizes the importance of the town ensuring a sufficient supply of affordable housing. It sets a goal to “[p]rovide housing that meets the needs of residents of all ages and income levels, while preserving the town’s historic homes and traditional neighborhoods.” Exh. 70, *Housing*, p. 2. One of the objectives is to “develop a plan for creation of housing that helps meet the state’s target percentage of affordable homes.” Exh. 70, *Housing*, p. 2. The Plan acknowledges a shortage in affordable rental units as well as starter homes. Exh. 70, *Housing*, pp. 11, 17. The Plan focuses its recommendation of multi-family construction in the Greenbush and Scituate Harbor Business Districts where “the need to contain costs should not preclude building multi-family housing that is visually appealing and has appropriate architectural styles for a New England town.” It also states that “[o]utside the Business District, multi-family developments may include duplexes, accessory dwellings and development of three to four attached units. These can usually be served by on-site septic systems and will be more easily absorbed into their surrounding neighborhoods than larger multi-family dwellings.” Exh. 70, *Housing*, pp. 17-18.

The Master Plan states that “Chapter 40B allows great increases in density with little concern for neighborhood character” which “may result in negative impacts on the environment which would not otherwise have occurred.” It also notes that “increased densities should be avoided within Zone II’s to public water supply wells; the watershed to the Reservoir; including regulated buffers to tributaries; buffers to wetlands; and other sensitive areas.” Exh. 70, *Housing*, p. 18. See Tr. III, 115; Exh. 80, ¶ 20D.

The Plan states that as of its writing, the Town had achieved 4.25% of its housing stock as credited on the subsidizing housing inventory, and “[i]f the town can obtain credit for its existing accessory dwellings, and housing now under consideration is constructed, Scituate will have to create 320 more affordable units to meet the 10% requirement.” Exh. 70, *Housing*, p. 19. The Plan recommends that the Town seek to produce an average of 22 deed-restricted affordable units per year for the next fifteen years to meet the 320 unit goal. Noting the difficulty of this target, the Plan notes that it must begin to require that a minimum “10% of all homes in new subdivisions be deed-restricted to be permanently

affordable,” by the adoption of inclusionary zoning, although the 22-unit target does not include units obtained by inclusionary zoning. Exh. 70, *Housing*, pp. 19-20. The Plan recommends increasing affordable rental units by amending business district zoning to promote mixed use development with apartments above commercial development in village centers, promotion of accessory dwelling options in the zoning bylaw, and land acquisition to develop rental units. It recommends increasing numbers of affordable homes for first-time buyers, by adopting an inclusionary zoning bylaw to obtain at least 10% affordable units in new developments of 10 or more units and adopting a zoning bylaw to allow increased densities in exchange for affordable units in areas where there will be minimal environmental impact and compatibility with surrounding neighborhoods. Exh. 70, *Housing*, pp. 21-22.

Scituate’s Town Planner, Ms. Laura Harbottle also testified regarding the Scituate Housing Plan, which was approved by DHCD in 2009. Exhs. 80, ¶ 20e; 85, ¶ 12; 85-2. However, this plan was approved in 2009, well after the developer submitted its comprehensive permit application and the Board issued its decision; therefore, its initiatives are not relevant to this issue. See note 19, *supra*.²¹

The Board argues that the Master Plan represents a *bona fide* planning document entitled to be given considerable weight to determine consistency with local needs. *KSM Trust v. Pembroke, supra*, No. 91-02, slip op. at 6; *Harbor Glen Associates v. Hingham, supra*, No. 80-06, slip op. at 12-14. It also argues that the proposed project is inconsistent with the Master Plan, with principles of smart growth and sustainable development and with the Town’s affordable housing strategy and its open space and environmental goals.

Herring Brook argues that the Town’s Master Plan should not be credited because the Town has not implemented the plan or demonstrated that it has developed affordable housing under the Master Plan to any significant degree.

21. The developer’s planning witness pointed out that even this document acknowledges that very few parcels can meet the requirement of concentrating residential development in existing business districts on a minimum of 10,000 s.f. lots. Exhs. 85, ¶ 12; 85-2, p. 58.

3. Analysis of Town Planning

The analysis of master plans starts with the questions articulated by *Pembroke* and *Stuborn*: *First, Is the Town's plan bona fide?* There is no dispute that the Town of Scituate Master Plan, adopted by the Town on March 13, 2004, was developed and adopted before Herring Brook submitted its comprehensive permit application to the Board. Exh. 70. The Board and the Town Planner also refer to the Town Housing Production Plan, Exh. 85-2, which was approved after the filing of this comprehensive permit application to the Board and cannot constitute a *bona fide* plan under this analysis. Exh. 85, ¶ 12. See note 19, *supra*.

A second part of this inquiry is whether the Master Plan continues to function as a planning tool. Ms. Harbottle testified regarding the measures being implemented to further the Plan's goal, by encouraging development in existing village centers, rather than sprawl in outlying areas Exh. 80. For example, she testified that the Town has implemented recommendations to concentrate development in village centers by adopting a Village Business Overlay District in March 2007 and approving a mixed use development under the new zoning. Exh. 80, ¶¶ 14-15. She also referred to streetscape improvements in the Villages of North Scituate and Greenbush and a transit-oriented development grant for new development in the business district. Exh. 80, ¶ 16-19. Although she testified that the Town has undertaken measures to advance affordable housing consistent with smart growth initiatives, the examples she cited either were developed after the critical date, do not contain deed-restricted affordable units, or otherwise do not qualify for the subsidized housing inventory. Exhs. 80, ¶ 20; 85, ¶¶ 20-29.

Ms. Harbottle stated that the salt marsh and tideland conservation zoning district, adopted to designate and protect salt marsh and tideland natural resources, restricts development within its boundaries. The flood plain and watershed protection overlay zoning district protects against flooding in low-lying areas and protects water supplies and environment resources. The district places great restrictions on development in its boundaries. Exh. 80, ¶ 8. Ms. Harbottle indicated the Town has a strong by-law which effectively prohibits new construction in the flood plain. Tr. I, 181.

Although many of the actions cited by the Board post-dated Herring Brook's comprehensive permit application and are too late to be considered, for the purposes of determining whether the Master Plan is *bona fide*, the Board has provided evidence of activity occurring before Herring Brook's application that demonstrates that its Plan is functioning as a municipal planning tool. Therefore, the Plan is *bona fide*.

Second, Does the plan promote affordable housing? The intent of this question is not merely whether a plan, on its face, promotes affordable housing, but whether it has actually shown results. 760 CMR 56.07(3)(g); *28 Clay Street Middleborough LLC v. Middleborough, supra*, No. 08-06, slip op. at 12; *Stuborn, supra*, No. 98-01, slip op. at 6 n.5.²² The Master Plan identifies actions the Town should take to increase affordable housing. The Plan recommends that the Town seek to produce an average of 22 deed-restricted affordable units per year for the next fifteen years to meet the 320 unit goal. Exh. 70, *Housing*, p. 19. The Plan recommends adopting an inclusionary zoning bylaw to obtain at least 10% affordable units in new developments of 10 or more units; adopting a zoning bylaw to allow increased densities in exchange for affordable units in areas where there will be minimal environmental impact, and encourages multi-family dwellings in the business district, but only where there will be minimal environmental impact. The Master Plan recommends concentrating residential development in existing business districts, but it has not shown that there are sufficient parcels available to meet the requirements. See Exhs. 85, ¶ 12; 70, *Housing*, p. 21.

Herring Brook argues that while the Town's plan on its face identifies methods to promote the increase in affordable housing production, the methods are ill-conceived or unrealistic. It points out the Town never performed an inventory of land suitable for development of SHI housing and suggests the only focus is to plan on placing units within the already developed commercial districts and adding units above retail stores, which is inadequate to meet affordable housing goals. See Tr. I, 121-122. The developer argues that

22. The Committee in *Stuborn* noted that the original question in *Pembroke*, of whether the plan was facially "restrictive of low- and moderate-income housing" had evolved to whether a town's plan affirmatively addressed the need for affordable housing. *Stuborn, supra*, slip op at 5 n.4.

the Plan appears to identify proper sites for denser housing but really is a means to exclude housing in other areas of the town.

The Town's goal of focusing housing in town centers, made without an assessment of its ability to meet the needs of affordable housing, cannot constitute sufficient promotion of affordable housing. Therefore, while the Master Plan states important housing goals, the lack of specific plans to address affordable housing beyond the town centers limits the effectiveness of those plans. Moreover, a review of the implementation of the Housing Element of the Master Plan confirms this. Much of the activity cited by the Board either focuses on the town centers, occurred after the date of Herring Brook's comprehensive permit application in November 2006, or developed housing not eligible for the SHI. Exh. 85, ¶¶ 20-22, 29.

Some zoning changes were established before November 2006. In March 2006, Scituate had adopted the Village Business Overlay District in Scituate Harbor, Greenbush and North Scituate Village centers, which requires developers to provide 15% deed restricted affordable housing to receive a density bonus. Exh. 65, § 560. But see Exh. 80, ¶¶ 14, 20a. Scituate allowed Affordable Accessory Dwellings in the Business District by special permit, located on any floor, in contrast to market rate accessory dwellings. Exh. 80, ¶ 20c. However, the Humarock Residential Village Overlay District was not established until March 2008. Exhs. 65; 80, ¶ 20b; 85, ¶ 22. The Town's Housing Production Plan was not approved until April 2009, while this appeal was pending. Exh. 85, ¶¶ 22-23. The comprehensive permit modification converting the Stockbridge Road II Realty Trust units from ownership to rental (increasing the SHI eligible units) was approved in May 2009. Tr. I, 143; Exh. 88.

Moreover, most of the other new housing on which the Board relies as demonstrating its progress in affordable housing is not relevant, since it is not eligible for the Subsidized Housing Inventory. Exh. 85, ¶¶ 20-22, 29. Harborside Village Condominiums, allowed by special permit, includes affordable units for Scituate residents only and therefore cannot count on the SHI. Mill Wharf Plaza contains no units deed restricted as affordable. Exhs. 80, ¶ 20g; 85, ¶ 22. The developer's witness, Mr. Connery, notes that very little qualified housing has been developed in the last 16 years. Exh. 85, ¶¶ 20-29. Even as of September

2008, well after the date of Herring Brook's comprehensive permit application, the SHI for Scituate was at only 4.5 percent. Ms. Harbottle was unable to state that any affordable units had been added to the SHI from 2004 to the date of Herring Brook's application or even the Board's decision. Tr. I, 110-111; Exh. 85, ¶ 21.

Although the Town Plan recommended a target of 22 deed-restricted affordable units per year, this target has been elusive. While the Board was anxious to suggest that its total of affordable housing would exceed 5 percent once the Stockbridge II project was added to the SHI, see Tr. I, 141-145, this is irrelevant; the fact is that as of the date of the application, its SHI percentage was 4.7 percent, far below the statutory minimum. See Exh. 88; Tr. I, 142. Therefore, the Town's Master Plan cannot be said to promote affordable housing.

Third, Has the plan been implemented in the area of the site? The implementation of the Town's Master Plan is assessed as of the date of the developer's application to the Board. See, e.g., *Hollis Hills, LLC v. Lunenburg*, No. 07-13, slip op. at 27 (Mass. Housing Appeals Committee Dec. 4. 2009); *Paragon Residential Properties, LLC v. Brookline, supra*, No. 04-16, slip op. at 45; *Meadowbrook Estates Ventures, LLC v. Amesbury, supra*, No. 02-21, slip op. at 12; *Northern Middlesex Housing Associates v. Billerica, supra*, No. 89-48, slip op. at 11. Also see 760 CMR 56.02; 56.03(1); 56.03(5). Therefore, actions taken by the Town after that date have no bearing on the implementation of the Town's affordable housing for the purpose of this appeal. See note 19, *supra*.

The Town argues that it has devised requirements to protect environmental resources in the area of the project site by focusing higher density projects in village areas and restricting development in environmentally sensitive areas. Scituate has implemented Master Plan recommendations to concentrate development in village centers, by focusing on planning and constructing streetscape improvements. Exh. 80, ¶¶ 16-19. The project site is in an area not zoned for high density, within overlay districts to protect environmental resources. Exh. 2, p. 5; Tr. II, 151-152, 154. Nevertheless, despite the goals of preserving open space and views, when the acquisition of a portion of the site for open space purposes was the subject of a Town Meeting vote in 1999, it was not approved. Exh. 85, ¶¶ 7, 11; Tr. I, 193-194. In addition, although Ms. Harbottle testified that Scituate has a strong by-law

prohibiting new construction in the flood plain, she acknowledged that the Town approved construction of a fire station within the flood plain zoning district. Tr. I, 180-182; Exhs. 65; 74, ¶ 35.

Therefore, the Town's implementation of its Master Plan in the area of the site falls short, and the Plan does not establish a sufficient local concern to outweigh the regional need for affordable housing.

4. Consistency of Herring Brook's Proposal with Town Planning

Since the Town's plan does not meet all of the first three criteria, it is not necessary to determine whether Herring Brook's Proposal is consistent with the Town's planning. However, on the record, the Board has not demonstrated that the proposal is inconsistent with or would undermine the Town's master planning. Unlike *28 Clay Street Middleborough LLC v. Middleborough*, *supra*, No. 08-06, slip op. at 17, and *Harbor Glen Associates v. Hingham*, *supra*, No. 80-06, slip op. at 9, the Town has not set aside the area of the site for a particular purpose inconsistent with the project. In 1999, the acquisition of a portion of the site for open space purposes was the subject of a Town Meeting vote, but was not approved. Exh. 85, ¶¶ 7, 11; Tr. I, 193-194. Indeed, the Master Plan's goal of preserving open space is reinforced with respect to most of the site, since 75% will be permanently preserved as open space.

The Board focused on the concepts of smart growth and sustainable development to argue that the Master Plan's focus on concentrating development in village centers and protection of environmental resources must control. See Exh. 80. However, despite the Town's limited focus on housing in town centers, there is no requirement that all affordable housing must be in such a district. For example, the Stockbridge project, approved under Chapter 40B, was not located in the business district. Tr. I, 141-143, 183-185. Similarly, the discussions regarding the likelihood of a future use of the rail bed right of way as a usable walkway are peripheral to the major issues in dispute. MassHousing's project eligibility determination specifically noted that the project was not required to comply with the Smart Growth Evaluation Criteria, although it encouraged the developer to work with Scituate officials to incorporate smart growth design. Exh. 1.

Moreover, the project need not be consistent with every aspect of the Master Plan; indeed, since Chapter 40B permits waivers of zoning and other local requirements, it does not contemplate that affordable housing built under this statute would be consistent with the entire plan. See *L. A. Associates v. Tewksbury*, No. 03-01, slip op at 8 n.7 (Mass. Housing Appeals Committee Feb. 1, 2005) (“In virtually every case, the Board could point to general provisions in the master plan that housing proposed under Chapter 40B is inconsistent with. That is because the very purpose of the Comprehensive Permit Law is to permit waiver of zoning provisions enacted under the master plan.”).

The developer argues that the project is consistent with the Master Plan with regard to its goals to preserve open space, preserve scenic areas along the Route 3A Greenway, and to conserve sensitive resource areas, since a large part of the parcel would be preserved for open space. It points out that the Town once had proposed the acquisition of a portion of the site for open space purposes in 1999, but the town meeting did not vote to approve the acquisition. Exh. 85, ¶¶ 7, 11; Tr. I, 193-194. We find that the project would satisfy affordable housing goals by adding 15 affordable units. The project preserves the major portion of the site as open space, by clustering the buildings toward Route 3A. The project uses established infrastructure and its own wastewater treatment facility. Exhs. 74, ¶¶ 14, 29-30; 85, ¶¶ 35-36; Tr. I, 117, 191-193; III, 40-44, 99. Finally, the state and federal approvals of the project demonstrate their environmental concerns are satisfied. Therefore, the Herring Brook project is not inconsistent with the Town’s Master Plan and certainly does not undermine the Plan.

C. Flooding on Intervener’s Property

Ms. Gloria Hollstein, an Intervener,²³ argues that the project will cause flooding on her property and inundation of her septic system. She also argues that enforcement of the Scituate Wetlands Bylaw and regulations pertaining to Isolated Vegetated Wetlands is necessary to protect her property against flooding, because the additional protections afforded by the local bylaw and regulations will prevent the flooding of her property and the

23. Although other neighbors were granted leave to participate as interveners, none of them submitted testimony or argument in this proceeding. Therefore, they are deemed to have waived participation in this appeal.

inundation of her septic system. She requests that if the Committee overturns the Board's denial of a comprehensive permit, this matter should be remanded for the Board to apply the local rules to the project to protect her interests. The Intervener, however, failed to provide any factual support for the argument that the project will increase flooding onto her property, or that it will have any effect on her septic system.

Ms. Hollstein owns and resides at 11 Martha's Lane in Scituate, which abuts the project site. Exh. 84, ¶¶ 1-3. She testified that during rainstorms, her rear yard is flooded frequently, resulting in standing water remaining on her property for many months of the year, usually between December and late May or June. She stated that her rear yard flood depth has been as much as about eight inches over an area of 1500 square feet. Exh. 84, ¶ 4. She also testified that she has observed flooding from rainstorms on the Watson Property adjacent to her rear yard to a depth between two inches to 1¼ feet over an area of approximately 90,000 square feet (s.f.), several times during the year, with standing water remaining on the field usually until late May or early June, although she provided no detail on how she measured the asserted 90,000 s.f. Exh. 84, ¶ 5. She also stated that she has seen water come up and over a three-foot tall retaining wall surrounding her pool during storm events and that she has experienced standing in water nearly up to her waist on part of the Watson Property after a storm. Exh. 84, ¶¶ 6-7.

Ms. Hollstein testified that the water standing on her property does not recede with the tide, but remains there for weeks. She stated that following spring flooding, a mixture of both fresh and salt water remains on her property until late May or early June, and one year she was unable to mow her lawn until after July 4th due to the flooding on her property. Exh. 84, ¶ 8.

In its Notice of Intent to the DEP, SITEC, the developer's engineering consulting firm stated:

There is also Isolated Land Subject to Flooding (ILSF) on the project site that contains flooding from upland surface runoff during normal spring rain season. The runoff is from the topographic rises to the west and south. This runoff is primarily directed to the property through a small dug channel that passes through a stonewall at the south border of the property and accumulates in a topographic low within the south side of the corn field. There is no

visible connection between the ILSF and First Herring Brook, although the entire field including the ILSF can flood during coastal storm surges. Any ponding within the ILSF above elevation 7-8 ft. drains via topographic gradient into First Herring Brook as overland sheet flow once any coastal storm flooding has subsided.

Exh. 22, *Stormwater*, § 2.30, p. 6. The report further stated:

[t]he relocated ILSF will have the same channel connection to the surface runoff as currently exists, and will have a large capacity. Hence, there will be no increase of freshwater flooding within the ILSF, either on the property or on the abutting property to the south. Additionally, upland sheet runoff currently coming from the proposed building area on the property into the ILSF will be redirected toward the salt marsh, thereby further reducing this flooding from upland runoff.

Regarding flooding from coastal storm surges, the work within the proposed building area will involve filling below the 11 ft 100-year FEMA elevation. Therefore, extreme coastal floods will be in contact with the proposed fill. Because flood storage capacity within a coastal zone setting such as this is infinite however, filling will not cause flooding on adjacent properties because no flood storage capacity will be lost.

Exh. 22, *Stormwater*, § 2.40, pp. 6-7. The report indicated that the ILSF's storage capacity will be exceeded by the replacement ILSF area, existing stormwater flows into the ILSF will be reduced, and no stormwater runoff will be directed toward the ILSF from the proposed development area. Exh. 22, *Open Space*, § 3.23, pp. 9-10.

Herring Brook's engineer, Steven D. Gioiosa, P.E., noted that the rear of Ms. Hollstein's property is in a coastal flood plain and at or below the elevation identified as Land Subject to Coastal Storm Flowage (LSCSF). Exh. 3A; Tr. II, 78-79. He also stated that the ILSF on the project site originates on her property south of the "Dug Channel" at the stone wall on the property line. Exhs. 3A, sheet 2; 87, ¶ 2. He agreed that retention of water in the ILSF was to be expected during significant rainfall events. However, he disagreed that the flooding limit would be 90,000 s.f., stating that his company's topographic information indicated the ILSF is limited to less than 1 foot in depth with a maximum surface area of 78,378 s.f. Exh. 87, ¶ 3. While Mr. Gioiosa agreed that water could reach 4 feet during a significant coastal storm event, he stated that it was reasonable to expect and consistent with

the elevations found on the site. Exh. 87, ¶ 5. Ms. McIntosh also testified about flooding on the project site. Tr. IV, 30-32; Exhs. 82, ¶ 7; 82C.²⁴

While the record contains ample evidence that flooding occurs on Ms. Hollstein's property and the project site, nothing has been shown, or proffered by the Intervener, to the effect that the project will exacerbate the current situation.²⁵ Without such evidence, the Intervener has not demonstrated a local concern regarding flooding. Indeed, the evidence submitted by the developer indicates that the project has been designed to prevent an increase in flooding post development, particularly with respect to abutting properties. Mr. Gioiosa testified that the relocation of the ILSF will result in an increase in flood storage of about 18 percent and stated that the design of the relocated ILSF will ensure that offsite flood levels will not be increased by the project. Exh. 75, ¶ 12B. Moreover, DEP has issued both a groundwater discharge permit, Exh. 54, and a Final Order of Conditions approving the stormwater management design for the project. Exh. 64. See Exh. 75, ¶ 15. As Mr. Gioiosa stated, since the work proposed within the LSCSF and the ILSF meets the applicable performance standards of DEP, it will not displace, redirect or increase flood levels on any adjacent property. Exhs. 75, ¶¶ 11-12; 87, ¶ 7. In addition, the Board's witness, Mr. Allen, acknowledged that the state DEP had determined that the project will not increase flooding onto adjacent properties, Tr. III, 207, and stated he made no independent determination himself or reviewed the SITEC calculations, concluding there would be no impact from the ISLF fill. Tr. III, 208.

Since Ms. Hollstein has not shown that the project will exacerbate flooding onto her property or inundation of her septic system, her arguments pertaining to the requirements of the local wetlands bylaws and regulations are not relevant. Ms. Hollstein has not shown any

24. The Board cited proposed Exhibits 58, 59 and 60, which were excluded from the record in this proceeding. They cannot be considered as evidence. See Board brief, p. 4; Tr. I, 62.

25. Although Mr. Allen stated that there would be an increased risk of flooding on Ms. Hollstein's property if his identified "IVW" were not properly compensated, Tr. IV, 6-7, he confirmed that the planned compensation of the ILSF would address the flood control function of the area he characterized as IVW. Tr. IV, 12-13. See Tr. III, 200. Ms. McIntosh agreed. Tr. IV, 109-110; see Tr. IV, 99.

nexus between the prohibition of disturbance of wetlands resources and the prevention of increased flooding onto her site.

The detailed testimony of Mr. Gioiosa, an experienced engineer, is more credible than that of Ms. Hollstein. Compliance with the Superseding Order of Conditions is likely to improve, albeit slightly, the drainage onto Ms. Hollstein's property. Therefore, none of the interveners, including Ms. Hollstein, has demonstrated a local concern that outweighs the need for affordable housing with regard to the effect of the project on the flooding and inundation of water on their property or septic systems.

V. CONCLUSION AND ORDER

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

1. The comprehensive permit shall conform to the application Herring Brook submitted to the Board, except as provided in this decision, including those conditions required to be added.

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

(a) The development shall be constructed as shown on drawings by SITEC Environmental, 769 Plain St., Unit C, Marshfield, MA 02050, dated January 10, 2008 (Sheets 1 through 3 and 5 through 11 of 11 sheets), and September 17, 2007 (Sheet 4 of 11) (collectively, the "Civil Site Plans") (Exh. 3A), as well as the architectural drawings entitled "Herring Brook Proposed New Residential Development at 126-132 Chief Justice Cushing Highway in Scituate MA," dated October 4, 2007, prepared by Phung/Porzio Studio of Architecture (the "Architectural Plans") (Exhibit 4) with adjustments described in Herring Brook's prefiled testimony.

(b) Design and construction shall be in compliance with the Massachusetts Department of Environmental Protection stormwater management, wetlands and groundwater discharge requirements.

3. 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.

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

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

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

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

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

(e) This comprehensive permit is subject to 760 CMR 56.00 and DHCD Guidelines issued pursuant thereto with respect to cost certification.

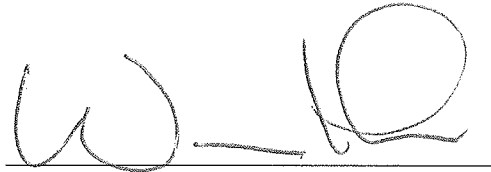
(f) No construction shall commence until detailed construction plans and specifications have been reviewed and have received final approval from the subsidizing agency or Project Administrator, until such agency has granted or approved construction financing, and until subsidy funding for the project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

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

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

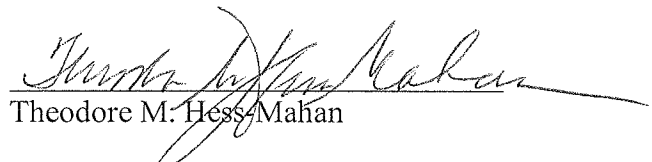
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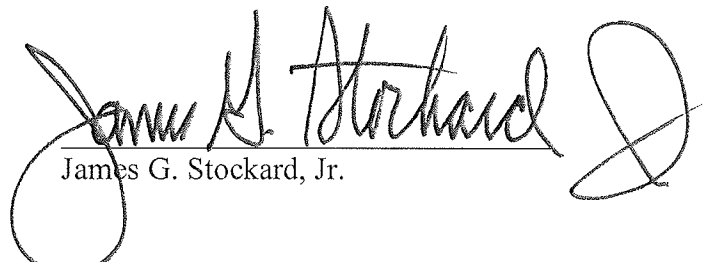
Joseph P. Henefield




Theodore M. Hess Mahan



Marion V. McEttrick



James G. Stockard, Jr.



Shelagh A. Ellman-Pearl, Presiding Officer