COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

TRANSFORMATIONS, INC.

v.

TOWNSEND ZONING BOARD OF APPEALS

No. 02-14

DECISION

January 26, 2004

TABLE OF CONTENTS

I. PROCEDURAL HISTORY 2

A. Motion for Summary Judgment 3

B. Jurisdiction 4

II. FACTUAL BACKGROUND 7

III. DENIAL OF A COMPREHENSIVE PERMIT 9

A. Project Compliance with State and Federal Requirements 9

B. Local Concerns 11

1. Nitrogen Loading 12

2. Local Wetlands 13

3. Open Space and the Preservation of the Natural Environment 14

IV. CONCLUSION 17

COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

TRANSFORMATIONS, INC. Appellant	)	
v.	)	No. 02-14
TOWNSEND BOARD OF APPEALS, Appellee	)	

DECISION

This is an appeal, pursuant to G.L. c. 40B §§ 20-23, brought by Transformations, Inc.,[1] from a decision of the Townsend Zoning Board of Appeals, denying a comprehensive permit for the construction of mixed income affordable housing on a 30.5 acre site located at 91 Highland Street in Townsend. The Board asserts that denial of the permit is justified as the New England Fund (NEF) of the Federal Home Loan Bank of Boston (FHLBB) is not an eligible subsidizing program under Chapter 40B, the project as proposed would have detrimental environmental impacts on a regional wildlife corridor and on the 250 acres of land recently acquired by the Town for use as a park, the project would have adverse effects on the Town's water supply by increasing nitrogen levels, and the project would have a significant negative impact on wetlands on or adjacent to the site.

1 Hereinafter referred to variously as the Developer, the Applicant, the Appellant, or Transformation.

As the Board failed to provide any basis in fact or law to establish otherwise, the Committee contends that the NEF is an eligible subsidizing program for the reasons indicated in our previous decisions. In addition, while many of the concerns expressed in the Board's decision are laudable, the Board failed to establish that they were valid local concerns as delineated by the statute. Therefore, the Committee finds that the decision of the Board denying Transformation's application for a comprehensive permit was unreasonable and not consistent with local needs and orders the Board to issue the comprehensive permit in compliance with this decision.

I. PROCEDURAL HISTORY

On May 24, 2001, Appellant submitted an application to the Townsend Zoning Board of Appeals for a comprehensive permit in accordance with G.L. c. 40B, §§ 20-23, to build 44 units of mixed-income affordable housing. Public hearings were duly noticed and commenced on June 20, 2001. The application was considered in twenty-one separate sessions held at regular intervals through May 30, 2002.

On June 1, 2002, the Board filed with the town clerk a written decision denying the comprehensive permit. Transformation filed an appeal with the Housing Appeals Committee (Committee) on June 19, 2002, claiming that the decision of the Board did not assert valid local concerns, was not consistent with regional housing needs, and that the Board failed to render a decision within forty days of the last public hearing as required by G.L. c 40B, § 21. In response, the Board contends that the denial is based on a valid concern for the local environment, particularly anticipated detrimental impacts from the project on wetlands, wildlife habitat, and

migration routes. The Board asserts that these concerns, in combination with a need to protect the Town's water supply from nitrogen loading, outweigh the regional housing need. In addition, the Board argues that financing by the NEF does not meet the statutory requirements to be considered a "subsidizing program" as defined in G.L. c. 40B, § 20.

A. Motion for Summary Judgment

On September 16, 2002, Appellant filed a Motion for Summary Judgment pursuant to 760 CMR 30.07, asserting that the Board did not reach its decision within forty days after the termination of the public hearings. See *Transformations, Inc. v. Townsend*, No. 02-14 (Housing Appeals Committee, Ruling on Motion for Summary Judgment Sep. 23, 2002); see also G.L. c. 40B, § 21. Appellant argues that the last public hearing was on March 13, 2002, and as the Board did not file its decision with the Town clerk until June 1, 2002, it failed to meet the time requirements of G.L. c. 40B, § 21, resulting in a constructive grant of the comprehensive permit. *Id.* at 7. The Board argues that the public hearings came to a close on April 24, 2002, and therefore the filing of the decision was within the deadline as defined by the statute. See *Transformations, Inc. v. Townsend*, No. 02-14, slip op. at 3 (Housing Appeals Committee, Ruling on Motion for Summary Judgment Sep. 23, 2002).

The motion for summary judgment was denied as the Committee could not determine "on the basis of the uncontested facts both that there was no meaningful hearing on April 24, 2002, and that there had been no mutual agreement between the parties to extend the hearing and time for rendering a decision." Id. at 5. The parties were therefore ordered to proceed with the hearing on the merits.

In conformity with this decision, the Committee conducted a site visit, held a 3-day *de novo* hearing, with witnesses sworn and full rights of cross examination, and a verbatim transcript. Witnesses for Transformation included Robert Carter Scott, president of Transformations and David Crossman, a wetland consultant. Witnesses for the Board included William Cadogan, Chairman of the Townsend Zoning Board of Appeals, Michele Cannon, Vice-chairman of the Townsend Board of Health and Chair of the Conservation Commission, and Scott Jackson, a wildlife biologist. Following the presentation of evidence, counsel submitted post-hearing briefs.

B. Jurisdiction

To be eligible for a comprehensive permit and to maintain an appeal before the Housing Appeals Committee, three jurisdictional requirements must be met. The applicant must be a limited dividend organization, the applicant must control the site, and the project must be fundable under an affordable housing program. See 760 CMR 31.01(1). The parties stipulated that Transformation is a limited dividend organization and that it controls the project site.[2] Pre-Hearing Order, § I-3, I-5.

The parties also agreed that Appellant received a determination of project eligibility under FHLBB NEF, through its member bank, Fidelity Bank. Exh. 1; Pre-Hearing Order, § I-4. However, the Board asserts both in the pre-hearing order and in its post-hearing brief that the NEF does not meet the requirements to be an affordable housing program in accordance with 760 CMR 31.01(1)(b). Pre-Hearing Order, § II-2. In its brief, the Board disagrees with the

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2 In addition, the Board stipulated that the Town of Townsend has not satisfied any of the statutory minima defined in G.L. c. 40B, § 20, thus foreclosing the defense that its decision is consistent with local needs as a matter of law pursuant to that section. Pre-Hearing Order, § I-2.

Committee's holding in *Stuborn Ltd. Partnership v. Barnstable Board of Appeals*, No. 98-01, (Mass. Housing Appeals Committee, March 6, 1999), and focuses its comments on the Committee's analysis using the four pronged test for determining whether an organization is a government agency as established in *Massachusetts Bay Transportation Authority Retirement Board v. State Ethics Commission*, 414 Mass. 582, 608 N.E.2d 1052 (1993). The Board's review fails to provide a legal basis upon which the Committee can offer a response, being principally comprised of conclusory statements.[3]

In addition, the Board failed to provide either testimony or demonstrative evidence[4] during the proceedings to establish a factual basis for consideration of this argument. For example, the Board states in its post-hearing brief that since the member bank is the only entity directly reviewing changes to the project by the developer,[5] the NEF lacks the supervision and

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3 Although the Housing Appeals Committee is an administrative body and hears appeals *de novo*, it is still essential that the party asserting a claim assist the Committee by providing a clear statement of the legal argument being asserted with appropriate citation to relevant authority, as well as a factual basis for that argument. See *Lolos v. Berlin*, 338 Mass. 10, 14, 153 N.E.2d 636, 639 (1958). To do no more than to provide unsubstantiated assertions, as the Board has done in the current case, may result in the issue being deemed waived. See *Tobin v. Commissioner of Banks*, 377 Mass. 909, 386 N.E.2d 1246, 1247 (1979).

4 Two of the witnesses provided limited testimony on the NEF. On cross-examination the developer, Mr. Scott, was asked what had been submitted in addition to the application to the NEF. Mr. Scott responded that his interaction with the NEF had been exclusively through the member bank and that he had submitted to that bank the application and associated plans, as well as recent amendments to those plans. Tr. I, 90-94. On direct examination the Chairman of the Townsend Zoning Board of Appeals, Mr. Cadogan, testified that he had "an issue with the New England Fund being a private funding entity [as it] typically has far less oversight over a project than the DHCD and the other – like a LIP program, things like that." Tr. II, 30-34. Mr. Cadogan also testified that "there was an article in the Boston Globe that got me started, basically, from a person who seemed to feel that, as I do, that the NEF was not a qualified funding agency based on the law. So, you know, it looked to me like that was an issue that we could use to essentially not permit this project." Tr. II, 52. This testimony comprises the entirety of evidence offered on the NEF issue by the Board.

5 The Board notes in its brief that since the original application, the developer has received an Approval Under the Subdivision Control Law Not Required (ANR) for a 3.3 acre parcel of land which is a portion of the current comprehensive permit proposal. Exh. 2, 3, 53, 53A, 53B. Shortly thereafter, the FHLBB

control that are crucial elements of state or federal entities and programs under the four pronged test. Based solely on this assertion, the Board concludes that the NEF is "not a federal program." However, the Board failed to provide any supporting evidence to demonstrate to the Committee how or why either the NEF's or the member bank's review process is any less effective than the review process used by other "acceptable" subsidizing programs, or even more basically, that the NEF was unaware of any proposed changes submitted by the developer to the member bank. The Board's failure to develop the record during the course of the current proceedings leaves the Committee without any form of substantial evidence that could support a conclusion that the NEF is not an acceptable subsidizing program under G.L. c. 40B. See *Zoning Board of Appeals of Wellesley v. Housing Appeals Committee*, 385 Mass. 651, 656, 433 N.E.2d 873, 876 (1982).

Neither is the Committee inclined to alter its analysis of *Stuborn* for the reasons recently stated in *Casaletto Estates v. Georgetown Board of Appeals*, No. 01-12, (Mass. Housing Appeals Committee, May 19, 2003).[6] The Committee also directs the Board's attention to another recent court decision, *Chin v. Zoning Board of Appeals of the Town of Scituate*, Misc. No. 287331 (Nov. 19, 2003). In *Chin*, the Land Court also considered whether a project funded through the NEF meets the definition of low and moderate income housing. Id. at 8. In its decision, the

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approved a $6,000 advance for the purpose of funding the 40B development. Exh. 18D. About a week after receiving the advance, the developer obtained a mortgage from the member bank on the ANR lot for "cash flow." Tr. I, 93-94. The Board concludes with the argument that, "these events demonstrate the lack of supervision and control exercised by member banks, or provided for in NEF guidelines." As mentioned above, the Board did not offer any evidence to indicate that FHLBB NEF was unaware of these transactions or any explanation as to how this demonstrates a lack of sufficient control or supervision by the NEF for it to not be deemed a federal program.

6 In *Casaletto*, the Georgetown Zoning Board of Appeals asserted that the New England Fund was not a federal subsidy, but rather a private subsidy from a private lending institution.6 *Id.* at 2. In that case, as in the current one, the board failed to introduce any evidence to show that the financing arrangement differed in any significant way from that in *Stuborn* which would require any alternative analysis or reconsideration by the Committee. See *id.*

Land Court stated that "*Stuborn* carefully reviewed the statutory framework and historical background of the comprehensive permit law and provided a full explanation for determination the NEF meets the jurisdiction requirements of § 20." Id. at 7.

The defendant in *Chin* also relied upon regulations issued after *Stuborn* by the Department of Housing and Community Development (DHCD) in which DHCD deemed the NEF to be a qualifying program.[7] Based on Stuborn and the regulations of DHCD, the Land Court found that the funding of a project through the NEF was enough for it to satisfy the definition of low and moderate income housing contained in G.L. c. 40B § 20. We therefore support our analysis and conclusion as originally stated in *Stuborn* that the provision of affordable housing financing is an essentially governmental function, and that because of the NEF's legislative underpinnings, the public nature of the funds, and the supervision provided by the Federal Housing Finance Board, that, for purposes of the Comprehensive Permit Law, the NEF is a program of the federal government.

II. FACTUAL BACKGROUND

The project site, consisting of approximately 30.5 acres, is located at 91 Highland Street in Townsend. Exh. 1. The site includes a farmhouse and a 4.5 acre field developed for agricultural purposes, with the remaining portion of the land is described as undeveloped. Exh.

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7 The court goes on to state that "Section 2 of the [Guidelines for Housing Programs in Which Funding is Provided Through a Non-Government Entity] states "DHCD deems the New England Fund to be a qualifying program" and cites two regulations promulgated to address the situation where project funding is provided through a non-governmental entity. 760 CMR 31.01 (2)(g), 31.09 (3). Category I of Appendix A to the 2001 notes provides a listing of housing programs recognized to be low or moderate income housing programs purposes of the comprehensive permit law and 760 CMR 30.02 (k), 31.04 (1)(a). Under the headings of Eligible Active Programs and Federal Programs within Category I, the 2001 notes list "FHLB New England Fund."" *Id.* at 8.

1. Although undeveloped, in the past ten years it has twice been impacted by timber harvesting and associated activities. Tr. I, 69. The area adjacent to the project site consists primarily of residential properties and undeveloped land. Exh. 1. Municipal water service is available from a main in Highland Street that could provide public water to the development. Tr. I, 41. The project is within the Town's residential RA and RB use districts, which require lot sizes between 2 to 3 acres for development of a detached one family dwelling. Exh. 1, 10; Tr. I, 41. Under this zoning the project area would be suitable for at least 10 single-family homes. Tr. II, 45.

The proposed project is designed to include the construction of 40 new units and the substantial rehabilitation of the existing farmhouse, for a total of 41 units. Exh. 1. The 40 new units will include 35 detached single-family homes and 5 attached single-family homes.[8] Exh. 1. Of the 41 units, 29 would be market rate units and 12 would be affordable units to remain affordable for a period of ninety-nine (99) years. Exh. 2, 57. The construction is to be completed in three (3) phases with 14 units in the first phase, 16 in the second phase, and 10 in the third phase. Exh. 2. The traffic report and peer review of that report found that the adjacent existing road system could adequately accommodate additional traffic from the project.[9] Exh. 12.

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8 These attached units have been identified as 5 of the 12 affordable units. Tr. I, 40; Exh. 2.

9 The peer review found the design as proposed was in keeping with American Association of State Highway and Transportation Officials standards. However, it was strongly recommend that two oak trees and underbrush at the entrance to Highland Street be removed to increase the sight distance in the easterly direction towards Adams Street. Exh. 12; Tr. I, 45.

III. DENIAL OF A COMPREHENSIVE PERMIT

Where the Board has denied a comprehensive permit, the ultimate question before the Committee is whether the decision of the Board is consistent with local needs. Under the Committee's regulations, the developer may establish a prima facie case by showing that its proposal complies generally with state and federal requirements or other generally recognized design standards. 760 CMR 31.06(2).

The burden then shifts to the Board, requiring a two-step inquiry to determine whether the denial by the Board complies with G.L. c. 40B, § 23. The Board must initially establish that there is a valid health, safety, environmental, design, open space, or other local concern, which supports the denial. 760 CMR 31.06(6). If the Board can establish the existence of a valid local concern, it must then further demonstrate that the local concern outweighs the regional need for housing. 760 CMR 31.06(6); see also *Hanover v. Housing Appeals Committee*, 363 Mass. 339, 365, 294 N.E.2d 393, 412 (1973); *Hamilton Housing Authority v. Hamilton*, No. 86-21, slip op. at 11 (Mass. Housing Appeals Committee Dec. 15, 1988).

A. Project Compliance with State and Federal Requirements

The parties agree that for the Applicant to establish its prima facie case, it must show that NEF funding is still committed for the project, that the septic systems as proposed would generally comply with the subsurface septic disposal requirements of Title 5 of the State Sanitary code, and that the project generally complies with the requirements of the Wetlands Protection Act, G.L. c. 131, § 40. Pre-Hearing Order, § II-3, II-4(a) & (b). The Applicant met its burden on the first issue by providing a letter and corroborating testimony that the FHLBB had reaffirmed the availability of the funds for the project. Exh. 18-D; Tr. I, 36-37.

The Applicant provided testimony and demonstrative evidence that the septic system as proposed for the project complies with Title 5 and will not cause unacceptable levels of nitrogen loading at the Cross Street Well and that the project was designed to be in compliance with the Wetlands Protection Act as well as making an effort to comply with the local wetland bylaw. Tr. I, 53-79, 95-100; Exh. 4, 5, 5A, 6. The Board, however, argues that the Applicant has not met its burden of proof on the nitrogen loading issue as the conceptual approval given by the Townsend Board of Health (Board of Health) on the proposed septic systems required the Applicant to submit a nitrogen aggregate loading plan, which the Applicant has failed to provide.[10] Board's Brief, p. 13. In addition, the Board argues that Transformation has not established its prima facie case for compliance with the Wetlands Protection Act, as it has not submitted a Notice of Intent to the Townsend Conservation Commission for Phase III of the project and is therefore not in compliance with G.L. c. 131, § 40, of the Wetlands Protection Act. Board's Brief, p. 14.

The Committee has ruled consistently that only preliminary plans, not full construction plans are necessary for a comprehensive permit. *Spencer Livingstone Assoc. Ltd. Partnership v. Medfield Zoning Board of Appeals*, No. 90-01, slip op. at 14 (Mass. Housing Appeals Committee, June 12, 1991). Correspondingly, it is not necessary for an applicant to obtain permits or acquire final state or federal approval in order for an applicant to be granted a

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10 Although the Board refers to Exhibits 14 through 16 in support of this argument, review of these documents provides no basis for this argument. Furthermore, testimony of the Vice-chairman of the Board of Health indicates that additional consideration of the nitrogen loading issue is not only outside the realm of local Board of Health's expertise, but that the "final call" as to nitrogen loading is no longer an issue that can be decided locally as it is "in the hands" of the Massachusetts Department of Environmental Protection (DEP). Tr. II, 115. It is also not conclusive, as suggested by the Board, that the plan will not be approved at the state level because of the Applicants failure to respond to a DEP request for additional information on that issue. Exh. 46; Tr. II, 64.

comprehensive permit or to establish its prima facie case in the case of a denial.[11] The Applicant need only provide sufficient evidence to prove that the project as proposed, "complies generally" with state and federal requirements or other generally recognized design standards. *Oxford Housing Authority v. Oxford Zoning Board of Appeals*, No. 90-12, slip op. at 2 (Mass. Housing Appeals Committee Mar. 20, 1991). As we have noted before, a prima facie case may be established with a minimum of evidence. *Canton Housing Authority v. Canton Zoning Board of Appeals*, No. 91-12, slip op. at 8 (Mass. Housing Appeals Committee July 28, 1993).

Therefore, the Committee finds that Transformation has presented sufficient evidence to establish a prima facie case that the proposal complies generally with state and federal requirements and other generally recognized design standards in keeping with 760 CMR 31.06(2).

B. Local Concerns

As Transformation has successfully established its prima facie case, the burden shifts to the Board to first establish that there is a valid health, safety, environmental, or other local concern, which supports the denial. G.L. c. 40B, §§ 20, 23; 760 CMR 31.05(2), 31.06(2), 31.06(6); *Hanover v. Housing Appeals Committee,* 363 Mass. 339, 294 N.E.2d 393 (1973). The Board initially identified five issues as valid local concerns supporting its denial of the comprehensive permit. The Board failed to brief or provide any evidence regarding the first local concern, that being the assertion that the public water supply was inadequate to support the

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11 The Applicant acknowledges that additional review and approval from the Conservation Commission may be required for Phase III. Appellant's Brief, p. 11. The Board did not supply any evidence to suggest that Phase III of the project will not be able to comply with the provisions of the Wetlands Protection Act and failure to file the Notice of Intent for a portion of the project does not support a conclusion that the entire project will not comply with the Wetlands Protection Act.

project and that it would be financially infeasible for the Town to supply water to the project. By failing to brief or present evidence on this issue, the Board is deemed to have waived this claim. See *An-Co, Inc. v. Havehrill Board of Appeals,* No. 90-11, slip op. at 19 (Mass. Housing Appeals Committee June 28, 1994) (citing *Lois v. Berlin*, 338 Mass. 10, 13-14 (1958)).

1. Nitrogen Loading

The next local concern asserted by the Board focuses on the potential impact of the proposed septic systems on the Cross Street Well public water supply and the integrated ground water system. Although this is a clearly serious local concern, it is necessary for the Board to establish that the proposed septic systems are a potential threat to the local water system.

The Applicant retained GeoSyntec Consultants to perform a nitrogen loading analysis to assess potential nitrate impact of the proposed project on the Cross Street Well. Exh. 4 & 6. All of the parties agree that the results of the analysis indicate that the anticipated increase in nitrogen is within the limits allowable under state and federal guidelines. Tr. I, 77; Tr. II, 39; Exh. 1, 4, 6. In addition, it was acknowledged by the parties that should all of the septic systems fail simultaneously, the increase in nitrate levels at the Cross Street Well would still be within state and federal limits. Tr. I, 77; Tr. II, 39; Exh. 1, 4, 6. As the Board did not provide any credible evidence to show that the development of the proposed project would have adverse impacts on the water quality of the Cross Street Well, we find that this is not a valid local concern.[12]

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12 The record is replete with credible evidence that the project will not have adverse impacts on the Cross Street Well, including exhibits and testimony offered by the Board. Exh. 1, 4, 5, 6, 15, 19C, 33,45, 53C; Tr. I, 49-52, 77-78, Tr. II, 17-19, 37-42, 112-120, 130-131.

2. Local Wetlands

The Board's next local concern is for the impact of the proposed development on the values and functions of wetlands on and adjacent to the site as protected by the Townsend Wetlands Bylaw and regulations (local wetlands bylaw). In support of this argument, the Board offered the testimony of Michele Cannon, Vice-chairman of the Townsend Board of Health and Chair of the Conservation Commission.[13] The Board, however, failed to develop this issue in a manner that would indicate to the Committee what negative impacts, outside of the previously expressed concern for nitrogen loading, were anticipated from the project.[14]

At most, the Board has made the claim that the wetlands within the project area indirectly feed into the Town water source, the Great Swamp, and regional water sources identified for preservation by the state.[15] Tr. II, 79-80; 85. However, the Board did not offer expert testimony nor demonstrative evidence that helped to define the anticipated harm the project will have on these water sources.[16] Nor did the Board adequately develop a factual basis to support its claim

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13 Ms. Cannon's testimony was not as an expert witness. She testified that she did not have any special training or advanced degrees. Tr. II, 111-112.

14 Ms. Cannon argued that although the bylaw requires a 35-foot no disturbance buffer, the Townsend Conservation Commission typically applies a 100-foot buffer for new construction. Tr. II, 77-78. She therefore argues that a 100-foot buffer should be required around all wetlands within the project area and specifically as to a naturally occurring cranberry bog and an intermittent stream. However, other than Ms. Cannon's statements, the Board provided no additional evidence to support the claim that a cranberry bog was located within the project area. The Board's expert witnesses, who testified that his area of concentration was in "wetlands ecology" never mentions the cranberry bog. Tr. III, 17. The Applicant's expert witness testified that the intermittent stream referred to by the Conservation Commission was not located within the project area, but was instead possibly located on the Meetinghouse property. Tr. III, 112.

15 None of the wetlands within the project area were identified as either being significant secondary sources or even as sources directly feeding into the water sources identified for protection. Tr. II, 84-85.

16 As the nitrogen loading issue was addressed in the prior section and nothing further was added in regard to the wetlands issue and therefore will not be reconsidered in this context. The Board failed to directly state what negative impacts were anticipated. There was no direct evidence to suggest the

that the project will have a "negative impact on the values and functions of wetlands on and adjacent to the site." See Boards Brief, p. 17. It is not enough to argue that the site is environmentally sensitive and contains unique wetland features as the Board has done here. It was the Board's burden to produce evidence to establish what unique features are present within the project area and to show that the project would have a definable negative impact on those features. Therefore, the Board has failed to meet its burden of proof[17] by establishing that the project will have a negative impact on local wetlands. In addition, the Board failed to provide any support for its argument that a wildlife habitat evaluation of the project site is required for compliance with the local wetlands bylaw.

3. Open Space and Protection of the Natural Environment

The Board's final concerns encompass the concepts of open space[18] and preservation of the natural environment. According to the Board, the project lies adjacent to a 250-acre parcel of

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project will result in the addition of pollutants, siltation, anticipated change in pH levels, or any other identifiable concern.

17 Although the burden of proof for this issue lies with the Board, Transformation provided evidence to show that it is more likely than not that the project will be in compliance with the requirements of the Wetlands Protection Act and with the local wetlands bylaw as written, as well as showing that the project will not have adverse impacts on wetlands within and adjacent to the project. In support of its claim that the project complies with the State Wetlands Protection Act, Transformation offered the expert testimony of David Crossman, a wetland consultant, originally retained by the Developer to delineate all wetland resource areas on the site and to prepare the filing of the Notice of Intent before the local Conservation Commission for distension basins. Tr. III, 90; Exh. 7. Based on his review of the project area, Mr. Crossman determined that the project would require three detention basins within the Buffer Zone of a Bordering Vegetated Wetland, which under the Wetlands Protection Act requires the developer to provide stringent protection of the adjacent wetland resource areas. Exh. 7. According to Mr. Crossman, the Applicant is proposing extensive use of erosion controls to prevent any alteration to the adjacent wetland, as well as innovative treatments such as rain gardens, swales, grass filter strips, and walkways made of porous pavers to minimize the impact of water runoff on the site and to adjacent wetlands and uplands. Tr. III, 100-101; Exh. 5-A, 7. These treatments are designed to filter or disperse run-off in an attempt to remove or decrease pollutants before the water reaches the detention basins, where there is further uptake of pollutants. Tr. I, 54.

18 This concern was poorly developed and closely associated with providing open space in keeping with

land (Meetinghouse Park) recently acquired by the Town under a matching conservation grant from the state. Exh. 1; Tr. II, 90-91. Meetinghouse Park was acquired for its environmental significance in terms of open space, wildlife habitat, and its status as a wildlife corridor. Exh. 1. The Board argues that the project area is an integral part of a wildlife corridor extending from the Squannacook River to the New Hampshire border in the north. Exh. 1. It also argues that the project area is located between two areas of Estimated Habitat for State listed Rare Wildlife.[19] Exh. 1. However, the site is not identified as being within the Priority Habitat Map for Rare Species or the Natural Heritage Endangered Species Habitat Map. Exh. 8.

The project area appears to be within the boundaries of the Squannassit Area of Critical Environmental Concern (ACEC) as designated on December 11, 2002.[20] Exh. 61. Designation within an ACEC does not require additional local review, however should the project be determined to be within the ACEC, it would require a more lengthy review process under the Massachusetts Environmental Protection Act (MEPA). It would also be necessary for the developer to file an environmental notification form (ENF) with the Department of Environmental Protection.[21] Tr. III, 102.

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the undeveloped nature of Meetinghouse Park and to decrease encumbrances to animal migration within the wildlife corridor.

19 The Board provided the expert testimony of Scott Jackson, a wildlife biologist, as to the significance of the project area for wildlife habitat and maintaining wildlife corridors within this portion of Massachusetts. Tr. III, 17-89.

20 Based solely on the maps and descriptions provided with the Designation of the Squannassit ACEC, it was not possible for the witnesses to state with certainty what portion, if any, of the project area is within the ACEC. Tr. III, 56-57; 108-109; Exh. 61A.

21 Mr. Crossman testified that Transformation had not filed an ENF, as there was no point in completing an ENF until it was decided if the project would be able to proceed. Tr. III, 109. He later corrected his testimony to reflect the fact that the ACEC was not adopted until December 11, 2002, therefore there was no prior requirement that the Applicant complete an ENF. Tr. III, 113.

Townsend has not enacted a local regulation that would allow it to directly regulate for wildlife habitat or corridors. Exh. 11; Tr. I, 60. In addition, excluding the possible ACEC designation, the project is not within an area recognized at the state or federal level that would require additional review or protection. Exh. 7 and 8. The Board's claim rests solely on the assertion that the project area is important locally and regionally due to its significant environmental value. Board's Brief, p. 16-18. The Board further asserts that 760 CMR 30.02, as well as the provisions of 760 CMR 31.06(6) and 31.07(3), indicate that "protection of the natural environment" can be asserted as a valid local concern.[22] Although that statement accurately reflects the language of the regulation, it does not lessen the burden of proof required by 760 CMR 31.06(6), requiring the Board to establish that there is a valid health, safety, environmental, open space, or other local concern which supports the denial of a comprehensive permit and that the concern outweigh the regional housing need.

Although the Board has shown that the project area may have the "potential" to add to the overall value of established conservation lands, it has not shown that the value that it adds is greater than what could be added by any parcel of land within the Town of Townsend or for that matter, the entire state. The testimony of the Board's expert was highly speculative and consisted predominately of statements delimited by such phrases as "might occur," "appear to be

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22 Although there was some discussion during the first hearing that this issue is a concern "that is not likely to be dealt with in another forum, and [arose] primarily because of the unanticipated nature of the subsidized housing development," the Board chose not to raise this argument. *Walega v. Acushnet*, No. 89-17, slip op. at 6, n.4 (Mass. Housing Appeals Committee, November 15, 1990); *Hamlet Development Corp. v. Hopedale*, No. 90-03, slip op. at 8 (Mass. Housing Appeals Committee, January 23, 1992). Tr. I, 31-32. This is reasonable, since the current case is more in keeping with a determination that "in the absence of exceptional circumstances, we are reluctant to consider local concerns that the town has not previously chosen to regulate." *Cirsan Realty Trust v. Woburn*, No. 01-22, slip op. at 4 (Mass. Housing Appeals Committee, June 11, 2003), see also *Sealund Sisters, Inc. v. Planning Board of Weymouth*, 50 Mass. App. Ct. 346, 349, 737 N.E.2d 503, 506 (2000) and *Garabedian v. Westland*, 59 Mass. App. Ct.

suitable," "are likely to," and "it's possible." Tr. III, 17-29. The Board failed to establish the presence of rare or endangered species, that the habitat was viable for use by such species, or that the project area would be any more accessible or usable by potentially migrating species without the development, as it was cut off from one of the areas where known protected species reside by a significant state highway and is fairly close to the center of the Town. Tr. III, 22, 28-29, 43, 63, 76-78. In addition, the Board's witness could not identify the location of the wildlife corridor, its size, or what width should be maintained to allow for migratory use. Tr. III, 78-80.

The Board, however, has shown that there are established methods by which the preservation of land can be accomplished within the system of local, state and federal government, such as purchasing the land, as was accomplished with Meetinghouse Park, or through land swaps, as suggested in the current instance by the Conservation Commission. Tr. II, 91-92; 109-110; 129-130. Therefore, the Committee finds that the Board has not established that open space and protection of the natural environment are valid local concerns as applied to this project area. Further, the Board has failed to articulate a single valid local concern that would require completion of the second part of the analysis in determining whether local concerns outweigh the need for affordable housing.

IV. CONCLUSION

Based upon review of the entire record and upon the findings of fact and discussion above, the Housing Appeals Committee concludes that the decision of the Townsend Board of Appeals is

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427, 435, 796 N.E.2d 439, 445(2003).

not consistent with local needs. The decision of the Board is vacated and the Board is directed to issue a comprehensive permit as provided in the text of this decision and the conditions below.

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

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

(a) The development shall be constructed as shown on drawings entitled "Coppersmith Way Development," dated May 21, 2001 by R. Wilson and Associates.

3. Should the Board fail to carry out this order within thirty days, then, pursuant to G.L. c. 40B, s. 23 and 760 CMR 31.09(1), 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 may impose additional requirements for site and building design so long as they do not result in less protection of local concerns than provided in the original design or by conditions imposed by the Board or this decision.

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

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

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

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

Date: January 26, 2004

Werner Lohe, Chairman

Joseph P. Henefield

Marion V. McEttrick

Frances C. Volkmann

Glenna J. Sheveland, Research Counsel