COMMONWEALTH OF MASSACHUSETTS

HOUSING APPEALS COMMITTEE

LITCHFIELD HEIGHTS, LLC

v.

PEABODY ZONING BOARD OF APPEALS

No. 04-20

DECISION

January 23, 2006

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LITCHFIELD HEIGHTS, LLC Appellant v. PEABODY ZONING BOARD OF APPEALS Appellee	)	No. 04-20

DECISION

This is an appeal pursuant to G.L. c. 40B, §§ 20-23, and 760 CMR 30.00 and 31.00, brought by Litchfield Heights, LLC (Litchfield), from a decision of the Peabody Zoning Board of Appeals, denying a comprehensive permit with respect to property in Peabody, Massachusetts. For the reasons set forth below, the decision of the Board is set aside.

I. PROCEDURAL HISTORY

On June 9, 2003, Litchfield submitted an application to the Board for a comprehensive permit pursuant to G.L. c. 40B, §§ 20-23, for the construction of 88 garden and townhouse-style condominium units on approximately 9.23 acres at 200 Bartholomew Street, Peabody, with 22 units designated as affordable housing. The project would be subsidized under the Housing Starts program of the Massachusetts Housing Finance Agency (MassHousing).

The Board's decision indicates that the public hearing began on June 30, 2003 and continued on August 4, September 22, October 27, November 24 and December 15, 2003, and on January 26, February 23, April 26, June 21 and June 22, 2004. The Board closed the hearing on June 22, and denied the comprehensive permit on July 20, 2004. The Board filed its decision with the Peabody Town Clerk on July 27, 2004. On August 13, 2004, Litchfield filed its appeal with the Housing Appeals Committee. The Committee held a Conference of Counsel and a Pre-Hearing Conference, respectively, on September 17 and November 16, 2004.[1] On January 11, 2005, the Presiding Officer issued a Pre-Hearing Order signed by counsel. The Pre-Hearing Order set out the schedule for filing pre-filed testimony, and set the date for the oral hearing, commencing with a site visit, to begin on May 9, 2005. The parties submitted prefiled direct testimony by their witnesses. The Appellant also submitted prefiled rebuttal witness testimony.

Following requests by the Appellant to continue the hearing, the Presiding Officer continued the hearing date several times, from May to October 2005, and thereafter to November, then December 2005. On August 22, 2005, the Appellant filed a Motion for Directed Decision. The Presiding Officer conducted a site visit on October 5, 2005.[2] On October 26, 2005, the Presiding Officer issued a Ruling on Motion for Directed Decision, granting the Appellant's motion with respect to the issue of congestion and safety of Bartholomew Street, but denying it in all other respects. On December 13, 2005, the

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1. The Housing Appeals Committee Chairman presided over these conferences and subsequently assigned this matter to the Presiding Officer.

2. The site visit was scheduled for this time for administrative reasons, and was unrelated to the Motion for Directed Decision.

Appellant filed a renewed motion for directed decision, supported by two additional affidavits. The Board has filed no objection or opposition to the motion.

II. 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 parties have stipulated that Litchfield is a limited dividend organization as required by 760 CMR 31.01(1)(a); that the project which is the subject of this proceeding is fundable under the Housing Starts program provided by MassHousing as required by 760 CMR 31.01.(12)(b); and that the Appellant controls the site of the project as required by 760 CMR 31.01(1)(c). Pre-Hearing Order, § II., ¶¶ 3-5.

III. RENEWED MOTION FOR DIRECTED DECISION

Litchfield has renewed its motion for a directed decision in this matter, citing new mitigation measures it has now proposed. It argues that as a result of these measures, the outstanding local concerns identified in the Presiding Officer's ruling on the original motion for directed decision have been resolved, and no longer exceed the regional need for affordable housing, based upon the undisputed facts of record. In support, Litchfield has filed the Affidavit of Gary Litchfield, the principal of the Appellant, and the Second Affidavit of Richard Carnevale, the Peabody Public Services Director. As a preliminary matter, the Board has not raised any opposition to this renewed motion. It therefore has waived its objection. See *Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85, 653 N.E.2d 595, 598 (1995). However, the record shows that the Appellant is also entitled to a grant of its motion on the merits.

Under 760 CMR 30.07(6), "[u]pon a party's submission of prefiled testimony, any opposing party may move for a directed decision in its favor on the ground that upon the facts or the law the original party has failed to prove a material element of its case or defense." In so moving, Litchfield relies on the two affidavits submitted in connection with the motion. Neither party submitted additional memoranda on the motion. However, some of the parties' arguments and authorities set out in their original memoranda remain applicable.

This appeal has presented the first instance in which the Committee has had the opportunity to consider a motion for directed decision under 760 CMR 30.07(6). As both parties suggest, an analogy to cases considering the directed verdict standard of Rule 50(a) of the Massachusetts Rules of Civil Procedure is therefore helpful. The Committee must determine whether the evidence contained in prefiled testimony and exhibits, when considered in the light most favorable to the nonmoving party, in this case the Board, is legally sufficient to support a decision in its favor. See *Donaldson v. Farrakhan,* 436 Mass. 94, 96, 762 N.E. 2d 835 (2002) (comparing standard to summary judgment standard). "The mere existence of a scintilla of evidence" to support the Board's position is insufficient. *Id.* at 96, quoting from *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Also see *Stapleton v. Macchi,* 401 Mass. 725, 728, 519 N.E. 2d 273 (1988). "[T]he evidence must contain facts from which reasonable inferences based on probabilities rather than possibilities may be drawn.... And the evidence must be sufficiently concrete to remove any inference which the [fact finder] might draw from it from the realm of mere speculation and conjecture." *Alholm v. Wareham,* 371 Mass. 621, 627, 358 N.E. 2d 788 (1976) (citations

omitted). Cf. *Dolan v. Suffolk Franklin Savings Bank*, 355 Mass. 665, 670, 246 N.E. 2d 798 (1969). The motion should be denied "[i]f, upon any reasonable view of the evidence, there is found a combination of facts from which a rational inference may be drawn in favor of the [Board]." *Chase v. Roy*, 363 Mass. 402, 404, 294 N.E. 2d 336 (1973). If sufficient evidence exists to warrant a finding in the favor of the non-moving party, "it is of no avail for the [moving party] to argue that there was some or even much evidence which would have warranted a contrary finding." *Id.* at 407. Also see *DiMarzo v. S. & P. Realty Corp.*, 364 Mass. 510, 514, 306 N.E. 2d 432 (1974). Cf. *Graci v. Massachusetts Gas & Electric Light Supply Co.,* 7 Mass. App. Ct. 221, 222-224, 386 N.E. 2d 1292 (1979).

This is an appeal of a denial of a comprehensive permit. When considering a board's denial of a comprehensive permit, the ultimate question before the Committee is whether the decision of the Board is consistent with local needs. Under the Committee's regulations, to make a *prima facie* case before the Committee in this matter, Litchfield must first show, with respect to those aspects of the proposed development that are in dispute, that its proposal complies with state and federal requirements or other generally recognized design standards. 760 CMR 31.06(2). The burden then shifts to the Board to prove first, that there is a valid health, safety, environmental, design, open space or other local concern which supports the denial, and second, that such concern outweighs the regional need for low and moderate income housing. G.L. c. 40B, §§ 20, 23; 760 CMR 31.06(6). Also see *Hanover v. Housing Appeals Committee*, 363 Mass. 339, 365, 294 N.E.2d 393, 412 (1973); *Hilltop Preserve LTD Partnership v. Walpole*, No. 00-11, slip op. at 4 (Mass. Housing Appeals Committee Apr. 10,

2002); *Hamilton Housing Authority v. Hamilton*, No. 86-21, slip op. at 11 (Mass. Housing Appeals Committee Dec. 15, 1988).

Litchfield has met its *prima facie* burden with respect to those aspects of the project that are in dispute. 760 CMR 31.06(2). See *Litchfield Heights, LLC v. Peabody,* No. 04-20, slip op. at 2-3 (Mass. Housing Appeals Committee Ruling on Motion for Directed Decision Oct. 26, 2005); Eby Affidavit, ¶¶ 5-9, 17-21, 22-38, 40-41; Blake Affidavit; ¶¶ 3-4; Blake Rebuttal Affidavit, ¶¶ 3, 5, 17, 24-25; Mello Affidavit, ¶¶ 2-10; Mello Rebuttal Affidavit, ¶¶ 6-9.[3] The foregoing directed decision standard must be applied to the Board's burden regarding each of the following local concerns put in issue.

A. Directed Decision for Litchfield on Bartholomew Street Traffic

In her Ruling on Motion for Directed Decision, the Presiding Officer granted Litchfield's motion with respect to off-site traffic issues. Her ruling provides:

> **Congestion and Safety of Bartholomew Street**: Litchfield submitted prefiled testimony and exhibits regarding sight distances in both directions from the Bartholomew Street entrance of the access roadway to the project, accident rates on Bartholomew Street, traffic volume in the vicinity of the site and traffic volume expected to be generated by the Project. Litchfield has established its *prima facie* case. 760 CMR 31.06(2). The evidence regarding sight distances, accident rates and the amount by which traffic is expected to increase as a result of the project has not been contradicted by the Board. The only traffic issue challenged by the Board is found in one short paragraph of its opposition to Litchfield's motion in which it focuses on the traffic burden on Bartholomew Street. The Board submitted extremely brief prefiled testimony from Joseph Viola, senior planner for the city, who stated that the traffic report fails to take into account the existing condition of Bartholomew Street and the areas where it intersects with Lynn and Lynnfield Street. He states that while the number of trips represents a small fraction of the overall volume, Bartholomew Street is already significantly overburdened due to the

3. Also see *Canton Property Holding, LLC v. Canton,* No. 03-17, slip op. at 7-9 (Mass. Housing Appeals Committee Sept. 20, 2005).

> narrowness of the roadway east of the site, where the width tapers to 14 to 16 feet. Viola Affidavit.
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> A July 6, 2004 Peabody Department of Community Development memorandum states that the proposal is projected to generate 585 trips per day, of which 176 will travel eastward toward Lynn Street through the narrow portion of Bartholomew Street. While acknowledging that the increased trips represent a small fraction of the current volume, the memorandum states in conclusory fashion that an increase in traffic in this direction will adversely affect public safety and the residents of the street. The memorandum also states that the intersections of Bartholomew and Lynn and Lynnfield Streets face greater capacity constraints, and currently operate at an "F" Level of Service during peak hours and the City's transportation plan lists both of these intersections as needing immediate improvements, likely full signalization to manage future traffic flows. It indicates that the "need for signalization of these intersections will be hastened by this project." Exh. 21. As noted above, much of this memorandum contains general conclusions about traffic safety. The Board, however, does not present facts to show a dangerous condition at these intersections or at the location of the narrowing of Bartholomew Street which will be exacerbated by the project. This evidence is insufficient to demonstrate a local concern that outweighs the need for affordable housing. See *Canton Property Holding, LLC v. Canton,* No. 03-17, slip op. at 21 (Mass. Housing Appeals Committee Sept. 20, 2005). Moreover, Litchfield has offered mitigation for any traffic impact in the form of a contribution of $15,000.00 toward the future signalization of the Lynnfield Street intersection. Litchfield's Motion for Directed Decision is granted with respect to traffic issues.

Litchfield Heights Ruling, No. 04-20, slip op. at 2-3. In his second affidavit, Mr. Carnevale stated that the $15,000.00 to be applied for traffic mitigation measures he may deem necessary on Bartholomew Street and surrounding areas addressed the local concerns regarding safety for traffic. Carnevale Affidavit, ¶ 10; Litchfield Affidavit, ¶ 4. The additional affidavit evidence offers further support for the conclusion reached in the Presiding Officer's ruling granting a directed decision on off-site traffic issues.

B. Renewed Motion Based on Supplemental Affidavits

The remaining issues left open for hearing relate to water service, sewer service and access to the site. The affidavits submitted in connection with the renewed motion refer to additional measures not in the original proposal, which are now offered by Litchfield to mitigate the local concerns identified in the Board's witnesses' affidavits. Litchfield offers these mitigation measures only if it is issued a comprehensive permit to develop the project as proposed. Second Carnevale Affidavit, ¶ 5; Litchfield Affidavit, ¶¶ 2-5. In particular, Litchfield will "contribute towards and assist in" these areas:

(1) modification of the proposed water tank and water supply system such that the tank to be constructed will also service the existing and planned developments along Bartholomew Street, including the Juniper Ridge comprehensive permit and the Town Line Acres subdivision;
(2) contribution of payment for certain improvements to be made to that portion of the public sewer system which will serve the Project;
(3) payment for certain improvements to be made to the City's public water systems and
(4) payment to implement certain traffic mitigation measures.

Second Carnevale Affidavit, ¶ 6. Monies from Litchfield, not to exceed $644, 000.00, are intended to be applied 1) primarily for assistance in construction of the water tank and associated pumping facilities; 2) for water mitigation measures that Mr. Carnevale, the Peabody Public Services Director, may deem necessary; 3) repairs of the portion of the municipal sewer system servicing the project; and 4) to municipal sewer system mitigation measures that Mr. Carnevale may deem necessary. *Id.*, ¶¶ 6, 7, 11; Litchfield Affidavit, ¶¶ 2, 3, 5. Additionally, Litchfield has proposed to pay $15,000.00 to provide for "traffic mitigation measures on Bartholomew Street and surrounding areas" that Mr. Carnevale may deem necessary. Second Carnevale Affidavit, ¶¶ 8, 12; Litchfield Affidavit, ¶ 4.

1. Water Tank Design

With regard to the water tank design, the ruling denying the original motion for directed decision noted concerns raised by the Board's witnesses regarding the water service to the project, as well as water pressure and water turnover in the water tank as designed:

> **Water Tank Design:** With regard to this issue, ... Mr. Carnevale, a registered professional civil engineer and public services director in Peabody, stated that the pump sizing would lower the city's water pressure below 20 pounds/square inch in violation of Mass DEP regulations, the proposed tank is significantly oversized for the anticipated daily water use by the project, and the low water turnover presents water quality issues with regard to DEP bacteriological standards. Carnevale Affidavit. As part of his testimony, Bruce W. Adams, a registered professional engineer who at the city's request evaluated the proposed Peabody water system, stated that the Litchfield developer has proposed building a pump station containing (2) 40 gallon per minute pumps, and (2) 400 gallon per minute fire flow pumps, which he states is inadequate. Adams Affidavit.
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> Although Litchfield points to the prefiled testimony of its witnesses contradicting this testimony, that contradictory testimony does not permit a directed decision. The concerns identified above, which are not all those identified in the prefiled testimony of the Board's witnesses, raise sufficient concerns to require oral testimony, at a minimum to permit the assessment of the credibility and weight of the witnesses' testimony. These issues warrant denial of Litchfield's motion.

Litchfield Heights Ruling, No. 04-20, slip op. at 4-5. As indicated above, Mr. Carnevale offered much of the Board's original testimony identifying its concerns with water service. Carnevale Affidavit, ¶¶ 4-8. In his second affidavit, Mr. Carnevale stated that the mitigation measures proposed by Litchfield, funding for modification of the proposed water tank and water supply system, would be adequate to address and mitigate the remaining local concerns relating to water service.[4] Second Carnevale Affidavit, ¶¶ 5, 6, 7, 9, 11, 13. Accordingly, in

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4. The additional concerns referred to by the Presiding Officer related to the original water tank configuration. See *Litchfield Heights* Ruling, No. 04-20, slip op. at 5.

light of the new evidence regarding the modified water tank configuration, the record contains insufficient evidence to support a conclusion that water service raises a local concern that outweighs the regional need for affordable housing. The Board's previous evidence regarding deficiencies in water service did not apply to the modifications set out in the Carnevale and Litchfield affidavits. To the extent that, based on the originally intended water tank configuration there may exist a "scintilla of evidence" supporting the Board's position, that scintilla is insufficient to prove a local concern that outweighs the regional need for affordable housing. See *Donaldson v. Farrakhan,* 436 Mass. 94, 96, quoting from *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Also see *Stapleton v. Macchi,* 401 Mass. 725, 728. "[T]he evidence must contain facts from which reasonable inferences based on probabilities rather than possibilities may be drawn.... And the evidence must be sufficiently concrete to remove any inference which the [fact finder] might draw from it from the realm of mere speculation and conjecture." *Alholm v. Wareham,* 371 Mass. 621, 627 (citations omitted). Therefore, Litchfield's renewed motion is granted with respect to water service.

2. Sewer Capacity

With regard to sewer capacity, the ruling denying the original motion for directed design noted concerns raised by the Board's witnesses regarding sewer pipe capacity and sewer hydraulic conditions, as well as the costs of improvements to the city sewer system necessary before the Litchfield project and other developments could discharge into the Bartholomew Street sewer:

> **Sewer Capacity**: As with other issues, Litchfield's interpretation of the evidence regarding sewer capacity are based on conclusions it and its witnesses have drawn regarding the Board's proposed exhibit -- the Bartholomew Street Sanitary Sewer Hydraulic Evaluation, Peabody, MA, Final Report (Study). The Study and the prefiled testimony of Omer Dumais, a registered professional engineer employed by Tighe & Bond, which completed the above study, indicate the following concerns, which are viewed in the light most favorable to the Board. Bartholomew Street has several sections of sewer pipe with inadequate capacity to handle existing and projected sewage flows. The Study estimated the impact of future flows from 4 developments to be located on Bartholomew Street, as well Litchfield's proposed project. The Study predicted greater deficiencies to sewer hydraulic conditions during times of high ground water and sustained rainfall, than during pre-development conditions, and peak flows that would exceed the safe capacity of the pipe. Mr. Dumais presented testimony concerning the estimated costs of improvements necessary before the Litchfield project and other developments could discharge into the Bartholomew Street sewer.
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> Litchfield argues that the Board's analysis is based on overly conservative assumptions and the data present sewer capacity conditions that do not exist currently and will not exist with the addition of the identified developments. Litchfield also disagrees with the testimony of Mr. Dumais that the Litchfield project was considered in the evaluation.
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> As noted above, the Committee's analysis must be based on a view of the evidence in the light most favorable to the Board. In this light, sufficient testimony has been introduced regarding the potential local concerns regarding the effect of the project on the municipal sewer system to warrant denial of Litchfield's motion on this basis. Questions of the correctness of assumptions, or the sufficiency of Litchfield's mitigation offer, see 760 31.06(9), are properly left for the oral hearing where the credibility and weight of [all] witnesses' testimony may be assessed.

Litchfield Heights Ruling, No. 04-20, slip op. at 5-6. In his second affidavit, Mr. Carnevale stated that the mitigation measures proposed by Litchfield, funding for repairs of the portion of the municipal sewer system servicing the project and for municipal sewer system measures that he may deem necessary, would be adequate to address and mitigate the remaining local concerns relating to sewer capacity. Second Carnevale Affidavit, ¶¶ 5, 6, 7, 9, 11, 13. Although his testimony of the sufficiency of the mitigation offer differs somewhat from the

previous estimates provided by the Board's engineer of the costs of his recommended improvements to the sewer system, those improvements relate to sewer service for other projects as well as Litchfield Heights. Dumais Affidavit, ¶¶ 19-46. In light of the acceptability of the mitigation measures and funding to the Peabody Public Services Director, the record contains insufficient evidence to support a conclusion that the adequacy of sewer service raises a local concern that outweighs the regional need for affordable housing. See *Donaldson v. Farrakhan, supra* at 96; *Stapleton v. Macchi, supra* at 728; *Alholm v. Wareham, supra* at 627. Therefore, Litchfield's renewed motion is granted with respect to sewer service.

3. Site Access

With regard to site access, the ruling denying the original motion for directed decision noted concerns raised by the Board's witnesses regarding the length, width and slope of the single access roadway, and roadway icing and snow storage in winter:

> **General access and Emergency Access to the Site:** ... [E]vidence indicates that the access driveway, the sole means of access to the site, is 1,100 feet in length and maintains a 9% grade for 1,000 feet, whereas subdivision regulations permit a 9% grade for a maximum of 500 feet. Viola Affidavit. Although the record contains a factual dispute regarding whether the access road would receive sufficient sunlight for adequate snow melting in winter to avoid ice patches or would remain icy, the evidence favoring the Board must be considered. Compare Mello Affidavit with the April 26, 2004 Department of Public Services (DPS) memorandum, Exh. 23. The April 26 report, from Richard M. Carnevale, P.E., a Board witness, states that "the cross-section of the road is inadequate for plowed snow storage and will force pedestrians to walk in the street in traffic. The roadway layout needs to be widened to allow for snow storage." That report also states, "[i]n the winter the road will be shaded a significant amount of time which leads to snowmelt and roadway icing." Exh. 23.

> Litchfield argues that the DPS January 26, 2004 memorandum to the Board stated that the detail of the road grades meets technical design standards. See Exh. 25. The conformance to technical design standards does not resolve the issue, however. The question of whether the access roadway represents a safety hazard that outweighs the need for affordable housing must examine other factors as well. See *Lexington Woods v. Waltham,* No. 02-36, slip op. at 7, 19-20 (Mass. Housing Appeals Committee Feb. 1, 2005). In any event, Litchfield does not acknowledge that the February 26, 2004 DPS memorandum, Exh. 24, rescinded the January 26 memorandum. At the least, this change of position suggests that oral testimony of the author of these memoranda, Mr. Carnevale, is necessary to assess the credibility and weight that should be given to his testimony. The question of the safety of the single access roadway to a project site of this size is sufficiently important that that this evidentiary conflict must be resolved through the assessment of witness testimony on oral cross-examination. See *Lexington Woods, supra.* The evidence about the potential winter hazards on a 9% grade single access roadway in excess of 1,000 feet serving 88 units, particularly in light of the fact that the grade does not comply with local requirements, is sufficient to warrant denial of Litchfield's motion.

Litchfield Heights Ruling, No. 04-20, slip op. at 3-4. In his second affidavit, Mr. Carnevale stated that the mitigation measures proposed by Litchfield "for traffic mitigation on Bartholomew Street and surrounding areas as deemed necessary by him" would satisfy the remaining local concerns relating to traffic issues on Bartholomew Street and surrounding areas, and would resolve all local concerns regarding "safety for traffic and access" including "any concerns over the proposed single driveway access to the Project." Second Carnevale Affidavit, ¶¶ 8, 10. Also see *id.,* ¶¶ 12, 13. Mr. Carnevale's additional testimony addresses the open issues he previously raised regarding the access drive and site access. See Exh. 23. Therefore, in light of the additional affidavits, the record contains insufficient evidence to support a conclusion that site access and on-site traffic safety issues raise local concerns that outweigh the regional need for affordable housing. See *Donaldson v. Farrakhan, supra* at 96; *Stapleton v. Macchi, supra* at 728; *Alholm v. Wareham, supra* at 627. Therefore,

Litchfield's renewed motion is granted with respect to all on-site traffic and site access issues.

IV. CONCLUSION

Based upon review of the evidence (exhibits, pre-filed testimony and affidavits) submitted in this proceeding, the Appellant Litchfield Heights, LLC's Renewed Motion for Directed Decision is hereby granted. The Housing Appeals Committee concludes that, based on the supplemental affidavits submitted, sufficient evidence does not exists to warrant a finding in favor of the Board that its denial of a comprehensive permit was consistent with local needs. Accordingly, 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.

(a) The development shall be constructed as shown on plans entitled "Site Development Permit Plan for Litchfield Heights, Peabody, Massachusetts" dated May 20, 2003 as revised through June 3, 2003 by Eastern Land Survey Associates, Inc.

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

(a) Litchfield shall provide the following mitigation it has offered to the Town of Peabody: monies up to the amount of $644,000.00 to be allocated in the following manner: first, toward funding of the construction of the water tank and associated pumping facilities; second toward funding certain water

mitigation measures that the Peabody Public Services Director may deem necessary; third, toward repairs to that portion of the municipal sewer system servicing Litchfield's project; and last, toward municipal sewer system measures that the Peabody Public Services Director may deem necessary. Litchfield shall either deposit $644,000.00 into an escrow account, bonded off, or shall furnish a letter of credit to provide access to these funds.

(b) Litchfield shall provide the following additional mitigation it has offered to the Town of Peabody: a payment of $15,000.00 to help fund traffic mitigation measures that the Peabody Public Services Director may deem necessary.

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

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.

(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 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 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

Date: January 23, 2006

Werner Lohe, Chairman

Marion V. McEttrick

Christine Snow Samuelson

James G. Stockard, Jr.

Shelagh A. Ellman-Pearl, Presiding Officer