COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

LEXINGTON WOODS, LLC

v.

WALTHAM ZONING BOARD OF APPEALS

No. 02-36

DECISION

February 1, 2005

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LEXINGTON WOODS, LLC Appellant v. WALTHAM ZONING BOARD OF APPEALS Appellee	)	No. 02-36

DECISION

This is an appeal pursuant to G.L. c. 40B, §§ 20-23, and 760 CMR §§ 30.00 and 31.00, brought by Lexington Woods, LLC (Lexington Woods), from a decision of the Waltham Zoning Board of Appeals, denying a comprehensive permit with respect to property located on the westerly side of Lexington Street in the City of Waltham. For the reasons set forth below, the decision of the Board is affirmed.

I. PROCEDURAL HISTORY

On or about October 14, 2001, Lexington Woods submitted an application to the Board for a comprehensive permit pursuant to G.L. c. 40B, §§ 20-23, for a 40-unit residential condominium development (reduced during the hearing to 36 units) on 6.6 acres of land in Waltham, Massachusetts. Of the 36 units proposed, 9 would be offered as affordable. The housing is to be subsidized by Salem Five Cents Savings Bank through the New England Fund (NEF) Program of the Federal Home Loan Bank of Boston.

The public hearing began on September 20, 2001, and continued on October 9, November 20 and December 18, 2001, and on February 12, March 12, April 23, June 4, June 18, August 20 and October 15, 2002. The hearing was closed on October 15, 2002. The Board denied the comprehensive permit on November 7, 2002 and filed its decision with the Waltham City Clerk on November 13, 2002.

On November 26, 2002, Lexington Woods filed its appeal with the Housing Appeals Committee. The Committee held a Conference of Counsel on December 10, 2002. The hearing commenced with a hearing and site visit in Waltham on March 13, 2003, and continued over four additional days between April 2003 and June 2004. The parties submitted post-hearing memoranda on August 16 and 17, 2004.

II. JURISDICTION

A. Limited Dividend Organization

To be eligible for a comprehensive permit and to maintain an appeal before the Housing Appeals Committee, three jurisdictional requirements must be met. See 760 CMR 31.01(1)(a)-(c). The parties have stipulated that Lexington Woods is a limited liability company duly organized under Massachusetts law and is a limited dividend organization as required by 760 CMR 31.01(1)(a). Pre-Hearing Order, § I.4.

B. Fundability

The Board argues that Lexington Woods has failed to sustain its burden under 760 CMR 31.01(b) of proving that it qualifies for NEF financing. It claims that the financing expired on March 31, 2004, and no evidence was presented indicating that it is eligible for reinstatement. Exh. 14. The Committee has previously determined that the expiration period in a financing letter is tolled if a developer has acted promptly in bringing its comprehensive permit application before a board and filing an appeal from a board's decision, and the project has not been modified significantly. *An-Co, Inc. v. Haverhill,* No. 90-11, slip op. at 6-8 (Mass. Housing Appeals Committee Order June 28, 1994). In this case, the developer applied for a comprehensive permit from the Board on August 30, 2001. Exh. 1. It received its NEF funding letter from the Federal Home Loan Bank Board on September 25, 2002. Exh. 9. The Board filed its decision in the City Clerk's office on November 13, 2002. Lexington Woods filed its appeal to the Committee on November 26, 2002. Hearings took place on five days between March 2003 and June 2004. The length of time that has passed during the appeal period did not occur as a result of undue delay caused by Lexington Woods. It has acted promptly in pursuing its comprehensive permit. Therefore, in this case, the expiration period in the NEF funding letter is tolled.

C. Site Control

The Pre-Hearing Order states that Lexington Woods is called upon to prove that it has met the requirement that it control the site. Pre-Hearing Order, § II. Appellant/Applicant's Case (1). However, neither party has raised this issue in its brief. Testimony from the legal agent for Lexington Woods, as well as a certification authorizing him to act for Lexington Woods, a purchase and sale agreement for the property, an assignment and designation of grantee, and a deed for the property, all demonstrate that Lexington Woods controls the site. 760 CMR 31.01(3). Tr. I, 13, 15, 19-21; Exhs. 11-13.

III. FACTUAL BACKGROUND

Lexington Woods proposes to develop a parcel of land consisting of approximately 6.6 acres, located at 640 Lexington Street in a well-developed section of Waltham, Massachusetts zoned as a Residence A2 Zoning District (single-family zoning). A single-family residence currently occupies the property. Lexington Woods contemplates building 36 residential condominium townhouse units including 9 to be restricted as low and moderate income units. The project contemplates extensive re-grading and landscaping. Tr. I, 21-26; V, 10; Exhs. 1, 3, 6.

The parcel is located on the westerly side of Lexington Street, a public way opposite the entrance driveway to the 75-acre public school campus of the Waltham High School and the Kennedy Middle School (the school complex). Tr. IV, 106, 113. The development would be located on the top of a hill on the property at a location approximately 75 feet above Lexington Street. Tr. III, 76. Access to the development consists of one roadway, approximately 1,000 feet in length. It winds upward from Lexington Street increasing in grade to 10% as it approaches the top of the hill and the area of parking spaces for the proposed buildings on the site. The road also narrows to 20 feet wide at this point. A sidewalk is proposed to follow the access drive on the right hand side (in the inbound direction). Steep ledge borders portions of the proposed drive on both sides. Tr. I, 83-84; II, 112-113; III, 18, 38-40; V, 27; Exh. 7.

Lexington Street is a major thoroughfare in Waltham. Tr. V, 17. It is a two-way, four lane roadway connecting downtown Waltham and Lexington center. A cross walk is located at the intersection of the school complex and Lexington Street. The intersection currently has traffic lights controlling Lexington Street and the entrance to the school complex. Tr. V, 8, 34.

The proposed access drive opens on Lexington Street about 40 feet north of the entrance to the school complex. Tr. III, 15. Lexington Woods has proposed improvements to the traffic signals to include the access driveway.

North of the entry to the access drive on Lexington Street, a curve in Lexington Street and a rock outcropping on the property reduce the line of sight of the proposed access drive and the sidewalk for motorists traveling in a southerly direction. Tr. V, 32-34. Lexington Woods proposes to remove a portion of ledge from the site to improve vehicle sight distances. Lexington Woods also proposes to direct storm water from the development under Lexington Street into Chester Brook on the school department property. The proposed water access to the site consists of a single pipe leading along the access drive. The developer has offered to loop the pipe providing access to the water main from Lexington Street in two locations.

IV. MOTION TO REMAND

Before the evidentiary portion of the hearing, the Board had moved pursuant to 760 CMR 31.02 and 31.03 to remand this matter to the Board for review of Lexington Woods' post-decision modification of the project as detailed in the six-page site plan. Exh. 7. The Board argues that the changes proposed were substantial and Lexington Woods did not have good cause for not having originally presented these details to the Board. Although the presiding officer admitted the plan of the proposal into evidence and permitted testimony regarding the plan, he invited the Board to raise the issue while giving a preliminary view that the changes were not substantial. Tr. I, 10; Exh. 7.

In its brief, the Board alleges generally that the post-decision site plan contains substantial changes to the project, that Lexington Woods failed to provide good cause for not originally presenting its modified project to the Board, and that this matter should be remanded to the Board for failure to exhaust administrative remedies. See 760 CMR 31.03(1). However, the Board's brief identifies neither the alleged substantial changes nor the reasons why any modifications are substantial. Lexington Woods' brief at p. 2 points out that:

> The Appellant has also agreed to widen a major portion of the driveway to 24 feet. In response to comments from the Waltham Traffic Director, the Appellant agreed to add an entrance-right turn lane on the westerly side of Lexington Street in front of the site, but the lane was removed from the plan when others objected to it. The plans [Exhibits 7 and 7A] before the Committee do not contain that lane, but do show the removal of significant ledge and other visual obstructions at the front of the site that improve the site [sic] distance beyond that required by governmental guidelines.

These are not substantial changes within the meaning of 760 CMR 31.03. They represent an attempt by Lexington Woods to address concerns raised by the Board. The right turn lane was not part of the original proposal to the Board, but offered by Hayes Engineering, Inc., while the Board proceeding was underway, also to address City concerns. There is no evidence that it was formalized as a change to the proposal. See Exh. 32. To the extent that the Board has other issues it considers to be substantial changes, it has not developed a record in this proceeding on which a decision can be made. Accordingly, the motion to remand is denied. See *Transformations, Inc. v. Townsend,* No. 02-14, slip op. at 5-6 (Mass. Housing Appeals Committee Jan. 26, 2004); also see *Zoning Board of Appeals of Wellesley v. Housing Appeals Comm.,* 385 Mass. 651, 656-57, 433 N.E.2d 873 (1982).

V. MOTION TO DISMISS

The Board moved to dismiss the proceeding on the ground that Lexington Woods failed to comply with 760 CMR 30.06(9) and 31.08(3) concerning the Massachusetts Environmental Policy Act (MEPA). It asserts that because the property is located within 200 feet of Chester Brook, a wetland resource subject to the Rivers Protection Act, a determination from EOEA is required. It contends that the developer merely filed a statement of a hired consultant that MEPA was inapplicable to this development, rather than obtaining the required EOEA determination. The project engineer submitted a letter to DHCD that the project does not meet any thresholds requiring the filing of an Environmental Notification Form or Environmental Impact Report (EIR) under 301 CMR 11.00. Exhs. 27, 28. The developer intends to apply for an order of conditions under the Massachusetts Wetlands Protection Act with respect to a portion of a riverfront area that extends onto the property. Tr. I, 102-03.

Lexington Woods argues that it has met its burden to establish a *prima facie* case by showing that its proposal complies with state and federal requirements or other generally recognized design standards. 760 CMR 31.06(2). Even if an EIR were required, the Committee may delay its decision or render its decision subject to the condition that any comprehensive permit not be implemented until the Committee has complied with MEPA. 760 CMR 31.08(3)(c)1. and 2. Therefore the lack of an EOEA determination does not require dismissal and the Board's motion on this basis is denied. In any event, in this instance, where the

Committee is upholding the Board's denial of a request for a comprehensive permit, the question of compliance with the MEPA process requirements is moot.

VI. ISSUES ON THE MERITS

When the Board has denied a comprehensive permit, the ultimate question before the Committee is whether the decision of the Board is consistent with local needs. Under the Committee's regulations, to make a *prima facie* case before the Committee in this matter, the developer must show, with respect to the aspects of the proposed development that are in dispute, that its proposal complies with state and federal requirements or other generally recognized design standards. 760 CMR 31.06(2). The burden then shifts to the Board to prove first, that there is a valid health, safety, environmental, or other local concern which supports the denial, and second, that such concern outweighs the regional need for low and moderate income housing. G.L. c. 40B, §§ 20, 23; 760 CMR 31.06(6). See *Hilltop Preserve LTD Partnership v. Walpole*, No. 00-11, slip op. at 4 (Mass. Housing Appeals Committee Apr. 10, 2002). As explained below, our analysis of the local concerns raised by the Board leads us to affirm the Board's denial of the comprehensive permit sought by Lexington Woods.

A. Statutory *Minima*

The parties stipulated that 1) low and moderate income housing units in Waltham comprise less than 10 percent of its total housing units, as determined pursuant to G.L. c. 40B §§ 20, *et seq.* and 760 CMR 31.00, *et seq.*; and 2) low and moderate income housing does not exist in Waltham on sites comprising 1.5 percent or more of the total land area zoned for residential, commercial, or industrial use as determined pursuant to G.L. c. 40B §§ 20, *et seq.* and 760 CMR 31.00, *et seq.* Pre-Hearing Order, § I.2-I.3. The parties disagree about who has the burden of proof regarding whether the project as proposed by Lexington Woods would result in the commencement of construction of low or moderate income housing on sites in Waltham comprising more than 0.3 of 1 percent of the total land area in Waltham zoned for residential, commercial or industrial use or 10 acres, whichever is larger, in any one calendar year. See 760 CMR 31.04(3) and 31.06(5). Neither party introduced evidence in this regard. 760 CMR 31.06(5) provides:

> In any case, the Board may show conclusively that its decision was consistent with local needs by proving that one of the statutory minima described in 760

> CMR 31.04 has been satisfied. The Board shall have the burden of proving satisfaction of such statutory *minima.*

Although the Board reserved the right to contest this issue in the Pre-Hearing Order, it never submitted evidence in this regard. The Board's failure to develop the record during the course of the current proceedings leaves the Committee without any form of substantial evidence that could support a conclusion that Waltham has met the requirement of 760 CMR 31.06(5). See *Zoning Board of Appeals of Wellesley,* 385 Mass. at 656-57, 433 N.E.2d 873. Accordingly, the Board has conceded this issue. See *Hilltop Preserve,* No. 00-11, slip op. at 2 n.1; also see *Cameron v. Carelli,* 39 Mass. App. Ct. 81, 85-86, 653 N.E. 2d 595 (1995).

B. Compliance with state and federal laws or generally accepted design standards

To support its burden of proof, Lexington Woods refers to testimony of its project engineer that the development will comply with state and federal laws. It also points to testimony and documentary evidence of the Board's expert, a civil engineer, that the project complies with drainage and wetland requirements. Tr. I, 78-80, 92, 102; II, 37, 40; Exhs. 7, 7A, 27, 28.

The developer further argues that the project is consistent with other generally recognized design standards, relying on testimony of its experts, a traffic consultant and a registered professional engineer specializing in traffic operations and roadway design, as well as the testimony and documentary evidence provided by traffic experts originally engaged by the City of Waltham. Lexington Woods has submitted sufficient evidence of compliance with state and federal laws or general accepted design standards with respect to the contested issues.

C. Health, safety, environmental, design, open space or other local concerns

The substantive issues raised by the Board relate to 1) the safety of the access to the site, including both the safety of the roadway itself and the lack of secondary access to the site; 2) traffic safety at the intersection of the access drive and Lexington Street and on Lexington Street near the site; 3) storm water management; and 4) the water system for the site. The Board argues that the different aspects of the development must be considered in the aggregate to evaluate the safety of the development. Lexington Woods argues that if each of the Board's claims is inadequate, then the whole of the Board's claim is inadequate.

1. Safety of Roadway Access to the Proposed Development

The Board has cited fourteen different provisions of the *Land Rules and Regulations of the Waltham Board of Survey and Planning*, which it says the project contravenes.[1] See Exh. 4. The Board's expert road design and traffic engineer testified that these regulations are well thought-out and apply industry standards for safety; thus a road constructed in accordance with

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1. The Board cites the following aspects of noncompliance with City provisions:

   1) Section 4.2.1 requires a design speed for residential roads of 30 mph. The access road has a design speed between 10 and 15 mph. Tr. II, 124; III, 14.

   2) Section 4.2.2.5.1 requires the avoidance of street jogs with centerline offsets of less than 125 feet. The access road is 40 feet from the school complex intersection with Lexington Street. Tr. III, 15-16.

   3) Section 4.2.2.5.2 requires residential roadways to have minimum centerline radii of 350 feet. The access road has a centerline radius of 75 feet. Tr. III, 16.

   4) Section 4.2.2.5.3 requires a tangent of at least 100 feet between curves unless the radius of both curves exceeds 700 feet. The access road has no tangent between reverse curves. Tr. I, 127.

   5) Section 4.2.2.8.1 limits dead-end or single access roads to a maximum length of 500 feet. The access road is an approximately 1,000-foot dead end road. Tr. III, 18.

   6) Section 4.2.3 requires a minimum width for residential streets of 50 feet. The paved access drive is 20 to 24 feet wide. A sidewalk of unknown width is planned for one side of the roadway. Tr. III, 19, 98-99.

   7) Section 4.2.4.1 requires a maximum centerline grade of 7% for residential streets. The access road has a centerline grade of up to 10%. Tr. III, 18, 38-40.

   8) Section 4.2.4.2 states that where curves and grades combine to create a potentially dangerous driving condition, the Board may require a suitable amount of super elevation of the curves or other protection.

   9) Section 4.2.4.4. limits the grade of subdivision streets to a maximum of 2% for a distance of 100 feet from the nearest exterior line of the intersecting street. The access drive has a grade of 3% for 100 feet from the intersection with Lexington Street. Tr. I, 83.

   10) Section 4.3.3 requires access easements and right of ways to park and conservation land or for use by emergency vehicles to be secured for the benefit of the City and to be 25 feet in width. No emergency access is provided for this project, and the sole access is 20 to 24 feet wide, except at its entrance. Tr. III, 19.

   11) Section 5.4.5 requires a minimum 30-foot pavement width for residential streets. The access drive has 20 to 24 feet pavement width, except at its entrance. Tr. III, 19, 98.

   12) Section 5.6.1 requires a sidewalk area 10 feet wide on each side of all streets. The development has a sidewalk of unknown width planned only on one side of the access drive. Tr. III, 98-99.

   13) Section 5.8 requires vertical granite curbing on both sides of all roadways. The access drive is proposed to have asphalt berm. Tr. III, 102.

   14) Section 5.9.1 requires the area in back of the sidewalk to be sloped at the maximum rate of three horizontal to one vertical (3:1). The access drive has a side slope of 1:1. Tr. III, 19.

the City requirements is presumed to be safe. Tr. III, 12-13. The Board suggests, conversely, that because the roadway does not comply with these requirements, it fails to meet generally accepted engineering standards. Although it acknowledges that its design does not meet all the City's requirements, Lexington Woods argues that its design meets generally accepted design standards and therefore is safe.

In evaluating the safety of the roadway's design it is important to look at all the factors involved, including the nature of the roadway. It is intended as a private way serving the residents of the proposed development. Section 4.1.3 of the Waltham regulations defines a "residential street" as "[a] street which generally serves only those residents living on that street and which can be considered to permanently serve the exclusive function of being a residential street." The Board's expert considered the proposed access roadway to be most similar to a residential street. Tr. III, 13. The developer's expert testified that the access drive should be evaluated as a private driveway, rather than a through roadway under requirements established by the American Association of State Highway and Transportation Officials (AASHTO) or the City of Waltham, since they are geared toward streets and roadways that are primarily throughways. Tr. II, 153-154.

The safety of the road design must be considered in light of the traffic it will serve. Although a private drive, the roadway would serve 36 households and visitors. However, it would not be a throughway serving traffic unrelated to the development. Therefore, the City requirements are not the sole standard for determining the safety of the roadway, but rather may be considered along with other design standards and circumstances. Certain provisions address safety concerns that are more relevant than others to the design and planned use of the access roadway.

a) Grade of the Access Drive

Waltham regulations establish 7% as the maximum allowed grade for a residential roadway and 2% as the maximum grade for the first 100 feet at intersecting internal streets. Exh. 4. The proposed access drive is approximately 1,000 feet in length. It slopes for the first 100 feet from Lexington Street at a 3% grade, curving to the left. The grade increases gradually to 8% and then to 10%, curving to the right and achieving a 10% grade somewhere in the range of 350 to 500 feet from the entrance, according to various experts. It runs at 10% for much of the roadway and then declines to approximately a 5% grade. It reaches a height of 75 feet above

Lexington Street. It terminates with a turnaround so vehicles can leave the site without having to stop. Tr. I, 83-84, 130-131; II, 112-113; III, 38-39, 76. Exh. 7, p. 4. The section of the driveway that has the 10% grade mainly runs parallel to Lexington Street. Tr. V, 95.

The project engineer testified that the access drive grade meets AASHTO standards, which set 15% as a maximum grade for local streets. He also stated that it is acceptable from an engineering perspective and should function adequately. Tr. I, 98-100; Exh. 37, p. 1. The developer's traffic consultant testified that the proposed driveway grades and geometry would not be unsafe. He believed a 3% approach grade at Lexington Street was reasonable. Tr. II, 28; Exh. 37, p. 2. Waltham's transportation director agreed that AASHTO set a 15% maximum grade standards for local streets and that the leveling area of the driveway near Lexington Street is satisfactory.[2] Tr. V, 5, 88, 92.

Other roadways in Waltham have grades equal to or greater than 10%. College Farm Road exceeds a 10% grade and has no leveling area at the entrance to Lexington Street. Tr. II, 28; Exh. 40.[3] The access driveway to the City YMCA, a curving roadway with a higher traffic volume than the site access drive, exceeds a 14% grade at some points. Tr. II, 28; III, 137; Exhs. 37, p. 2, 41. There was unrebutted testimony that approximately 8 to 15 other driveways on Lexington Street equal or exceed the slope of the existing site driveway on Lexington Street, which has a steeper slope than the proposed access drive. Tr. I, 50. The Waltham director of public works[4] testified that Stearns Hill Road, an access road into a multi-unit apartment complex, Windsor Village, was extremely steep, with some areas exceeding the grades on the access drive. Tr. III, 119. He agreed that the road could have a grade as high as 20%, and that Prentiss Street, Sherborn Place and Hillcrest Road all may have grades in excess of 10%. Tr. III, 134, 137. He also testified that a roadway in the Villages at Bear Hill has a grade of 12%. Tr. III, 136. Other towns, including Newton and Lynn, allow road grades of 10% or more. Tr. I, 40-41;

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2. When the developer's counsel read to the deputy fire chief a portion of the National Fire Protection Association (NFPA) guidelines, which state that grade shall not be more than 10 percent, the witness acknowledged that the access road grade was equal to the maximum under the NEPA guidelines. The Waltham fire department relies on these guidelines for fire prevention and safety. Tr. IV, 67, 89-90.

3. The intersection of College Farm Road and Lexington Street has experienced a relatively low number of traffic accidents, even though it is a through road with heavy traffic and has no leveling of the grade at the Lexington Street intersection. Tr. II, 34-35; Exh. 37, p. 2.

4. The director of public works is also the City engineer and the clerk of the board of survey and planning. Tr. III, 86.

III, 59. The police chief and deputy fire chief believed the grade of the access drive would adversely affect emergency access. Tr. IV, 12, 15-17, 67-68, 70-74. In making his assessment, the police chief considered the grades and configuration of the existing gravel driveway as well as Stearns Hill Road, both of which have steeper grades than the access roadway. Tr. IV, 39.

The record is unclear regarding when the other steep roadways in Waltham were built. Evidence in the record indicates that a grade of 10%, though at or near the limit of what is generally considered acceptable, is not necessarily unsafe and can be consistent with generally accepted design standards under some circumstances. However, an assessment of the safety of the grade must take into consideration the other elements of the road layout and design, including secondary access, roadway width, reverse curves, sight distance and snow storage issues and well as the purpose of the roadway, as discussed below.

b) Road Construction and Layout

The access drive does not meet the Waltham requirements for the extent and layout of sidewalks, granite curbing, roadway width, length and construction, and side slope. Waltham requires residential roads to be 50 feet wide, with 30 feet of pavement and 10 feet on both sides for sidewalks. At the intersection of the driveway with Lexington Street, the access drive would be 30 feet wide, with an entrance lane 14 feet wide and an exit lane 16 feet wide separated by a median. According to various experts, the roadway tapers to 24 feet to approximately the end of the 8% grade. From the beginning of the 10% grade, either approaching or where the housing access area begins, it is about 20 feet wide. Tr. I, 130-131; II, 112-113; III, 38-39; Exh. 7. The City also requires a width of 25 feet width for emergency secondary access. Tr. III, 110-111.

Focusing on the portion of the access drive that has a grade of 10%, the Board argues that the grade and the reverse curves[5] make the access drive unsafe because there is no "tangent" or straight area in the road between the curves to allow a motorist to recover control of the vehicle between curves. Tr. III, 17. At this location, the roadway is 20 feet wide and the development would have cars pulling in and out of the access drive, exacerbating the situation. Tr. III, 39-40.

The developer's project engineer testified that the width of the driveway conforms to acceptable engineering standards and the width and configuration of the driveway, turnaround and interior parking layout are adequate for emergency vehicle access and everyday usage and

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5. A reverse curve is a turn of the road in one direction immediately followed by a turn in the other. Tr. III, 17.

emergency vehicle turnaround. Tr. I, 93; Exh. 7. He also stated that the "cross slopes are typical of any roadway. The horizontal curvature is not out of the realm of the ordinary and I wouldn't expect there to be a problem. And that was the basis for the design." Tr. I, 114.

The site plan shows no designated area along the access road for the storage of snow plowed off the access road or single sidewalk. The City director of public works acknowledged that there is some area for snow disposal, but he expressed uncertainty about its adequacy. He noted that grass strips should be part of a sidewalk layout for snow storage off roadways. The access roadway design, including only one sidewalk, does not meet the City requirements for residential sidewalks. Tr. III, 91, 92, 98-99, 101, 121-22, 140. The roadway has a side slope of 1:1 compared to the 3:1 required by the City. Instead of granite curbing as required by the City, for most of the roadway, Lexington Woods proposed to use asphalt berm. The Board argues that granite curbing is important to create a barrier between the roadway and the sidewalk, to improve pedestrian safety, and to direct storm water into the storm water system. Tr. III, 19, 102-06.

The project engineer testified that snow would be pushed off on either side of the roadway, and that the slope on the southern side is not too steep to pile snow. He believed the piling of snow on either side would not reduce the width of the paved roadway. Tr. I, 134-135. Lexington Woods also suggested that snowplowing would be under the control of the condominium association, and that the Committee could impose a condition requiring the establishment of a snow removal plan to be followed by the development's snow contractors, to ensure that snow is removed from driveway. It points out that the Committee has previously commented that addressing snow removal is a typical problem in New England, and "[p]resumably a snow removal contractor to be engaged by the management will have the skill and equipment to be equal to the task." *Capital Site Management Assoc. Ltd. Partnership v. Wellesley*, No. 89-15, slip op. at 35 (Massachusetts Housing Appeals Committee Sept. 24, 1992), *aff'd*, No. 96-P-1839 (Mass. App. Ct. Feb. 18, 1998). In that case, the Committee approved a project with a serpentine road less than 200 feet in length, 24 feet wide with a grade of 8 or 9%. *Id.* at 25, 31-32.

We share the concern of the Waltham public works director that granite curbing would necessary for this type of roadway because it assists snowplow operators in defining roadways, particularly narrow roads. He testified that asphalt berms are inadequate for this function because either snowplow operators either plow up against asphalt berms, damaging them, or stay

a bit away from the berm resulting in the snow bank creeping into the roadway with successive snowfalls. Tr. III, 102-106. He also testified that granite curbing was especially important for steep roadways, both for channeling storm water and for snowplowing purposes.[6] Tr. III, 109. The Board's traffic expert testified that the safety of a 25-foot wide roadway with a 10% grade, compared to the average width of a passenger car of 6-8 feet, would be compromised if snow removal were not complete. Tr. V, 57-59. Reducing the width of the roadway through inadequate snow storage would reduce the available paved space for typical traffic or emergency vehicles and could eliminate pedestrian use of the sidewalk. Tr. III, 101-111. It would also increase the slipperiness of the roadway. All of these conditions would increase the likelihood of accidents.[7]

c) Design speed of the access road

The developer's traffic consultant defined design speed as the speed at which people will drive in a roadway based on the layout. With low volume roadways, streets or driveways, he stated that the design speed is not specifically chosen. Tr. II, 64-65. The developer's road design expert did not believe there was a specific design speed selected and carried out; rather the topography and existing site conditions led to the layout that resulted in a design speed of about 10 to 15 mph. Tr. II, 124-125. The factors that resulted in the design speed include grade, vertical and horizontal curves, rate of bend in the road, degree of cross slope, banking, and width. Tr. II, 124; Tr. III, 20-25. The weight of the testimony supports the conclusion that the design speed of the access drive is in the range of 10 to 15 mph, rather than the design speed of 30 mph for residential roads set out in the City regulations.[8] Tr. I, 110; II, 124; III, 14, 20; V, 37; Exh. 4.

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6. Lexington Woods argues that Waltham approved the Indian Ridge Project, a Chapter 40B project, allowing "Cape Cod" or asphalt berms on part of the access roadway to that site. The Indian Ridge project, approved in about 2002, was proposed for 264 units on an access roadway over 2,000 feet in length. Tr. III, 129-130; IV, 91. The record does not contain all relevant information about the approval of the Indian Ridge project.

7. Because the Committee is affirming the Board's denial of the comprehensive permit, it is not necessary to reach the issue of whether conditions, such as a requirement of granite curbing along the entire access drive, would be appropriate.

8. The Board suggests that the roadway is unsafe because it was designed based on topography, rather than on a predetermined design speed. Tr. II, 148. The Board makes much of testimony of the developer's project engineer, that he did not know the design speed but thought it was 20 mph, and testified that he deferred the decision of the proper design speed to the developer's traffic engineer, who

The Board's road design expert stated, "...lower volume roadways again have less risk associated with them. Higher volume roadways have more risk. So you design them more conservatively." Tr. III, 71. He acknowledged that AASHTO imposes lower standards for lower volume roads. He stated that, based on AASHTO requirements the road as designed is safe only up to approximately 15 mph but it would be unsafe for vehicles traveling faster. Tr. III, 21-25, 55. The developer's project engineer testified that he does not expect people to travel faster on the down slope of the drive because they would be familiar with the roadway and know the approach of the Lexington Street intersection. Tr. I, 118-119.

A number of witnesses, however, including the Board's roadway design expert and the developer's traffic consultant, testified that vehicles would likely travel faster than the design speed, possibly as fast as 20 or 25 mph. The Board's road design expert believed drivers would want to travel out of the access roadway as fast as they could. He also stated the combination of the grade and geometry would cause vehicles to tend to slide to the outside curve on the tight curves of the roadway, and ice and snow in winter would make the road even more potentially dangerous. Tr. III, 25-26, 64; II, 72.

The parties' experts also used stopping distances to analyze the safety of the roadway. An increase in grade increases the distance required for stopping, under either a breaking distance or a stopping sight distance assessment.[9] Tr. V, 95-99; III, 27; Exh. 34. The breaking distance (the distance it takes to stop once breaks are applied at a given speed) on a 10% grade is 3 feet more than that on a 7% grade at 15 mph, and 7 feet more at 20 mph, on wet pavement. Tr. V, 98-99; II, 27; Exh. 34, p. 5. The Board argues that because of the tight curves in the road, vehicles traveling at 25 mph would not see obstructions in the roadway in time to stop. A vehicle traveling 25 mph on a 9% downgrade (compared to the 10% grade on the access drive) would require 173 feet to stop. However, the line of sight at the 10% grade portion of the access drive is 100 to 150 feet. Tr. V, 55-56; I, 119.

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testified that he did not recommend a design speed to the project engineer. Tr. I, 110-113; II, 62. While the fact that the project engineer was not certain of the design speed of the roadway is of some concern, the evaluation of the safety of the roadway is based on its actual design, not the manner in which it was planned.

9. During the hearing witnesses used several measures of stopping distance: breaking distance, stopping sight distance, and in the context of student drivers at Lexington Road, decision sight distance. In this matter, the choice of the more appropriate method is inconsequential to the decision.

Although reverse curves are problematic on roadways with high speeds, their existence on a private drive does not automatically determine the drive to be unsafe. Lexington Woods argues that the safety concerns with reverse curves do not apply to the access drive because it is low-volume and low-speed. The Board's road design expert testified that the City's 350-foot radius requirement is consistent with the 30-mph design speed under the regulations. Tr. III, 16. He also stated that if a driveway "had curves [drivers] would slow down with the curves." Tr. III, 64. The City transportation director believed that the road conditions would cause drivers to slow down, with speeds closer to 10 to 15 mph due to the horizontal and vertical alignments of the roadway. He also testified that curves are used as a traffic calming technique, to reduce the speed of traffic on a specific roadway. Tr. V, 37, 92-93.

The access drive is a lower volume roadway as defined by AASHTO policies. The developer's roadway design expert testified that when dealing with a low-volume street or local street, such as the access roadway, one should not try to design for a high speed.[10] Tr. II, 154. Although several witnesses testified about the likelihood of drivers exceeding the design speed, for many drivers roadway layout could encourage drivers to slow down, limiting the sight distance necessary. Some drivers may speed out of impatience, but residents who are familiar with the topography of the roadway, the steep slope, tight curves and narrow width would know to drive carefully on the curves, which are likely to serve as a traffic-calming feature. See *Cirsan Realty Trust v. Woburn*, No. 01-22, slip op. at 9 (Mass. Housing Appeals Committee June 11, 2003). Thus, we find that the 15 mph design speed is on the margin of safety, but must be considered with the other characteristics of the roadway and development design.

d) Lack of secondary access

The project has only one proposed access road, an approximately 1,000-foot dead end road. Waltham's local rules prohibit dead end roads in excess of 500 feet. Municipal regulations limiting the length of dead-end roads seek to minimize the number of users, thereby limiting the risk associated with the single point of entry. Tr. III, 41.

The fire department tries to keep its response times to emergency and fire calls to 3-4 minutes, and dispatches fire engines from two different stations via different routes to eliminate

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10. Although Lexington Woods preferred to retain the curves and grade to keep the design speed low, rather than adding super elevation to the curves as suggested by the Board's expert, it suggested that super elevation could be provided if the Committee deemed it an appropriate condition. Tr. III, 61, 79.

delay in response. Tr. IV, 19, 62, 69-70. The deputy fire chief testified that a car blocking the access road could not easily be pushed out of the way because of the steep grade and riprap on either side of the paved roadway, although generally if a fire vehicle is blocked on a roadway, the fire department just pushes the obstructing vehicle aside. Tr. IV, 93-94. He stated that if the access road were blocked, emergency personnel would be required to climb the access road or adjacent hill by foot carrying all their heavy gear. If fire engines were not able to travel up the access road, response time would be increased by 45 minutes. He stated that secondary access would make the development safer. Tr. IV, 65-66, 67-74, 84-85.

The police chief shared the concerns that the single access, particularly with the steepness of the grade, and the potential for obstructions in the roadway during slippery, icy or snowy conditions, was unsafe both for crime prevention and emergency response. Tr. IV, 12, 14-17. He testified that he had experienced difficulty responding at Windsor Village, where a steep single access was blocked during blizzards, when police and fire officers had to leave the ambulance, police cars and fire trucks and traverse through steep grades to get equipment where it was needed, delaying response time. Tr. IV, 15-17. He expressed particular concern about the effect of such delays on life threatening emergencies, such as heart attacks, shocks, or choking. Tr. IV, 18-19. For this reason, be believed that "[i]t's a mistake to have anything in the city that doesn't have multiple access points," particularly if access is a steep roadway. Tr. IV, 16. The police chief also stated an accident or blockage in the access drive could cause backup traffic to spill out onto Lexington Street, which experiences congested and speeding traffic, and limited sight distances. Tr. IV, 13, 28-29.

The developer's roadway design expert stated there are numerous examples throughout the state of roadways of this length, and the concern really becomes one of emergency accessibility. He gave his opinion that the road length was appropriate in light of the number of units served by the roadway, and because the units would have sprinklers. Tr. II, 116-117; I, 23-24. This Committee has noted that sprinklers can improve fire protection for residents. *Hilltop Preserve,* No, 00-11, slip op. at 21. See also *Capital Site Management,* No. 89-15, slip op. at 28. However, as noted by the deputy fire chief, sprinklers are not a substitute for access to the site for firefighting, and they do not protect against medical emergencies. Tr. IV, 81.

The developer's project engineer and roadway design expert testified that the driveway length and design are consistent with generally recognized design standards and provide

adequate emergency access to the site and buildings without need for an alternative access. Tr. I, 93-94; V, 138. The Board's road design expert agreed that the fact that the access drive is a sole dead end access does not make it unsafe *per se*, noting as well that other municipalities allow dead-end roadways of lengths greater than the project's driveway length. Tr. III, 60. Lexington Woods submitted evidence that North Reading, Tewksbury, Boxford, Stow, and Billerica all allow such length dead-end roads. Tr. I, 100. It contends that if there were inherent safety problems with such dead-end road lengths, no municipalities would allow them. The Board's road design expert agreed that of the seven municipalities that he checked, two allow dead-end road lengths of 1,000 feet or more. Tr. III, 74. The Waltham transportation director agreed that safety precepts are universal and not dependent on the municipality. Tr. V, 93-94.

Lexington Woods argues, citing *Hilltop Preserve*, No. 00-11, slip op. at 23, that the Board has relied on hypothetical examples and improbable scenarios to suggest the seriousness of the risk that the access drive would be blocked to emergency vehicles, citing the police chief's reference to intentional blockages. Tr. IV, 25. Its project engineer testified he has not known of an instance when the lack of a secondary access caused a problem of access, and he believed blockage of the driveway at this site was improbable. Tr. I, 129-130. The deputy fire chief also acknowledged that although during the Blizzard of 1978 the fire department had to walk through snow to reach a development due to stranded cars all over the access roadway, Route 128 was also impassable in that blizzard. Tr. IV, 74-75, 90. Lexington Woods suggests that his testimony is not credible because in earlier correspondence to the Board in this matter he stated the developer had satisfied his concerns. Exh. 20.[11] *Hilltop Preserve* is not directly applicable. There, the Committee found loss of site access resulting from blockage of a major highway during sporting events to be extremely improbable. *Id.* at 22.

Lexington Woods argues that its project has been treated differently than other developments and that the access drive is being held to standards not required of other roadways in the City, even though it meets generally accepted engineering standards. It refers to two other single access ways in Waltham – the YMCA access drive and the Indian Ridge development. Indian Ridge, a Chapter 40B plan, with 264 proposed units on a single access road of more than

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11. Although the circumstances of the deputy fire chief's one-sentence letter to the Board stating he was satisfied are unknown, we find his testimony at this proceeding to be credible. See Tr. IV, 94-96.

2,000 feet, was apparently approved in about 2002.[12] Tr. III, 79-82, 86, 130; IV, 37, 91, 92, 95; Exh. 42. The Board's expert distinguished the Indian Ridge development, stating:

> For example, this road, although it appears as a mirror image configuration of the Lexington Woods plan, it has 20-foot wide pavement.[13] It is about 7 percent grade. It is super elevated three to 4 percent. It has a minimum radius of 100 foot, and it has no reverse curves. It is consistent with a 20 miles an hour design speed in all elements.
>
> So although the road looks similar, I did review this road with respect to its design speed and though that this was an appropriately responsible design, including the critical elements of design that seem to be missing from this plan, the Lexington plan.

Tr. III, 84. Regarding the YMCA single access drive on a 14% slope, Lexington Woods suggests that safe access may be even more crucial considering that the YMCA has a childcare facility. Tr. IV, 91. The chief of the Waltham police department testified that he was unaware of any problems experienced with access for response to the YMCA. Tr. IV, 4, 57. A childcare facility, and indeed, the entire YMCA, however, can and most likely would close in severe weather, whereas a residential development must be accessible at all times. It is not comparable to a Chapter 40B residential development. Although the Indian Ridge project is comparable in some ways, the access roadway has several distinguishing features, including a grade that meets the City requirements.

This is not the first time the Committee has been asked to evaluate safety concerns involving a steep, winding roadway into a development. In *Cirsan Realty Trust,* No. 01-22, slip op. at 8, this Committee noted regarding the safety of steep serpentine roadways, "[e]ach such design must be considered on its own merits. *Id.* at 10. In *Cirsan,* the maximum grade on the main roadway was 8%, with curves ranging from 40 to 60 feet in radius. During the hearing process the roadway was widened from 26 feet to 28 feet, the curves were modified, and a five-foot level shoulder added, making the roadway safe for a design speed of 15 mph. The secondary emergency access had a 14% grade. There, the Committee considered the board had not proved the design of the main and secondary roadways raised sufficient local concerns. *Id.* at 10, 11.

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12. The deputy fire chief testified that he recommended approval of the Indian Ridge project because he was given plans for secondary police and fire department access. However, when asked on cross-examination whether the Board approved the plans with a single access, he replied, "I'm not aware of that yet. But if you say so, it must be so." Tr. IV, 92.

13. A review of the Indian Ridge Plan shows that the width of the roadway is approximately 30 feet. The reference to 20 feet here appears to be a stenographic error. Exh. 42.

The Committee also considered similar access way arguments in *Capital Site Management,* No. 89-15, slip op. at 24-35. Although the board argued that the combination of the length, width and slope of the serpentine access road (less than 200 feet, with an 8 or 9% grade) was unsafe, especially during hazardous winter snow and ice conditions, the Committee found that "the provisions for pedestrian access and passage by trucks and other vehicles are adequately met and that no defect or hazard exists of gravity to outweigh the housing need." The Committee also noted "[f]or these concerns to be considered as defect in this proposal, it must be specifically proved that there is something about this proposal, or this site, that renders it particularly susceptible to one or more of these specific problems." *Id.* at 38, 31.

The Committee has also previously approved roadways with less than 30 feet paved width. See *Delphic Associates, LLC v. Middleborough,* No. 00-13, slip op. at 12-14 (Mass. Housing Appeals Committee July 17, 2002) (20-foot wide roadway); *Woodridge Realty Trust v. Ipswich,* No. 00-04, slip op. at 17, 24 (Mass. Housing Appeals Committee June 28, 2001) (project approved off 18-foot wide roadway). As with the question of slope, the safety of the roadway cannot be assessed solely on the basis of its width, but must be evaluated in light of all of its characteristics.

As land available for new housing becomes more limited in Massachusetts, more developers are proposing projects on parcels that present topographical challenges. It is important that legitimate local concerns be respected, mindful of the balance against the regional need for affordable housing. Whether this roadway presents too great a safety risk is essentially an analysis of all the characteristics of the roadway taken together. The roadway will be steep, winding and narrow, with tight curves and steep slopes on either side. There is little room for vehicles to pull off on the side. If a vehicle breaks down in the roadway, it will be difficult for emergency vehicles to pass by. If a large vehicle breaks down, even cars would be trapped at the development. On this record, we cannot determine why the Board approved the Indian Ridge project, another Chapter 40B development, despite the fire department's recommendation that the plan go forward with two means of access. The complete record there is not before us and we do not know what site specific facts may have led the Board to waive local requirements. We

also note that the grade of the access drive in that site is within City requirements. See *Capital Site Management*, No. 89-15, slip op. at 34.[14]

Although Waltham rules do not specifically mandate a secondary access, the requirements as a whole demonstrate a plan to secure emergency access. Exh. 4. In this matter, the lack of a secondary access to the development, combined with the extreme grade, and narrow serpentine roadway, gives rise to a valid local concern that residents of the development may lose access to or from the site. The Committee's decision in *Methuen Housing Authority v. Methuen,* No. 84-02, slip op. at 5-6, 8 (Mass. Housing Appeals Committee July 22, 1985) does not require a different result. There the Committee approved 42 units on an 820-foot single access road. However, the record shows no indication that that roadway possessed all the characteristics which cause serious concerns with the roadway in the Lexington Woods project.

The Board has presented sufficient evidence of local concerns regarding health and safety with respect to access to the site. The combination of the extreme steepness of the grade, the reverse curves, the narrow width of the roadway at the same portion of the road as the 10% grade, together with the lack of any other vehicular access to the development raise serious health and safety concerns, both in terms of roadway safety and emergency access. We are persuaded that the issues raised by the police chief and the deputy fire chief about the effect on emergency response times in the event of road blockage from an accident or snow, are sufficiently serious for a development of 36 homes. Although the Committee has approved narrow roads, or serpentine roads, or steep roads or even single access roads before, we find that the combination of these problematic elements leads to a health and safety concern that outweighs the regional need for affordable housing. Accordingly, on this basis, we affirm the Board's denial of the comprehensive permit.

The Board has raised additional bases for denying the comprehensive permit. Although we do not need to reach these issues, we shall address them briefly. We find that none of them are sufficiently serious to stand as a basis for denial of the permit.

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

2. Safety of Intersection with Lexington Road and Traffic Impact

The Board raised several issues affecting Lexington Road as a basis for denying the comprehensive permit: road capacity and levels of service, sight distances and traffic speed, busing of schoolchildren and inexperienced student drivers traveling in the area.

a) Road Capacity and Levels of Service

The access driveway for 36 residences is anticipated to generate 275 vehicle trips per day, an increase from the use generated by the existing single-family residence located at the site. Tr. II, 77. The Board contends that the design of the access roadway, including the offset of the access drive from the intersection of the school complex with Lexington Street, and the increased traffic from the development near the school complex, will jeopardize the safety of student drivers and pedestrians in the area, including schoolchildren. However, expert witnesses for the Board and the developer agreed that the development will not have a significantly adverse effect on the levels of service in the area and that Lexington Street has the capacity to handle the traffic from the site with the developer's proposed modifications. Tr. II, 8, 29; V, 78-79; Exhs. 34, 36, p. 5. Also the developer's traffic consultant testified that the outbound lane of the driveway would line up with the inbound driveway to the school complex. Tr. II, 103.

The Waltham transportation director agreed with the Board's peer review traffic consultant that the increase in traffic volume would not adversely affect the operations of the roads under a Level of Service (LOS) analysis.[15] Tr. V, 20-21; II, 14-15. Although he testified that the peer review consultant did not take into account specific characteristics that affect the traffic safety of the location, including secondary access, pedestrians, horizontal alignment and grades, obstructions limiting of sight distances, school buses, and inexperienced drivers traveling to and from the school complex, in an area with a high incidence of speeding, the transportation director did not testify that it is dangerous or unacceptable. Tr. V, 20-26. Thus road capacity presents no local concern here.

b) Sight Distances and Traffic Speed

The authorized speed limit for Lexington Street near the intersection with the access drive is 30 mph. Tr. II, 25; IV, 29, 38. There is a high incidence of speeding vehicles in the

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15. The peer review consultant stated that the developer's data relating to the project and its impact on Lexington Street addressed its original concerns. Exh. 38.

vicinity of the entrance to the development.[16] Tr. IV, 29; V, 13-15, 86. The proposed access road intersection would be just south of a horizontal curve on Lexington Street. A rock outcropping on the property currently limits sight distances for travelers southbound on Lexington Street. The City's transportation director testified that the line of sight at the intersection is between 240 feet and 400 feet depending on which southbound lane a motorist is traveling in and where an obstruction in the road is located. Tr. V, 32-35. See Tr. I, 138. He testified that the rock outcropping affected the safety of sight distance at the intersection with the school complex. Tr. V, 11-12.

The witnesses for both parties disagreed about whether stopping sight distance or decision sight distance should be used to determine how great a distance is necessary for southbound travelers approaching the intersection with the school complex. The Waltham transportation director noted that because a large number of inexperienced student drivers drive near the school complex, decision sight distances, rather than stopping site distances, should be used because under AASHTO standards, stopping sight distances "are often inadequate when drivers must make complex or instantaneous decisions, when information is difficult to perceive or when unexpected or unusual maneuvers are required." Exh. 48; Tr. V, 50-51. The Board argues that even under the stopping sight distance standard, a vehicle traveling at 75 mph would require 820 feet of sight distance. The developer argues that under AASHTO standards, the stopping sight distance for a vehicle traveling south on Lexington Street at 30 mph is 200 feet and the respective stopping sight distances at 40 and 45 mph are 305 feet and 360 feet. Exh. 47.

The developer's traffic consultant agreed that the current sight distance along Lexington Street is insufficient to accommodate travel speeds on that road. Tr. II, 105; Exh. 34, pp. 2, 6. To address sight distances, he recommended signalizing the intersection or removing the rock outcropping obstructing the view. While he noted that the rock outcropping could be cut back to improve visibility out the driveway looking up Lexington Street, he preferred signalizing the access drive intersection as a more practical approach. Tr. II, 25, 74, 106; Exh. 34, p. 6.

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

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16. The evidence regarding traffic accidents near this intersection is mixed. Although the Board's experts testified to the high incidence of accidents, Waltham's transportation director testified before the Board that there is not a high accident history at this location. Tr. V, 86-87.

Moreover, as Lexington Woods notes, it is not the developer's responsibility to remedy existing traffic problems on Lexington Street even if they are in the area where the proposed development is located. *Hilltop Preserve,* No. 00-11, slip op. at 30. Nor can it use this condition as a basis to deny a comprehensive permit. *Sheridan Development Co. v. Tewksbury,* No. 89-46, slip op. at 6 (Mass. Housing Appeals Committee Jan. 16, 1991) (existing off-site traffic hazard which will not be exacerbated in any significant way by proposed project is not legitimate local concern).

The Board's argument that current inadequate sight distances represent a valid local concern is without merit. Its argument is based in part on assumptions of drivers traveling 45 mph in excess of the speed limit. Moreover, its analysis omits consideration of the developer's proposed removal of a portion of the rock outcropping that limits visibility. Finally, as Lexington Woods points out, the sight distance limitations, and inexperienced student drivers, are existing conditions. The record does not indicate that the development would exacerbate the situation in any material way. On the contrary, the improvements proposed by the developer would alleviate many of the issues raised by the Board's witnesses. Thus, these issues afford no basis to deny a comprehensive permit.

c) Traffic Signalization

The current traffic signal at the intersection of Lexington Street and the school complex controls the north-south traffic flow on Lexington Street and traffic turning east into the one-way inbound entrance into the school property. There is also a pedestrian actuated signal across the southerly part of the intersection. The current driveway on the site is not controlled by the traffic light. Tr. II, 17. In addition to removal of obstructions including ledge and vegetation at the front of the site to enhance sight distance for vehicles leaving the site and for southbound traffic on Lexington Street, the developer proposes to install signal heads facing the site driveway so it would be controlled by the traffic light; install handicapped ramps on the crosswalks; cut the median across Lexington Street south of the intersection to make crosswalks across Lexington Street compatible with the Americans with Disabilities Act; revise the signal timing to incorporate the new driveway and include loop detector sensors in the pavement to accommodate and adjust for traffic flows; and provide a "No Turn on Red" sign leaving the site driveway. Tr. II, 18-19, 103-104; Exh. 36, p. 5. Lexington Woods also asserts in its brief that it would install an additional signal to enhance the visibility of the signal for southbound traffic on Lexington Street.

These proposals to improve the intersection would enhance the safety of the intersection for residents of the development. They should also improve the traffic concerns regarding drivers, pedestrians and visitors to the school complex. The Board cannot rely on the bad traffic situation in the vicinity of the site as a basis for denying the comprehensive permit. *Sheridan Development Co.,* No. 89-46, slip op. at 6.

d) Pick up and drop off of Schoolchildren

The business manager of the Waltham schools testified regarding school busing issues. Because pick up of children inside the proposed development is impractical in poor weather, and for route timing purposes, he recommended the developer obtain a right of way over an access driveway that exists to College Farm Road that would take the students and the bus off Lexington Street, or build a turnaround at the base of the roadway so the bus could turn off Lexington Street for loading and unloading children from the development. Tr. IV, 103-106, 121-126, 129-131; Exh. 46. Because of traffic hazards, the school department permits bus stops on Lexington Street in limited circumstances, where Lexington Street is straight with good sight lines and only one or two students involved, to minimize stopping time. Tr. IV, 123-124, 126-129, 132-136, 139. According to DHCD numbers, five school-age children are projected to reside in the development. Tr. I, 33. Middle and high school students could walk to the school complex.

Lexington Woods argues that the issues involving school children walking to school, school bus stops and student drivers are existing conditions relating to Lexington Street. It argues that the development would not significantly exacerbate traffic, especially since its proposal includes safety improvements to the line of sight, traffic signalization, and pedestrian crosswalks. Tr. II, 20-21. Schoolchildren in neighboring homes already can reach the school complex without traveling in front of the site. Tr. II, 20. Middle and high school students can walk to school using the roadway sidewalks, at least in good weather. The developer argues that for the few other schoolchildren who would ride a school bus, the buses can safely use the driveway and enter the site or can stop on Lexington Street. Tr. IV, 127-128. It also argues that the development will generate only a few vehicle trips during the peak school arrival and departure times. Exhs. 34, 36. See *Sheridan Development Co.,* No. 89-46, slip op. at 6.

Given the small number of students projected to live at the proposed development, the number who likely would actually use a bus is small enough that stopping on Lexington Street

for drop off or pick up, particularly with sight lines improved by the developer, would be consistent with the City's current practice. We note that placement of a median might alleviate the Board's concern about opposite direction traffic not stopping for school buses. Accordingly the issues regarding safe transport of schoolchildren are existing conditions, situations that would improve under the developer's proposal, or circumstances that could be addressed. They afford no basis to deny a comprehensive permit.

3. Storm water management system

Chester Brook and its related wetlands are located on the easterly side of Lexington Street. Currently, rainwater drains down from the site untreated onto Lexington Street, washing gravel from the driveway out into Lexington Street. From the site the water runs into catch basins or sheets across Lexington Street to enter Chester Brook. Tr. I, 86-89; II, 53-54; III, 138; Exh. 6.

Currently, the Lexington Street system has a pair of catch basins with a connection that comes out to Chester Brook in several places, as well as a storm drain further down Lexington Street. The City director of public works stated that the catch basins gather storm water in Lexington Street and solely serve the public way. Connections to the catch basins are not permitted. The developer proposes to put three 18-inch pipes across Lexington Street to bring the storm water from the site across Lexington Street over to the school department property, but not connect to the City pipes. Tr. III, 123-124. The proposal plans storm water collection and treatment to provide over 80% removal of total suspended solids resulting from site improvements. Exh. 10. The Board's original engineering consultant testified that the project would meet applicable state Department of Environmental Protection (DEP) and City storm water standards as well as generally acceptable engineering standards. He stated there would be no increase in the post-development rate of run off from the site and the quality of the water would be cleaner from post-site development. He acknowledged that the system meets DEP standards, but agreed with the Board's counsel that it could have been designed so that there was no increased volume of discharge into Chester Brook. Tr. II, 40, 54, 57.

Waltham's director of public works acknowledged that the drainage system as designed for this project may alleviate some of the current drainage problems if it were built as designed and then maintained. He stated that the catch basins would need to be cleaned four times a year, which is what the developer's proposed operations and maintenance plan specifies. Tr. I, 105-

106; III, 130-131, 139, 151; see Exh. 10. The developer's project engineer testified that the proposed storm water management plan would improve the existing conditions, which currently do not meet DEP standards. Tr. I, 89-90.

Lexington Woods argues that the proposal calls for adherence to applicable storm water standards, the water drainage arrangement is adequate, and the environment is not at risk. It also requests that a comprehensive permit expressly include licenses to install the drainage improvements as proposed.[17]

The Board argues that Lexington Woods' proposal is flawed because it requires the grant by the City of Waltham of an easement over a wetlands area in the school complex. It claims that this would require: 1) a declaration of surplus by the school department of land under its care and control pursuant to G.L. c. 41, § I5A; 2) potentially a two-thirds vote of the Massachusetts Legislature authorizing change in use of Article 97 land; 3) a two-thirds vote of the City council and approval of the mayor authorizing conveyance of this interest in land to Lexington Woods pursuant to G.L. c. 41, § I5A; and 4) compliance with the state procurement law, G.L. c. 30B. The Board argues that without the necessary approvals and land interests, Lexington Woods failed to demonstrate that it satisfied state law concerning storm water drainage and that it will not damage Chester Brook.

To support this argument, the Board relied on the views of the City director of public works, who stated that because the project would deposit storm water on school department property, the developer would need an easement from the school department, possibly through City council action, as well as a permit from his department to put in pipes to direct the water flow under Lexington Street. Tr. III, 125-126. At the hearing, Board counsel stated that a comprehensive permit waiver would not be applicable; rather the project would require an easement or authority to enter land. Tr. III, 149. Although the Board submitted this testimony and the Board's counsel's assertion concerning a required easement and necessary action by the City council to allow the use of school department property, it offered no legal expert testimony on this issue.

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17. To address the City Engineer's concern that a drainage maintenance plan be followed, which included periodic cleaning of catch basins, Lexington Woods proposes a requirement that the drainage system operations and maintenance plan be recorded as an exhibit to master deed and imposed as an obligation on the condominium association to run with the land. Tr. III, 151-152.

Lexington Woods has submitted evidence that its proposal complies with state and federal requirements. We find on the record that the proposed storm water drainage system is adequate. See *Franklin Commons Ltd. Partnership v. Franklin,* No. 00-09, slip op. at 6 (Mass. Housing Appeals Committee Sept. 27, 2001). Waltham cannot require the developer to remedy existing infrastructure problems even if they are in the area where the proposed development is located. See *Hilltop Preserve,* No. 00-11, slip op. at 15.

To the extent that the City's approval would be required, the comprehensive permit system is intended to provide one venue for those approvals. Under Chapter 40B, the Board and the Committee have the authority to waive City council votes and take action to obtain local permits and licenses. *Board of Appeals of Maynard v. Housing Appeals Comm.*, 370 Mass. 64, 68-69, 345 N.E.2d 382 (1976). Thus, the lack of these permissions is no basis to deny a comprehensive permit. Had the Committee reversed the Board's denial of this application, a condition requiring obtaining necessary property rights or approvals from state authorities could have been included in a decision. The concerns raised by the Board do not form the basis for the denial of a comprehensive grant.

4. Looping of water system

The Board argues that the lack of a fully looped water system would create a serious threat to the safety and health of the residents of the proposed development. It relies on testimony of the deputy fire chief that the lack of a looped water supply to the development could result in delayed response to fires of approximately 15 minutes because of the need to coordinate relay pumps, and about 1 hour, if the road were also blocked as a result of icing of a broken main. Tr. IV, 97-100.

The water pressure at Lexington Street is adequate. Tr. IV, 100. Lexington Woods suggests that the addition of "gates" or valves on the Lexington Street water main on both sides of the connection to the site water main and then on the site water line at the beginning of the line into the site would address the Board's concern, as installation of these valves would adequately protect against loss of water supply in the event of failure on either side. Tr. III, 132. The Board raises the concern that this would not protect against a break in the water main under the access road, which would interrupt the water supply to residents of the development without a water loop.

While not disputing that it would be preferable to have the water line looped on the site itself, Lexington Woods further argues that this requirement was not applied to the Indian Ridge development, a 264-unit complex with a longer dead end water line. Tr. III, 131-132.

The record is not sufficient regarding the nature of the water system at Indian Ridge to permit a comparison of the two sites. Although the Committee is of the view that such looping of water systems is a best practice and should be provided wherever possible, in light of the record before us, we need not decide the appropriateness of a condition requiring looping of the water system if a comprehensive permit had been granted in this matter. In any event, it is not the basis for denying a comprehensive permit.

VII. CONCLUSION

For the foregoing reasons, the valid local health and safety concerns raised by the lack of secondary access to the site, in combination with the grade and design of the single access drive into the proposed development, outweigh the regional need for affordable housing. The measures proposed by Lexington Woods in mitigation do not address these particular local concerns adequately to eliminate or sufficiently lessen the safety concerns presented. Accordingly the Board's decision denying the request for a comprehensive permit is affirmed.

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: February 1, 2005

Werner Lohe, Chairman

Joseph P. Henefield

Marion V. McEttrick

Shelagh A. Ellman-Pearl, Esq., Hearing Officer