**C O M M O N W E A L T H  O F  M A S S A C H U S E T T S**

**H O U S I N G  A P P E A L S  C O M M I T T E E**

**POND VIEW COMMONS, LLC**

v.

**LUNENBURG ZONING BOARD OF APPEALS**

No. 2023-01

# SUMMARY DECISION

November 22, 2023

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**C O M M O N W E A L T H  O F  M A S S A C H U S E T T S**

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| POND VIEW COMMONS, LLC,<br>Appellant, | ) | |
| v. | ) | No. 2023-01 |
| LUNENBURG ZONING BOARD OF APPEALS,<br>Appellee, | ) | |

**SUMMARY DECISION**

## I. INTRODUCTION AND PROCEDURAL HISTORY

This appeal was brought as an interlocutory challenge by Pond View Commons, LLC (Pond View or the developer) to a "Certificate of Partial Vote" issued by the Lunenburg Zoning Board of Appeals (Board) on February 8, 2023, which denied two waivers requested by the developer to extend sewer and water services for its affordable housing project. This case is presented to the Committee in an unusual procedural posture, since the Board has not issued a final decision granting or denying the requested comprehensive permit. Rather, the developer and the Board signed a stipulation to indefinitely suspend the proceedings before the Board pending a final adjudication of the authority, or not, of the Board to grant the requested waivers. Pond View's motion for summary decision and the oppositions thereto present undisputed facts for disposition of this issue.

Pond View filed its application for a comprehensive permit with the Board on August 18, 2022. The public hearing on the application was opened on September 14, 2022, and continued over several sessions on October 12, 2022, October 26, 2022, November 9, 2022, December 14, 2022, January 11, 2023, January 25, 2023, and February 8, 2023. Developer motion, Exh. A. During the course of the public hearing, the Board advised Pond View that it intended to deny the two waiver requests. Thereafter, the developer and the Board executed a stipulation which anticipated a vote by the Board denying the waivers to allow the extension of sewer and water

services on the basis of a finding by the Board that it lacked authority to grant the two waivers requested (stipulation). Developer motion, Exh. A. By a decision dated February 8, 2023, which was filed with the Lunenburg Town Clerk on February 21, 2023, the Board purported to deny the sewer waiver and water waiver.

Pond View filed its appeal on March 8, 2023. Following the initial conference of counsel on March 21, 2023, with the parties' agreement, the presiding officer invited the Lunenburg Water District (Water District) and the Lunenburg Sewer Commission (Sewer Commission) or their counsel to appear at the next scheduled conference to discuss whether these entities wish to participate in this matter. At the next conference on April 4, 2023, counsel for the Water District attended. Counsel for the Board represented that it is also counsel for the Sewer Commission and subsequently confirmed that the Sewer Commission wished to participate and authorized Board counsel to represent the Sewer Commission in this matter. At that conference, all parties, the Water District, and the Sewer Commission agreed that these entities should be given Interested Person status, and such status was granted so that they could address the motion for summary decision, which was filed by the developer on May 10, 2023.

The developer's motion seeks the following relief: (1) annul the Board's waiver denials; (2) find and declare that the authority to grant the requested waivers is within the jurisdiction of the Committee and the Board under the Comprehensive Permit Law, G.L. c. 40B, §§ 20-23, and the comprehensive permit regulations; and (3) order that the matter be remanded to the Board with direction that the Board grant the requested waivers and resume its consideration of the comprehensive permit application. Developer motion, p. 17. In support of its motion, the developer included the following exhibits: the Board's February 8, 2023, decision and stipulation, Chapter 185 of the Acts of 2010, and Chapter 17 of the Acts of 1939. The Board and the Sewer Commission filed a joint opposition and cross motion for summary decision (Board opposition), attaching exhibits, including the following additional exhibits: four memoranda and an email from the Sewer Commission to the Board, a letter from the Water District to the Board, a letter from K-P Law to the Board, and an excerpt from *Woodcrest Village Associates v. Maynard*, No. 1972-13 (Mass. Housing Appeals Comm. Feb. 13, 1974), *aff'd Board of Appeals of Maynard v.* Housing Appeals Comm., 370 Mass. 64 (1976). The Water District filed an

opposition to the developer's motion, with no exhibits attached (Water District opposition),[1] and a reply to each of those oppositions was filed by the developer.

## II. UNDISPUTED FACTS

The following undisputed facts are from the parties' exhibits. The project involves construction of 200 units of rental housing on 18.5 acres of property located at 318, 390, and 400 Howard Street, Lunenburg, Massachusetts (project). Developer motion, Exh. A. The project is located outside of the boundaries of the Lunenburg sewer service area and outside of the boundaries of Lunenburg's water district. Board opposition, Exh. 7. As part of its application, Pond View requested two waivers relevant here. First, the developer seeks approval to extend and connect the Town's common sewer system to the project to provide sanitary sewer service for the project (sewer waiver), waiving the requirement to obtain a vote of Lunenburg Town Meeting for a sewer connection located outside of the Town's current sewer service area. *Id*. Second, the developer seeks approval to extend and connect the Lunenburg Water District's drinking water system to the project to provide water service for the project (water waiver), waiving the requirement to obtain a vote of the Lunenburg Water District for a water connection located outside of the district's current service boundaries. *Id*. During the course of the public hearing, the developer and the Board engaged in extensive discussions with regard to the proposal to extend sewer and water service to the project and the Board solicited and considered comments and opinions from its counsel, developer's counsel, the Water District and its counsel, and the Sewer Commission and its counsel. Developer motion, Exh. A.

The Sewer Commission was established by special act pursuant to Chapter 185 of the Acts of 2010, "An Act Relative to the Sewer Service Area for the Town of Lunenburg" (Sewer Act). Developer motion, Exh. B. The Sewer Act provides in § 2.0 that "[n]o person shall extend or construct a sanitary sewer intended to be connected to a municipal common sewer to serve property, or any portion of a property, located outside the designated sewer service area," and, in § 3.0, that "[n]o property or portion of a property, located outside of sewer service zones shall be allowed to extend or construct a sanitary sewer." Section 4.0 of the Sewer Act authorizes "[o]wners of parcels of land or portion of parcels of land located *within* the sewer service area

[1] The Water District inadvertently titled its opposition as "Lunenburg Sewer Commission's Opposition to Appellant's Motion for Summary Decision," when it should be titled as the Water District's opposition.

not presently served by sewer [to] extend the existing sewer system to serve those parcels but such extension shall be at the discretion of the commission, subject to available capacity…." [Emphasis added.] The Sewer Act refers to the "sewer service area map" approved by the town meeting vote on May 2, 2009, which may be amended "by vote of the town meeting." The quoted provisions of the Sewer Act have also been codified as part of Chapter 200 of the Town's General Code. Board opposition, p. 5, Exh. 9. In addition, the sewer capacity of the sewer district is subject to an intermunicipal agreement among the Town of Lunenburg and the Cities of Fitchburg and Leominster. Developer motion, p. 12, n.10; Board opposition, Exh. 2. The Sewer Commission reported to the Board during the hearing that if sewer service to the project is ultimately provided and it exceeds the current limits under the intermunicipal agreement, the agreement may need to be renegotiated with the Cities of Fitchburg and Leominster. Board opposition, Exh. 5. The Sewer Commission's correspondence to the Board describes its ongoing concern over many years regarding sewer capacity and reserve capacity, which has been calculated based upon the current users as well as those parcels included in the sewer district that have been assessed and have been paying sewer betterments, as well as those that have paid sewer betterments but have not yet connected to the system. Board opposition, Exh. 2.

The Water District was established, and its boundaries defined, by special legislation pursuant to Chapter 17 of the Acts of 1939 (Water Act). Developer motion, Exh. C; Board opposition, p. 6, Exh. 10. Although the Water District is located within Lunenburg, it does not encompass the entire geographical area of the town. The Water District boundaries are set forth in § 1 of the Water Act and provide that the inhabitants of Lunenburg residing within the boundaries of the district "shall constitute a fire and water district and are hereby made a body corporate by the name of Lunenburg Water District of Lunenburg [sic]…." *Id*. Section 13 of the Water Act provides:

> Upon a petition in writing addressed to said board of water commissioners requesting that certain real estate, accurately described therein located in said town and abutting on said district, be included within the limits thereof, and signed by the owners of such real estate, or a major portion of such real estate, said water commissioners shall cause a duly warned meeting of the district to be called, at which meeting the voters may vote on the question of including said real estate within the district. If a majority of the voters present and voting thereon vote in the affirmative the district clerk shall within ten days file with the town clerk of said town and with the state secretary an attested copy of said petition and vote; and thereupon said real estate shall become and be part of the district and

> shall be holden under this act in the same manner and to the same extent as the real estate described in section one.

Developer motion, Exh. C, § 13. Meetings of the Water District may also be called upon the application of ten or more legal voters in the district, by a warrant from the Lunenburg board of selectmen, or from a justice of the peace. *Id.,* §8. The Water District has independent authority to enter into contracts; perform eminent domain takings; and acquire real property within the Town of Lunenburg by lease, purchase or otherwise. It may issue bonds and borrow money, assess taxes, hold elections, and take other actions. Board opposition, Exhs. 7, 10.

On January 27, 2021, the Water Commissioners called a special meeting of the Water District, at which the registered voters of the Water District voted to reject an article proposing to expand the Water District boundaries to include the project area. Board opposition, Exhs. 7, 8. The record does not indicate whether the developer could potentially construct the project by installing a private well or private wastewater treatment facility. The record also does not indicate whether the Lunenburg Town Meeting has taken any vote or action regarding expansion of the Sewer District to the project area.

## III. JURISDICTION OF THE COMMITTEE

As noted above, this matter presents itself at an unusual juncture in the comprehensive permit process. The Board has issued neither final approval nor a denial of the comprehensive permit application. Rather, the developer has filed this interlocutory appeal, arguing that pursuant to 760 CMR 56.05(9)(c), an appeal to the Committee is authorized if a board "takes action adverse to the Applicant under 760 CMR 56.03(8), 760 CMR 56.05(11), or a similar provision of 760 CMR 56.00, or otherwise violates or fails to implement M.G.L. c. 40B, §§ 20 through 23…." The preliminary decision to deny the two waivers at issue here, the developer argues, is "an adverse decision" that will "impede" and "prevent the development of low income housing," because the waiver denials will render the project infeasible. Developer motion, p. 6. Further, the developer argues, citing *Zoning Bd. of Appeals of Milton v. HD/MW Randolph Ave., LLC*, 490 Mass. 257, 263 (2022), that the "instant appeal is precisely the type of action the Supreme Judicial Court has determined the Committee is empowered to resolve." In support of this argument, the developer asserts that the Board has violated and failed to implement Chapter 40B by denying the sewer waiver and water waiver requests and the Board's denial constituted a decision similar to adverse action authorized under 760 CMR 56.03(8). Because Pond View's

project is not …feasible without the requested waivers and because such a denial is not consistent with local needs, the developer argues, this matter is directly comparable to interlocutory appeals of adverse preliminary actions taken under 760 CMR 56.03(8) and 56.05(11). Developer motion, p. 6.

The Board, the Sewer Commission, and the Water District do not dispute the Committee's jurisdiction to hear this motion. However, subject matter jurisdiction is an issue we may address *sua sponte. In re Harvard Pilgrim Health Care, Inc.*, 434 Mass. 51, 56 (2001), citing *Ginther v. Commissioner of Ins.*, 427 Mass. 319, 322 (1998) and *Litton Business Sys., Inc. v. Commissioner of Revenue*, 383 Mass. 619, 622 (1981). We believe it is important to address why this matter should be considered at this stage of the proceedings, where the Board has not issued a final decision either denying the permit or granting it with conditions. "The question at the heart of subject matter jurisdiction is: 'Has the Legislature empowered the [agency] to hear cases of a certain genre?'" *Milton,* 490 Mass. 257, 263*,* citing *Doe, Sex Offender Registry Bd. No. 3974 v. Sex Offender Registry Bd.,* 457 Mass. 53, 56, (2010). "The genre of cases [the Committee] is empowered to hear is developer appeals from adverse comprehensive permit decisions by local zoning boards of appeals that will impede or prevent the development of low income housing." *Id*., citing *Middleborough v. Housing Appeals Comm.*, 449 Mass. 514, 521 (2007) (intent of Chapter 40B is to streamline and accelerate permitting process). Furthermore, as the developer argues, 760 CMR 56.05(9)(c) authorizes an appeal to the Committee from a board decision where "the Board takes action adverse to the Applicant under 760 CMR 56.03(8), 760 CMR 56.05(11), or a similar provision of 760 CMR 56.00, or otherwise violates or fails to implement [Chapter 40B] …." The question here is whether the waiver denials, outside of a final decision by a board, constitute the kind of adverse action or violation or failure to implement Chapter 40B contemplated by 760 CMR 56.05(9)(c) or adverse decision by a board that will "impede" and "prevent the development of low income housing" described by *Middleborough,* 449 Mass. 514, 521.

We are unaware of Committee proceedings in which we previously entertained "piecemeal" review of a local board's decision. There is certainly a risk that doing so here could result in a precedent leading to interlocutory appeals more often, which ultimately may result in prolonging, rather than streamlining, the comprehensive permit process. Here, however, Pond View and the Board have stipulated that the Board will deny the requested waivers, and the

Board asserts it has no authority to grant the waivers. The undisputed evidence for this motion shows that the Water District has already denied an extension of water service to the project. Under this unique circumstance, where water service for the project has been denied, the Board's decision to deny the requested waivers, at least with regard to water service, will impede or prevent the development of low income housing within the meaning of 760 CMR 56.05(9)(c). In making this determination, we also take into account the parties' stipulation and agreement that the Committee hear the issue at this stage and their prior attempts at resolution of the matter between themselves and with the Sewer Commission and Water District. Both parties agree that resolution of this issue at this time will ensure a more efficient resolution of this matter. Based on the specific facts presented here and the unique nature of the disputed waiver requests, we conclude that the Committee has jurisdiction to render a determination on the issue presented.

## IV. STANDARD OF REVIEW

Summary decision is appropriate on one or more issues that are the subject of an appeal before the Committee if "the record before the Committee, together with the affidavits (if any) shows that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor as a matter of law." 760 CMR 56.06(5)(d); *see Catlin v. Board of Registration of Architects*, 414 Mass. 1, 7 (1992); *Warren Place, LLC v. Quincy,* No. 2017-10, slip op. at 4 (Mass. Housing Appeals Comm. Aug. 17, 2018); *Delphic Assocs., LLC v. Duxbury,* No. 2003-08, slip op. at 6 (Mass. Housing Appeals Comm. Sept. 14, 2010); *Grandview Realty, Inc. v. Lexington,* No. 2005-11, slip op. at 4 (Mass. Housing Appeals Comm. July 10, 2006).

A review of the papers submitted by the parties, the Sewer Commission and Water District in support of their cross motions for summary decision demonstrates that no genuine issue exists regarding the facts that are material to the issues raised. No affidavits or documents attesting to a factual dispute were filed. Thus, the material facts presented for summary decision are undisputed.

## V. DISCUSSION

### A. Are the Sewer Commission and Water District Local Boards?

Pursuant to 760 CMR 56.02, a local board is defined as:

… any local board or official, including, but not limited to any board of survey;

> board of health; planning board; conservation commission; historical commission; water, sewer, or other commission or district; fire, police, traffic, or other department; building inspector or similar official or board; city council or board of selectmen. All boards, regardless of their geographical jurisdiction or their source of authority (that is, including boards created by special acts of the legislature or by other legislative action) shall be deemed Local Boards if they perform functions usually performed by locally created boards.

The developer argues that both the Sewer Commission and the Water District must be considered "local boards" within the meaning of the regulation and because the plain language of the definition includes "boards created by special acts of the legislature or by other legislative action." Developer motion, pp. 8-9. The Board, the Sewer Commission and the Water District argue that neither the Sewer Commission nor the Water District are local boards within the meaning of 760 CMR 56.02 for several reasons.[2] First, they argue that the relief sought by the developer is not relief that either the Sewer Commission or the Water District can grant. The Sewer Commission, they argue, has no independent authority to allow expansion of the sewer district area to include the project site, which can only be accomplished by either legislative amendment of the Sewer Act or by vote of the Lunenburg Town Meeting. Board opposition, p. 10. The Water District's authority, they argue, is no different, and expansion of the district cannot be accomplished except by a vote at a duly warned meeting of the district voters. Based upon the requirements of the special acts, they argue, both the Lunenburg Town Meeting and the Water District meeting are legislative bodies, not executive boards, and neither performs functions "usually" performed by "locally created boards" within the meaning and language of the Comprehensive Permit law. *Id.*, p. 11.

We agree with the developer that the Sewer Commission and the Water District are local boards. We have previously determined that a town sewer department constitutes a local board for the purposes of Chapter 40B. *See Wilmington Arboretum Apts. Associates Limited P'ship v. Wilmington*, No. 1987-17, slip op. at 25-28 (Mass. Housing Appeals Comm. June 20, 1990). *See also Peppercorn Village Realty Trust v. Hopkinton*, No. 2002-02, slip op. at 10 (Mass. Housing Appeals Comm. Jan. 26, 2004), citing *Board of Appeals of Maynard v. Housing Appeals Committee*, 370 Mass. 64, 68-69 (1976). Pursuant to § 4 of the Sewer Act, owners of land *within*

[2] The arguments offered by the Board relate to the authority of both the Sewer Commission and the Water District, while the arguments offered by the Sewer Commission and Water District relate only to their respective special acts, but for ease of reference, these arguments are referred to in the aggregate.

the sewer service area not presently served by sewer may extend such service to their property and such extension "shall be at the discretion of the commission." [Emphasis added.] Similarly, §§ 6 and 7 of the Sewer Act authorize existing user capacity to be changed or expanded in the same manner, without the requirement of a town meeting vote. Developer motion, Exh. C; Board opposition, Exh. 9. Those are the kinds of "usually performed" functions contemplated by the definition of local board and whose ordinary jurisdiction may be performed by a zoning board. *See Dennis Hous. Corp. v. Zoning Bd. of Appeals of Dennis*, 439 Mass. 71, 80 (2003) (mere fact that historic district was created by act of Legislature does not operate to negate overwhelmingly "local" nature of its implementation and operation). *See also Washington Green Development, LLC v. Groton*, No. 2004-09, slip op. at 16 (Mass. Housing Appeals Comm. Sept. 20, 2005) (provision of public utilities is sort of government function Chapter 40B intended to regulate). Furthermore, there is no state agency that has oversight of the workings of either the Sewer Commission or the Water District and both entities were created for the benefit of their respective districts, not for the state at large. *See Dennis Hous. Corp.,* 439 Mass. 71, 81-82. For these reasons, we consider the Sewer Commission and the Water District's operations are local in nature, despite their special legislative origins. Accordingly, the Sewer Commission and the Water District are local boards within the meaning of 760 CMR 56.02.

### B. Are Provisions of the Special Acts Local Requirements and Regulations that the Board and Committee May Waive?

Local requirements and regulations are defined in 760 CMR 56.02 as:

> … all local legislative, regulatory, or other actions which are more restrictive than state requirements, if any, including local zoning and wetlands ordinances or by-laws, subdivision and board of health rules, and other local ordinances, by-laws, codes, and regulations, in each case which are in effect on the date of the Project's application to the Board.

The developer argues that both the Sewer Act and the Water Act are local requirements and regulations, relying on *Maynard,* 370 Mass. 64 and *135 Wells Avenue, LLC v. Newton*, No. 2014-11 (Mass. Housing Appeals Comm. Dec. 15, 2015).[3] Pointing to the *Maynard* decision, the developer argues that the Supreme Judicial Court "expressly determined that where extension of

[3] The developer cites the Committee's decision in *135 Wells Avenue* as support for its argument that *Maynard* "allow[s] the Committee to dispense with a town meeting vote to allow a sewer extension." Developer motion, p. 11.

a sewer line from an existing public sewer requires a town meeting vote, zoning boards and the Committee may 'dispense' with such a vote as a 'requirement or regulation not consistent with local needs.'" Developer motion, p. 11, citing *Board of Appeals of Maynard*, 370 Mass. 64, 68-69. Pond View argues in particular that the Sewer Act's town meeting vote requirement and the Water Act's Water District vote requirement are "local requirements and regulations," that the Board and Committee may waive under 760 CMR 56.02. In support it also cites *Dennis,* 439 Mass. 71, 80, in which the Supreme Judicial Court concluded that a zoning board was empowered to act on behalf of a local town historic district committee to issue permits and approvals under the requirements and regulations of that committee, which was established by state legislation. *Id.* at 82-83; Developer reply, p. 8.

Pond View also argues that "local board" is a term of art that encompasses legislative bodies in addition to executive boards. *Id.*, p. 3. Although 760 CMR 56.02 does not include "town meeting" in its definition of "local board," the developer nonetheless argues that if the drafters of the comprehensive permit regulations intended there to be "such an important disparity in treatment of the legislative bodies of cities and towns, it is far more likely that the distinction would have been expressly stated in the Comprehensive Permit Regulations." This argument, the developer urges, is consistent with *Maynard,* 370 Mass. 64, 68-69, which, it claims, "unambiguously determined that where extension of a sewer line from an existing public sewer required a town meeting vote, a zoning board and the Committee were empowered to 'dispense' with such vote as 'a requirement or regulation not consistent with local needs.'" Developer reply, p. 4.

Finally, the developer argues that policy reasons support finding that both town meeting and the Water District meeting are local boards, and that their votes are local requirements and regulations which the Board and the Committee are authorized to waive. Otherwise, the developer contends, municipalities would be empowered to enact laws requiring town meeting or district meeting votes on permits and approvals necessary to the construction of affordable housing. Such town meetings or district meetings, the developer argues, would not be required to consider the "regional need" for affordable housing, with no recourse under the Comprehensive Permit Act for negative votes preventing the construction of affordable housing. Developer reply, p. 6.

The Board, the Sewer Commission and the Water District dispute the characterization of

the Sewer Act and Water Act as local requirements and regulations, asserting that the special acts at issue here "cannot be likened, in their entirety, to quantitative zoning bylaw requirements, or qualitative wetlands protections, or even standards aimed at protection of the public health, or stormwater control, or historic preservation." Board opposition, p. 12. They further argue that the developer did not ask the Board to act on behalf of a local board by issuing a permit or approval or waiving a requirement within that board's purview. Rather, they argue the developer asked the Board to "alter the Legislative edict or act on behalf of Town Meeting and District Meeting voters to extend the boundaries of the SSA and Water District, respectively," which, they assert, the Board was not permitted to do, and the Committee cannot do. *Id.*, pp. 12-13.

The Board, Sewer Commission and Water District also argue that neither the Board nor the Committee has the authority to grant the requested waivers. Citing *135 Wells Avenue*, 478 Mass. 346, 354 (2017), they argue that "…the power of [a zoning board of appeals] derives from, and is generally no greater than, that collectively possessed by these other bodies" and that a waiver of the voting requirements under the special acts does not fall under the category of a permit or approval that a local board has to authority to grant. Board opposition, p. 13; Water District opposition, p. 5. In addition, they cite *Zoning Bd. of Appeals of Groton v. Housing Appeals Comm*., 451 Mass. 35, 41 (2008), to argue that "the requirements of Town Meeting and District Meeting authorizations are 'directive[s] imposed by the Legislature…' and the Committee 'cannot…act as the legislative body of a municipality' or independent District." Board opposition, pp. 14-15.

The Board, Sewer Commission and Water District further argue that the developer reads *Maynard* too expansively, asserting the decision must be read in the context of its underlying facts, as outlined in the Committee's decision, *Woodcrest Village Associates, supra,* No. 1972-13, slip op. at 18. In *Maynard*, sewer service was already available to the project and the developer had agreed to construct at its own expense a sewer line to tie into the public sewer. The decision in *Maynard,* 370 Mass. 64, 68-69, related to the performance of the developer's agreement to extend a public sewer line as a condition of the permit. The Board, Sewer Commission and Water District claim that in *Maynard,* the board rejected that offer, insisting on a town meeting vote on the funding of the sewer line. They argue that the issue here is the extension of service, not simply its funding. Furthermore, they argue that *Maynard* contained minimal explanation for its holding, stating only that the board's argument was "frivolous" and

"because of the hostility to the project no such vote could be obtained…" allowing the Committee to dispense with the vote requirement. Water District opposition, p. 6, quoting *Maynard*, 370 Mass. 64, 68-69.

The *Maynard* decision has been distinguished by the Supreme Judicial Court in both *Groton*, 451 Mass. 35, and *135 Wells Avenue,* 478 Mass. 346. In *Groton*, the court overturned the Committee's decision that granted an easement over town land for the benefit of the proposed development ruling that grants of real property rights may only be made by town meeting. The court rejected and annulled an order that the Town Electric Light Department grant an easement on its property to allow site work. In doing so, the court reasoned that, "to obtain approval to develop a site (whether for affordable housing or another use), a developer would not usually be required to obtain easements from abutters, and a local board would have no authority to direct an abutter to grant an easement." *Groton*, 451 Mass. 35, 40. Because the local board had no such authority, neither did the Committee, as the grant of an easement is a transfer of land, not a "permit or approval" and, in the case of a grant of an easement by a municipality, is governed by state law. *Id.* at 41. The court distinguished *Maynard* as a case involving an agreement by the developer to bear the costs of the sewer extension rather than an attempt to usurp a town's legislative authority, stating "the committee's power is … circumscribed by the fact that it lacks authority to override State law." *Id.,* citing *Jepson v. Zoning Bd. of Appeals of Ipswich*, 450 Mass. 81, 85 n. 9 (2007); *Board of Appeals of N. Andover v. Housing Appeals Comm.*, 4 Mass. App. Ct. 676, 680 (1976). *Groton's* distinction was made even though *Maynard* allowed the Committee to act in place of a town meeting vote. Like the easement in *Groton,* the votes required under the Sewer Act and the Water Act are governed by state statutes which provide that such decisions must be made by a town meeting. *Maynard* is silent on the factual basis of the board's argument that the sewer extension required a town meeting vote and whether it was based on state law.

In distinguishing the *Maynard* decision, *Groton* held that, with regard to the authority to convey an easement, "town meeting authorization … is a directive imposed by the Legislature" and "this legislative judgment cannot be stretched to empower the committee to act as the legislative body of a municipality for purposes of land transfers." *Groton,* 451 Mass. 35, 41, citing *LeClair v. Norwell*, 430 Mass. 328, 336 (1999). The court reaffirmed its reasoning in *Groton,* where they also stated:

> The phrase "permits or approvals," read in the context of [Chapter 40B], refers to building permits and other approvals typically given on application to, and evaluation by, separate local agencies, boards, or commissions whose approval would otherwise be required for a housing development to go forward. This interpretation is virtually compelled by the language, "who would otherwise act with respect to such application," appearing in [G.L. 40B,] § 21. The interpretation is further supported by the examples expressly cited in § 21, namely, action typically required by local permitting authorities with respect to "height, site plan, size or shape, or building materials."

*Groton,* 451 Mass. 35*,* 40. Thus, *Groton* appears to have distinguished *Maynard* as limited to the authority of a board or the Committee to require connection to an already existing sewer system for property owners already entitled to that sewer service.

Similarly, in *135 Wells Avenue*, 478 Mass. 346, 356, the court held that an order directing a grant of an interest in land is "an action fundamentally different from the types of 'permits or approvals' that G.L. c. 40B authorizes a local zoning board to undertake." The court also noted, "in *Maynard*, we stated that the [Committee] could dispense with a town's requirement that a developer perform its agreement to extend a sewer line to an affordable housing development, pursuant to its power to dispense with 'requirements or regulations' under G L. c. 40B." *Id*. at 352. Distinguishing *Maynard* this way makes sense, given that landowners abutting a way with public sewer with adequate capacity have a statutory right to connect to it, *Clark v. Board of Water and Sewer Comm'rs of Norwood*, 353 Mass. 708, 711 (1968), and given that the authorizations for those connections are called permits (*e.g.,* a "sewer-connection permit"). And in *Maynard*, sewer service was already available to the project and the developer there had agreed to construct at its own expense a sewer line to tie into the public sewer. *Maynard,* 370 Mass. 64, 68-69.

We consider the reasoning in *Groton* to be controlling here since it rests on the distinction between the permitting and legislative functions on which that decision is based. The Water Act and Sewer Act, as enabling statutes, authorize both executive and legislative functions. For example, a select board can issue permits and licenses, but cannot transfer or sell real estate without authorization from town meeting. G.L. c. 40, §§ 15, 15A. While the special acts here authorize the Sewer Commission and the Water District to perform their usual executive functions, such as those discretionary functions discussed above (*see* § II, *supra*), including entering into contracts, performing eminent domain takings, and acquiring real property within the Town of Lunenburg, they do not authorize them to waive legislative

mandates. The special acts grant neither the Sewer Commission nor the Water District the authority to waive the Town Meeting or Water District votes, respectively, or to expand their respective districts without such votes; *See 135 Wells Avenue*, 478 Mass. 346, 357 (noting that only the aldermen's permitting authority, and not their authority to control city's property interests, is subject to waiver under c. 40B).

We believe that a town meeting or district meeting vote to expand the boundaries of a water or sewer district is more consistent with the court's characterization of a legislative, rather than a permitting function, by determining what areas are eligible for the privileges of inclusion in a district, and such a vote is unlike the type of permit or approval typically or routinely required for a comprehensive permit to go forward.[4] The unavailability of sewer and water service outside the service areas, arising from the project's location outside of those districts, is not a regulatory barrier akin to dimensional, use or other typical local regulations. Rather, expansion of utility services areas cannot be accomplished without the necessary town and district meeting votes and not by a zoning board of appeals or even the Committee. This situation is analogous to one where a town faces a water supply crisis and limits or prohibits new connections to already available water service. In that instance the Committee ruled that we would be able to override local water department rules, but we had no power to override a state-imposed moratorium on new water connections. *See Hopkinton, supra*, No. 2002-02, slip op. at 13, n.9.

*Dennis* does not support Pond View's position that creation of a local committee by state legislation authorizes a zoning board to override state requirements. *See* Developer reply, p. 8. In *Dennis,* the Legislature created a historic district committee comprised of several Cape Cod

[4] Unlike the Town meeting vote and the Water District vote, established by special act, a zoning bylaw is a local requirement or regulation, which a zoning board has the authority to waive as part of the comprehensive permit process. *Board of Appeals of Hanover v. Housing Appeals Comm*., 363 Mass. 339, 354 (1973). However, a zoning board does not have the authority to amend a zoning bylaw. The authority for amending a zoning bylaw is vested in town meeting pursuant to G.L. c. 40A, § 5. That legislative mandate does not make a zoning bylaw any less of a local requirement or regulation—a zoning board may still act pursuant to the authority it holds thereunder—but it may not amend a zoning bylaw on its own authority. Similarly, the Sewer Commission and the Water District can take those actions they are authorized to take under their respective special acts, as outlined above. However, neither of the special acts at issue can be amended without a vote of their respective legislative bodies, *i.e.*, the Lunenburg Town Meeting and the Water District. The Sewer Act and the Water Act are state laws which neither the Board nor the Committee can waive. *See Holliston v. Housing Appeals Comm*., 80 Mass. App. Ct. 406 (2011), *F.A.R. den.,* 460 Mass. 1116 (2011).

towns, a historic district comprised of portions of those towns, and established a "town historic district committee" for each of those member towns. Within the historic district, no building or structure can be erected without a certificate of appropriateness issued by the town historic committee, and the building inspector may not issue a building permit unless the applicant submits the requisite certificate of appropriateness. *Dennis,* 439 Mass. 71, 74. The Legislature also established the Old King's Highway regional historic district commission (historic commission), which is comprised of the chairpersons of each of the town historic committees. Persons aggrieved by a town historic committee's grant or denial of a certificate of appropriateness may appeal to the historic commission, and the historic commission may reverse the town historic committee's decision if the committee "exceeded its authority…." *Id.* at 75. The Supreme Judicial Court determined that "[w]ithin the operational structure of the historic district, the functions of the town historic committee are directly linked to those of the building inspector," who is the local official that operates to uphold and enforce the town historic committee's power. *Id*. at 79-80. As such, the town historic district committee is a local board, despite its origins in the special act creating it. Unlike the Sewer Act and the Water Act, the state legislation in *Dennis* authorized the town historic district commission to act independently, without town meeting or district meeting votes. In *Dennis,* the court stated:

> While it is true that the Legislature set the general standards to be employed in assessing an application for a certificate of appropriateness, it is left to the locally elected and locally appointed historic commission and town historic committees to administer the historic district, exempt geographic areas and categories of features from its requirements, and decide applications for certificates of appropriateness....

*Id.* at 81. Nor was there an attempt in *Dennis* to have the board or the Committee alter the boundaries of the historic district set by the legislative act.

Finally, in *135 Wells Avenue, LLC*, 478 Mass. 346, 358, n.11, the Supreme Judicial Court rejected the developer's policy argument that municipalities could start enacting laws containing the need for town meeting votes to avoid the comprehensive permit process. In response to the developer's argument that a decision denying the board's and Committee's authority to override a deed restriction would "allow municipalities to influence private landowners to create deed restrictions so as to prevent the development of affordable housing," the court stated, "a plaintiff is not left without a remedy in such cases," as they may still pursue a claim against a

municipality for bad faith as part of an appeal under G.L. c. 30A, § 14. *Id.* In this case, there has been no assertion that either the Sewer Act or the Water Act was enacted in order to thwart affordable housing development in the town of Lunenburg or that the Board was acting in bad faith in denying the waivers. The sewer system currently serves less than one-tenth of the population of Lunenburg. Board opposition, Exh. 3. Likewise, the Water District was established in 1939, long before enactment of Chapter 40B, and the developer has offered no evidence that the vote of the Board, or the vote of the Water District denying the developer's request to expand the district, was taken in bad faith or as an attempt to thwart affordable housing. *See Zoning Bd. of Appeals of Lunenburg v. Housing Appeals Comm.*, 464 Mass. 38, 48–49 (2013) (Committee recognized that town's long-term comprehensive planning efforts, "'when expressed in a bona fide, effective master plan or comprehensive plan,' may be so substantial a local concern as to outweigh the regional need for affordable housing").[5]

Accordingly, neither the Board nor the Committee has the authority to grant the requested waivers, which require votes by the Lunenburg Town Meeting and the Water District Meeting. We therefore grant summary decision for the Board on the issue of its authority to grant these waivers.

### C. Do the Board and the Committee Have the Authority to Order the Amendment of the Intermunicipal Agreement?

Even if the Board and the Committee had the authority to order waiver of the special act's Town Meeting and Water District voting requirements, the expansion of the sewer capacity to accommodate the project is subject to an existing intermunicipal agreement between the Cities of Fitchburg and Leominster and Lunenburg. The developer argues that the "alteration, amendment, or renegotiation" of the intermunicipal agreement to accommodate extension of the sewer service to the project is an action that would be "achievable by the Sewer Commission or the Select Board," and, as such, constitutes a local requirement that may be acted upon by the

[5] Nor is there evidence that the Water District or Sewer Commission has voted to expand their respective districts in the past for unsubsidized housing developments, potentially raising a question of unequal treatment. *See Lever Development, LLC v. West Boylston*, No. 2004-10, slip op. at 26 (Mass. Housing Appeals Comm. Dec. 10, 2007); 760 CMR 56.07(2)(a)4. In *Lever,* we stated that "towns may not reserve capacity for other potential future users at the expense of affordable housing. '[S]ewer commissioners are not empowered to postpone presently sought connections to give precedence to connections contemplated for the future....'" *Id.* at 24, quoting *Oceanside Village, LLC v. Scituate*, No. 2005-03, slip op. at 12-13 (Mass. Housing Appeals Comm. July 17, 2007).

board and the Committee. Developer motion, p. 12.

The Board and the Sewer Commission argue that neither the Board nor the Committee is authorized to enter into contractual negotiations or make contractual commitments on behalf of the Town or its Select Board or Sewer Commission. Such contractual dealings, they argue, are not "the functional equivalent of permits or approvals" that can be waived under Chapter 40B. They point to G.L. c. 40, § 4A, which governs intermunicipal agreements, and note that statute provides these agreements must be authorized "by the parties thereto," as well as by the board of selectmen and entered into by the "chief executive officer of a city or town, or a board, committee or officer authorized by law to execute a contract in the name of the governmental unit." Furthermore, they state that, where capital expenditures or borrowing is required, town meeting authorization is necessary. *See* G.L. c. 40, § 5; G.L. c. 44, § 8.

The parties also disagree regarding whether any change to the intermunicipal agreement would be necessary to extend service to the project. They submitted conflicting evidence on the capacity required for the project and the unused, existing capacity available for future uses in Lunenburg, and neither party provided a copy of the intermunicipal agreement to evidence its terms. Therefore, this issue is not ripe for summary decision, and we need not decide whether the Board or the Committee has the authority to dictate the terms of that agreement. Summary decision is denied on the question of the Board and Committee's authority to order amendment of the intermunicipal agreement.

## VI. CONCLUSION AND ORDER

Based upon the foregoing, we find that there is no genuine issue as to any material fact with regard to the authority of the Board and the Committee to grant the requested waivers of the Town Meeting vote and the Water District vote under the Sewer Act or the Water Act. Therefore, pursuant to 760 CMR 56.06(5)(d), the Board is granted summary decision in its favor as a matter of law determining that neither the Board nor the Committee may grant the requested waivers. Summary decision is denied on the issue of the authority to order the amendment of the intermunicipal agreement among Lunenburg, Fitchburg and Leominster. This matter is remanded to the Board further proceedings on Pond View's application for a comprehensive permit.

**HOUSING APPEALS COMMITTEE**

November 22, 2023

Shelagh A. Ellman-Pearl, Chair

Lionel G. Romain

James G. Stockard, Jr.

Lisa V. Whelan, Presiding Officer