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

383 WASHINGTON STREET, LLC

v.

BRAINTREE ZONING BOARD OF APPEALS

No. 2020-04

DECISION

March 15, 2022

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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

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

383 WASHINGTON STREET, LLC, Appellant,	)	
v.	)	No. 2020-04
BRAINTREE ZONING BOARD OF APPEALS, Appellee,	)	

DECISION

I. INTRODUCTION AND PROCEDURAL BACKGROUND

This is an appeal pursuant to G.L. c. 40B, § 22 of a decision by the Town of Braintree Zoning Board of Appeals (Board) denying a comprehensive permit to the Appellant 383 Washington Street, LLC (383 Washington or Developer). On February 14, 2017, 383 Washington applied to the Board for a comprehensive permit to build a 70-unit multifamily rental housing development including 18 affordable units on a parcel of land located at 383-385 Washington Street, 0 Storrs Avenue and Alves Avenue, Braintree, Massachusetts. Exh. 10, p. 2; Pre-Hearing Order, § II, ¶ 25. The Board opened the public hearing on the Developer's application on March 13, 2017, and verbally invoked the General Land Area Minimum safe harbor pursuant to 760 CMR 56.03(3)(b), asserting that the Town had 1.5% of its general land area dedicated to affordable housing at the time of the receipt of the application. After an interlocutory appeal by the Board of the determination by the Department of Housing and Community Development (DHCD) that the Board had not satisfied its burden to establish the safe harbor, on June 27, 2019, the Housing Appeals Committee issued a Decision on Interlocutory Appeal Regarding Applicability of Safe Harbor determining that the Town had not achieved the safe harbor. *Matter of Braintree and 383 Washington Street, LLC,* No. 2017-05

(Mass. Housing Appeals Comm. Interlocutory Decision June 27, 2019). The Committee remanded the matter to the Board for further proceedings.[1] After resuming the public hearing on the application, on February 10, 2020, the Board voted to deny the application by decision filed with the town clerk on February 14, 2020.

An initial conference of counsel was held on March 11, 2020. Thereafter, pursuant to 760 CMR 56.06(7)(d)(3), the parties negotiated a pre-hearing order, which the presiding officer issued on September 17, 2020. In preparation for hearing, the parties submitted pre-filed direct and rebuttal testimony of nine witnesses. On October 14, 2020, the Committee conducted a site visit, and three days of hearings took place on November 17, 18 and 19, 2020, to permit cross-examination of witnesses. A total of 33 exhibits was entered into evidence.

Following the presentation of evidence, the parties submitted post-hearing briefs and reply briefs. The Board also submitted an appendix to its post-hearing brief, containing 98 proposed comprehensive permit conditions (many with multiple sub-conditions) to be imposed upon the project should the Committee overturn the Board's denial and order issuance of the comprehensive permit. 383 Washington submitted a response to the Board's appendix, opposing it on the basis that many of the proposed conditions are improper as a matter of law, are overly restrictive and in some instances impose conditions requiring improper post-permit review and approvals by the fire and planning departments. The Developer did, however, agree to selected conditions. We adopt those conditions on which the parties have agreed and decline to adopt the remainder. We address those conditions relating to the Board's arguments in support of denial of the comprehensive permit more specifically in our discussion of local concerns below.

As part of its post-hearing submission, 383 Washington also filed a motion to strike opinion testimony of Melissa SantucciRozzi, the Braintree Assistant Director of the Department of Planning and Community Development, and Robert Campbell, the Braintree Town Engineer, arguing that they were not experts qualified to offer opinions on the proper interpretation of the local rules and regulations in Braintree as applied to the project. We address that motion below.

[1] The Committee's interlocutory decision is hereby incorporated into this decision, and the record of the interlocutory proceeding, *Matter of Braintree,* is incorporated into the record of this proceeding.

II. FACTUAL BACKGROUND

The Apartment Project consists of 70 rental units in a single apartment building, ranging from three to four stories in height and from 40 to 47 feet high, including a portion of a garage that is above ground. Exhs. 4; 7E; 10; 24, ¶¶ 8-9. The project site is located at 383-385 Washington Street, 0 Storrs Avenue and Alves Avenue, and contains approximately three acres of land located in North Braintree Square, abutting a municipal parking lot. The site borders Archbishop Williams High School's football field along one side at Storrs Avenue, a commercial office building at the lower end of Storrs Avenue, and a Masonic Temple at the upper end. The site has frontage along Storrs Avenue with an existing curb cut and access on the upper end from the east to Washington Street through a 20-foot-wide access easement known as the Parking Way, which runs approximately 225 feet from the intersection of Washington Street to the lot line for the project. The Parking Way access easement is shared by the developer, the Town and other properties. Exhs. 28, ¶ 8, 24, ¶ 10.

The project site is in the General Business Zoning District and the Village Overlay District and is within walking distance (approximately one tenth of a mile) to retail shops, restaurants, stores and various retail, personal and commercial services in North Braintree Square. Exhs. 3E, Sheet 5; 28, ¶ 9. There is also a MBTA bus stop located a short walk from the site. Exh. 28, ¶ 9. Existing on the site currently are three buildings—two metal garage bay buildings and a larger concrete block building—in various conditions, currently used for storage for developer's construction company. Pre-Hearing Order, § II, ¶ 3; Exh. 28, ¶ 10.

The proposed apartment building is three-story horseshoe-shaped structure, akin to an inverted "U," with a bump out on the north side of the building. The units will be comprised of four studio apartments, 30 one-bedroom apartments, 29 two-bedroom apartments, and seven three-bedroom apartments, for a total of 113 bedrooms. The project will not provide any private decks, balconies, and/or patios attached to any of the 70 dwelling units. Pre-Hearing Order, § II, ¶ 3; Exhs. 24, ¶¶ 8-9; 3E, Sheet 5.

The property has been divided by an endorsed Approval Not Required plan into Lots 1 and 2. The Apartment Project is located on Lot 1, which has an area of 93,866 square feet (s.f.).[2] Pre-Hearing Order, § II, ¶¶ 1-3; Exh. 10. The apartment building and associated parking area cover 73.9% of the 93,866 s.f. lot. Exh. 3E, Sheet 5. The project provides 128 parking spaces, 81 of which are in a garage under the building and another 47 parking spaces located on the surface of the site. *Id.*; Exhs. 3E; 10. Eight of the surface parking spaces are within the inverted "U" shaped center of the building with two landscaped islands capping the ends. Exh. 3E, Sheet 5.

III. MOTION TO STRIKE OPINION TESTIMONY OF BOARD WITNESSES

In moving to strike opinion testimony of Board witnesses Ms. SantucciRozzi and Mr. Campbell, 383 Washington argues that their testimony usurps the role of the Committee by offering opinions on the proper interpretation of the Braintree Zoning Bylaw and whether the bylaw expresses a valid local concern, which are questions of law on which no expert testimony is proper under *Perry v. Medeiros,* 369 Mass. 836, 842 (1976).

The Board opposes the Developer's motion on two grounds: First, that the Developer waived its ability to challenge the admission of the testimony by failing to do so prior to or during the testimony and, second, that Ms. SantucciRozzi and Mr. Campbell are experts qualified to offer their opinions on the matter for which they testified. Relying on *Mattbob, Inc. v. Groton,* No. 2009-10, slip op. at 3-5 (Mass. Housing Appeals Comm. Dec. 13, 2010), the Board argues that the Committee is entitled to rely on such expert testimony, in the context of an administrative proceeding, where the rules of evidence are relaxed. The Board further cites *Davis v. Zoning Bd. of Chatham*, 52 Mass. App. Ct. 349 (2001) and *Koines v. Zoning Bd. of Appeals of Cohasset,* 91 Mass. App. Ct. 903 (2017) for the argument that deference is owed to the local expertise and intimate knowledge of local officials relative to the interpretation and application of zoning bylaws. However, as the Developer points out, an incorrect interpretation of a bylaw by a local board or official is not entitled to deference and the Committee should interpret the intent of the bylaw in light of its language. *See Drummey v. Falmouth*, 87 Mass. App. Ct. 127, 130 (2015). *See also Miles-Matthias v. Zoning Bd. of Appeals of Seekonk*, 84

[2] The remaining land, Lot 2, is the site of a related project referred to as the Townhouse Project, which is the subject of a separate appeal decided today, *383 Washington Street, LLC v. Braintree*, No. 2020-03 (Mass. Housing Appeals Comm. Mar. 15, 2022).

Mass. App. Ct. 778, 789 (2014) and cases cited (derivation of words' usual and accepted meanings to be obtained from sources presumably known to bylaw's enactors, such as their use in other legal contexts and dictionary definitions); *Tanner v. Board of Appeals of Boxford*, 61 Mass. App. Ct. 647, 649 (2004) (in absence of express definition, meaning of word or phrase used in bylaw is question of law to be determined by ordinary principles of statutory construction).

In general, the Committee, as an administrative body, has discretion to admit testimony that would not be appropriate in a court and the credibility and weight assigned to such testimony is a matter for the Committee. *See* G.L. c. 30A, § 11(2). We agree with the Board's argument that the Committee may rely on such testimony in our administrative proceedings. However, with regard to its argument that the Committee must defer to local officials' interpretation and application of zoning bylaws under the *Davis* and *Koines* cases, those decisions apply within the context of appeals under G.L. c. 40A and do not preclude the Committee from evaluating the testimony and assigning to it the weight and credibility we deem appropriate. Unless the inclusion of testimony such as that challenged here is prejudicial, we are reluctant to strike such testimony. In this instance, we do not believe the challenged testimony of Ms. SantucciRozzi and Mr. Campbell is prejudicial and the parties have had ample opportunity to address its credibility and weight in their post-hearing briefs. For these reasons, none of Ms. SantucciRozzi's and Mr. Campbell's testimony will be struck, and their testimony will be given appropriate weight based upon their credibility and the evidentiary record, as discussed below.

IV. STANDARD OF REVIEW AND BURDENS OF PROOF

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 comprehensive permit regulations, the developer:

> "may establish a *prima facie* case by proving, with respect to only those aspects of the Project which are in dispute (which shall be limited), in the case of a Pre-Hearing Order, to contested issues identified in the pre-hearing order that its proposal complies with federal or state statutes or regulations or with generally

> recognized standards as to matters of health, safety, the environment, design, open space, or other matters of Local Concern."[3]

760 CMR 56.07(2)(a)(2). Alternatively, a developer may prove that "Local Requirements and Regulations have not been applied as equally as possible to subsidized and unsubsidized housing." 760 CMR 56.07(2)(a)(4); G.L. c. 40B, § 20.

The Board's burden is to prove "first, that there is a valid health, safety, environmental, or other Local Concern which supports such denial, and then, that such Local Concern outweighs the regional Housing Need." 760 CMR 56.07(2)(b)(2). The comprehensive permit regulations, 760 CMR 56.02(a)(2) and (b)(2), do not explicitly specify that the developer's burden to establish a *prima facie* case is a prerequisite for the Board's obligation to demonstrate local concerns, although Committee decisions have generally stated that if the developer sustains its burden, the burden shifts to the Board to prove a valid local concern that supports the denial. *See, e.g., Hanover R.S. Limited P'ship v. Andover*, No. 2012-04, slip op. at 5 (Mass. Housing Appeals Comm. Feb 10, 2014); *Sugarbush Meadow, LLC v. Sunderland*, No. 2008-02, slip op. at 5 (Mass. Housing Appeals Comm. June 21, 2010).[4]

V. DEVELOPER'S *PRIMA FACIE* CASE

A. Firefighting Access

383 Washington argues it met its *prima facie* case based upon testimony of Paul Holland, James Burke, Kevin Hastings, and Mark Major that the project complies with all applicable federal and state standards. Exhs. 28-32; Developer brief, pp. 2-6.

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[3] "[A] *prima facie* case may be established with a minimum of evidence." *100 Burrill Street, LLC v. Swampscott*, No. 2005-21, slip op. at 7 (Mass. Housing Appeals Comm. June 9, 2008), quoting *Canton Housing Authority v. Canton*, No. 1991-12, slip op. at 8 (Mass. Housing Appeals Comm. July 28, 1993). For example, "it may suffice for the developer to simply introduce professionally drawn plans and specifications." *Tetiquet River Village, Inc. v. Raynham*, No. 1988-31, slip. op. 9 (Mass. Housing Appeals Comm. Mar. 20, 1991).

[4] The Pre-Hearing Order drafted by the parties, and issued by the presiding officer, states, however, that the Developer "shall have [the] burden, if Appellee Board proves a Local Requirement or Regulation exists, to show either that the project conforms to the Local Requirement or Regulation or that the Project satisfies state or federal requirements, if any." Pre-Hearing Order, § IV at 10. As discussed below, we conclude that the developer has satisfied its *prima facie* burden set out in the Pre-Hearing Order and 760 CMR 56.07(2)(a)(2). Therefore, any alteration of the burdens is immaterial. *See, e.g., Zoning Bd. Of Woburn v. Housing Appeals Committee,* 92 Mass. App. Ct. 1115 (2017) (Rule 1:28 opinion discussing Committee obligation to comply with pretrial order).

On behalf of the developer, Kevin Hastings, a registered professional fire protection engineer, testified that the project complies with all the applicable provisions of the state fire safety code. Exhs. 29, ¶¶ 7, 20; 30, ¶ 13. Mr. Hastings testified that there is access to the site from both Storrs Avenue and Washington Street. The access from Storrs Avenue is along a 40-foot right of way known as Alves Way. Access from Washington Street is along an access easement that is 20 feet wide, known as the Parking Way. According to Mr. Hastings, each of these access ways qualifies as a "fire department access road" as defined under NFPA § 3.3.117 and each provides the required access mandated under NFPA § 18.2.3.1.2. He testified that each access road satisfies the NFPA specifications for width and vertical clearance and each is designed to support the imposed loads of fire apparatus and will be provided with all-weather driving surfaces as required by the NFPA standards. Exh. 29, ¶ 10.

Such expert testimony directly addressing the matter in issue is more than sufficient to establish the developer's *prima facie* case. *See, e.g., Sugarbush Meadow, LLC, supra*, slip op. at 9; *100 Burrill Street, LLC v. Swampscott*, No. 2005-21, slip op. at 7 (Mass. Housing Appeals Comm. June 9, 2008) (citations omitted).

The Board contends that 383 Washington did not make its *prima facie* case under 760 CMR 56.07(2)(a)(2) that its proposal complies with federal or state requirements or generally accepted standards relating to fire department access. Board brief, p. 49. It argues the Developer has not shown it will comply with state requirements for fire department access as determined by the Braintree Deputy Fire Chief, Steven G. Sawtelle, who is the Authority Having Jurisdiction (AHJ) under the National Fire Protection Code, which has been incorporated into state regulations.[5]

383 Washington has submitted sufficient evidence to establish a *prima facie* case of compliance with state or federal statutes or generally accepted standards with respect to fire

[5] The governing regulations for fire safety in Massachusetts are contained within the state building code, 780 CMR 1.00, *et seq.,* at the state fire safety code (527 CMR 1.00, *et seq.*). 527 CMR 1.00 adopts, with some amendments, the 2015 edition of the national fire safety code published by the National Fire Protection Association (NFPA), a non-profit organization that develops fire standards. Exh. 29, ¶ 7; Tr. III, 4-5. The NFPA code is referred to as the NFPA by the parties. We have adopted their practice in our discussion of fire safety issues, and will cite to the relevant NFPA section, rather than the specific provision of the Massachusetts regulation. Braintree does not have any local regulations concerning fire safety so the AHJ's authority is limited to the requirements of the state fire safety code. Exh. 30, ¶ 5; Tr. I, 94-95.

department access for fire apparatus or operational set-up for firefighters and rescue personnel, and with the state fire safety requirements embodied in the NFPA, as well as and general design standards. Mr. Hastings testified that, based upon his training and experience, he determined that the project complies with federal, state and local codes regarding fire safety and with good fire safety practices. Exh. 29, ¶ 20. Mr. Burke, the Developer's engineer, testified that the sketch plans he prepared to demonstrate access to the site by fire apparatus were completed by him in accordance with sound engineering practices. Further, he testified that the design of the project complies with all applicable state and local standards for stormwater management and water and sewer design. Exh. 31, ¶¶ 14, 18.

The argument presented by the Board, primarily based upon the testimony of Deputy Chief Sawtelle, disputing the Developer's satisfaction of its *prima facie* case is not supported by the requirements in the NFPA or the testimony presented. It is undisputed that 383 Washington complied with the requirements of the NFPA. Exh. 27, ¶¶ 2, 6, 7, 8; Tr. I, 59-60. The Board's evidence regarding Deputy Chief Sawtelle's additional unwritten rules for his preferred firefighting techniques is not material to the determination of whether 383 Washington Street complies with the NFPA. Accordingly, we find that 383 Washington Street has met is *prima facie* case on the issue of fire safety.

B. Recreational Open Space

Regarding the second local concern, it is clear from the Pre-Hearing Order that the issue relates only to the adequacy of outdoor recreational space, not other open space concerns. The Pre-Hearing Order sets out the local concern as: "Whether there is a Local Requirement or Regulation that is more restrictive than state requirements, if any, and requires the Apartment Project to have more outdoor recreation space than it does…," and sets out the Developer's *prima facie* case regarding recreational open space: "Appellant shall have burden, if Appellee Board proves a Local Requirement or Regulation exists, to show either that the project conforms to the Local Requirement or Regulation or that the Project satisfies state or federal requirements, if any." Pre-Hearing Order, § IV at 10.[6] The Board claims 383 Washington introduced no

[6] The pre-hearing order makes clear that the issue raised relates to concern for more outdoor recreational space on the development site, rather than the preservation of natural open spaces on the project site. Pre-Hearing Order, § IV at 9. To the extent the Board also characterized its concern as relating to "open

evidence that its proposal complies with federal or state statutes or with generally recognized standards as to open space and recreation. The Board suggests that it is unclear "whether the burden even shifted to the Board to have to make out its case regarding inadequate recreational space in the first instance." Board brief, p. 49.[7]

The Developer makes two arguments to support its having proved a *prima facie* case. First, 383 Washington argues that outdoor recreational space is not a requirement under the Town zoning bylaw and therefore the Developer is not required to demonstrate compliance with state or federal standards in this regard at all. 383 Washington provided evidence to show that neither the Braintree Zoning Bylaw nor the Braintree Master Plan impose a requirement that a multi-family development provide outdoor recreational space applicable to the project. Exhs. 12A-H, 13. Therefore, it argues, without a valid applicable local concern, the developer was not required to make its *prima facie* case.

Second, the Developer argues, citing testimony of its architect, Mark G. Major, that it has demonstrated that there are no applicable federal or state standards that mandate when or how much outdoor recreational area is required for a multifamily residential project. Mr. Major testified further that there is no standard or custom in his field of expertise that dictates or suggests that outdoor recreational space must be provided in such projects. *See* note 6, above. Mr. Major stated that whether or how much recreational space is provided in a multifamily project is a function of a variety of factors, which include the "vision or goal of the developer, the size of the development site, the characteristics of the land under development, and the surrounding neighborhood." Exh. 32, ¶ 16. He testified that he had wide experience with "developments that have included numerous parking garages, commercial projects, and housing facilities in new, converted and renovated structures," stating he has been the project architect

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space" generally, the Pre-Hearing Order does not include identification of the preservation of natural open spaces or the requirement of sufficient landscaped open space in general as a local concern for this appeal, but only addresses "outdoor recreational space." *See* Pre-Hearing Order, § IV at 10.

[7] The Board's argument also appears to suggest that the Developer was required to prove compliance with applicable local requirements as well, even though that is not stated in the comprehensive permit regulation. Board brief, p 49. In support of this, the Board contends that the Developer has failed to comply with § 135-705 of the Braintree zoning bylaw, which imposes dimensional standards applicable only to multifamily uses in the General Business district. Board brief, p. 9; Exh. 12D. The cited provision is a local requirement, rather than a state or federal law or regulation. Thus, demonstrating compliance with it is not part of the developer's *prima facie* case.

"for all types of housing facilities, including facilities designed to accommodate low-income, elderly and handicapped residents." Exh. 32, ¶ 3. He noted that the building will include a community fitness and training center, a lounge and a club room. He concluded that it was his "expert professional opinion that the architectural design of the Parkside Apartments project complies with all applicable standards for architectural design for a residential project of the type proposed by 383 Washington Street, LLC." *Id.,* ¶ 17.

The Developer also relies upon the testimony of Mr. Holland, its principal, an experienced developer familiar with residential and commercial development and with the Braintree community in particular to show that outdoor recreational space is not a requirement imposed upon the project. Exhs. 12A-H, 13, 28-32. Mr. Holland also testified about the suitability of the project for the Braintree Square area and its proximity to retail, public transit, public recreation land, emphasizing that this is a redevelopment of a "blighted industrial property" into new housing stock. Exh. 28, ¶¶ 17-19.

Mr. Burke testified that there is no federal, state or local regulation or bylaw that mandates that the project have outdoor recreational area as part of the development. Exh. 31, ¶ 27; Tr. II, 72. He testified that there is not a standard or custom in his field of expertise that dictates or suggests that outdoor recreational area shall be provided for a multi-family project. Exh. 31, ¶ 25.

This case presents an unusual circumstance in which the Developer has presented testimony from two expert witnesses that there are no state or federal standards regarding the amount of outdoor recreational space that is appropriate or adequate for a development of this type. In such a circumstance, where the developer could identify no standard specifically for outdoor recreational space, it provided evidence through its expert witnesses, an architect and a civil engineer, not only regarding the project's compliance with applicable state requirements, but also that the proposal complies with generally accepted architectural design standards and has met its *prima facie* case with respect to the issues in dispute.

VI. LOCAL CONCERNS

As noted above, in the case of denial, the Board has the burden of proving, first, that there is a valid local concern, or local need, that supports such denial, and then, that the local concern such local concern or need outweighs the need for affordable housing.

A. Fire Safety

The Pre-Hearing Order drafted by the parties for issuance by the presiding officer sets out the specific local concerns at issue in this appeal. It describes the Board's concern regarding fire safety as follows:

> Appellee Board has the burden to prove that there is an applicable Local Requirement or Regulation, within the meaning of 760 CMR 56.02, that requires the Apartment Project to have additional access for fire apparatus or operational set-up for firefighters and rescue personnel, and, if so, that any deficiency is a Local Concern that outweighs the Housing Need so that the Apartment Project is not Consistent with Local Needs….

Pre-Hearing Order, § IV at 9. *See* 760 CMR 56.07(2)(b)(2).

The arguments offered by the Board in support of its denial of the permit are based, in part, upon its interpretation of the Massachusetts state fire safety code's provision regarding the authority of Deputy Chief Sawtelle, acting in his capacity as the AHJ. *See* 527 CMR 1.00, *et seq*. The Board argues that the site's access routes and site design do not provide adequate access for apparatus or operational set-up for firefighters and rescue personnel. Board brief, p. 4. The Board identifies five fire access concerns that it argues support its denial, which we discuss below.

1. The Parking Way

The Board argues that, because the Parking Way is private-owned, the Developer cannot maintain this portion of the fire department access road free of obstructions, particularly parked cars, as required by NFPA §18.2.3.4.1.1. Exh. 16C; Board brief, pp. 4-5. Section 18.2.3.4.1.1 provides that: "Fire department access road shall have an unobstructed width of not less than 20 ft. (6.1m)." Exh. 16C. "Fire department access road" is defined as: "The road or other means developed to allow access and operational setup for firefighting and rescue apparatus." NFPA § 3.3.117. Exh. 16A. NFPA §18.2.4.1.1 provides that: "The required width of a fire department access road shall not be obstructed in any manner, including by the parking of vehicles." Exh. 16A. The term "unobstructed" is not defined in the NFPA; however, the type of obstruction over which the Board expressed concern was that of cars parking along the Parking Way and impeding fire apparatus access. Board reply, pp. 5-6. Deputy Chief Sawtelle acknowledged that, in terms of width and vertical clearance, the Parking Way meets the requirements of the NFPA and, therefore, as a fire access road, it meets the technical requirements. Tr. I, 64; Exh. 8D. However, the Board argues, the Parking Way is a private way and neither the Developer nor the

Town has any ownership or control over it, nor can the Fire Chief compel the Developer or a private third-party to erect signage or markings along the Parking Way to prevent obstructions. Exh. 27, ¶ 4; Board reply, p. 5. Therefore, according to Deputy Chief Sawtelle, the Parking Way cannot be considered a code-compliant fire department access road that is free of obstructions. Exh. 27, ¶ 5.

Evidence presented by the Board included a letter from Fire Chief James O'Brien, stating that, during non-peak traffic hours, accessibility to the site via the Parking Way by an engine truck and a ladder truck was obtainable. The letter stated that, during peak traffic times, however, entrance by those vehicles to the site via the Parking Way would be extremely difficult, if not impossible, due to traffic gridlock. Exh. 8. The fire chief did not clarify his reference to "traffic gridlock," nor did he explain how such "gridlock" would impede access to the Parking Way, or indeed, that the Parking Way was itself inadequate. In a second letter, Deputy Chief Sawtelle indicated that traffic along Washington Street and the area in general would hamper fire department response times not only to the site but along the entire response route. Exh. 8A. The Board offered no evidence of prior fire department or emergency equipment access issues caused by obstructions on or insufficiency of the Parking Way, nor any evidence that the proposed development would somehow increase the probability of an obstruction occurring on the Parking Way preventing access by the fire department.

The Developer points out that not only does the Parking Way meet the 20-foot minimum width required by the NFPA standards, as testified to by Mr. Hastings and acknowledged by Deputy Chief Sawtelle, but also that the deputy chief failed to acknowledge his power as Braintree's AHJ permits him to address the issues he raised. It argues that he has the power to order the installation of no parking signs, roadway surface markings and other notices to inform the public that obstruction along the Parking Way is prohibited. Developer brief, pp. 10-11. In addition, the Parking Way currently serves as a fire department access road for the existing buildings in Braintree Square that front on Washington Street. Tr. I, 64-65.

Paul Holland, the principal of 383 Washington, testified that his easement over the Parking Way gives him the legal right to an unobstructed right of way, which includes enforcement rights to prevent parking and other obstructions within the 20-foot right of way. Tr. II, 52-53. Historically, he testified, he has had no issues with obstructions in the Parking Way preventing his rights of access. Tr. II, 54. The granted easement states that 383 Washington

has "the right to use 'Right of Way' as shown on the aforementioned plan for all purposes for which streets and roads are or may be used in the Town of Braintree." Exh. 2.

"Where a plan is incorporated by reference in the deed, '[t]he plaintiff [is] entitled to the use of the passageways within the limits indicated by the plan unobstructed throughout their entire width.'" *Martin v. Simmons Properties, LLC*, 82 Mass. App. Ct. 403, 408 (2012), citing *Peavey v. Moran*, 256 Mass. 311, 316 (1926). An unobstructed right of way is a "valuable asset" and an easement holder is entitled to an injunction for the removal of trespassing structures. *Beaudoin v. Sinodinos*, 313 Mass. 511, 519(1943). Based upon the language of the easement over the Parking Way and case law governing easements, we find that 383 Washington does indeed possess the power to prevent and eliminate obstructions thereon that interfere with its ability to use the Parking Way "for all purposes for which streets and roads are or may be used in the Town of Braintree." Moreover, NFPA § 18.2.3.5.1 provides that: "[w]here required by the AHJ, approved signs, approved roadway markings, or other approved notices shall be provided and maintained to identify fire department access roads or to prohibit the obstruction thereof or both." Exhs. 16C; 30, ¶ 8. Further, NFPA § 18.1.1.1 indicates that Chapter 18 applies to public and privately owned fire apparatus access roads.[8]

There was no evidence presented that the project would result in a greater risk of obstruction by a parked car on the Parking Way than there could be on any other public way, caused by a double-parked delivery truck, car or other random occurrences such as traffic accidents or construction. Testimony offered by the Board through Ronald Müller, P.E., its traffic engineer, was relatively consistent with testimony offered by the Developer through its traffic engineer, Jeffrey S. Dirk, P.E., PTOE, FITE. Neither Mr. Müller nor Mr. Dirk stated unequivocally that emergency access to the project via the Parking Way will be unreasonably impaired. Mr. Müller stated that, with certain mitigation measures, fire department access via the Parking Way could be improved. Exh. 23, ¶ 6, 7. Both experts agreed that certain recommendations to further investigate traffic patterns and signalization on Washington Street area are warranted. However, neither stated that emergency access to the project during peak traffic hours would be unreasonably impaired. *See* Exhs. 23, ¶ 6; 33, ¶¶ 13, 15. The Board did

[8] "Fire apparatus access road" as used in 527 CMR 1.05 appears to be synonymous with "fire department access road" as used in NFPA § 3.3.117. *See* Exhs. 16A;16E.

not demonstrate that additional traffic generated by the project would result in increased obstructions on the Parking Way. The evidence indicates that access is obtainable by fire department equipment via the Parking Way, and access issues are more likely caused by existing traffic congestion along Washington Street than an obstruction from a car parked on the Parking Way.[9] Exhs. 7B; 8. Accordingly, the Board has failed to demonstrate that the alleged impaired access on Parking Way represents a valid local concern that outweighs the regional need for affordable housing.

2. **Grass-Crete Pad**

NFPA § 18.2.3.2.2 requires that "[f]ire department access roads shall be provided such that any portion … of an exterior wall of the first story of the building is located not more than 150 ft. from the fire department access roads as measured by an approved route around the exterior of the building…." Exh. 16D. Where, as here, buildings are improved with a fire sprinkler system, this distance is increased to 250 feet from the building. Exh. 16D, § 18.2.3.2.2.1. 383 Washington has proposed such a fire sprinkler system; therefore, the applicable distance under NFPA for compliance is 250 feet. Exh. 7I. The Developer proposes to install a 2,000 s.f., 26.5 foot-wide, grass-crete pad[10] at the southeasterly corner of the project along the lot line to serve as a staging area for fire apparatus. Exhs. 3E, Sheet 5; 26, ¶ 12.

Deputy Chief Sawtelle testified that the grass-crete pad leaves insufficient room for operational set-up, would impede access to the south side of the building, would not allow aerial ladder truck stabilizers to be safely deployed, and would choke off the means of access along the Parking Way for other emergency vehicles. Exh. 26, ¶ 12. Therefore, the Board argues, while the grass-crete pad may provide technical compliance with NFPA § 18.2.3.2.2.1, it was rejected by the AHJ for lack of adequate or practical access as an approved fire department access road based upon his operational setup preferences, and consequently, it does not comply with NFPA § 18.2.3.2.2.1. Board brief, p. 5; Exh. 26, ¶ 12. Approval of fire department access roads is a

[9] The Developer has agreed to two of the Board's proposed conditions, which we have adopted in § VIII.2, below, regarding traffic mitigation measures at the Storrs Avenue, Elm Street and Washington Street intersection as well as installation of a "no left turn" sign at the project's curb cut on Storrs Avenue.

[10] The grass-crete pad will be an approved pervious loading surface. Exh. 3E, Sheet 5. In addition, the Developer has agreed to a condition proposed by the Board allowing modification of the grass crete area as shown on Exh. 3E, Sheet 5, to eliminate the curb as shown and to replace it with a mountable curb or surface acceptable to the Braintree Fire Chief. *See* § VIII.2, below.

matter within the jurisdiction of the AHJ, the Board argues, and this jurisdiction includes not only approval of the physical dimensions and location of a fire department access road but also the overall adequacy and practical use of such roads to the building. Board brief, p. 14.

Mr. Hastings and Mr. Sawtelle both agreed, however, that the grass-crete pad met the NFPA requirements for a fire department access road. Tr. I, 59; Exhs. 26, ¶ 12; 29, ¶ 14; 30, ¶ 7. The parties dispute whether, and to what extent, the AHJ has authority to determine noncompliance based upon unwritten standards of local practice or preferred firefighting tactics. The Developer argues that such alleged authority is an example of the type of "unbridled discretion" of a fire chief that was struck down in *Zoning Bd. Of Appeals of Sunderland v. Sugarbush Meadow, LLC*, 464 Mass. 166, 185 (2013). Developer reply, p. 7. The Board calls this argument an attempt to dismiss the valid public safety concern expressed by Deputy Chief Sawtelle, and it claims the *Sunderland* case can be distinguished on the facts. The issue in this case, the Board states, is not whether the Braintree Fire Department has the right piece of apparatus to fight a fire, which was the case in *Sunderland*, but whether the project as designed provides unobstructed fire access roads that allow for operational set up. Board reply, p. 4.

Deputy Chief Sawtelle's issue with the grass-crete pad was related to access by the department's aerial ladder truck. Taking into consideration the width of the grass-crete pad, the width of the aerial ladder truck when fully deployed, and the height and distance from the roof, he testified that it would not be possible to deploy the ladder to the roof at a safe climbing angle from the grass-crete pad. Tr. I, 125-129. The Developer argues that the NFPA does not address roof access by an aerial fire truck and whether and to what extent a local fire department may use an aerial ladder truck is a matter of fire department discretion. Developer brief, p. 15. Mr. Hastings identified multiple areas around the building where an aerial ladder truck could be positioned, other than the grass-crete pad. Exhs. 7F; 31, ¶ 22. The Developer argues that Deputy Chief Sawtelle never testified that the project was unsafe because there was no roof access, only that he would never deploy an aerial ladder truck in the locations depicted on the sketch provided by Mr. Hastings.; Developer brief, p. 16. The sketch depicting the aerial truck on the grass-crete pad, Mr. Hastings testified, was to show the worst-case scenario, *i.e.*, if the largest truck (aerial ladder) can maneuver through the site, then any other fire department vehicles can. Tr. III, 14; Exh. 31, ¶ 22.

It is also important to consider the context underlying whether it is necessary to have the sort of ladder truck access to the south side of the building that the Board would require. The building will also include two fire safety features to protect the occupants and the building in the event of a fire. First, the building will be a one-hour rated wood-framed structure, which means that the wood structure of the building will not be exposed; it will be covered by gypsum wallboard, which is not flammable. Second, the building will be protected by a sprinkler system that complies with NFPA 13, the highest level of sprinkler protection available under the building code.[11] Exh. 30, ¶ 10. The proposed sprinkler system, Mr. Hastings testified, is intended to confine the fire to the apartment unit in which it started and not allow it to spread to other parts of the building. Based upon research conducted by the NFPA regarding fires in the United States between 2010 and 2014, sprinkler systems like the one proposed were effective in controlling fires in 96% of the incidents studied, *i.e.*, they did not spread beyond the area in which they originated. Compared to structures with no sprinkler system or lesser sprinkler systems, the NFPA 13 sprinkler system results in significantly more protection to people and property. Exh. 30, ¶ 11.

Comparison to the *Sunderland* case is also instructive. In that case, the town did not possess a ladder truck to gain roof access. Here, the Town does own a ladder truck but access to the roof from the grass-crete pad may not be ideal in some situations. In either case, the Court's holding in *Sunderland* applies. The Court does "not interpret the provision of the code requiring 'building ... access for fire fighting ... personnel' to declare that a building is in violation where its roof cannot be accessed by any ladder possessed by the local fire department." *Sunderland, supra,* 464 Mass. at 181-182. Any additional risk to occupants and fire fighters created by the inability to park the Town's aerial ladder truck on the grass-crete pad, as opposed to elsewhere on the site, is minimal in light of the wood-framed construction and advanced sprinkler system to be installed in the building, which would diminish the risk of a structural fire that would require ventilation of the roof. *Id*. at 184.

Therefore, the evidence counterposed by the Board does not credibly prove a valid safety concern that outweighs the regional need for affordable housing.

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[11] One of the conditions proposed by the Board, and agreed to by the Developer, requires submittal of final fire alarm and sprinkler plans for approval by the Braintree Fire Chief; we have adopted that condition in § VIII.2, below.

3. **Northwest Access**

The fire department access road along Alves Way terminates at a "bump-out" at the northwest corner of the building, which leads to a walking path that follows the rear of the building adjacent to the Archbishop Williams High School's football field. Exh. 7G; Tr. III, 17-18. It is at this "bump-out" that the fire-access distance required under NFPA § 18.2.3.2.2.1 is measured, to ensure that any portion of an exterior wall of the first story of the building is located not more than 250 feet from the access road. Exhs. 16D; 29, ¶ 12. As shown on the emergency vehicle access plans submitted by the Developer, the northwest access point of the fire department access road is 232 feet to the rear corner of the building. Exhs. 29, ¶ 14; 7G.

The Board argues that Deputy Chief Sawtelle rejected this extension of the fire department access road because physical constraints, such as possible accumulation of snow or the presence of parked cars in the area, would not leave sufficient room for operational set-up, would impede access to the west side of the building, and would not allow room for the aerial ladder to be safely deployed. For those reasons, the Board contends, this fire department access road does not provide adequate room for firefighting operations and set-up. Board brief, p. 26; Exhs. 26, ¶ 10.a; 27, ¶ 8. The Board claims that Deputy Chief Sawtelle, as the AHJ, has the discretion to reject this area as insufficient for operational set-up, even though it complies with the NFPA requirements for width and vertical clearance. Board brief, pp. 14, 27. Because of the area's inadequacies, the Board argues that the deputy chief is authorized to demand a third access road based upon the NFPA authority of the AHJ and the Braintree Fire Department's unwritten practice of requiring access to three sides of a building similar in nature to the one proposed. Board brief, p. 27; Tr. II, 143; Exhs. 16F; 26, ¶ 19.

The Developer argues that NFPA § 18.2.3.3 authorizes "more than one fire department access road … when it is determined that access by a single road could be impaired by vehicle congestion, condition of terrain, climatic conditions, or other factors that could limit access." Exh. 16F. Where the project already has two fully compliant fire department access roads, the Developer argues that § 18.2.3.3 does not apply and does not support the Board's assertion of authority to require additional access roads. Developer brief, p. 12. Furthermore, the Developer points to Deputy Chief Sawtelle's testimony that the so-called "three sides rule" is an unwritten rule, not codified or published anywhere. Nor could the deputy fire chief recall when he began using the rule or whether there were any exceptions to it. The rule, he testified, is based solely

on his judgment. Tr. I, 92-96. Mr. Hastings gave his opinion that NFPA § 18.2.3.3 authorizes an AHJ to require a second access road where a single access road is inadequate. Tr. II, 145. He further testified the NFPA definition of a fire department access road states that it is intended to provide for operational set-up of fire apparatus. Tr. II, 157, III, p. 12; Exh. 16A. Mr. Hastings testified that if a fire department access road meets the NFPA 20-foot width requirement, there is no further requirement for additional area for operational set-up. Tr. III, 12.

We agree with 383 Washington that the discretion relied upon by Deputy Chief Sawtelle to require additional access roads goes beyond that authorized by the NFPA where there is already more than one compliant access road provided. *Sunderland*, *supra*, 464 Mass. at 182. Additionally, the Board has failed to prove that the so-called "three sides rule" is a valid local rule or regulation in force in the Town of Braintree. NFPA § 18.2.3.3 does not give an AHJ "unbridled discretion" to effectively deny a comprehensive permit by refusing to approve fire construction documents based on such an unwritten rule. *Sunderland* at 182 "In the context of a comprehensive permit application, just as the building official is a "[l]ocal [b]oard" within the definition of G.L. c. 40B, § 20, the fire chief is a 'local board or official who would otherwise act with respect to such application,' and the board in reviewing such application has the 'same power to issue ... approvals' as the fire chief. *Id*. at 182-183. "The board's power to disapprove a comprehensive permit, like its power to impose conditions in issuing a comprehensive permit, *Zoning Bd. of Appeals of Amesbury v. Housing Appeals Comm*., 457 Mass. 748, 755-756, (2010), is limited to the scope of concern of the various local boards in whose stead the local zoning board acts." *Zoning Bd. of Appeals of Holliston v. Housing Appeals Committee*, 80 Mass. App. Ct. 406, 417-418 (2011); *Zoning Bd. of Appeals of Woburn v. Housing Appeals Committee*, 92 Mass. App. Ct. 1115, *4 (2017) (board failed to prove noise was local concern where town had no local regulation or bylaw regulating noise). As the regulations, long-standing case law and our decisions reflect, the reason for the shifting burden of proof, once a developer has met its initial burden of proof that its proposal complies with state and federal requirements or other matters of local concern, is to avoid frustration of the purposes of Chapter 40B by requiring local officials to show compelling evidence that their objections to the proposal do in fact outweigh the regional need for housing, and to prevent municipal officials from exercising unbridled discretion over matters which the municipality has not adequately codified or defined. *Board of Appeals of Hanover v. Housing Appeals Comm., supra*, 363 Mass. at 360, 366. *See also Hollis*

Hills, LLC v. Lunenburg, No. 2007-13, slip op. at 8-14 (Mass. Housing Appeals Comm. Post Decision Ruling … Mar. 25, 2013).

We conclude that the Board has not satisfied its burden of proof that the northwest fire department access road does not comply with NFPA requirements, nor has it satisfied its burden to prove that the Deputy Chief's requirement for a third fire department access road for this development is supported by a valid local concern that outweighs the regional need for affordable housing.

4. **Foot Paths**

The left and rear sides of the building are located at the south and west sides of the property. The southerly side of the building extends approximately 214.4 feet from the grass-crete pad to the proposed deck in the southwesterly corner of the building. The westerly side of the building extends approximately 164.4 feet along the lot line, then jogs in for 57.5 feet to the point where it connects to the "bump out" at the northwest access point described in § VI.A.3, above. Exhs. 3E, Sheet 5; 24, ¶ 11. The plans depict these areas as lawn and landscaped areas, bounded on the south side by a chain link fence and on the west side by a retaining wall and chain link fence. Exhs. 3E, Sheet 5; 6, 6A. The plans indicate that each of these areas ranges in width from 17.9 feet to 16.6 feet to 15.7 feet. Exhs. 3E, Sheet 5; 26, ¶¶ 13-14. However, with landscaping as depicted, the non-landscaped area is reduced to 10 feet wide in areas. Exh. 6A. Along the south side of the building, there is a two-foot change in elevation for approximately every 20 feet, which is equivalent to the grade of a typical handicapped ramp. Along the west side, the elevation ranges between 67 and 58 feet at the edge of a retaining wall along the westerly boundary line. Tr. III, 29; Exhs. 3, Sheet 5; 26, ¶¶ 13-14. Mr. Hastings testified that the foot paths are relatively level and easily walkable. Tr. III, 20-21. The Developer has not proposed these to be "fire department access roads" and there are no NFPA standards governing foot paths. Tr. III, 17; Exhs. 30, ¶ 9; 27, ¶ 6. The purpose of these foot paths, as described by Mr. Hastings, is to allow fire fighters to access those two sides of the building on foot, if necessary. Tr. III, 18-19. In response to Deputy Chief Sawtelle's concerns regarding fire department access to the left and rear sides of the building, the Developer proposed to affix 40-foot ladders to those two sides of the building perimeter to minimize the distance fire fighters would have to carry a ground ladder in the event of a fire. Exh. 3E, Sheets 5-7; Exh. 29, ¶ 17.

The Board relies on testimony of Deputy Chief Sawtelle that, given the height of the building, clearance is inadequate to extend the ladders at an Occupational Safety and Health Administration (OSHA) approved standard on either foot path. Exh. 26, ¶ 17. The Board argues that these foot paths do not provide safe or adequate access for firefighting or rescue operations and they should be designed to meet the standards of a fire department access road. Board brief, p. 28.

The Developer's civil engineer, Mr. Burke, testified, however, that the 40-foot ladders attached to the building were placed in those locations along the south and west sides not to reach the roof, but to evacuate residents via windows, stating firefighters could use the ladder to break a window to gain access through it either to evacuate residents or enter the building. He testified that he had learned of this technique through his conversations with Deputy Chief Sawtelle. Tr. II, 125. 383 Washington argues that adequate roof access was demonstrated by the aerial apparatus placement sketch, which shows roof access by an aerial ladder truck is possible at three locations, at the northwest corner of the building next to the parking garage, towards the rear of the building at the grass-crete pad, and the front U-shaped circle, as well as additional locations around the front of the building. Exhs. 7F; 7H; Tr. I, 101. Therefore, the Developer argues, the Board's claim that the foot paths do not provide adequate clearance for ladders to reach the roof is inapplicable. 383 Washington notes also that the Braintree zoning bylaw for this zoning district requires a side yard setback of only 10 feet from the property line, meaning that a building can comply with zoning requirements for side yard setbacks but still not provide the Board's desired width for a foot path for fire department access. Developer brief, p. 14. The Developer also cites the *Sunderland* case to argue that it is reasonable to be "skeptical of the fire chief's testimony that a building is unsafe" when the building nonetheless complies with zoning requirements. *Sunderland, supra,* 464 Mass. at 184; Developer brief, p. 14.

We find that the proposed foot paths provide adequate access for firefighters by foot to the left and rear sides of the building. We do not agree with the Board that these foot paths must meet NFPA standards for fire department access roads. Under the NFPA, there is no regulation for the width of a foot path that provides access to the exterior of a building from a fire department access road. Both foot paths comply with NFPA length requirements. Exhs. 29, ¶ 17; 16D. The AHJ's authority under the NFPA is not unlimited and cannot be interpreted to allow imposition of unwritten, discretionary requirements based on situational preferences rather

than written standards. *Sunderland, supra,* 464 Mass. at 182. Therefore, the Board has not credibly demonstrated that there is a valid health, safety, environmental, or other local concern that supports the imposition of a third fire department access road.

5. **Operational Set-Up**

The Developer offered expert testimony and sketches to show where roof access was possible at three different locations for aerial apparatus around the building, to demonstrate that the project complied with the applicable NFPA standards. Exhs. 7B, 7H, 7F; 31, ¶ 21. These locations were not intended to represent all possible ladder truck locations or locations that the Braintree Fire Department could necessarily use for that purpose. The requirements for fire department access roads under the NFPA do not include requirements specific to ladder truck placement nor do they contain any specific requirements for roof access by fire apparatus. Exhs. 7H; 16A-F; 29, ¶ 19. Mr. Hastings and Mr. Burke testified that, as the project is designed, accessibility to the roof is possible for this particular site. Tr. II, 119, 160.

383 Washington argues that Deputy Chief Sawtelle never testified that the project was unsafe because there was no roof access, only that he would never deploy an aerial ladder truck in the locations depicted on the sketches. Developer brief, p. 16; Exh. 26, ¶ 10(g). Deputy Chief Sawtelle testified that there is no "cookie cutter" approach to fighting a fire and that each fire will present problems in different ways, such as weather and other intangibles. Tr. I, 84. He further testified that the local requirements he refers to when reviewing a proposed project are based on his opinion and his judgment. Tr. I, 95. Even stating various caveats about the Developer's proposed aerial truck locations, Deputy Chief Sawtelle agreed the project, as designed, does in fact provide roof access by an aerial truck to the building. Tr. I, 107.

The Board argues that none of the Developer's proposed fire truck placement locations at the grass-crete pad, the northwest corner, or the front U-shaped circle, provide the necessary 50 feet of distance from the building for an aerial ladder to be safely deployed, and failing to provide sufficient room for operational set-up, they do not meet the definition of a fire department access road. Board brief, p. 7. It argues that the NFPA does not provide for or dictate tactical decisions, such as where and how to deploy fire apparatus; it is the role of the fire department to make fact-specific determinations as to the best location for operational set-up. As a result, the Board argues, the AHJ has the authority to require access to at least three sides of a multi-story, multi-family complex in order to safely and efficiently respond to fires using the fire

apparatus available to it. Board brief, p. 33. This, the Board argues, proves that the project design fails to address the Board's valid local concerns with respect to protecting the health, life, and safety of the residents posed by the inadequate fire protection and access. *Id*.

The Board's argument regarding operational set-up considers the four aspects of firefighting access—the Parking Way, the grass-crete pad, the northwest access and the foot paths—that it alleges do not comply with the NFPA and the AHJ's local unwritten standards for firefighting tactics. The evidence, according to the Board, proves that the site design does not satisfy the NFPA or address the Fire Department's local concerns of adequate operational set up, due to the potential for blockages of access for other emergency vehicles. It cites *HD/MW Randolph Avenue, LLC v. Milton,* No. 2015-03, slip op at 19 (Mass. Housing Appeals Comm., Dec. 20, 2018) for the proposition that a valid local concern exists where "locating multiple large fire vehicles on the access drive for a period of time for firefighting increases the risk of blockage of the access driveway."

The Board's reliance on the *Milton* case is misplaced, as in that case, while we recognized that locating fire vehicles on an access drive may cause access issues, we also required the developer to provide a paved area for placement of fire vehicles at strategic locations, which is similar to what the Developer has done here with the grass-crete pad and the northwest access point. *Milton*, *supra*, slip op. at 25. There is no credible evidence in this case that the building completely lacks roof access by an aerial ladder truck. In fact, Deputy Chief Sawtelle testified on cross-examination that there is roof access by an aerial truck to the building. Tr. I, 107. *Sunderland* is instructive as in that case, the town's subdivision regulations allowed a maximum building height of 45 feet, "which suggests an acknowledgment by the town that a building may be as tall as forty-five feet and potentially still be safe even though the town has no ladder truck." *Sunderland,* 464 Mass. at 180. Here, the maximum allowed height in the General Business/Village Overlay District is 50 feet and the minimum side and front yard setbacks in the district are 0 to10 feet. The maximum proposed height of the building is 47 feet, the proposed side yard setback is 20.3 feet and the front yard setback is 248.3. Exh. 3; Exh. 12A-C. Therefore, as *Sunderland* discusses, the Town's own regulations imply a policy that allows a building that could potentially have limited to no ladder access. The Court found it was not unreasonable for the Committee to be skeptical of an AHJ's testimony that "a building is unsafe if its roof can only be reached with a ladder truck" when the town zoning allowed building

heights that would not be accessible by a ladder truck, noting "that height limitations have often been used by towns 'as a pretext to exclude affordable housing.'" *Sunderland* 464 Mass. at 184 and n.21, citing *Standerwick v. Zoning Bd. of Appeals of Andover*, 447 Mass. 20, 29 (2006).

Based upon the evidence presented, after evaluating the testimony and credibility of the Mr. Burke, Mr. Hastings and Mr. Sawtelle in the context of the roof access under the NFPA, we find the testimony of Mr. Hastings to be more credible than that of Mr. Sawtelle, and we conclude the Board has failed to meet its burden of establishing that there is a specific local fire-safety concern based upon unwritten standards for operational set up that outweighs the regional need for housing.

B. Outdoor Recreational Space

As identified in the Pre-Hearing Order, the Board has the following burden:

> … to prove that there is an applicable Local Requirement or Regulation, within the meaning of 760 CMR 56.02, that requires the Apartment Project to have more outdoor recreational space than the Apartment Project proposes to have, and, if so, that any deficiency is a Local Concern that outweighs the Housing Need so that the Apartment Project is not Consistent with Local Needs.

Pre-Hearing Order, § IV at 9. *See also* 760 CMR 56.07(2)(b)(2). In support of its claim that requiring additional recreational open space is a valid local concern, the Board argues that the Zoning Bylaw imposes a higher standard on open space associated with multi-family developments in the General Business district, as evidenced by § 135-705:

> As authorized in § 135-601, multifamily dwellings may be erected in Residence C, Cluster I, II, and III, General Business, Highway Business and Commercial Districts. Minimum lot size shall be 43,560 square feet (except Cluster I, II, and III which shall be five acres); minimum frontage shall be 100 feet; minimum open space shall be 2,000 square feet per dwelling unit. For Residence C, General Business, Highway Business and Commercial Zoning Districts the number of multifamily units to be allowed on site shall be determined as follows: 5,000 square feet for each one-bedroom or studio unit plus 1,000 square feet for each additional bedroom in each unit. The two-thousand-square-foot open space requirement is not in addition to the five-thousand-square-foot space requirement. For Cluster I, II, and III Zoning Districts, the number of multifamily units to be allowed on site shall be determined by the standards established in § 135-610C of this chapter.

Exh. 12D; Board brief, p. 9. The Board argues that the term "open space" as used in § 135-705 should be interpreted to include "outdoor recreational space" and that the Bylaw is intended to

require a developer to provide 2,000 square feet of outdoor recreational space per unit in a multi-family development. Board brief, p. 42-43.

Based upon the number of units and bedrooms in the project, Ms. SantucciRozzi calculated that, pursuant to § 135-705, the project required 393,000 s.f. of lot area, and a total of 140,000 s.f. of open space.[12] Exhs. 10; 24, ¶ 18. The project as proposed contains 93,866 s.f. of lot area and 24,499 s.f. of open space, or 350 s.f. of open space per unit. *Id.*; Exhs. 11, 12D. The Board argues that the "open space" required by § 135-705 should be interpreted as "outdoor recreational space." Board brief, p. 34. It points to 760 CMR 56.02: *Open Spaces*, which defines open space as "land areas, including parks, parkland, and other areas which contain no major structures and are reserved for outdoor recreational, conservation, scenic, or other similar use by the general public through public acquisition, easements, long-term lease, trusteeship, or other title restrictions which run with the land." At the same time, the Board refers to the Zoning Bylaw definition of open space as "undeveloped land maintained in a natural state." Board brief, p. 10; Exh. 12F, § 135-102. It argues that the landscaped areas provided by the Developer do not meet the quantitative standard of § 135-705 of the Zoning Bylaw, and they provide neither land in its natural state nor outdoor recreational space as required by 760 CMR 56.07(2)(b) and § 135-102. Finally, the Board argues that the Master Plan and the Subdivision Rules and Regulations contain open space and recreation standards that incorporate design guidelines relative to environmental concerns, recreation opportunities, and land use standards for open space on any given site. Exh. 13.[13]

In support of the Board's arguments, Ms. SantucciRozzi testified that the 2,000 s.f. open space requirement contained in § 135-705 "may not be called an outdoor recreational requirement, but the nature and intent of this Zoning Bylaw is clearly to regulate multifamily density and to guard against the over-development of a site." Exh. 25, ¶ 1. On cross-examination, she stated that the Zoning Bylaw table of dimensional and density requirements found in § 135-701 does not contain a requirement for outdoor recreational space and that the

[12] The calculation is based on 70 total units comprised of four studio units, 30 one-bedroom units, 29 two-bedroom units and seven three-bedroom units. Exhs. 10; 24, ¶ 18.

[13] The Board's reference to the Subdivision Rules and Regulations is unconvincing, as it is based on Ms. SantucciRozzi's testimony that the section on open space she references "provides that the Board may require that no building be erected upon a park or playground for recreational purposes without its approval." Board brief, p. 12, citing Exh. 24, ¶ 26.

only way a person would know that outdoor recreational space may be a requirement for a development would be to consult directly with her. Tr. I, 34-36. While the Zoning Bylaw definition of open space found in § 135-102 is "undeveloped land maintained in a natural state," Ms. SantucciRozzi testified on cross-examination that, in her opinion, recreational space is part of that definition of open space, as "natural open space is often used for recreation." Tr. I, 36-37. She also testified that the definition of "open space landscaped" found in § 135-102 ("[th]e parts of a lot designed and developed for pleasant appearance with landscaped elements and walks and terraces designed for nonvehicular use…") could also include outdoor recreational space. Tr. I, 38. She based this interpretation on the fact that § 135-102 references terraces, which "can often be used for exterior enjoyment, relaxation, reading" and are "typically areas that have some levelness to them and are available to be used." Tr. I, 38-39. Finally, Ms. SantucciRozzi refers to the Braintree Master Plan, Exh. 13, as guidance in reaching her opinion that outdoor recreational space is required. Tr. I, 43. On cross-examination, she pointed to certain "Guiding Principles" contained in the section of the Master Plan titled "Open Space and Recreation," for such support, but could not answer whether the Board considered these principles in making its decision. Tr. I, 46.

On further cross-examination, the Developer directed Ms. SantucciRozzi to the Master Plan section titled "Open Space and Recreation Action Plan," and inquired whether such plan contains a requirement for outdoor recreational space on private developments. Ms. SantucciRozzi responded that the Master Plan's first objective is to "[p]ursue strategies to protect publicly-owned and acquire or otherwise protect privately-owned open space" and that objective is not the same as requiring recreational space on a private development. Tr. I, 47-48; Exh. 13, p. 43. The next objective in the Master Plan is "to increase access to existing public open spaces for passive recreation." Exh. 13, p. 43. Ms. SantucciRozzi agreed that that objective applies to public property. Tr. I, 48. The third objective is to "increase opportunities for active recreation" which is followed by a list of several public parcels of land where there is public space for recreation. Exh. 13, p. 43. Ms. SantucciRozzi further testified on cross-examination that the Master Plan makes a number of recommendations for changes to the Zoning Bylaw, that the Master Plan gives an implementation plan for this open space and recreational section, and that of the proposed zoning amendments that are set forth in the Master Plan, none included a requirement of outdoor recreational space for private development. Tr. I, 48-51.

The Developer argues that the Board fails to identify a bylaw, regulation or a local rule that supports its claim that the town has a local planning concern that "places any weight on the absence or presence of outdoor recreational space on a multi-family project." Developer reply, pp. 13-14. The Developer argues that "open space" is different from "outdoor recreational space" and there is no support for concluding that the terms should be used interchangeably. It refers to the zoning bylaw definition of "open space" as "[u]ndeveloped land maintained in a natural state," and the definition for "open space landscaped," which states: "[t]he parts of a lot designed and developed for pleasant appearance with landscaped elements and walks and terraces designed for non-vehicular use. Such space may not include lot area used for parking, access drives, other hard-surface areas and walks and terraces that are in excess of 50% of the total required open space," and points out these contain no reference to outdoor recreational space. Developer brief, pp. 18-19. Exh. 12F, § 135-102. The Developer argues that none of the Board's attempts to insert outdoor recreational space into the meaning of open space are supported by the evidence. Developer reply, pp. 11-13.[14]

"The board's power to disapprove a comprehensive permit, like its power to impose conditions in issuing a comprehensive permit, *Zoning Bd. of Appeals of Amesbury v. Housing Appeals Committee*, 457 Mass. at 755-756, is limited to the scope of the concern of the various local boards in whose stead the local zoning board acts." *Zoning Bd. of Appeals of Holliston v. Housing Appeals Committee*, 80 Mass. App. Ct. 406, 414-18 (2011). The Board has the burden to prove a local concern protected by the Town's local requirements or regulations, that it applies to the proposed development, and that the specific interests identified in the local regulation are

[14] 383 Washington also posed the alternative argument, in a footnote, that, under § 135-705, it did not need to seek a waiver of the open space requirement because it is not a requirement for as-of-right development in any zoning district in Braintree. 760 CMR 56.05(7) ("[z]oning waivers are required solely from the 'as-of-right' requirements of the zoning district where the project is located; there shall be no requirement to obtain waivers from the special permit requirements of the district"). Developer brief, p. 19, n.5. The Board argues that § 135-705 is not a special permit requirement, stating that the Zoning Bylaw provides that however the multifamily use is authorized by § 135-601, "the dimensional requirements of § 135-705 apply in place of the dimensional requirements applicable to any other use in the underlying district." Board reply, p. 7. We need not decide this issue, as we determine the 2,000 s.f. open space per unit requirement does not establish a local concern for 2,000 s.f. of outdoor recreational open space, or a local concern that requires the developer to increase the open space on the project site.

important at the site.[15] *Herring Brook Meadow, LLC v. Scituate*, No. 2007-15, slip op. at 25 (Mass. Housing Appeals Comm. May 26, 2010). If the Board has not articulated the local concern, nor shown its relationship to a specific applicable local requirement, nor demonstrated its importance to the proposed development site, the Board has failed to demonstrate a valid local concern applicable to the project, much less that such a concern outweighs the regional need for affordable housing. *Id.* at 23-26. *See Weiss Farm Apartments, LLC v. Stoneham*, No. 2014-10, slip op. at 31 (Mass. Housing Appeals Comm. Mar. 15, 2021). On the record before us, we do not find the testimony of Ms. SantucciRozzi and Mr. Campbell regarding the purported intent of the bylaw to require recreational open space for multifamily development to be credible.

We rule that § 135-705 does not impose a requirement that a private development provide outdoor recreational space. The evidence and testimony presented by the Board do not credibly support a finding that the Zoning Bylaw definitions of "open space" and "open space landscaped" in the Zoning Bylaw include a requirement for outdoor recreational space, nor does the manner of calculating open space found in § 135-708. *See* Exhs. 12E; 12F. None of these provisions contain a definition for the term "outdoor recreational space," nor is that term used in the Zoning Bylaw in any other descriptive manner. Further, based upon language of the cited provisions above, while there may be an inconsistency within the Zoning Bylaw regarding the meaning and application of the term "open space" in different contexts, in no context is the term "recreational space" used or defined. Because the bylaw does not define the term "outdoor recreational space," we have adopted a "plain language" interpretation of the term. *See Matter of Norwood and Davis Marcus Partners*, No. 2015-06, slip op. at 14 (Mass. Housing Appeals Comm. Dec. 8, 2016). *See also Miles-Matthias, supra,* 843 Mass. App. Ct. at 789; *Tanner, supra,* 61 Mass. App. Ct. at 649.

The Board relies upon *Dennis* for its argument that the Committee has held that open space "must" include recreational opportunities. Board brief, p. 40. *See Dennis Housing Corporation v. Dennis,* No. 2001-02, slip op. at 9. The *Dennis* case, however, was based upon the Cape Cod Commission's Regional Policy Plan, local rules and regulations applicable in Dennis, that included specific performance standards and methodologies for implementation of

[15] The inclusion of the "preserv[ation of] open spaces" as a category of local need in G.L. c. 40B, § 20, addresses general municipal preservation of open spaces, which are defined in 760 CMR 56.02: *Open Spaces.* This is not applicable to the Board's position that the development as proposed contains inadequate recreational areas for the residents of the development.

local open space concerns. *Dennis*, *supra*, slip op. at 9. No such specific performance standards or methodologies exist in Braintree. In *8 Grant Street LLC v. Natick*, No. 2005-13, slip op. at 11-13 (Mass. Housing Appeals Comm. Mar. 5, 2007), we found that the open space provided there, which was similar in kind to the open space provided here, was sufficient for an apartment development and that the Board's concern in that case did not outweigh the regional need for housing even though in *Natick*, unlike Braintree, the bylaw contained express guidance that open space may include outdoor recreational facilities.

Moreover, in *CMA, Inc. v. Westborough*, No. 1989-25, slip op. at 26-27 (Mass. Housing Appeals Comm., June 25, 1992), we noted the importance of "whether the particular design before us responds appropriately to the site itself and the surrounding area." As the Developer's witnesses testified, the design of the project is suitable for the surrounding area. Braintree Square is within walking distance to several public outdoor recreational facilities and an MBTA bus stop, retail shops, offices, religious, educational and recreational uses, restaurants and other types of businesses. Exhs. 10; 28, ¶¶ 9, 17; 28A. While the Board's stated concern for outdoor recreational space is based on its view that young, active families will be likely tenants of the project, we find that multiple opportunities for outdoor and indoor recreation, public transit and entertainment can be found in close proximity to the project. It is precisely the project's location in Braintree Square that makes it an attractive location for the prospective residents. In addition, as Mr. Holland testified, and unlike in the *Dennis* case, the property as it exists today, is a "blighted industrial property" and its redevelopment will provide housing that is in demand, while taking advantage of existing infrastructure on the site. Exh. 28, ¶¶ 19- 20.

Finally, neither the Master Plan nor the Subdivision Rules and Regulations supports the Board's position that outdoor recreational space is required for private developments.[16] Notable throughout the Master Plan section on Open Space and Recreation Action Plan are references and goals relating to publicly accessible open spaces, publicly accessible passive and active recreational facilities and preservation of natural resources. Exh. 13, pp. 36-44. The Master Plan does not contain any recommendations that the Town impose outdoor recreational facilities on private developments. Further, as the Developer notes, the Board has not established that the

[16] *See* note 13, above. The Developer also notes that correctly notes that the Subdivision Rules and Regulations do not apply to this project. 760 CMR 56. 05(7).

Master Plan meets the standards required for our consideration set forth in *28 Clay Street Middleborough, LLC v. Middleborough*, No. 2006-16, slip op. at 12 (Mass. Housing Appeals Comm. Sept. 28, 2009). Under *Middleborough*, for a master plan to be considered as part of the town's long-term planning goals, the Board must present evidence that: (1) there is a bona fide long-term master plan; (2) the plan promotes affordable housing; and (3) the plan has been implemented in the area of the project. *Middleborough, supra*, slip op. at 12. These three elements were not established by the Board, nor does the Master Plan offer a valid local concern supporting the denial of the project based upon lack of outdoor recreational space that outweighs the regional need for affordable housing.[17]

Even if the Board had demonstrated a local concern for on-site outdoor recreational space generally, the Developer's principal, Mr. Holland, testified that there is little, if any, need for such outdoor recreational space at this development. Mr. Holland, a long-time resident of Braintree, stated that, as a resident of Braintree, if he wished to engage in outdoor recreation or exercise, he would do so at one of the public parks in town and this is what he assumes most tenants of an apartment building would do as well. Tr. II, 18-19. Mr. Holland noted that the development is located behind Braintree Square, and abuts a private school football field, a commercial office building, and is within walking distance of shops and restaurants. Exh. 28, ¶¶ 8-9. He also testified that the Hollis School recreational complex is approximately four-tenths of a mile away from the project, and provides "large areas for outdoor recreation, including playing fields, basketball courts, a tot lot, and a community playground." Adjacent to the Hollis School recreational complex is the Daughraty Gym, which is available for public use and within approximately seven-tenths of a mile; the Flaherty Elementary School off Storrs Avenue has an outdoor recreational area that is available to the public. Mr. Holland testified that he expects that the residents of the project would utilize any of those facilities for outdoor activities. Exh. 28, ¶ 17. Residents will also have access to an indoor fitness facility within the apartment project. Exh. 28, ¶ 18. We find Mr. Holland's testimony to more credible than that of

[17] The Board also suggests that Braintree's status as an environmental justice community under state policy, demonstrates a local concern for the increase in outdoor recreation area on the project site. Board brief, p. 39 and n.4. This largely undeveloped argument based on state policy is unpersuasive. *See e.g., Herring Brook Meadow, LLC v. Scituate,* No. 2007-15, slip op. 2 (Mass. Housing Appeals Comm. May 26, 2010) (noting statewide goals of smart growth and sustainable development are not of themselves local requirements, although they may form part of municipal planning).

the Board witnesses and conclude that the Board has not proven sufficient local concern at this particular location to outweigh the regional need for affordable housing.[18]

The Board has shown no local concern supporting the denial of the comprehensive permit based on a lack of outdoor recreational space under the circumstances presented here. Nor has it shown a valid local concern for on-site outdoor recreational space in multifamily developments located in its Village Overlay District. Therefore, we further find the Board has failed to show any such local concern that outweighs the regional need for affordable housing. Accordingly, we rule that the Board has not met its burden of proving that outdoor recreational space within the project site at issue is a valid local concern and that, even if such a concern existed, the Board did not present credible evidence to meet its burden of proving that the need for outdoor recreational space within the project site outweighs the regional need for affordable housing in Braintree. For this reason, its denial of a waiver of the Zoning Bylaw § 135-703 is unsupported by a valid local concern that outweighs the regional need for affordable housing.

VII. UNEQUAL TREATMENT

The Developer also claims that the Board has not applied its local requirements and regulations as equally as possible to subsidized and unsubsidized housing. General Laws, chapter 40B, § 20 provides that local rules and regulations cannot be deemed "consistent with local needs" unless they are "applied as equally as possible to both subsidized and unsubsidized housing." The Developer carries the burden of proving such unequal treatment. 760 CMR 56.07(2)(a)(4). There is no shifting of burden on this issue; the Developer has the burden of proof and the Board may attempt to rebut the Developer's proof. *Avalon Cohasset, Inc. v. Cohasset*, No. 2005-09, slip op. at 8 (Mass. Housing Appeals Comm. Sept. 18, 2007). One of the clearest examples of unequal application of local requirements is if a condition is not based upon some local legislative or regulatory requirement, but rather is based on concerns not

[18] Although not a matter about which the parties were obligated to provide evidence, and not a basis for our decision, we note this type of development is consistent with statewide land use policy goals we have acknowledged in past decisions. This proposed development provides the type of infill housing that is prioritized by the smart growth zoning statute, G.L. c. 40R, *see, e.g.*, *Paragon Residential Properties, LLC v. Brookline*, No. 2004-16, slip op. at 48 (Mass. Housing Appeals Comm. Mar. 26, 2007); *Cloverleaf Apartments, LLC v. Natick,* No. 2001-21, slip op. at 16 (Mass. Housing Appeals Comm. Dec. 23, 2002), as well as recent housing choice legislation, G.L. c. 40A, §§ 3A, 5, 9, as revised by St. 2020, c. 358.

previously regulated. *Haskins Way, LLC v. Middleborough*, No. 2009-08, slip op. at 13, n.14 (Mass. Housing Appeals Comm. March 28, 2011); *see also Green View Realty, LLC v. Holliston,* No. 2006-16, slip op. at 10 (Mass. Housing Appeals Comm. Jan. 12, 2009).

The Board identified seven multifamily projects intended to prove that "open space" is a valid local planning concern in Braintree. Ms. SantucciRozzi testified that § 135-705 of the Zoning Bylaw, Exh. 12D, has been applied and interpreted as imposing additional dimensional requirements for multifamily dwellings, regardless of whether they are allowed as of right or by special permit in the underlying zoning district, and that this provision has been applied to various projects including: 639 Washington Street (homeownership multifamily townhouses); 205 Elm Street (homeownership multifamily townhouses); 177-179 Commercial Street (rental multifamily flats). Exh. 24, ¶ 16. She further testified that all these developments, which were unsubsidized housing developments, either complied with or were granted zoning relief from the open space requirement of § 135-705. Exh. 25, ¶ 3. On cross-examination, Ms. SantucciRozzi testified that, while the application materials for those developments show or reference outdoor recreational areas, there was no requirement in the decisions for those developments, which decisions she wrote, to include outdoor recreational space. Exh. 25, ¶ 3; Tr. I, 51-52. In addition to those three developments, Ms. SantucciRozzi also testified about other multifamily developments, including 60 Pearl Street, Independence Avenue and 84 Pearl Street/French Avenue and compared them to the 383 Washington Street project. Her testimony included the table reproduced below.

EXHIBIT V
SantucciRozzi Rebuttal Testimony
Apartment Project

Address	Style of Units	Total Number of Units	Total Lot Area	Total Open Space	Open Space Per Unit
205 Elm Street	Townhouse and Flats	12 Units 2-Bedroom Units	77,000 Sq. Ft.	50,500 Sq. Ft.	4,209 Sq. Ft.
550 Liberty Street Lenox Farms	Flats, Duplexes and Townhouses	338 Units (137) 1-Bedroom Units (201) 2-Bedroom Units	50.6 Acres	31.26 Acres	4,028 Sq. Ft.
177-179 Commercial Street	Duplex and Flats	5 Units (3) 1-Bedroom Units (2) 2-Bedroom Units	17,775 Sq. Ft.	11,264 Sq. Ft.	2,253 Sq. Ft.
639 Washington Street	Townhouse	4 Units 3-Bedroom Units	15,846 Sq. Ft.	7,035 Sq. Ft.	1,758 Sq. Ft.
800 West Street Ridge	Flats and Duplexes	186 (82) 1-Bedroom Units (104) 2-Bedroom Units	16 Acres	**6 Acres	**1,405 Sq. Ft.
79 Shaw Street Wind Jammer Cove	Flats	73 Units 2-Bedroom Units	143,748 Sq. Ft.	37,230 Sq. Ft.	510 Sq. Ft.
60 Pearl Street	Flats	18 Units (2) Studio Units (16) 1-Bedroom Units	24,900 Sq. Ft.	6,865 Sq. Ft.	381 Sq. Ft.
9 Independence Avenue	Flats	35 Units 2-Bedroom Units	45,935 Sq. Ft.	11,515 Sq. Ft.	329 Sq. Ft.
84 Pearl and French Avenue	Townhouse and Flats	15 Units (2) 2-Bedroom Units (13) 1-Bedroom Units	18,900 Sq. Ft.	3,675 Sq. Ft.	245 Sq. Ft.

** Only includes the Easement (Area exceeds values in the Table)

Address	Style of Units	Total Number of Units	Total Lot Area	Total Open Space	Open Space Per Unit
383 Washington Street	Flats	70 Units (4) Studios (30) 1-Bedroom Units (29) 2-Bedroom Units (7) 3-Bedroom Units	93,866 Sq. Ft.	24,499 Sq. Ft.	349 Sq. Ft.

Exhs. 25, ¶¶ 4A-D, 5A-B; 25-V.

The Developer argues that, because none of the decisions for the above projects contains any requirement for "outdoor recreational space" as a condition of approval, the Board has not applied the local requirements and regulations equally. Developer brief, p. 23. Mr. Holland testified that this project proposes 70 units of housing on a 93,866 s.f. lot, resulting in a density of approximately 32.5 units per acre, which is less dense than three of the other projects identified by Ms. SantucciRozzi: 60 Pearl Street development (32.7 units/acre; 381 s.f. of open space per unit), Independence Avenue development (43.6 units/acre; 329 s.f. of open space per unit) and 84 Pearl Street/French Avenue project (43.9 units/acre; 245 s.f. of open space per unit). Exh. 28, ¶ 19. Furthermore, Mr. Holland testified that three of the listed developments (639 Washington Street, 205 Elm Street and 177-179 Commercial Street) were approved by the Board and were granted dimensional variances and special permits that relieved those developments from strict compliance with § 135-705. He also pointed out that this project, like those three projects, as approved by the applicable permit granting authority, were intended to redevelop

blighted industrial or underutilized commercial or residential property, which the approving boards supported in those other nonsubsidized housing decisions. Exh. 28, ¶ 19.

Looking specifically at two of the three projects singled out by Mr. Holland as having similar amounts of open space per unit, Ms. SantucciRozzi argues they should be distinguished from this project because they are within the Village Overlay District which encourages greater density and more compact sites and was created to "breathe new life into once vibrant squares or villages." Exh. 25, ¶ 6, 6A. Yet, she acknowledged that this project is also within the Village Overlay District. Ms. SantucciRozzi attempted to distinguish this project from the other two projects—60 Pearl Street and 84 Pearl Street/French Avenue developments—by stating that the style of units and number of bedrooms included in this project is designed to attract families rather than "individuals living alone, young professionals or those who prefer to live, work and play in close proximity to businesses and restaurants."[19] Exh. 25, ¶ 7. She also acknowledged that both the 60 Pearl Street and 84 Pearl Street/French Avenue projects were granted special permits and variances from the requirements of § 135-705.[20] Exh. 25, ¶ 7, Exh. 25-T. We are not persuaded that Ms. SantucciRozzi's testimony that this project is designed to attract families is credible or material to the disparate treatment regarding these developments and the proposed project. The same is true for the third project, Independence Avenue, which is in the General Business district and was also granted zoning relief from the provisions of § 135-705 to allow 329 s.f. of open space per unit. Exh. 25, ¶ 4.B; Exh. 25-V.

As stated above, none of the unsubsidized developments cited by the Board contain any requirement for outdoor recreational space. Tr. I, 52. Further, several of the developments, notably two that are in the same Village Overlay district as this project, received zoning relief from § 135-705 to permit comparable areas of reduced open space. Accordingly, we find that the Board failed to treat this project as equally as possible as unsubsidized projects in its application of § 135-705, in violation of G.L. c. 40B, § 20 and 760 CMR 56.07(2)(a)(4).

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[19] The "Purpose" section of § 135-613, the Village Overlay District bylaw, states that it is intended to "specifically provide[] a set of development standards which promote a collective identity and encourage visual harmony." Exh. 12B. Section 135-705 contains no statement or indication that its intent is to attract young professionals or individuals living alone.

[20] 84 Pearl Street obtained a variance from the requirements of § 135-705. Exh. 25-T; Ms. SantucciRozzi did not testify as to the specific form of zoning relief granted for 60 Pearl Street. Exh. 25, ¶ 5A.

VIII. CONCLUSION

Based upon review of the entire record and upon the findings of fact and discussion above, the Housing Appeals Committee concludes that the decision of the Board is not consistent with local needs. The decision of the Board is vacated, and the Board is directed to issue a comprehensive permit that conforms to this decision as provided in the text of this decision and subject to the following conditions.

1. Any specific reference to the submission of materials to Town officials or offices for their review or approval shall mean submission to the appropriate municipal official with relevant expertise to determine whether the submission is consistent with the final comprehensive permit, such determination not to be unreasonably withheld. Such official may consult with other officials or offices with relevant expertise as they deem necessary or appropriate. In addition, such review shall be made in a reasonably expeditious manner, consistent with the timing for review of comparable submissions for unsubsidized projects. *See* 760 CMR 56.07(6).

2. The comprehensive permit shall conform to the application submitted to the Board, as modified by the following conditions.

    a. The Development shall be constructed as shown on the site plans set out in and prepared by Decelle-Burke Sala & Associates. Exh. 3E.

    b. The developer shall comply with all applicable non-waived local requirements and regulations in effect on the date of 383 Washington Street's submission of its comprehensive permit application to the Board, consistent with this decision pursuant to 760 CMR 56.02: *Local Requirements and Regulations*.

    c. Compliance with the minimum open space requirements of Zoning Bylaw § 135-705 is waived.

    d. The following additional conditions proposed by the Board, and agreed to by the Developer, are to be included in the comprehensive permit:

        i. Prior to the issuance of any building permit excluding demolition, the Developer shall submit final fire alarm/sprinkler plans to the Braintree Fire Chief for review and approval. The Developer shall install sprinklers in compliance with M.G.L. c. 148, §26I, which requires a sprinkler system designated per NFPA Code and the Massachusetts State Fire Code, as reviewed and approved by the Fire Chief. All fire protection systems shall comply with the State

Building Code and any amendments thereto.

ii. If the grass-crete life and fire safety access area proposed at the southeast corner of the site remains part of the Developer's final plans, the curb shown on Exh. 3E, Sheet 5 shall be eliminated and replaced with a mountable curb or surface acceptable to the Braintree Fire Chief.

iii. Developer shall submit hydrant flow testing demonstrating that the water system can deliver adequate fire flow and static pressure to the project.

iv. All final hydrant locations are to be approved by the Braintree Fire Chief.

v. The Developer shall design, fund and construct all recommended upgrades to the Storrs, Elm and Washington intersection, as described in the OFF-SITE Section on page 3 of the TIA dated February 2017 updated to July 2019 and as reconfirmed in the updated TIA dated October 18, 2019.

vi. The Developer shall install a NO LEFT TURN sign at the project's curb cut on Storrs Avenue.

e. The developer shall submit final construction plans for all buildings, roadways, stormwater management systems, and other infrastructure to Braintree town entities, staff or officials for final comprehensive permit review and approval pursuant to 760 CMR 56.05(10)(b).

f. All Braintree town staff, officials and boards shall promptly take whatever steps are necessary to permit construction of the proposed housing in conformity with the standard permitting practices applied to unsubsidized housing in Braintree.

3. Should the Board fail to carry out this order within thirty days, then, pursuant to G.L. c. 40B, § 23 and 760 CMR 56.07(6)(a), this decision shall for all purposes be deemed the action of the Board.

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

a) Construction in all particulars shall be in accordance with all applicable local zoning and other bylaws, regulations and other local requirements in effect on the date of 383 Washington Street's submission of its

comprehensive permit application to the Board, except those waived by this decision or in prior proceedings in this case.

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

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

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

e) The Board and all other Braintree town staff, officials and boards shall take whatever steps are necessary to ensure that a building permit and other permits are issued to 383 Washington Street, without undue delay, upon presentation of construction plans, pursuant to 760 CMR 56.05(10)(b), that conform to the comprehensive permit and the Massachusetts Uniform Building Code.

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

g) This comprehensive permit is subject to the cost certification requirements of 760 CMR 56.00 and DHCD guidelines issued pursuant thereto.

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

March 15, 2022

Shelagh A. Ellman-Pearl, Chair

Joseph P. Henefield

James G. Stockard, Jr.

Lisa V. Whelan, Presiding Officer