

**COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE**

41 TUSNUA, LLC

v.

NEWTON ZONING BOARD OF APPEALS

No. 2024-13

DECISION

April 30, 2026

TABLE OF CONTENTS

I. INTRODUCTION	1
II. PROCEDURAL BACKGROUND.....	2
III. FACTUAL BACKGROUND.....	3
IV. STANDARD OF REVIEW AND PARTIES’ BURDENS	4
A. Developer’s Burden to Establish a Prima Facie Case.....	5
B. Board’s Burden to Establish Valid Local Concerns	6
C. Board’s Procedural Arguments.....	6
1. Weight of the Affordable Housing Need	6
2. De Novo Hearing Before the Committee.....	8
3. Board’s Argument for Deference to Its Legal Interpretations	8
V. STORMWATER MANAGEMENT.....	10
A. Developer’s Prima Facie Case	10
B. Board’s Local Concerns Case.....	11
1. The “Discretionary” Requirement for a Groundwater Mounding Analysis	11
2. Asserted Stormwater Management System Design Flaws	15
C. Committee’s Discussion	16
1. The Board’s Asserted “Discretionary” Authority to Require a Groundwater Mounding Analysis is Not a Valid Local Requirement or Regulation	18
2. The Record Does Not Establish Local Concerns Regarding Groundwater Runoff or Mounding.....	20
3. The Board’s Asserted Design Flaws Do Not Amount to a Local Concern	21
VI. ARCHITECTURE, DENSITY, AND MASSING	22
A. Developer’s Prima Facie Case	22
B. Board’s Local Concerns.....	24
C. Committee’s Discussion	26
VII. TRAFFIC, ON-SITE CIRCULATION AND RELATED SITE DESIGN, AND ACCESSIBILITY	27
A. Developer’s Prima Facie Case	27
B. Board’s Local Concerns.....	29
C. Committee’s Discussion	29
VIII. CONCLUSION.....	30

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COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

41 TUSNUA, LLC,)	
)	
Appellant,)	
)	
v.)	No. 2024-13
)	
NEWTON ZONING BOARD OF APPEALS,)	
)	
Appellee.)	
)	

DECISION

I. INTRODUCTION

This is an appeal brought by 41 TusNua, LLC (developer), pursuant to G.L. c. 40B, § 22, from a decision of the Newton Zoning Board of Appeals (Board) denying its comprehensive permit application with respect to property located in Newton. After an evidentiary hearing and review of the record, as discussed below, we conclude the Board’s decision was not reasonable and consistent with local needs. Chapter 40B, the Comprehensive Permit Law, tasks this Committee with weighing a municipality’s local concerns (regarding the protection of health or safety, promotion of better site or building design, or preservation of open spaces that are supported by municipal requirements and regulations) against the regional need for low and moderate income (affordable) housing. *See* G.L. c. 40B, §§ 20, 23; 760 CMR 56.07. The Board asserted concerns with the developer’s proposal regarding stormwater management, site and building design, and accessibility for persons with disabilities, but it failed to demonstrate that its concerns were valid local concerns that outweigh the substantial need for affordable housing.

II. PROCEDURAL BACKGROUND

On July 10, 2023, the Massachusetts Housing Finance Agency (MassHousing) issued a project eligibility letter (PEL) establishing that the developer's proposal meets the project eligibility criteria set forth in 760 CMR 56.04(1). Exh. 1; Pre-Hearing Order, § II, ¶ 1. On August 15, 2023, the developer filed with the Board a comprehensive permit application to develop 16 homeownership units of which four will be affordable. Exh. 2, ¶ 2. On September 13, 2023, the Board opened a public hearing to consider the developer's application. *Id.*, ¶ 3. The Board continued the public hearing for six additional sessions and closed the hearing on September 9, 2024. *Id.*, ¶¶ 3, 8. The Board deliberated at a meeting held on October 16, 2024, and voted to deny the comprehensive permit application. *Id.*, ¶ 9. The Board's denial decision, dated October 16, 2024, was filed with the Newton City Clerk on October 17, 2024. Exh. 2; Pre-Hearing Order, § II, ¶ 2.

On November 5, 2024, the developer appealed the Board's denial decision to this Committee. On November 20, 2024, nine Newton homeowners (collectively, Neighbors) moved to participate in this appeal as interested persons; the Neighbors' unopposed motion was allowed.¹ On November 22, 2024, the presiding officer opened the Committee hearing by holding an initial conference of counsel pursuant to 760 CMR 56.06(7)(d)1. Thereafter, the parties jointly drafted a pre-hearing order to identify the issues for hearing, which the presiding officer issued on March 6, 2025. *See* 760 CMR 56.06(7)(d)3; *River Stone, LLC v. Hingham*, No. 2016-15, slip op. at 24 n.19 (Mass. Housing Appeals Comm. Sept. 23, 2022). Thereupon, the parties each filed written direct testimony, and the developer filed written rebuttal testimony. On July 23, 2025, the presiding officer held a pre-hearing conference to discuss, inter alia, logistics for the evidentiary portion of the hearing. On July 28, 2025, before the evidentiary hearing, the presiding officer and counsel for the parties and Neighbors conducted a site visit of the proposed development. The evidentiary hearing was held on July 28 and 29, 2025, to allow cross examination of witnesses who filed written testimony.² Sixty-eight exhibits were admitted into

¹ The interested persons are Kim Gluck, Andy Gluck, Jen Murphy, Jodi Vito, Kevin Vito, Liam Ryan, Julia Meigs, James Meigs, and Paul Fair.

² The Board waived cross examination of Robert Michaud, the developer's traffic engineer. The developer waived cross examination of three of the Board's witnesses: Paul Fair and Kevin Vito, who are Interested Persons, as well as Ben Whitesides, who is an abutter to the proposed development.

evidence. Following the presentation of evidence, the parties and Neighbors submitted post-hearing briefs and reply briefs. In their post-hearing brief, the Neighbors request that the Committee issue a tentative or proposed decision to allow them the opportunity to file objections thereto, as well as the chance to present oral argument before the Committee. Neighbors brief, p. 19. The developer correctly notes that the Neighbors are not parties to this proceeding. *See* Developer reply, p. 18. Because neither of the parties in this case requested oral argument or a proposed decision, the provisions of G.L. c. 30A, § 11(7), 760 CMR 56.06(7)(e)9 and 56.06(7)(f) are inapplicable.³ The Neighbors' request is therefore denied.

III. FACTUAL BACKGROUND

The developer proposes to construct 16 homeownership units in a single, four-story building with indoor parking on approximately 0.6 acres of land at 41 Washington Street in Newton, Massachusetts. *See* Exhs. 2, ¶ 2; 32, ¶ 12. Twenty-five percent (four) of the 16 units will be deed-restricted as affordable to persons who earn up to 80% of the area median income. *See* Exh. 1.

The proposal includes 20 indoor parking spaces and no on-site, outdoor parking. The ground floor of the building includes the parking garage, bicycle parking, mechanical spaces, and a trash and recycling room. *See* Exh. 32, ¶ 12. The project proposes a lot area of 1,619 feet per unit. Exh. 56, ¶ 25. Approximately 65% of the property for the project will be open space. *See* Exh. 32, ¶ 13; Tr. I, 90. The project has a 25-foot front yard setback, a 12.3-foot side yard setback, and a 77.7-foot rear yard setback. Exh. 32, ¶ 14. The proposed building is 43.57 feet tall, less than one foot taller than the existing 42.8-foot-tall building on the Property that this development would replace. *See* Exh. 32, ¶ 15.

The property is located in Newton's Single Residence 3 (SR-3) Zoning District. *See* Exh. 10. It is situated on Washington Street in the middle of a roughly square-shaped block and is surrounded by abutting single-family residences on three sides; these abutting residences are

³ "The presiding officer may allow interested persons to participate in the hearing. Such persons shall be entitled to receive all notices ... and all other documents ..., but shall be permitted to participate further in the hearing only to the extent and under the terms determined in the discretion of the presiding officer." 760 CMR 56.06(2)(c). Here, the Neighbors, as interested persons, were permitted to receive notices and documents, present an unsworn statement at the opening of the evidentiary hearing, and submit written post-hearing memoranda. *See* Ruling Granting Motion to Participate as Interested Persons (December 3, 2024).

located on Grasmere Street to the northwest, Merton Street to the northeast, and Elmhurst Road to the southeast. *See* Exh. 53. The project proposes a stormwater management system designed to capture and infiltrate stormwater, reducing runoff to abutting properties. *See* Tr. II, 32. Additional facts are addressed below in the discussion of local concerns.

IV. STANDARD OF REVIEW AND PARTIES' BURDENS

The Comprehensive Permit Law, G.L. c. 40B, §§ 20-23, sets the standard of review for developer appeals. “The hearing by the [Committee] shall be limited to the issue of whether, in the case of the denial of an application, the decision of the board of appeals was reasonable and consistent with local needs....” G.L. c. 40B, § 23. This is the central purpose of proceedings before the Committee.⁴ The comprehensive permit regulations provide that, in the case of a denial, a 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.

760 CMR 56.07(2)(a)2.

“In the case of denial, the Board shall have the burden of proving, first, that there is a valid health, safety, environmental, design, open space, or other Local Concern which supports such denial, and then, that such Local Concern outweighs the Housing Need.” 760 CMR 56.07(2)(b)2. “The comprehensive permit regulations, 760 CMR 56.07(2)(a)2 and (b)2, do not explicitly specify that the developer’s *prima facie* case is a prerequisite for the Board’s obligation to demonstrate local concerns; however, Committee decisions have stated that if the developer establishes a *prima facie* case, the burden shifts to the board to prove a valid local concern that supports the denial.” *104 Stony Brook, LLC v. Weston*, No. 2017-14, slip op. at 11 (Mass. Housing Appeals Comm. June 23, 2023), *aff’d sub nom. City of Cambridge v. Housing Appeals*

⁴ “The Legislature’s intent in [enacting G.L. c. 40B, §§ 20-23,] was to provide relief from exclusionary zoning practices which prevented the construction of badly needed low and moderate income housing.” *Zoning Bd. of Appeals of Amesbury v. Housing Appeals Comm.*, 457 Mass. 748, 760 (2010), quoting *Board of Appeals of Hanover v. Housing Appeals Comm.*, 363 Mass. 339, 353-354 (1973). *See, e.g., Standerwick v. Zoning Bd. of Appeals of Andover*, 447 Mass. 20, 28-29 (2006); *Zoning Bd. of Appeals of Wellesley v. Ardemore Apartments Ltd. P’ship*, 436 Mass. 811, 814–815, 820–824 (2002).

Comm., No. 2381CV02105 (Middlesex Super. Ct. June 10, 2025), *appeal docketed* Nos. 2025-P-0986, 2025-P-1007, and cases cited.

Here, the following aspects of the project are in dispute: (i) stormwater management; (ii) architecture, density, and massing; (iii) traffic, on-site circulation and related site design; and (iv) accessibility for persons with disabilities. Pre-Hearing Order, § IV.⁵

A. Developer’s Burden to Establish a Prima Facie Case

“In a long line of cases, the Committee has consistently ruled that developers need to make only a minimal showing for the prima facie case in the hearing before the Committee under the comprehensive permit regulations.” *Weston, supra*, No. 2017-14, slip op. at 12. “[A] *prima facie* case may be established with [minimal] evidence.” *100 Burrill Street, LLC v. Swampscott*, No. 2005-21, slip op. at 7 (Mass. Housing Appeals Comm. June 9, 2008). “For example, ‘it may suffice for the developer to simply introduce professionally drawn plans and specifications.’” *Sugarbush Meadow, LLC v. Sunderland*, No. 2008-02, slip op. at 5 n.4 (Mass. Housing Appeals Comm. June 21, 2010), *aff’d sub nom. Zoning Bd. of Appeals of Sunderland v. Sugarbush Meadow, LLC*, 464 Mass. 166 (2013) quoting *Tetiquet River Village, Inc. v. Raynham*, No. 1988-31, slip. op. at 9 (Mass. Housing Appeals Committee Mar. 20, 1991). This prima facie rule is in place not as a “technical requirement to be fulfilled by the developer. [Rather] [t]he prima facie requirement exists both so that this Committee will have a clear idea of the proposal before it, and so that the Board has a fair opportunity to challenge it.” *Tetiquet River, supra*, No. 1988-31, slip op. at 11.

The developer argues that it met its prima facie case that the project complies with all applicable federal or state statutes or regulations regarding the Board’s asserted local concerns in this appeal— stormwater management; architecture, density, and massing; traffic, on-site circulation and related site design; and accessibility for persons with disabilities. *See* Developer brief, pp. 5-8. Having reviewed the evidence, as discussed below, we agree.⁶

⁵ While the jointly drafted Pre-Hearing Order identified traffic as an issue in dispute, the Board did not brief the issue so it is therefore waived. *See Washington Green Development LLC v. Groton*, No. 04-09, slip op. at 3 n.2 (Mass. Housing Appeals Comm. Sept. 20, 2005), citing *Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85 (1995).

⁶ The Board, in its briefs, makes no argument that the developer failed to establish a prima facie case.

B. Board's Burden to Establish Valid Local Concerns

Pursuant to 760 CMR 56.07(2)(b)2, the Board was required to prove that valid health, safety, environmental, design, open space, or other local concerns supported the denial of the comprehensive permit. The Board has the burden of proving there is a local concern protected by a provision of Newton's local requirements or regulations that is more stringent (*i.e.*, more protective) than what is required under state or federal law. 760 CMR 56.02: *Local Requirements and Regulations* (defined as provisions that "are more restrictive than state requirements"); *see also Zoning Bd. of Appeals of Holliston v. Housing Appeals Comm.*, 80 Mass. App. Ct. 406, 417, 420 (2011). Not only must a board show there is a more protective local requirement or regulation, but it must also show that the local rule protects against a specific harm that the state and federal requirements do not. *Id.* We have described this requirement in a similar way in *Herring Brook Meadow, LLC v. Scituate*, No. 2007-15, slip op. at 26 (Mass. Housing Appeals Comm. May 26, 2010), where we held that a board had to show that the local bylaw or regulation applies to the proposed development, and that "the specific interests identified in [the local rule] are important at the site." "If the Board has not articulated the local concern, nor shown its relationship to a specific applicable local requirement, nor demonstrated the relevant harm from the proposed development, the Board has failed to demonstrate a valid local concern applicable to the project, much less that such a concern outweighs the need for affordable housing." *104 Stony Brook, supra*, No. 2017-14, slip op. at 17, citing *Holliston*, 80 Mass. App. Ct. 405, 417, 420; *Scituate, supra*, No. 2007-15, slip op. at 23-26.

For the reasons discussed herein, we conclude the Board has not established valid local concerns that outweigh the need for affordable housing.

C. Board's Procedural Arguments

Below we review each disputed aspect of the project, starting with the developer's prima facie case, then followed by the Board's local concerns arguments. Before discussing those substantive issues, we first address the Board's procedural arguments regarding the Committee's standard of review and the Board's burden to establish valid local concerns.

1. Weight of the Affordable Housing Need

The Board argues that although, at the time of the developer's application, the City's Subsidized Housing Inventory (SHI) reflected 8.82% subsidized housing units in Newton, it had an SHI of 10.82% as of January 2024 and 11.03% as of the date testimony was submitted in this

matter. Board brief, pp. 20-21. Therefore, it argues, this is “evidence that the Housing need is ‘not as great’ as in areas where municipalities are yet to meet this threshold, and the weight of the housing need when balanced against local concerns should be decreased accordingly.” *Id.*, p. 21, citing 760 CMR 56.07(3)(b)(3). The Board contends “the immediacy of harm to neighboring properties likely to result from the construction of this Project” outweighs the regional need for affordable housing. *Id.* This argument is not persuasive for two reasons.

First, the parties stipulated that, as of the date of the developer’s comprehensive permit application, the City of Newton had not satisfied any of the statutory minima in G.L. c. 40B, § 20.⁷ Pre-Hearing Order, § II, ¶ 3. Therefore, there exists a rebuttable presumption that there is a substantial need for affordable housing that outweighs local concerns. 760 CMR 56.07(3)(a); *see Zoning Bd. of Appeals of Lunenburg v. Housing Appeals Comm.*, 464 Mass. 38, 42 (2013) (“there is a rebuttable presumption that there is a substantial Housing Need which outweighs Local Concerns” if statutory minima are not met), quoting *Boothroyd v. Zoning Bd. of Appeals of Amherst*, 449 Mass. 333, 340 (2007), quoting *Hanover*, 363 Mass. 339, 346, 365, 367 (“municipality’s failure to meet its minimum [affordable] housing obligations defined in § 20 will provide compelling evidence that the regional need for housing does in fact outweigh the objections to the proposal”). If the Board intended to rebut this presumption, it was required to put on evidence of “the regional need for [affordable] housing, considered with the proportion of the municipality’s population that consists of Low Income Persons.” 760 CMR 56.07(3)(b). The Board has not done so and cannot rely solely on the SHI because the SHI does not provide data regarding a municipality’s population of low-income persons.

Second, as discussed below, the Board has not demonstrated a valid local concern, so we do not reach the analysis of whether those local concerns outweigh the need for affordable housing. *See Holliston*, 80 Mass. App. Ct. 405, 417, 420; *Scituate*, *supra*, No. 2007-15, slip op. at 23-26; *see also* 760 CMR 56.07(3)(b)2.

⁷ SHI fluctuations after the application date have no bearing on the rebuttable presumption. *See* 760 CMR 56.03(1) (safe harbor calculated “as of the date of the Project’s application”); *Taylor v. Housing Appeals Comm.*, 451 Mass. 149, 155 (2008) (upholding validity of comprehensive permit regulation setting date on which municipality’s stock of low or moderate income housing is calculated); *see also Zoning Bd. of Appeals of Hingham v. Housing Appeals Comm.*, 105 Mass. App. Ct. 1145 (Aug. 25, 2025) (Rule 23.0 Decision) (concluding that “[t]o the extent the statute and regulations are silent as to the date to consider the relative need for affordable housing, it was reasonable for the [Committee] to apply the date of application”).

2. De Novo Hearing Before the Committee

The Board argues that the Committee's de novo review "is not without its limits" and appears to argue that this Committee should not consider new evidence on appeal but should instead evaluate whether the Board's denial decision was reasonable at the time it was made. *See* Board brief, p. 29. It states that at the close of the Board's public hearing, "the peer reviewer's conclusions about groundwater mounding were unrebutted, and the [developer] was refusing to carry out subsequent testing." *Id.* It argues that "[s]ince the [developer] failed to advance any of the arguments or evidence it now claims undermine the credibility of that analysis during the public hearing process, those arguments and evidence cannot now be reliable [sic] upon to establish that the board unreasonably relied on the evidence before it." "The [developer's] decision to supply a limited response to the Board's earlier request for further information, for the first time during this appeal, does not render the Board's decision to deny their permit in the fact [sic] of their earlier refusal to cooperate unreasonable or inconsistent with local needs." Board brief, pp. 29-30.

To the extent the Board argues that the Committee's de novo hearing is limited to a review of the evidence presented during the Board's hearing, it misunderstands the function of the Committee's de novo review. This framework is not, as the Board suggests, a review of whether the Board acted reasonably upon the information it had and the conclusions it reached during its public hearing. The Supreme Judicial Court rejected this argument in *Hanover* and concluded that Chapter 40B requires the Committee to conduct a de novo review of the application. *See Hanover*, 363 Mass. 339, 368-369 (rejecting boards' arguments that Committee's review is limited to re-examination of proceedings and evidence before boards). This appeal is limited to whether the Board's denial decision was reasonable and "consistent with local needs," a term of art defined by G.L. c. 40B, § 20, that provides the balancing of local needs against the affordable housing need. If the Committee finds that the board's decision "was unreasonable and not consistent with local needs, it shall vacate such decision and shall direct the board to issue a comprehensive permit..." G.L. c. 40B, § 23. Thus, this appeal allows parties to introduce new evidence that was not presented during the hearing before the Board.

3. Board's Argument for Deference to Its Legal Interpretations

As discussed in § V below, the Board argues that it has the discretionary authority to require a groundwater mounding analysis under local stormwater management regulations.

Board brief, pp. 17-18. It argues that “[i]n the zoning context generally, and as a general rule of review of local decisions, a zoning board is afforded ‘substantial deference.’” *Id.*, p. 18. It states, “[t]he City’s Engineering Department and the Board have consistently interpreted the Stormwater Ordinance and Local Rules as affording the City the discretion to request additional testing beyond what is set forth in federal or state regulations, and they are entitled to deference in that interpretation.” *Id.*, p. 18; *see* Tr. I, 114-117; Exh. 57, ¶ 47.

In support, the Board cites only to cases pursuant to G.L. c. 40A, § 17, which provides a deferential standard of review of zoning board decisions challenged in Superior Court. Chapter 40B, § 21, provides that persons aggrieved by the issuance of a comprehensive permit or approval may appeal to court as provided in G.L. c. 40A, § 17. Notably, however, Chapter 40B does not provide a deferential standard for developer appeals of board denials or grants with conditions that render the project uneconomic. Instead, for developer appeals, Chapter 40B requires that this Committee decide whether the board’s decision was reasonable and consistent with local needs, based on a *de novo* review, which permits the Committee to review the record before us and make our own determinations of relevance, credibility and weight to be given to evidence. Chapter 40A’s deferential standard of review by courts is not applicable here. This makes sense, as the statute is intended to facilitate the development of affordable housing. *See, e.g., Standerwick*, 447 Mass. 20, 29 (2006) (“statute reflects the Legislature’s considered judgment that a crisis in housing for low and moderate income people demands a legislative scheme that requires the local interests of a town to yield to the regional need for the construction of low and moderate income housing....”). The Board acknowledges that a court’s review of “the grant of a comprehensive permit is far more deferential, and the Board does not claim that this is the same standard of review applied in this appeal.” Board brief, p. 30 n.4. The Board cites no authority suggesting a deferential standard of review is applied to cases such as this, where a developer appeals a board’s comprehensive permit denial pursuant to G.L. c. 40B, § 22, nor is this Committee aware of any. Therefore, we decline to defer to the Board’s interpretation of Newton’s stormwater regulations.⁸

⁸ “While the Committee, as an administrative adjudicatory body, may at its discretion admit and hear testimony of local officials, including opinions on the proper interpretation of a bylaw, it is not required to give such interpretations deference in every instance.” *Wall Street Dev. Corp. v. Walpole*, No. 2022-08, slip op. at 30 (Mass. Housing Appeals Comm. Apr. 13, 2026), citing *383 Washington Street, LLC v.*

V. STORMWATER MANAGEMENT

A. Developer's Prima Facie Case

To establish its prima facie case regarding stormwater management, the developer relies on the expert testimony of Edmond Spruhan, P.E. (Exhs. 30, 64) and Robert Gemma, P.E., PLS (Exhs. 33, 63), and evidence that included, among other things, site development and architectural plans (Exh. 3) and a stormwater management report (Exh. 7).

The developer retained Mr. Spruhan, a registered professional engineer with more than 15 years of experience and a master's degree in engineering. Exh. 30, ¶ 2. He has expertise in permitting and civil engineering for complex land development projects, including utility, drainage, and structural design. *Id.*, ¶ 1. He has worked in Newton for over 15 years and has designed over 300 stormwater systems, submitting more than 60 stormwater systems for approval under the City's Stormwater Ordinance in 2024 alone. *Id.*, ¶ 4. Mr. Spruhan designed and prepared the developer's civil engineering site plans, the stormwater report, and the operations and management plan. He testified that the proposed stormwater management system will consist of 37 "Stormtech" Chambers embedded in a crushed stone pit with an overflow connection to Newton's drainage system. He stated that if the stormwater chambers were to "fail," overflow would go to City's stormwater system. Exh. 30, ¶ 9. He testified that the stormwater design complies with Massachusetts Stormwater Standards. *Id.*, ¶¶ 10, 19-27.

The developer also retained Mr. Gemma, who has over 30 years' experience practicing civil engineering in Newton. Exh. 33, ¶ 7. Mr. Gemma is a registered professional land surveyor, DEP-certified Title V soil evaluator and septic system inspector who works extensively with the Massachusetts Wetlands Protection Act. *Id.*, ¶¶ 3, 5. Mr. Gemma provided consulting services in support of the design, permitting, and construction, and he reviewed Mr. Spruhan's civil engineering site plans, stormwater report, and operations and maintenance plans. Mr. Gemma testified that the Massachusetts Stormwater Handbook requires a groundwater mounding analysis (GMA) where there is less than four feet of separation provided between the bottom of the

Braintree, No. 2020-03, slip op. at 4-5 (Mass. Housing Appeals Comm. Mar. 15, 2022), *aff'd* No. 23-P-1213, Mass. App. Ct. June 18, 2025. "Instead, the Committee's role is to evaluate the testimony and assign the weight and credibility it deems appropriate." *Id.* "Further, 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." *Id.* We note, however, that even under a deferential standard of review, the Board's asserted authority to impose discretionary GMA requirements has no foundation in the regulations and is therefore not persuasive.

stormwater infiltration chamber and the estimated seasonal high groundwater. *Id.*, ¶ 11. He testified that more than four feet of separation will be maintained between the bottom of the stormwater infiltration chamber and estimated seasonal high groundwater because a minimum offset of 4.57 feet has been provided. Accordingly, he stated that no GMA is required by the Stormwater Handbook. *Id.*, ¶ 12. We find this evidence is sufficient and the developer has established its prima facie case with respect to stormwater management.

B. Board's Local Concerns Case

The Board's local concerns case regarding stormwater management is largely based on observations of its witnesses, John Daghlian, Associate City Engineer, and its peer reviewer, Janet Bernardo, P.E., that the project locus and surrounding neighborhood are, under existing conditions, prone to high groundwater and flooding. Board brief, pp. 7, 13, citing Exhs. 57, ¶¶ 18-19; 58, ¶¶ 10, 24-27; Tr. I, 138. It argues that its concerns with existing conditions, coupled with the changes proposed by the project, merit imposition of the discretionary requirement that the developer perform a GMA, which the developer refused to perform.

1. The "Discretionary" Requirement for a Groundwater Mounding Analysis

The Board argues, based on renderings prepared by the developer, that the project will raise and level the currently sloped backyard (under which the stormwater management system will be located) to provide a level yard and play area for residents. Board brief, pp. 6-7. It notes the resulting raised design will be supported by retaining walls and stepped landscaping. *Id.*, p. 6, citing Exh. 9, pp. 6-7. It states that the project will remove 11 mature trees on the site and increase impervious area by more than 7,000 square feet (s.f.), from 3,516 s.f. to 10,821 s.f. *Id.*, p. 6, citing Exhs. 3, Sheet L1; 7, p. 3; and 57, ¶ 31. Further, the project will eliminate 2,933 s.f. of pervious area and reduce the landscaped area from 19,452 s.f. to 15,051 s.f. *Id.*

The Board argues that, during its public hearings, the City and residents raised concerns regarding the "high groundwater and potential flooding as a result of construction and new impervious area." Board brief, p. 7, citing Exh. 1, pp. 2-3. The Board claims that "given the slope of the rear yard, the City and abutters were concerned about the combined effects of construction on this lot, with the changes to the site topography it would entail, combined with the high groundwater levels on the site, could cause water to flood or seep into adjacent properties on lower-lying lots." *Id.*, citing Exh. 58, ¶¶ 10, 24-27; Tr. I, 138. It also asserts that

“[t]he City was also concerned that the stormwater system proposed by the [developer] will not be able to adequately dewater between significant storm events, impacting its functionality and potentially overburdening the City’s own municipal drainage system.” *Id.*, p. 8, citing Exhs. 2, ¶ 26; 58, ¶ 26. Mr. Daghlian, “testified that he personally witnessed and photographed groundwater bubbling up on adjacent properties during a site visit to the neighborhood, confirming testimony from abutters that current site conditions create stormwater-related difficulties for their properties.” *Id.*, p. 8, citing Tr. I, 138; Exh. 68.

The Board argues that, because of these existing conditions regarding high groundwater and flooding, and the project’s increase in impervious area, the City’s engineering department “exercised its authority under the City’s local stormwater regulations to request a mounding analysis from the applicant.” *Id.*, pp. 8-9, citing Exhs. 38, p. 2; 58, ¶ 25.⁹ Mr. Daghlian stated that GMAs “are used to predict the maximum height of a groundwater mound in a particular groundwater recharge area. They are used to assess whether an infiltration chamber has enough volume to adequately manage stormwater following a storm and additionally assess whether the groundwater mound that forms under the recharge system as a result of the storm will break out above the land, impacting adjacent properties.” Exh. 57, ¶ 48.

The Board argues the purpose of the mounding analysis “would be to ensure the proposed stormwater management system would sufficiently mitigate groundwater mounding at abutting properties after significant storm events.” Board brief, p. 9. The Board states the developer “refused to carry out the requested mounding analysis” because it was “not inclined to pay for a costly study it did not believe was required under local regulations.” *Id.*, citing Exh. 35 (correspondence from developer to Board describing GMA as “prohibitively expensive”).

Because the developer declined to perform a GMA, the Board requested that its peer reviewer, the Horsley Witten Group, “assess groundwater mounding possibilities given the data provided by the [developer].” *Id.*, citing Exh. 58, ¶ 12. The Horsley Witten Group used the Hantush Method of analysis, which Ms. Bernardo described as “an industry standard method of

⁹ Neither of these cited exhibits is a local requirement or regulation. Exhibit 38 is a memorandum from the City of Newton Department of Public Works Engineering Division, which, on page 2, notes DEP’s inapplicable requirement for a groundwater mounding analysis for stormwater systems that have less than 4 feet of vertical separation from the Estimated Seasonal High Groundwater. Exhibit 58, ¶ 25, is pre-filed testimony from the Board’s witness, Ms. Bernardo, regarding her recommendation that the developer conduct a GMA “to determine that the proposed system would recharge groundwater without impacting abutters following a storm ... in light of the known issues with stormwater runoff at the Property....”

measuring groundwater mounding” that “is used to calculate the height of a groundwater mound beneath a stormwater infiltration basin.” Exh. 58, ¶¶ 28-29. “The Hantush Method produces a hydrograph that depicts groundwater mounding in feet at various distances from the infiltration system, with less mounding occurring the farther the distance from the system.” *Id.*, ¶ 29. Its analysis “used variables provided by the [developer] . . . , supplemented when necessary with variables established through consultation with industry-standard reference databases.” *Id.* According to the Horsley Witten Group, “[t]he results of this preliminary analysis demonstrated that there was a potential for groundwater mounding at heights of up to six feet at property boundaries, and half a foot at neighboring buildings, which could impact water seepage into neighboring structures.” *Id.*, citing Exh. 29, p. 4. Given these results, it was “unable to rule out the possibility that a groundwater mound after a significant storm event could break out and harm neighboring properties.” *Id.*, pp. 9-10, citing Tr. II, 24-25. However, the Horsley Witten Group “thereafter advised the [B]oard that more information was needed to confirm or deny the results of this analysis, in part because certain variables could not be accounted for by the Hantush Method, and a more complex study was outside the scope of Horsley Witten’s role as a peer reviewer.” *Id.*, p. 10, citing Exh. 20.

The Board argues it “denied the application on the ground that the information before it suggested a likelihood of damage to neighboring properties if the project was constructed as designed, and that while further study was necessary to confirm or deny these conditions, the [developer] declined to carry out further groundwater modeling or analysis.” *Id.*, p. 10.

Regarding the Board’s authority for requesting a GMA, the Board states:

Although the City does not have a separate groundwater ordinance, the stated objectives of its stormwater management regulatory scheme encompasses [sic] the responsible infiltration of groundwater following significant storm events, demonstrating that the two topics are intrinsically linked under local regulations. *See, e.g.*, Tr. [I, 138-139] (Associate City Engineer testified that groundwater is incorporated throughout the City’s Stormwater Ordinance and Local Rules); Tr. [I, 76, 79] (testimony from Applicant’s engineer about relationship between stormwater management and groundwater).

Id., pp. 14-15. The Board contends that “the Local Rules vest discretion in the City’s Engineering Department to place additional conditions upon the grant of major stormwater permits beyond what may be required elsewhere in local, state, or federal regulations when necessary to meet and uphold the objectives of the Stormwater Ordinance.” *Id.*, p. 16, citing

Exhs. 12, § 7(B)(3); 57, ¶ 23-25.¹⁰ “Among the ‘conditions’ the City may choose to impose are the requirements that a permit applicant submit additional testing, or collect additional data, as necessary on a given site to ensure these objectives are met.” *Id.*, pp. 16-17, citing Tr. I, 136-138. The Board contends that “[t]he flexible ability to require additional tests beyond what is required under state and federal regulations makes the City’s stormwater management regulations more strict than either state or federal regulations.” *Id.*, p. 17. Because, it claims, the City has “exercised its regulatory discretion in the past” to request mounding analyses where one is not required under state standards (e.g., where there are more than four feet of vertical separation between the system and estimated seasonal high groundwater), the Board argues “[t]he City’s history of local stormwater regulation is therefore both more strict than state and federal standards on a broad level, and on the specific question of groundwater mounding.” *Id.* The Board claims “[t]he discretion inherent in the City’s stormwater management regulations not only renders its local regulations more strict than state standards, it also provide greater protection for persons and property than is accomplished under the state standards.” *Id.*, p. 20; *see id.*, p. 19. Further, the Board argues its interpretation of “the Stormwater Ordinance and Local Rules as affording the City the discretion to request additional testing beyond what is set forth in federal or state regulations” is entitled to deference. *Id.*, p. 18.¹¹

Further, the Board claims that “[t]he proposed changes to the landscape of the property, together with the proposed significant decrease in the amount of permeable space on the project site, can create conditions that change the direction and amount of stormwater runoff and, ultimately, groundwater infiltration, in a manner that negatively impacts adjacent properties.” *Id.*, pp. 15-16, citing Tr. I, 76. “Responsible stormwater management on residential development sites is therefore an area of local concern regulated by the Stormwater Ordinance and Local Rules, that is important relative to this site, given the known issues with seasonal high groundwater and concerns for flooding to adjacent properties.” *Id.*, p. 16.

¹⁰ Section 7(B)(3) of the Newton Stormwater Management and Erosion Control Rules and Regulations provides a procedure by which the City engineer reviews stormwater management permit applications and may approve, approve with conditions, or deny permit applications. *See* Exh. 12.

¹¹ The Board’s argument regarding deference is addressed above in § IV.C.3.

2. Asserted Stormwater Management System Design Flaws

The Board argues that there are “[f]laws inherent in the [developer’s] plans for its stormwater management system [that] render the project’s design unable to mitigate the Board’s stormwater management concerns.” *Id.*, p. 22.

The Board points out that the project incorporates and relies on a system of retaining walls supported by impermeable barriers. *Id.* The Board argues the “walls as designed and reflected in the final iteration of the [developer’s] plans are structurally insufficient, and likely to fail.” *Id.*, p. 23. It states that the plan details call for the use of Versa-Lok segmental block retaining walls, “which both parties agreed are not ‘structurally robust,’ particularly when combined with the proposed impermeable barriers” *Id.*, citing Exh. 11, ¶ 11; Tr. I, 57-60. “Retaining walls must be designed with free draining material installed behind the back face of the wall to prevent excess hydrostatic pressure. Excess water behind a wall must be allowed to drain to avoid the buildup of this pressure.” *Id.*, citing Exh. 57, ¶¶ 40-41.

The Board also argues the developer “failed to justify the depth to which its proposed impermeable barriers will be installed, and has not demonstrated that the chosen two-foot depth will have any impact on groundwater flow.” *Id.*, p. 24. It states that “where seasonal high groundwater is lower than the bottom of the proposed retaining wall and impermeable barriers, groundwater may simply percolate and flow underneath the wall.” *Id.*, citing Exhs. 38; 57, ¶ 39. It states that “[t]he bottom of the rear-most retaining wall is 113 feet above sea level, while the [estimated seasonal high groundwater] in this area is 108.2 feet above sea level, leaving 4.8 feet of vertical separation between the two where groundwater may mound and exfiltrate beneath the wall.” *Id.*, citing Exh. 58, ¶ 47.

Next, the Board contends the developer’s engineers “overstate the utility and impact of the overflow pipe intended to be installed as a part of the Stormwater Management system.” *Id.*, p. 25. The Board quotes Ms. Bernardo who testified “[t]he overflow pipe is incorporated into the system at 116.7 feet above sea level, less than one foot below the system’s peak elevation of 117.67 feet above sea level.” *Id.*, citing Exh. 58, ¶ 52. It argues that “[t]he overflow pipe therefore is not triggered unless and until the water in the system reaches that height, and it cannot serve to discharge all water in a system in the event of failure.” *Id.*, p. 25. Further, the Board claims, “[t]he small size of the pipe also implies that groundwater will continue to percolate and recharge into the earth, as the pipe attempts to direct stormwater runoff to the

City's municipal system. Essentially, given the small size of the overflow pipe, it may assist in the discharge of water out of the stormwater management system but does not eliminate the risk that flooding will result on neighboring properties." *Id.*, citing Exh. 58, ¶ 46.

C. Committee's Discussion

Regarding stormwater management, the Board has failed to identify an applicable local rule or regulation that provides greater protection than state and federal law. It also failed to demonstrate that any harm is likely to occur because of this development. The Board's peer reviewer, Ms. Bernardo, conceded that the project complies with both state *and* local requirements with respect to stormwater management. Tr. II, 31-32. Newton does not have an ordinance regulating groundwater. *See* Tr. I, 130-131. However, the Board argues the Newton engineering department had the discretionary ability to require a GMA, asserting that discretionary requirement amounts to a local rule that is more stringent than state standards. We disagree that Newton's stormwater rules and regulations grant discretion to require a GMA, but even if they did, the circumstances here do not establish a local concern that outweighs the affordable housing need. Indeed, as discussed below, Mr. Gemma re-ran the Board's own GMA using its inputs but correcting the math; when read properly, even under the most extreme 100-year storm event, the model shows no groundwater mounding at abutting foundations. Tr. II, 33-34. The Board's peer reviewer, Ms. Bernardo, agreed with Mr. Gemma's calculations. *Id.*

Mr. Spruhan testified that the project complies with state stormwater standards and all four criteria of Newton's stormwater regulations. *See* Exh. 30, ¶¶ 10-27. He candidly noted, however, that the project is designed to remove 85% of average annual load of total suspended solids (TSS). Although Newton regulations require 90% TSS removal, he stated that the Newton city engineer has always accepted 85% TSS removal as satisfying the stormwater regulations and Massachusetts Stormwater Standard 4 requires only 80% TSS removal. Exh. 30, ¶ 22. Further, Mr. Spruhan testified that neither the Newton stormwater ordinance nor regulations requires a GMA, and he has never been asked to provide one, either before or after the stormwater ordinance and regulations were adopted. Exh. 30, ¶¶ 29-31.

Mr. Spruhan's stormwater management report described the site's existing conditions, the developer's proposed stormwater infiltration system, and the proposed conditions of the project. Exh. 7. As described above, the project site is a 25,902-s.f. lot and the property has a steep slope that runs from the south (the right front of the property) to the north (the left rear of the

property). *Id.*, p. 3. The existing dwelling is located at the highest elevation of the site and positioned to the southeast of the lot at 122 feet above sea level. The property has a large rear yard with an existing rear setback of 133.3 feet. Exh. 56, ¶ 22. The rear yard slopes downward at a 12% slope, away from the dwelling to a low point in the northwestern corner and the properties located at the corner of Grasmere and Merton Streets. Exhs. 7, p. 3; 58, ¶ 18. The downward slope concludes at 105 feet above sea level at its lowest point. Exh. 37, p. 1. The property does not have an existing drainage or infiltration system, so “[c]onsequently, stormwater at the Property currently scours across the surface at grade.” Exh. 7, p. 3. The developer’s proposed development increases the total impervious surface area from 3,516 s.f. to 10,821 s.f. and reduces the landscaped area from 19,453 s.f. to 15,081 s.f. *Id.*, pp. 3-4, Tables 1-2. The proposed 37-Stormtech-Chamber infiltration system is designed to store 3,655 cubic feet (C.F.) of stormwater runoff, more than twice the 1,804 C.F. storage required by the Newton Stormwater Management and Erosion Control Rules & Regulations. *Id.*, p. 5. Further, the report includes detailed HydroCAD calculations and provides a summary of existing and proposed conditions as they relate to flow rate and volume of stormwater runoff. *Id.*, p. 6, Appendix A. For all analyzed storm events, the 2-, 10-, 25-, and 100-year storms, the calculations demonstrated a reduction in both runoff flow rate and volume of runoff for the proposed stormwater system compared to existing conditions. *Id.* Thus, Mr. Spruhan’s report concluded that “[t]his design will control the runoff from the site and substantially improve drainage at the property.” *Id.*, p. 6. “This represents a reduction of more than 55%, which is a significant improvement over existing conditions.” Exh. 64, ¶ 4.

Like Mr. Spruhan, Mr. Gemma testified that no separate GMA is required under the Newton Stormwater Ordinance and Stormwater Regulations and stated that he has never been asked to provide a GMA for a project. Exh. 33, ¶¶ 13-15; *see* Exh. 30, ¶¶ 29-31. He explained that the purpose of a GMA is to assess whether a mound encroaching upon the bottom of an infiltration chamber may impede the rate of infiltration such that the chamber’s capacity could be exceeded, resulting in flooding. Exh. 33, ¶ 16. Because the proposed stormwater system includes an overflow connection to Newton’s drainage system, he stated that “even in the event that a mound did impede infiltration, there is no risk that flooding will result.” *Id.*, ¶ 17.

Regarding stormwater management, we find the developer’s witnesses, Mr. Spruhan and Mr. Gemma, more credible than the Board’s witnesses, Ms. Bernardo and Mr. Daghlian. The

evidence shows that the developer proposes a stormwater management system that is equipped to retain twice the volume of stormwater that is required under local rules. *See* Exhs. 30, ¶ 14; 7, p. 5. Except for the requirement to remove 90% of total suspended solids, it is designed to comply with state and local requirements and will reduce stormwater runoff to abutting properties.¹² This represents an improvement from existing conditions on the property that currently has no stormwater management system. In addition, the proposal includes an overflow connection to the City’s drainage system, so if the stormwater system were to fail, any overflow from the stormwater chambers would go to the City’s stormwater system.¹³ Exh. 30, ¶ 9.

The evidence demonstrates that the developer’s proposed stormwater management system will improve existing stormwater conditions that negatively impact abutters by capturing and infiltrating stormwater and reducing stormwater runoff to their properties.

1. The Board’s Asserted “Discretionary” Authority to Require a Groundwater Mounding Analysis is Not a Valid Local Requirement or Regulation

The Board argues that the City’s Engineering Department’s discretion to require a GMA stems from § 7 of the City’s Stormwater Management and Erosion Control Rules and Regulations. *See* Board brief, p. 16; Exh. 12. Section 5 provides the four specific design standards for stormwater systems with which the project complies. *See* Exhs. 12; 30, ¶¶ 13-14. There is no GMA requirement in these regulations. *See* Exhs. 3; 12; 30, ¶ 29. The Board argues that such a requirement—to be imposed at the Engineering Department’s discretion—is implied in a more general section of the regulations, which provides:

¹² The Board in its briefs makes no local concern argument regarding TSS. While this is an example of a more protective local rule, the Board does not argue there is any harm caused by 85% TSS removal rather than 90%, nor that this additional protection is necessary to such a degree that it outweighs the substantial housing need.

¹³ While the Board argues the developer overstated the utility of the overflow connection to the City’s stormwater system, its expert, Ms. Bernardo, offered no evidence, analysis, or explanation to support her conclusion and therefore we do not credit it. *See*, Exh. 58, ¶ 46. The Board states that the “overflow pipe is incorporated into the system at 116.7 feet above sea level, less than one foot below the system’s peak elevation of 117.67 feet above sea level” and “therefore [it] is not triggered unless and until the water in the system reaches that height, and cannot serve to discharge all water in a system in the event of failure.” Board brief, p. 25. Mr. Spruhan testified that Ms. Bernardo “is wrong” because “[i]n the event that the stormwater system was to fill, the overflow pipe engages, as is shown in [the developer’s] analysis.” Exh. 64, ¶ 7. We agree with Mr. Spruhan. The overflow connection is a failsafe to prevent flooding. It does not need to completely dewater the stormwater system in order to properly serve its purpose.

Complete Applications. Each Application ... shall be acted upon within fifteen (15) business days of the date that the Engineering Division determines that the Application is complete. ... The Engineering Division may: a) Approve the Permit Application upon finding that the proposed project will meet the objectives of the Stormwater Management Ordinance and the Design Standards. b) Approve the Permit Application with conditions, ... c) Deny the Permit Application due to non-compliance with Design Standards (in Section 5) or insufficient information to make a determination.

Exh. 12, § 7(B)(3). There is nothing in the regulation to suggest that an application is incomplete without a GMA or that a permit may be denied for reasons other than non-compliance with design standards. The above language does not provide authority to impose requirements before approval or to serve as a basis for denial and therefore does not support a valid local concern. *See* Developer brief, p. 10; Tr. I, 120; Tr. II, 15-16.¹⁴

Additionally, in its brief and reply brief, the developer argues the City did not apply its discretionary GMA requirement “consistently between subsidized and unsubsidized housing in clear violation of 760 CMR 56.02.”¹⁵ Developer brief, p. 13, citing Tr. I, 115-16; Tr. II, 5-8. On cross-examination, Mr. Daghlian testified that he had reviewed a “couple hundred” projects under the stormwater ordinance and requested GMAs be performed for only three, two of which he readily identified as comprehensive permit projects. Tr. I, 114, 116. When asked whether he ever requested a GMA for the stormwater project for any project that wasn’t a comprehensive permit project, Mr. Daghlian testified “no, I don’t believe so.” Tr. I, 116. In its reply brief, the Board argues that the third discretionary GMA that Mr. Daghlian identified for the Kessler Woods subdivision was not a 40B project. It also points out the City required an additional test pit, but not a GMA, as a building permit condition for a different project. Board reply, p. 4; Tr. I, 136-137. The record shows that the City appears to have rarely exercised its asserted discretion to require GMAs. Of the four cited projects for which the City has required GMAs, three were 40B developments. The Board has failed to show the Town’s unwritten discretionary GMA practice is a valid local requirement or regulation. *See 383 Washington Street, LLC v. Braintree,*

¹⁴ The parties agree that because there is more than four feet of vertical separation between the bottom of the infiltration system to estimated seasonal high groundwater, a GMA is not required under the state Stormwater Handbook. *See* Exh. 33, ¶¶ 11-12.

¹⁵ To the extent the developer makes an unequal treatment argument under 760 CMR 56.07(2)(a)(4), this issue was not raised in the pre-hearing order. In any event, the record is sparse and insufficient regarding comparisons of the 40B projects and other unsubsidized housing in question.

No. 2020-04, slip op. at 18 (Mass. Housing Appeals Comm. Mar. 13, 2022) (finding board failed to prove fire chief’s unwritten rule requiring fire access on three sides of a building was valid local rule or regulation, reasoning it amounted to “unbridled discretion” to effectively deny a comprehensive permit), *aff’d* No. 23-P-1213, Mass. App. Ct. June 18, 2025. It therefore does not support a valid local concern.

We agree with the developer that the Board and the Neighbors have identified no language in the City’s Stormwater Ordinance or its Regulations giving the Board the authority to require the developer to conduct a GMA. Further, the Board’s own GMA using the Hantush Method, discussed below, demonstrates that there are no impacts to abutting properties and thus there is no local concern justifying denial of the project on that basis. Developer reply, p. 1.

2. The Record Does Not Establish Local Concerns Regarding Groundwater Runoff or Mounding

Ms. Bernardo prepared a “preliminary” GMA on behalf of the Board using the Hantush method of analysis.¹⁶ The Board states the results demonstrated there “was a potential for groundwater mounding at heights of up to six feet at property boundaries, and half a foot at neighboring buildings, which could impact water seepage into neighboring structures.” Board brief, p. 9, citing Exh. 29, p. 4; *see* Exh. 57, ¶ 53. However, Mr. Gemma re-ran Ms. Bernardo’s calculations using her inputs, adjusting for the fact that the Hantush methodology only calculates

¹⁶ The parties dispute the appropriateness of the Hantush analysis. The developer argues there are many limitations and incorrect assumptions that render the Hantush analysis results flawed. *See* Developer brief, pp. 13-14; Board brief, pp. 27-28. The Board maintains that it is an acceptable method and notes that it is “an industry standard method recommended by the State Stormwater Handbook...” Board brief, p. 28 n.3; *see* Exh. 57, ¶ 51. The Board, however, argues that the Hantush GMA produced only preliminary results and its requirement that the developer perform additional testing “to confirm or deny those preliminary results.” Board brief, p. 27; *see id.*, pp. 9 (purpose of Hantush GMA was “for the sake of determining whether further analysis was needed”) and 28 (conceding GMA “performed using data collected by the [developer] from test pits and borings on the site would have resulted in a more accurate and comprehensive groundwater model”). The developer notes this inconsistency, stating the “Board cannot argue out of both sides of its mouth like this, either the use of the Hantush Method is inappropriate and unwarranted, as the Developer’s expert Mr. Gemma stated ‘a truly accurate groundwater model would need to be something other than Hantush’ (*See* Tr. V. 1, P. 82) or, if the Hantush Method is appropriate, as the Board seems to go on to argue in its brief, then Mr. Gemma’s testimony was clear, and Ms. Bernardo agreed, that the analysis using the Hantush Method produced by Horsley Witten, when correctly read showed no impacts to abutting foundations and negligible mounding at the property line following the most extreme 100 year storm event. *See* Tr. V. 2, P. 34.” Developer reply, p. 8.

mounding along the x-axis.¹⁷ Exh. 63, ¶¶ 10-11; Tr. II, 33-34. Ms. Bernardo agreed that the adjusted model results, even in the most extreme 100-year storm event, indicated less than two inches of groundwater mounding at abutting property lines and zero mounding would occur at abutting residential foundations. *Id.* We find Mr. Gemma’s testimony and calculations to be more credible than Ms. Bernardo’s testimony and initial calculation results that indicated six-foot groundwater mounds at abutting property lines and a half-foot mound at neighboring buildings.

The Board put on no evidence regarding the harm of, at most, two inches of groundwater mounding at abutting property lines where the mound dissipates before reaching abutting residences. *See Holliston*, 80 Mass. App. Ct. 406, 421-22 (where board fails to demonstrate harm from waivers of local regulations and simply points out that local regulations will be violated, board has not demonstrated a local concern that outweighs need for affordable housing). The results of the Hantush analysis do not support the Board’s position that further testing is required; rather, they further support the conclusion that there are no stormwater or groundwater concerns caused by this project.

3. The Board’s Asserted Design Flaws Do Not Amount to a Local Concern

Regarding the Board’s concerns with the plans’ use of segmental block retaining walls, Mr. Spruhan testified that the plans incorrectly list a Versa-Lok segmental wall, and the Detail Sheet should show a reinforced concrete retaining wall. Tr. I, 56-58; *see* Exh. 3, Detail Sheet 2. Mr. Spruhan’s cross-examination testimony is consistent with his pre-filed testimony. *See* Exh. 64, ¶ 11 (“The Project ... does not include segmental block retaining walls, but instead the rear retaining walls are reinforced concrete walls, designed to withstand full-depth hydrostatic pressure on their interior face.”); Tr. I, 60 (stating “plans reflect the impermeable barrier in front of the wall which can’t work with segmental block”). Mr. Spruhan credibly testified that the plans incorrectly show segmental walls, and that the proposal is actually for reinforced concrete retaining walls, and we still remove any possible ambiguity by providing for this in a condition,

¹⁷ Mr. Gemma explained that under the Hantush model, “[m]ounding is calculated only along the x-axis, and mound height is measured from the mid-point of the x-axis. In order to calculate the mound height along the other axis, the input parameters for the x- and y-axis must be switched or refused in the input to the Hantush spreadsheet.” Exh. 63, ¶ 10.

below. Further, the developer correctly points out that only preliminary site development plans are required at this permitting stage. *See* Developer reply brief, p. 8.

We have emphasized that “the requirement . . . is for a preliminary presentation [and] where it is possible to improve the presentation and satisfy the Board's objections by a condition in the comprehensive permit, we will include it.” *Billerica Dev. Co. v. Billerica*, No. 1987-23, slip op. at 34-35 (Mass. Housing Appeals Comm. Jan. 23, 1992) (where board attacked drainage report that was “the cornerstone of the presentation, on the ground that it contains errors and faulty assumptions” Committee resolved question with condition in its decision); *see also Tetiquet River, supra*, No. 1988-31, slip. op. at 3, 5-6 (if there is question about sufficiency of developer’s submission, Committee may address issue by attaching condition to address it). Therefore, we include in this decision a condition requiring the use of reinforced concrete retaining walls.

Additionally, the Board argues that the developer failed to justify the two-foot height of the impermeable barriers and had not demonstrated that the chosen two-foot depth will have any impact on groundwater flow. The Board has not pointed to an ordinance or bylaw that establishes requirements regarding groundwater flow. *See* Exh. 37, p. 3 (Mr. Daghljan stating “[it] is imperative to note that the City only regulates surface runoff . . . [t]here is no mechanism to address groundwater streams or flow”). The developer is therefore not required to demonstrate an impact on groundwater flow. Further, the Board states that groundwater may percolate and flow underneath the wall but fails to demonstrate that any harm is likely to result from the uninterrupted flow of groundwater. *See* Board brief, p. 24, citing Exhs. 38; 54, ¶ 39.¹⁸

VI. ARCHITECTURE, DENSITY, AND MASSING

A. Developer’s Prima Facie Case

Regarding its architecture, density, and massing prima facie case, the developer relies on the expert testimony of John Pears (Exh. 31), and Jose Guzman (Exh. 32), as well as architectural plans (Exh. 3) and context images of the surrounding buildings (Exh. 15).

¹⁸ Exhibit 38 is a City of Newton Engineering Division Memorandum in which Mr. Daghljan asked: “How was the two-foot extension below the bottom of the wall determined? What and where is the calculation to support this dimension, will the two-foot extension prevent groundwater flow to the abutter’s properties, and prevent any negative impacts?” *Id.*, p. 3. Exhibit 54 appears to be miscited as it is a City of Newton Memorandum regarding safe harbor status, which does not discuss groundwater.

The developer retained Mr. Pears, a design consultant with over 35 years of experience as a designer with expertise in mixed-use, social housing, construction, comprehensive planning, complex permitting, and sustainable design. Exh. 31, ¶¶ 1, 3. Mr. Pears designed the developer's proposed multifamily residential condominium project. *Id.*, ¶ 7. Mr. Pears worked with Mr. Guzman, the architect of record, to design and prepare the project plans. *Id.*, ¶ 8. They designed and prepared the architectural plans and prepared responses to questions raised during the Board's public hearings. *Id.*, ¶ 9, citing Exhs. 3 and 16.

The neighborhood consists of single and two-family homes, which Mr. Pears describes as follows:

Most homes in this neighborhood are typically 2-2½ stories, raised above the typically sloping grades by 2-5 feet with an exposed basement clad in a variety of materials including lattice, painted concrete, and stone veneer. Exterior cladding materials vary and include mostly painted clapboards and shingles with a few brick-clad homes. The colors of the homes vary widely. Roofs are typically pitched, varying from approximately 6:12 to 12:12 in rise-over-run ratio and clad in asphalt shingles. The roof colors also vary, but many are shades of light and dark gray. The windows in most homes are wood double-hung with some divided lights in a variety of patterns and exterior mounted aluminum storm windows.

Depending on the style, some homes are relatively simple, plain, and unadorned, while some homes feature elaborate cornices and trim. Most homes in this neighborhood are not good examples of a particular style, except for a cluster of Victorian homes mostly located on Grasmere Street. The homes located on Grasmere Street, while not easily visible from Washington Street, are examples of typical Victorians with steeply sloping turrets and towers, large front low-pitched porches with supporting columns, bay windows, adorned cornices, and elaborate trim. Most homes directly across the street from the Property on Washington, Merton, and parts of Elmhurst Streets are center entrance colonials, and modern interpretations of center entrance colonials.

Exh. 31, ¶¶ 13-14. Regarding the project design, Mr. Pears testified that:

The Project is designed to provide a tripartite façade, with a base, middle and top. The base of the building will have a stone veneer applied to the first-floor concrete walls, as well as the planter and site walls where the building faces Washington Street. The middle of the building will be clad in beige composite clapboard and the top will be clad in medium gray composite wall shingles, mimicking the look of a mansard roof as seen in some of the surrounding architecture. To add further detail, two cornices encircle the building. The primary white/off-white composite cornice is located between the middle and the top sections, with a secondary white/off-white composite cornice located at the top of the parapet at the roof line.

Id., ¶ 15. Mr. Pears stated that, “[g]iven that most of the homes in the neighborhood are not good examples of a particular style, and the neighborhood is not [within] a historic district, the Project’s design is complementary to and in keeping with the surrounding neighborhood, including having a similar center entrance as the surrounding center-entrance colonials, and a similar front porch to the surrounding structures.” *Id.*, ¶ 16. He testified that the project was designed to meet or exceed all required minimum setbacks. *Id.*, ¶¶ 17-18. Further, he noted that the project is “only approximately 1 foot taller than the existing home on the property” and exceeds the 50% open space requirement by providing over 66% open space. *Id.*, ¶ 19. Mr. Pears testified that “the proposed building is thoughtfully designed to be consistent with the surrounding neighborhood, both in terms of the dimensions of the building as well as the architectural features of the building.” *Id.*, ¶ 20.

As noted above, Mr. Guzman is the architect of record who worked with Mr. Pears to design and prepare the project plans. Mr. Guzman is a registered professional architect with over 36 years of experience as a design and construction management architect for various building types and uses including single and multifamily housing. Exh. 32, ¶¶ 1-4. With respect to the project description, Mr. Guzman’s testimony echoed much of that of Mr. Pears. *See id.*, ¶¶ 11-14. Mr. Guzman noted that the proposed design maximizes the number of existing trees to be retained and provides an enhanced vegetative buffer for the residential neighbors. *Id.*, ¶ 13. Mr. Guzman testified that the proposed building complies with the Architectural Access Board’s regulations and the Massachusetts Building Code. *Id.*, ¶¶ 16-17. Accordingly, we conclude the developer has established its prima facie case with respect to architecture, density, and massing.

B. Board’s Local Concerns

The Board argues “[t]he chosen density of the development of the site is excessive and the massing is out of scale with the strict confines of the site.” Board brief, p. 32. Further, it states that “[s]uch out-of-scale development will negatively impact abutters and neighboring residents through a loss of privacy, increased noise and light, as well as traffic and parking problems caused by site operations. The Project’s request for numerous zoning ordinance waivers, as it relates to lot area, minimum lot size, and measurements like floor area ratio, will result in the construction of a building far too dense for the small lot on which it is intended to be placed, which will negatively impact the neighborhood as a whole.” *Id.*

The Board argues the project is not aligned with the City's comprehensive plan, which outlines strategic approaches for development, including development in line with existing patterns of residential type and character and design that respects neighborhood context. *See Id.*, pp. 3, 31; Exh. 36. It also states "[t]he Project's proposal to demolish the historic home on the property instead will result in an immediate change to the historic landscape of the property, and a loss of historic fabric in this neighborhood." *Id.*, p. 33. The Board argues that the City "has a 'demolition delay' ordinance intended to promote the preservation of historic buildings and structures through a review by a local historic commission of any request to demolish a building over fifty years of age." *Id.*, pp. 31-32, citing Newton General Ordinances, c. 22, § 22-50. It argues that because there is no state-wide review process akin to Newton's demolition delay ordinance, "the City's approach to regulation of these topics [is] stricter than state standards." *Id.*, p. 32. Further, it argues, "[t]he Project's proposal to demolish the historic home on the property instead will result in an immediate change to the historic landscape of the property, and a loss of historic fabric in this neighborhood." *Id.*, p. 33.

The Board argues that the following waiver requests are examples of how the project differs from local zoning requirements: (1) the proposed lot area per unit is 1,619 s.f., where 10,000 s.f. per lot is the minimum allowed as of right in the SR-3 zone; (2) the project proposed 32.9% lot coverage, where the maximum allowed lot coverage in the SR-3 zone is 30%; (3) the project proposed a floor area ratio of 1.16, where .36 is the maximum allowed as of right; (4) an increase in the bulk of the site in relation to the lot is more than three times the maximum allowed; (5) the proposal exceeds the maximum height allowed by right by 7 feet, 7.2 inches; and (6) it exceeds the maximum number of stories allowed by right by 1.5 stories. *Id.*, p. 5.

Next, the Board notes that the project as proposed "will be the only multi-family residential structure in this neighborhood" and that the "other dwellings in this neighborhood are either single family residential homes, or two-family non-conforming structures." *Id.*, p. 34, citing Exh. 56, ¶ 30. It states the proposal "demolishes the historic structure in favor of the construction of a large, gray, box-like structure with a flat roof and features like a raised porch and balconies not found elsewhere in the neighborhood." *Id.*, pp. 33-34, citing Exh. 56, ¶¶ 19, 40-45. The Board claims the proposal "represents a dramatic break from the primarily Colonial and Victorian neighborhood of primarily single family homes." It also asserts "[t]he proposed increase in the size of the building is also inconsistent with the neighborhood character and

structural density in this area.” *Id.*, p. 34. The Board concludes that the developer’s “refusal to consider a slightly smaller massing the project has also contributed to the concerns about the impact increased impermeable space will have on surface, stormwater and groundwater runoff at the project site, and continue to contribute to privacy, light, traffic and noise pollution concerns for abutting properties.” *Id.*, p. 36.

C. Committee’s Discussion

The Board does not identify a local rule or requirement with respect to architecture, density, or massing. It argues that the development is excessive and the massing is out of scale with the strict confines of the site, which will negatively impact abutters and neighboring residents through a loss of privacy, increased noise and light, and cause traffic and parking problems.¹⁹ The developer correctly notes the Board’s asserted negative impacts are vague and unsubstantiated, and the Board did not present any evidence on aspects such as noise and light. *See* Developer reply, p. 16.

The Board points to the developer’s zoning waiver requests regarding lot area, minimum lot size, and floor area ratio, but fails to acknowledge that the Project complies with or exceeds set back and open space requirements. Mr. Guzman testified the 77.7-foot rear yard setback exceeds the 15-foot minimum; the side yard setback of 12.3 feet exceeds the 7.5-foot minimum; and the 25-foot front yard setback complies with the 25-foot minimum. Exh. 32, ¶ 14. Mr. Guzman testified the project proposes 65.6% open space, exceeding the 50% minimum required by the zoning ordinance. *Id.*, ¶ 13. Further, the proposed building is less than one foot taller than the existing building on the property. Mr. Guzman observed that “[m]any properties in the surrounding area appear to exceed the 36-foot maximum height permitted by the Zoning Ordinance.” *Id.*, ¶ 15. Mr. Pears testified as to the ways the project was designed to conform with the neighborhood, which included constructing a similar center entrance and front porch as surrounding buildings. Exh. 31., ¶ 16. The building is also designed to have a tripartite façade, which will give the appearance of break up the massing. Here, the building was thoughtfully designed to consider the context of the neighborhood, comply with setback and open space

¹⁹ Concerns regarding privacy, noise, and light were not raised in the Pre-Hearing Order and are therefore deemed waived. Further, these issues are also deemed waived because they are not briefed with citations to authority or analyzed in any detail other than two conclusory sentences. *See id.*, pp. 32, 36. Similarly, the Board did not raise the issue of alignment with the City’s comprehensive plan in the Pre-Hearing Order or brief the issue with sufficient specificity for our consideration.

requirements as well as the state building code and Architectural Access Board regulations. Waivers from zoning requirements are routinely requested as part of comprehensive permit applications; mere zoning nonconformity, without more, does not establish a local concern.

Next, the Board claims that Newton has a demolition delay intended to preserve historic buildings and that ordinance is stricter than state standards. This argument is unpersuasive. The Board does not claim the existing dwelling has been designated a historic building or that it is located within a historic district. Further, though the Board repeatedly refers to the building as a “historical” structure, the evidence in the record, from the developer’s expert witnesses and not contested by opposing expert testimony, shows that the existing building is unexceptional. It simply states the demolition of the existing home on the property will change the historic landscape on the property and will result in the loss of existing fabric in the neighborhood.

The Board also points out that the project will be the only multi-family residential structure in the neighborhood, which is a change from the primarily Colonial and Victorian neighborhood of single-family homes and is inconsistent with the character of the neighborhood. Mr. Pears testified that most of the homes in this neighborhood are not good examples of a particular style, which was confirmed during the site visit.

Based on the record and site visit, we conclude that the Board’s architectural concerns are not substantiated by the neighborhood as it is, and the Board has not shown a valid local concern. The homes near the property are varied, and do not represent a cohesive historic or traditional style that the proposed project would undermine. Nor is there a local requirement or regulation to support the arguments raised by the Board. Finally, even if we were to find a valid local concern, it certainly would not outweigh the need for affordable housing in this instance.

VII. TRAFFIC, ON-SITE CIRCULATION AND RELATED SITE DESIGN, AND ACCESSIBILITY

A. Developer’s Prima Facie Case

Regarding traffic, the developer retained Robert Michaud, a registered professional engineer with over 35 years of experience in transportation planning and engineering and who is a member of the Institute of Transportation Engineers and American Society of Civil Engineers. Exh. 34, ¶¶ 1-2. Mr. Michaud prepared a traffic impact assessment (TIA) (Exh. 21), a response to peer review comments from the BSC Group (Exh. 23), a supplemental memorandum (Exh. 25), and a vehicle swept path (Autoturn) analysis to determine maneuverability in the garage

(Exh. 27). *Id.*, ¶ 7. He testified that, during the hearings before the Board, the project was redesigned to eliminate the existing dwelling as the building for the housing and to put all parking within the new proposed building to maximize open space and eliminate a curb cut along Washington Street. *Id.*, ¶ 8. The revised site layout also reduced number of on-site parking spaces from 24 to 20. *Id.* He testified there was no change in building unit count therefore there is no material change in traffic impact relative to the prior submitted TIA. *Id.*, ¶ 9. His testimony reiterated his TIA conclusions that there is adequate capacity available along Washington Street to accommodate the traffic increases that may occur at the site. *Id.*, ¶ 9, citing Exh. 25. As described in the TIA, the addition of project-related traffic to the study area roadways and intersections is not anticipated to significantly impact traffic operations within the study area. Project-related traffic increases do not result in significant impacts to area traffic operations. *Id.*, ¶14. Further, as described in TIA, no additional safety countermeasures are warranted based on review of MassDOT crash data because the Washington Street study area experienced crash rates that are below the MassDOT averages. *Id.*, ¶ 15. He testified that available sight lines at the project site driveway intersection with Washington Street exceed recommended site line requirements from the American Association of State Highway and Transportation Officials (AASHTO). *Id.*, ¶ 16. He further testified that peak parking demands will remain within the on-site parking supply. The existing on-street parking supply will augment this on-site supply for occasional supplemental residential and visitor parking demands, consistent with the neighborhood. *Id.*, ¶ 17. Mr. Michaud testified the parking supply is sufficient to support a 16-unit development. *Id.*, ¶ 23. He noted the project includes an interior bike room with capacity for 16 spaces, with additional bike racks proximate to the building entrance. *Id.*, ¶ 24. Further, as shown in the Autoturn analysis, he testified the proposed parking garage layout provides sufficient aisle width and maneuvering area for access to all parking spaces and provides sufficient space for a wheelchair lift van to access the designated handicap parking space. *Id.*, ¶ 27, citing Exh. 27.

The developer's evidence demonstrates that its proposal complies with generally recognized transportation standards by exceeding AASHTO's recommended site line requirements. Further, its evidence demonstrates that project-related traffic will not have a significant impact on area traffic operations and additional safety countermeasures are not required because of the below average crash rates on Washington Street. Regarding onsite

circulation, the developer prepared an Autoturn analysis to ensure vehicles can maneuver within the garage as designed. The developer has met its prima facie case regarding traffic, onsite circulation, and related site design.

Regarding accessibility, the project is designed to have an elevator at garage level. *See* Exhs. 9; 16. As noted above, Mr. Michaud testified the design provides sufficient space for a wheelchair lift van to access the designated accessible parking space and Mr. Guzman testified that the proposed building complies with the Architectural Access Board's regulations and the Massachusetts Building Code. *See* Exhs. 32, ¶¶ 16-17; 34. ¶ 27. Accordingly, the developer has met its prima facie burden with respect to accessibility.

B. Board's Local Concerns

The Board argues that, as designed, “the garage does not allow for moving operations to take place inside the building and cannot accommodate large vehicles in the intended parking spaces.” Board brief, p. 33. It states “there is also a designed and intended conflict between access to the [] accessible parking space on the site, and vital utilities like the trash room and staircase and elevator into the building.” *Id.*, citing Exh. 56, ¶ 46; Tr. I, 37-38, 43-50. It states that “[w]hile the Applicant has described waiting for use of the accessible stall while trash operations occur—which may take up to 70 minutes, according to Applicant submitted materials—as an ‘inconvenience,’ the City remains dedicated to assuring accessible features are truly accessible through ensuring they are available when needed.” *Id.*, citing Tr. I, 53; Exh. 16. “The accessible aisle is the sole access point to the trash room, bicycle storage room, and elevator on this floor. Residents needing to use the accessible parking stall therefore may need to wait for trash operations or other resident operations to finish before accessing their vehicle and wait which could take up to 70 minutes based on the Applicant's expected trash operations procedures.” Board brief, p. 35.

C. Committee's Discussion

The Board does not identify a local rule or requirement with respect to traffic, onsite circulation, related site design, or accessibility. The Board's argument that the garage does not allow for moving operations to take place inside the building and cannot accommodate large vehicles in the intended parking spaces does not amount to a local concern that outweighs the

need for affordable housing.²⁰ The same is true regarding its argument that there is a conflict between access to the accessible parking space on the site and utilities like the trash room, staircase and elevator. Mr. Guzman estimated that it may take about ten minutes to move each trash receptacle from the building to the street. Tr. I, 47-48. We agree with the developer that the Board's concern that residents would have to wait 70 minutes in order to access the accessible parking stall is not supported by the record evidence. *See* Developer reply, p. 17 (reasoning "[i]f a resident needed to access their car in the accessible stall there is no reason why they wouldn't be able to after one trash bin was wheeled by (as opposed to having to wait for all seven)"). We conclude that waiting, at most, ten minutes for a trash bin to be moved is a minor inconvenience, not a local concern that outweighs the substantial housing need.

VIII. CONCLUSION

Based upon review of the entire record and upon the findings of fact and discussion above, the Committee concludes the decision of the Board is not consistent with local needs. The Board's request for a remand is denied. The decision of the Board is hereby vacated, and the Board is directed to issue a comprehensive permit that conforms to the text of this decision and is subject to the following conditions.

1. Any specific reference to the submission of materials to City 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 development and architectural plans dated March 1, 2024, last revised August 27, 2024, prepared by Spruhan Engineering, P.C. Exh. 3.

²⁰ The City's Deputy Director of Planning confirmed that she is not aware of any City ordinance violated by the parking layout. *See* Tr. I, 98-100.

- b. The developer shall comply with all applicable non-waived local requirements and regulations in effect on the date of submission of its comprehensive permit application to the Board, consistent with this decision, pursuant to 760 CMR 56.02: *Local Requirements and Regulations*.
 - c. The developer shall submit final construction plans for all buildings, roadways, stormwater management systems, and other infrastructure to City of Newton entities, staff or officials for final comprehensive permit review and approval pursuant to 760 CMR 56.05(10)(b).
 - d. All City of Newton staff, officials and boards shall promptly take action necessary to permit construction of the proposed housing in conformity with the standard permitting practices applied to unsubsidized housing in Newton.
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 further subject to the following conditions:
- a) Construction in all particulars shall be in accordance with all applicable local bylaws, regulations and other local requirements in effect on the date of the developer'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, provided 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, such agency has granted or approved construction financing, and subsidy funding for the project has been committed.

- e) The Board and all other City of Newton staff, officials and boards shall take whatever action is necessary to ensure that a building permit and other permits are issued to the developer, 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) Design and construction in all particulars shall be in compliance with all applicable state and federal requirements, including the state Wetland Protection Act, and Massachusetts Department of Environmental Protection requirements pertaining to stormwater management and wastewater management.
- g) Construction and marketing in all particulars shall be in accordance with all applicable state and federal requirements, including without limitation, fair housing requirements.
- h) This comprehensive permit is subject to the cost certification requirements of 760 CMR 56.00 and Executive Office of Housing and Livable Communities (EOHLC) 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

April 30, 2026

Shelagh A. Ellman-Pearl
Shelagh A. Ellman-Pearl, Chair

Lionel G. Romain
Lionel G. Romain

James G. Stockard, Jr.
James G. Stockard, Jr.

Oliver L. Stark
Oliver L. Stark, Presiding Officer