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

RIVER MARSH, LLC

v.

PEMBROKE ZONING BOARD OF APPEALS

No. 2019-04

DECISION

April 11, 2024

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Counsel for Developer River Marsh, LLC
Kimberly Kroha, Esq.
Paul Barbadoro, Esq.
Baker, Braverman & Barbadoro, P.C.
1200 Crown Colony Drive, Suite 610
Quincy, MA 02169

Counsel for Pembroke Zoning Board of Appeals
Amy E. Kwesell, Esq.
KP Law, P.C.
101 Arch Street, 12th Floor
Boston, MA 02110

Counsel for Interveners Carolyn Crossley and Shannon Wilson
Daniel C. Hill, Esq.
Dennis A. Murphy, Esq.
6 Beacon Street, Suite 600
Boston, MA 02108

Developer's Witnesses
Bradford Holmes
Bradley McKenzie, P.E.
Brian Murphy
Shaun P. Kelly

Board's Witnesses
Peter Palmieri
Ron Müller

Interveners' Witnesses
Scott W. Horsley
Patrick C. Garner
Maureen Finlay, P.E.

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

RIVER MARSH, LLC, Appellant,	)	
v.	)	No. 2019-04
PEMBROKE ZONING BOARD OF APPEALS, Appellee.	)	

DECISION

I. INTRODUCTION AND PROCEDURAL HISTORY

This is an appeal to the Housing Appeals Committee pursuant to G.L. c. 40B, § 22, of a decision by the Pembroke Zoning Board of Appeals (Board) denying a comprehensive permit to River Marsh, LLC (River Marsh or developer).

On November 27, 2018, River Marsh applied to the Board for a comprehensive permit to build a 56-unit home ownership condominium development. The Board opened the public hearing on the developer's application on February 13, 2019, and notified the developer and the Department of Housing and Community Development (DHCD)[1] that it considered that the Town had achieved the safe harbor, or statutory minimum, available to a municipality that has met the housing unit minimum by having low or moderate income housing comprise more than 10 percent of its total housing stock as defined in G.L. c. 40B, § 20 and 760 CMR 56.03(1) and 56.03(3)(a). River Marsh filed an objection with DHCD challenging the Board's claim of a safe harbor. Exh. 2. DHCD thereafter issued a determination that the Board had not established it had achieved the safe harbor, and the Board filed an interlocutory appeal with the Committee. The

[1]As of May 30, 2023, the Department of Housing and Community Development became the Executive Office of Housing and Livable Communities (EOHLC). St. 2023, c. 7. Since the proceedings on this project were held before the change in agency status, we refer to the agency as DHCD throughout this decision.

Committee issued a summary decision determining that Pembroke had not achieved the 10 percent housing unit minimum at the time of River Marsh's application to the Board for a comprehensive permit and remanded the matter to the Board for further proceedings. *Matter of Pembroke and River Marsh, LLC,* No. 2019-04 (Mass. Housing Appeals. Comm Interlocutory Decision July 20, 2020). *See* 760 CMR 56.03(8)(c); 760 CMR 56.05. After resuming the public hearing on the application, on January 12, 2021, the Board voted to deny the application by decision filed with the Town clerk on December 10, 2021.

The developer appealed the Board's decision to the Committee on December 27, 2021. An initial conference of counsel was held on January 6, 2022. Following this conference, the parties engaged in mediation, which was unsuccessful. By ruling dated May 25, 2022, the presiding officer allowed a motion to intervene by abutters Carolyn Crossley and Shannon Wilson in part—regarding Ms. Wilson's issues of driveway relocation, removal of a fence, landscape buffering and setback concerns and regarding Ms. Crossley's issues of landscape buffering and setbacks. Thereafter, pursuant to 760 CMR 56.06(7)(d)(3), the parties negotiated a pre-hearing order, which the presiding officer issued on October 27, 2022, and the parties further revised on January 23, 2023. The parties submitted pre-filed direct and rebuttal testimony of nine witnesses. On May 10, 2023, the presiding officer conducted a site visit, and three days of hearings took place on May 10, 11 and 12, 2023, to permit cross-examination of witnesses. Seventy-one exhibits were entered into evidence, including six disputed exhibits which were admitted *de bene* during the hearing, at which time the presiding officer deferred a ruling upon them, *See* § III below.

The Interveners requested the issuance of a proposed decision, which was issued on February 28, 2024, and to which the parties each filed comments, responses, or objections. The Interveners also requested oral argument before the full Committee. That request for oral argument is denied.

II. FACTUAL BACKGROUND

The project is a 56-unit home ownership condominium development, comprised of 17 buildings, including an existing single-family home,[2] located off Water Street in Pembroke. Exhs. 2; 3, Sheet C-1. The development will include three-, four-, and five-unit buildings with 11

[2] The single-family home is known as and numbered 274 Water Street.

two-bedroom and forty-five three-bedroom units. Fourteen units will be affordable. Exhs. 2; 4-8. The project site includes 49.94 acres of land, extending from Water Street west to the North River. Of that 49.94 acres of land, the eastern portion, comprised of approximately 22 acres, will be developed. The project's entrance is on Water Street where the existing single-family home is located. From there, the project site extends to the west and south behind 274 Water Street and three other adjacent homes along Water Street, including the home of Intervener Shannon Wilson. The remainder of the property to the rear of the project site, extending west and south from the development to the North River, contains wetlands. Exhs. 2; 3, Sheets Ex.-1, C-1. Access to the development will be provided by two driveways from Water Street. Exhs. 2; 3, Sheet C-1; 22. The project site is located on the westerly side of Water Street, approximately 200 feet north of the intersection of Water Street and Church Street (state Route 139). Exh. 60, ¶ 7. The property is bordered on the west by the North River. Exhs. 2; 3, Sheet C-1. It is located primarily within the Residence A Zoning District, with approximately 10,700 square feet of the project site located within the Business B Zoning District. The units will be connected to a private wastewater treatment plant and subsurface sewage disposal system which the developer proposes to build on the south side of the property. Exhs. 54, ¶ 11; 59, ¶ 10.

III. DISPUTED EXHIBITS

The Board sought to admit six exhibits, marked as Exhibits 46 through 51, to which River Marsh objected. The presiding officer admitted them *de bene* during the hearing, allowing oral argument on their admissibility and deferring ruling on them. Exhibit 46 is a project eligibility letter denying an earlier proposal for a project to be built on the same site. Exhibits 47 and 48 relate to an unrelated project of the developer in a different municipality. Exhibits 49 through 51 are letters from legislators representing communities in the area, providing comments on the project to the Massachusetts Housing Finance Agency (MassHousing) and the Board. The Board argues that these documents are relevant, asserting that Exhibit 46—the project eligibility letter of denial—was relied upon by the Board in its decision because of similarities in the projects; that Exhibits 47 and 48 are relevant to the developer's qualifications to construct this affordable housing project; and that Exhibits 49 through 51 are from representatives of various communities of the South Shore, who the Board claims are uniquely qualified to address the interests of their constituent communities.

The developer objects to the documents on the grounds that they are irrelevant and hearsay and, as such, do not benefit the Committee's review. Exhibit 46, it argues, is "moot and irrelevant," as a subsequent project eligibility letter was issued for this project. Exhibits 47 and 48, it argues, relate to cost examinations of the developer's other, unrelated, projects in another community and, therefore, speak to matters within the province of the subsidizing agency, which are generally excluded from Committee hearings. River Marsh argues that it did not have the opportunity to contest the veracity of Exhibits 49 through 51, which it argues provide opinions without apparent personal knowledge about the details of the project or expert qualifications to make any expert opinions.

As an administrative body, the Committee has discretion to admit evidence that would not be admissible in a court; the credibility and weight assigned to such evidence is a matter for the Committee. *See* G.L. c. 30A, § 11(2); *River Stone, LLC v. Hingham*, No. 2016-05, slip op. at 21 (Mass. Housing Appeals Comm. Sept. 23, 2022), *appeal pending, Hingham Zoning Bd. of Appeals and Town of Hingham v. Housing Appeals Comm*., Land Ct. No. 22PS000551. In considering admitting evidence that is exclusively hearsay in an administrative proceeding, the question is not whether it is admissible under judicial rules of evidence, but whether the evidence has indicia of reliability and probative value. *See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n*, 401 Mass. 526, 530 (1988); *104 Stony Brook, LLC v. Weston*, No. 2017-14, slip op. at 8-9 (Mass. Housing Appeals Comm. June 22, 2023). Unless the inclusion of evidence such as that challenged here is prejudicial, we are usually reluctant to strike such evidence. Exhibit 46 is a project eligibility letter related to a different project and is offered as proof of the concerns that MassHousing had about that prior project. The developer was not provided an opportunity for cross examination of its author. MassHousing issued a new project eligibility letter approving this project; if its concerns were still valid, it had the opportunity to include such concerns in the new project eligibility letter. Therefore, Exhibit 46 is not admitted for the truth; it is admitted solely as background for the Board's decision. Exhibits 47 and 48 relate to the developer's qualifications; they address a matter which is solely within the province of the subsidizing agency and is not considered by the Committee. 760 CMR 56.04(4)(f) (applicant must meet "the general eligibility standards of the housing program"); *see, e.g., Zoning Bd. of Appeals of Amesbury v. Housing Appeals Comm,* 457 Mass. 748, 757-758 (2010); *Board of Appeals of Hanover v. Housing Appeals Comm.,* 363 Mass. 339, 379 (1973); *Paragon*

Residential Properties, LLC v. Brookline, No. 2004-16, slip op. at 14 (Mass. Housing Appeals Comm. Mar. 26, 2007) (developer's reputation and qualifications not issues intended to be reviewed during comprehensive permit appeal). Accordingly Exhibits 47 and 48 are not admitted into evidence. The contested statements of state legislators contained in Exhibits 49, 50 and 51, are offered by the Board for the truth of the statements contained therein and contain statements of opinion without verification of personal knowledge or expert qualifications of the authors. The developer was not provided with any opportunity to cross-examine the persons making such statements to contest the validity of the opinions contained therein. We do not admit disputed Exhibits 49 through 51 into evidence; they are marked for identification only as Exhibits 49, 50 and 51. Our practice is to include in the record unsworn oral and written statements submitted to the Committee by individuals granted interested person status pursuant to 760 CMR 56.06(2)(c), as well as by legislators who represent the community in which the project is proposed to be located. *See Herring Brook Meadow, LLC v. Scituate,* No. 2007-15, slip op. at 2 n.2 (Mass. Housing Appeals Comm. May 26,2010). However, such statements are not admitted into evidence and they are accorded no evidentiary weight. We will treat these statements in the same manner.

IV. STANDARD OF REVIEW AND THE PARTIES' BURDENS

The comprehensive permit law provides the standard for an appeal of a board's denial of a comprehensive permit, stating: "[t]he 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 principle of the proceeding before the Committee.[3] The comprehensive permit regulations, 760 CMR 56.00, *et seq.*, add the following with respect to the developer's case before the Committee:

> In the case of a denial, 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

[3] The comprehensive permit law is intended to remove various obstacles to the development of affordable housing, including regulatory requirements utilized by local opponents to thwart such development in their towns. *See Zoning Bd. of Appeals of Wellesley v. Ardemore Apartments Ltd. P'ship,* 436 Mass. 811, 814–815, 820–824 (2002); *Board of Appeals of Hanover v. Housing Appeals Comm.,* 363 Mass. 339, 347–355 (1973); Rodgers, Snob Zoning in Massachusetts, 1970 Ann. Survey of Mass. L. 487, 487–489. *Dennis Hous. Corp. v. Zoning Bd. of Appeals of Dennis*, 439 Mass. 71, 76 (2003).

> 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.

> The regulations also set out the Board's case:
>
> 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. Sections 56.07(2)(a)2 and (b)2 do not explicitly state that the provision providing for 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. *See, e.g., Sugarbush Meadow, LLC v. Sunderland*, No. 2008-02, slip op. at 5 (Mass. Housing Appeals Comm. June 21, 2010), *aff'd Zoning Bd. of Appeals of Sunderland v. Sugarbush Meadows, LLC*, 464 Mass. 166 (2013); *Green View Realty, LLC v. Holliston,* No. 2006-16, slip op. at 9 (Mass. Housing Appeals Comm. Jan. 12, 2009), *aff'd sub nom. Holliston v. Housing Appeals Comm.,* 80 Mass. App. Ct. 406 (2011), *F.A.R. den.,* 460 Mass. 1116 (2011); *Hanover R.S. Ltd. P'ship v. Andover*, No. 2012-04, slip op. at 5 (Mass. Housing Appeals Comm. Feb. 10, 2014).

V. DEVELOPER'S PRIMA FACIE CASE

A. Application of Prima Facie Case

We have recently discussed in depth how we apply the rule concerning the developer's establishment of a prima facie case under 760 CMR 56.07(2)(a)2. *Weston*, *supra*, No. 2017-14, slip op. at 12-16. In *Weston,* we reviewed our past decisions and discussed our consistent rulings that developers need make only a minimal showing for the prima facie case in the hearing before the Committee under the comprehensive permit regulations. *See id.,* slip op at 12: "[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) (prima facie case established where expert testified regarding design to fit diverse character of neighborhood), quoting *Canton Housing Auth. 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.'" *Sunderland, supra,* No. 2008-02, slip op. at 5 n.4, quoting *Tetiquet River Village, Inc. v. Raynham*, No. 1988-31, slip. op. 9 (Mass. Housing Appeals Comm. Mar. 20, 1991). *See Eisai, Inc. v. Housing Appeals Comm.,* 89 Mass. App. Ct. 604, 610 (2016) (regulatory scheme governing applications for comprehensive permits requires only preliminary plans showing that proposal conforms to generally recognized standards) (citation omitted). "[E]xpert testimony directly addressing the matter in issue is more than sufficient to establish the developer's *prima facie* case." *Sunderland, supra,* No. 2008-02, slip op. at 9; *Canton Property Holding, LLC v. Canton*, No. 2003-17, slip op. at 22 (Mass Housing Appeals Comm. Sept. 20, 2005) (expert testimony that design will comply with state stormwater management standards is sufficient to establish prima facie case). *See also Oxford Housing Auth. v. Oxford*, No. 1990-12, slip op. at 5 (Mass. Housing Appeals Comm. Nov. 18, 1991) (plans must be sufficient to permit Committee to evaluate proposal with regard to aspects that are in dispute and to permit full cross-examination); *Watertown Housing Auth. v. Watertown*, No. 1983-08, slip op. at 5, 10-12 (Mass. Housing Appeals Comm. June 5, 1984) ("requirements are to be applied in a common sense, rather than an overly technical manner in context of establishing prima facie case"). And the Appeals Court has confirmed that "[i]t has long been held that it is unreasonable for a board to withhold approval of an application for a comprehensive permit when it could condition approval on the tendering of a suitable plan that would comply with State standards." *Holliston,* 80 Mass. App. Ct. 406, 416, citing *Board of Appeals of Hanover v. Housing Appeals Comm.,* 363 Mass. 339, 381 (1973).

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." *Weston, supra,* No. 2017-14, slip op. at 13; *Tetiquet River, supra,* No. 1988-31, slip op. at 11. *See also Transformations, Inc. v. Townsend*, No. 2002-12, slip op. at 10-11 (Mass. Housing Appeals Comm. Jan. 26, 2004) ("it is not necessary for an applicant to obtain permits or acquire final state or federal approval in order for an applicant to be granted a comprehensive permit or to establish its prima facie case in the case of a denial"); *Oxford Housing Auth. v. Oxford*, *supra,* No. 1990-12, slip op. at 4-5 ("since design work involves substantial costs for the developer, it is unreasonable to require completed plans before the comprehensive permit is issued"). In *Tetiquet,* the only case in which the Committee ruled that a developer had failed to meet the

requirement, the Committee noted that the developer had failed to meet a very low bar, stating "it may suffice for the developer to simply introduce professionally drawn plans and specifications." *Id.* at 9.

This minimum standard is important, because in proceedings before the Committee and under 760 CMR 56.07(2)(a)2, a "prima facie case" is a special term of art—it is not intended to require a developer to provide sufficient evidence in detail regarding each aspect of every potentially applicable state and federal requirement to demonstrate it could meet a burden of ultimate persuasion of compliance with all state and federal requirements, as would occur if it bore the ultimate burden of proof of the issue in this appeal. Here, the matters on which § 56.07(2)(a)2 states the developer may make the preliminary prima facie showing, general compliance with state or federal requirements or generally accepted standards, are not ones on which it has the ultimate burden of proof before the Committee, since the Committee has neither the responsibility nor the authority to finally determine such compliance. *Weston, supra,* No. 2017-14, slip op. at 13. *See also Hanover,* 363 Mass. 339, 379;[4] *Board of Appeals of North Andover v. Housing Appeals Comm.,* 4 Mass. App. Ct. 676, 680 (1976) (stating "…nothing in [G.L. c. 40B, §§ 20-23] or in [*Hanover,* 363 Mass. 339] … suggests that the Housing Appeals Committee has been empowered with authority to override or ignore laws passed by the Legislature or regulations validly promulgated by the Commonwealth's various boards, departments, agencies or commissions." The prima facie case is a burden of production: to introduce "evidence sufficient to form a reasonable basis for a [decision] in that party's favor." *Tiffany Hill, Inc. v. Norwell*, No. 2004-15, slip op. at 6 (Mass. Housing Appeals Comm. Sept. 18, 2007) (internal citations omitted). Thus, "[p]rima facie evidence, in the absence of contradictory evidence, requires a finding that the evidence is true… even in the presence of contradictory evidence, however, the prima facie evidence is sufficient to sustain the proposition to which it is applicable." *Id*.

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[4] In *Hanover,* 363 Mass. 339, the Supreme Judicial Court stated, "[t]he legal issues properly before the committee are circumscribed by c. 774 [G.L. c. 40B, §§ 20-23]. When the board has denied an application for a comprehensive permit, the committee is required to determine whether the board's decision was 'reasonable and consistent with local needs.'" *Id.* at 370, citing G.L. c. 40B, § 23. In that case, the court noted that compliance with state requirements could be assured by including a condition in the comprehensive permit. *Id.* at 373-375, 381.

This burden of production must be consistent with the language of the 760 CMR 56.07(2)(a)2, which describes the developer's case as proving compliance with federal *or* state standards *or* generally accepted standards. The regulation's use of the disjunctive "or," makes it clear this is not a requirement to prove compliance with every state and federal requirement that may be applicable, particularly when viewed in the context of this entire provision.[5] *See Moronta v. Nationstar Mortg., LLC*, 476 Mass. 1013, 1014 (2016) (use of word "or" to separate prongs of statute indicates prongs are alternatives and either one would be sufficient on its own and it is not necessary to establish both), citing *Eastern Massachusetts St. Ry. Co. v. Massachusetts Bay Transp. Auth.,* 350 Mass. 340, 343 (1966) (word "or" is given disjunctive meaning "unless the context and the main purpose of all the words demand otherwise").

Our longstanding interpretation that the regulation requires a minimum showing serves the purpose of having the developer provide sufficient information to allow the Board to make its local concerns case. *Tetiquet River, supra,* No. 1988-31, slip op. at 11. "[E]ven where plans were incomplete, a developer that proposed to modify its plans to comply with State and Federal statutes or regulations had established a prima facie case." *Zoning Bd. of Appeals of Woburn v. Housing Appeals Comm.,* 92 Mass. App. Ct. 1115 (2017) (Rule 1:28 decision), citing *Holliston,* 80 Mass. App. Ct. 406, 416. In *Woburn,* the Appeals Court ruled that "where the developer here plans to comply with all applicable noise regulations, [the Appeals Court] similarly conclude[s] the HAC did not err in finding that the developer had established a prima facie case." *Woburn,* 92 Mass. App. Ct. 1115. *See Holliston,* 80 Mass. App. Ct., 406, 415-416 (to extent preliminary plans submitted are lacking or in fact admittedly do not comply with current State regulations or standards, developer's proposal does not end with plans when the developer proposes to make all modifications necessary to achieve compliance with state regulations).

Moreover, in cases in which a developer may not have correctly addressed every aspect of compliance with state or federal requirements, we have emphasized that "the requirement … is for a preliminary presentation [and] where it is possible to improve the presentation and satisfy

[5] The requirement of 760 CMR 56.07(2)(a)2 is distinguished in three ways from the burdens of persuasion imposed upon the parties in other subsections of 760 CMR 56.07(2): 1) by using the term prima facie case, it establishes a requirement of production, not persuasion; 2) by use of the disjunctive to separate the potential subjects on which to present a prima facie case, it precludes a requirement to present evidence on all alternatives; and 3) unlike the other burdens which use the mandatory "shall have the burden of proving," this provision begins by stating, "[i]n the case of a denial, the Applicant *may* establish a *prima facie case*…." (Emphasis added).

the Board's objections by a condition in the comprehensive permit, we will include it." *Billerica Development 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). Such a condition may include a requirement that approval of a comprehensive permit is subject to compliance with applicable federal and state requirements.

In light of these precedents, we examine the testimony and exhibits submitted by the developer for our review of the prima facie case. *See Tiffany Hill, supra,* No. 2004-15, slip op. at 3, 6 (presiding officer denied motion for directed decision submitted on developer's pre-filed testimony; Committee ruled that evidence at hearing did not affect that ruling). Here, both the Board and Interveners undertook to supply evidence from their witnesses regarding the developer's prima facie case, opining about both the evidence submitted by the developer and about the state and federal regulations they argue are relevant to this issue. Their testimony is not relevant. We consider the developer's prima facie case based solely on evidence supplied by the developer. As we stated above, the Committee has no authority to determine whether a project will comply with state or federal requirements; nor may we waive any requirement of state or federal law. Any project we approve must still comply with all applicable federal and state requirements. *See, e.g., Tiffany Hill, supra,* No. 2004-15, slip op. at 11.

As discussed below, our review of the developer's evidence demonstrates that the developer has provided detailed plans describing the project, including traffic and driveways, wetlands and North River, landscaping and screening, stormwater, wastewater, and open space, providing evidence of future compliance with applicable state and federal law. That evidence is sufficient to establish its prima facie case.

B. Developer's Presentation

River Marsh argues that it made its prima facie case that the project complies with all applicable federal or state statutes or regulations or with generally recognized standards for the disputed aspects of the project, namely traffic and driveways, wetlands and North River,

landscaping and screening, stormwater, wastewater, and environmental issues and open space.[6] River Marsh's civil engineer, Bradley McKenzie, relied on his own expertise and testimony from River Marsh's other experts—Shaun P. Kelly for transportation and Bradford Holmes for wetlands and the North River—and testified that the proposal complied with such standards in each of the six categories in dispute. Ex. 54, ¶ 8. River Marsh presented testimony and exhibits attesting that the project will comply with particular state or federal requirements and that additional information would be analyzed and completed during future permitting, including a hydrological analysis that would be performed during Department of Environmental Protection (DEP) review of the wastewater system and soil testing in the location of the four proposed subsurface roof leaching dry well systems that would be performed for stormwater review by the Conservation Commission. Tr. II, 35-36, 50-51, 64, 68.

1. Traffic and Driveways

River Marsh bases its prima facie case on the issue of traffic safety both on and off site, on the testimony of Mr. McKenzie and its transportation engineer, Shaun P. Kelly. Mr. Kelly testified that the project plans include sidewalks internally on at least one side of the roadways, in compliance with all federal or state statutes or regulations and with generally recognized standards for roadway design. Exh. 57, ¶ 6. He further testified that the proposed roadway width of 20 feet will safely and adequately serve the project and not imperil public safety. He also stated the intersection of Water Street and Church Street is an offsite intersection under the jurisdiction of the Massachusetts Department of Transportation (MassDOT), and the developer has committed to making safety improvements and upgrades to this intersection, which would be subject to MassDOT's approval and which comply with all federal or state statutes or regulations and with generally recognized standards regarding roadway design and intersection design. Exhs. 19; 57, ¶¶ 7, 8; 58, ¶ 6; Tr. II, 130-134.

2. Wetlands and the North River

In support of its prima facie case on wetlands and the North River, River Marsh relies upon the testimony of Mr. McKenzie and its wetlands scientist, Bradford Holmes. Mr. Holmes testified that he delineated the bordering vegetated wetlands on the project site and delineated the

[6] The Pre-Hearing Order, drafted by the parties and issued by the presiding officer, identified these as the areas for which the developer was responsible for making a prima facie case. Pre-Hearing Order, § IV.3 (Appellant/Applicant's Case).

natural bank of the North River, which borders the property on the west, as shown on the project plans. Exhs. 2; 3, Sheet C-1; 52, ¶ 5. The North River is subject to the Scenic and Recreational River Protective Order for the North River issued by the Commonwealth of Massachusetts Department of Environmental Management (Protective Order), pursuant to St. 1978, c. 367, § 62, which established the North River Commission. Exh. 70. Mr. Holmes testified that the project plans show that all construction is entirely outside of the 300-foot North River Corridor governed by the Protective Order. Exh. 52, ¶ 8. The Corridor, over which the North River Commission has jurisdiction under the Protective Order, was established in 1978 and delineated on plans entitled, "Scenic River Corridor, North River" recorded in the Plymouth County Registry of Deeds (the North River Corridor map). Exhs. 69, 71. Mr. Holmes testified that River Marsh's delineation for the Scenic River Corridor shown on the project plans is more landward than the Corridor as shown on the North River Corridor map. Exh. 53, ¶ 4; Tr. II, 114. He testified that River Marsh's improvements and work area are all outside of the delineated corridor and the delineation analysis ensured that River Marsh did not encroach on the Corridor. Exhs. 3, Sheet C-1; 53, ¶ 6; Tr. II, 114.

Mr. Holmes further testified that the plans comply with the Wetlands Protection Act (WPA) and 310 CMR 10.00, and that the project will require a Notice of Intent (NOI) and review by the Pembroke Conservation Commission to review work within wetlands resource areas or buffer zones. Tr. II, 116. In connection with the NOI it will file with the Pembroke Conservation Commission, he stated that River Marsh will demonstrate that the proposed activities within the wetlands buffer zone will not result in an adverse effect on the BVW. Exh. 52, ¶¶ 6, 9. He testified that the Conservation Commission, in its review of the NOI, applies the state standards under the WPA. Tr. II, 116.[7] Mr. Holmes testified that the Superseding Order of Resource Area Delineation (SORAD), which is a bordering resource delineation issued by DEP to confirm location of what the resource area is through an Area of Natural Resource Area Delineation (ANRAD) application, confirmed the location of the BVW. Tr. II, 106-107; Exh. 68.

3. Landscaping and Screening

On the issue of landscaping and screening, River Marsh argues it has met its prima facie case based upon the testimony of Mr. McKenzie that there are no federal or state statutes or

[7] While Pembroke does have a local wetlands bylaw, there is no evidence or allegation that it is any stricter than the WPA.

regulations that govern landscaping and screening applicable to this project. 760 CMR 56.05(2)(a) requires the developer to submit preliminary site development plans showing the proposed landscaping improvements and open areas within the site. While the plans submitted did not include every final construction detail, Mr. McKenzie testified that the plans are more detailed than the preliminary plan requirements of 760 CMR 56.05(2) and satisfy the developer's burden. Tr. II, 35-36.

The developer argues that it produced unchallenged evidence that there are "no buffering or screening requirements for Residence A" in the Zoning Bylaws and Business B only requires "a dense natural hedge greater than six feet in height and located within ten feet of any structures and parking area and the residential areas." Exh. 54, ¶ 9. Mr. McKenzie testified that the developer proposed a 6-foot fence and a 10-foot vegetated buffer and that the final construction plans would include additional detail from a landscape architect. Exhs. 3, Sheet L-1; 54, ¶ 9; Tr. II, 21-22. The site is split between Residence A and Business B, but no residential units are located in Business B. Exh. 54, ¶ 9. Even if Business B applied, Mr. McKenzie opined that the Revised Plan Set meets the Business B requirement and that the project meets and exceeds all local landscaping and screening requirements. *Id.*

4. Stormwater and Wastewater

Mr. McKenzie testified that the project plans will comply with federal or state statutes or regulations and with generally recognized standards regarding stormwater and wastewater. Exh. 54, ¶¶ 10, 11. He noted that the Board's peer reviewer, Peter G. Palmieri, stated that all of its comments regarding stormwater were satisfactorily addressed as long as the permit is conditioned upon compliance with DEP Stormwater Standards. Exhs. 54, ¶ 10; 37; Tr. I, 38. Mr. McKenzie testified further, and Mr. Palmieri agreed, that the proposed wastewater treatment plant will require a permit from DEP under its groundwater discharge permitting program, 314 CMR 5.00 and, as such DEP is "required to witness the soil testing within the limits of the proposed soil absorption system during the permitting process." Exhs. 54, ¶ 11; 37, p. 9. Mr. McKenzie testified that the preliminary design for the wastewater system meets DEP regulations for sufficient separation between the stormwater infiltration system and the wastewater system and, should further testing prove the preliminary assumptions untrue, the "appropriate engineering methods will be implemented to make any required adjustments" in connection with the wastewater system permitting. Exh. 55, ¶¶ 12, 13; Tr. II, 51. He further testified that the

wastewater treatment system is designed outside of the North River Corridor as delineated by Mr. Holmes. Exh. 55, ¶ 15.

5. Open Space

Mr. McKenzie testified that the project complies with federal or state statutes or regulations and with generally recognized standards regarding open space. He testified that there are no local open space or outdoor recreation requirements applicable to the project. Exhs. 54, ¶¶ 9, 12; 41. While the project site contains 49.94 acres of land, only the upland portion, or 22.53 acres of the site, will be developed and the project plans show 17.54 of those 22.53 acres, or 77.85 percent of the upland area, as open space. Exh. 3, Sheet C-1. River Marsh produced evidence that the project provides more open space than is required for other similar development types under the Zoning Bylaw. Exhs. 41; 54, ¶ 9.

C. Board's Challenge to Developer's Prima Facie Case on Open Space

The Board challenges River Marsh's prima facie case only regarding open space and recreation.[8] It claims the open space and recreational areas provided in the project are inadequate under the Guidelines, G.L. c. 40B Comprehensive Permit Projects, Subsidized Housing Inventory, updated December 2014 (40B Guidelines), which state:

> It is important for developers to bear in mind that there is consistency between G.L. c. 40B and meeting environmental concerns. (G.L. c. 40B § 20). Consistency with local needs requires a balancing between the regional need for affordable housing and, among other factors, the environment and open space. 760 CMR 56.07(3). Creative land use designs which minimize infrastructure costs and adverse environmental impacts and/or maximize resident recreational areas and meaningful open space shall be pursued whenever reasonably possible.

Exh. 45, § V(E). It argues that the project failed to provide "meaningful open space," thus demonstrating a failure to comply with the 40B Guidelines.

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[8] The Board did not dispute that the developer had made a prima facie case on the other issues, traffic and driveways, wetlands and North River, and landscaping and screening. Accordingly, the Board has waived any dispute of the developer's prima facie case on those since issues that are not briefed are waived. *See Sunderland, supra*, No. 2008-02, slip op. at 3; *Hilltop Preserve Ltd. P'ship v. Walpole*, No. 2000-11, slip op. at 2 n.1 (Mass. Housing Appeals Comm. Apr. 10, 2002); *An-Co, Inc. v. Haverhill*, No. 1990-11, slip op. at 19 (Mass. Housing Appeals Comm. June 28, 1994)*; see also Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85-86 (1995), quoting *Lolos v. Berlin*, 338 Mass. 10, 13-14 (1958).

D. Committee Conclusion

The evidence presented by River Marsh is sufficient to meet the prima facie standard of 760 CMR 56.07(2)(a)2. As discussed above, the prima facie showing in our proceedings is to provide the Committee and the Board sufficient information so that the Committee and the Board know what the developer is proposing. The developer presented plans, including information relating to traffic and driveways, wetlands and the North River, stormwater and wastewater, and environmental and open space, as well as expert testimony on applicable state and federal requirements. The submission by River Marsh meets that standard.

The only aspect challenged by the Board, open space, meets this standard. River Marsh's witnesses testified that the project complies with federal or state statutes or regulations and with generally recognized standards regarding open space. Exhs. 54, ¶¶ 9, 12; 41. Moreover, River Marsh produced evidence that the project provides more open space than is required for other similar development types under the Zoning Bylaw. Exhs. 41; 54, ¶ 9. The Board's argument, relying on a recommendation in the 40B Guidelines, does not alter our conclusion.

The same is true for the other issues in dispute. Regarding traffic and driveways, Mr. Kelly testified that the project plans comply with all federal or state statutes or regulations and with generally recognized standards for roadway design. Exh. 57, ¶ 6. The developer presented testimony that it was committed to making certain safety improvements and upgrades to the Water Street and Church Street intersection, subject to MassDOT's approval. Exh. 58, ¶ 6.

River Marsh's experts, Mr. McKenzie and Mr. Holmes, testified that the project is outside the 300-foot North River Corridor, and thus, the North River Protective Order did not apply to the project. Exhs. 3, Sheet C-1; 53, ¶ 6; Tr. II, 114. The developer presented testimony that River Marsh's improvements and work area are all outside of the delineated corridor on its plans and the delineation analysis ensured that River Marsh did not encroach on the Corridor. *Id.*

With regard to landscaping and screening, Mr. McKenzie testified that there are no federal or state statutes or regulations that govern landscaping and screening applicable to this project and that the Revised Plan Set met the Zoning Bylaw requirements for landscaping and screening requirements. Exh. 54, ¶ 9.

River Marsh has stated it will comply with all applicable state and federal requirements for stormwater and wastewater. Mr. McKenzie testified that the Board's peer reviewer, Mr. Palmieri, stated that all of its comments regarding stormwater were satisfactorily addressed as

long as the permit is conditioned upon compliance with DEP Stormwater Standards. Exhs. 54, ¶ 10; 37; Tr. I, 38. Furthermore, Mr. McKenzie testified that the proposed wastewater treatment plant will require a permit from DEP under its groundwater discharge permitting program, 314 CMR 5.00, and River Marsh has committed to performing additional testing which DEP is "required to witness the soil testing within the limits of the proposed soil absorption system during the permitting process." Exh. 54, ¶ 11. Finally, Mr. McKenzie testified that the wastewater treatment system is designed outside of the North River Corridor as delineated by Mr. Holmes. Exh. 55, ¶ 15.

The prima facie case does not require proof of, or even explicit testimony showing compliance with, every applicable federal or state statute, regulation, or guideline. *See Weston, supra,* No. 2017-14, slip op. at 13 and cases cited. The developer has agreed to comply with all applicable state and federal requirements, as it is required to do, and to oversight by DEP. Its evidence demonstrates to us that it has satisfactorily addressed state and federal requirements and it has included evidence that it will comply with state and federal law, as well as generally accepted standards, as shown in its plans, reports and testimony. No more is required to meet the requirements of 760 CMR 56.07(2)(a)2.[9] If the project is subject to additional state requirements, it will be obligated to comply with them. As is our custom, we include a condition mandating such compliance.

Additionally, the Board's (and Interveners')[10] legal challenges (and evidence) to the developer's experts' testimony regarding the nuances and details of the applicable state and

[9] The developer's experts testified that the plans comply with state and federal requirements and the plans provide sufficient information to demonstrate that compliance, subject to further required permitting review; to invest time and resources in a proposal that is likely to fail for lack of compliance with these requirements would not make sense.

[10] The ruling on the Interveners' motion to intervene made clear that "[t]he Committee's grant of intervener status does not constitute a finding that the intervener has proved aggrievement; rather it simply allows the intervener to demonstrate in proceedings before the Committee, the intervener's substantial and specific aggrievement by the relief requested by the developer." Ruling on Motion to Intervene, May 25, 2022, slip op. at 5, n.7. That ruling did not allow Interveners to participate on the issue of the developer's prima facie case and we do not consider their arguments on this issue. Nevertheless, their argument that the developer's prima facie case fails because it has not shown present, rather than future, compliance with state or federal requirements is incorrect, as we discussed in *Weston, supra,* No. 2017-14, slip op. at 16.

federal requirements go beyond the purpose of the prima facie case, since we do not ultimately determine whether a project will comply with state or federal requirements. *See* § V.A., above.

For the reasons stated above, the plans, pre-filed testimony and other evidence submitted by the developer are sufficient to make the preliminary showing and we conclude that River Marsh has satisfied the requirements of 760 CMR 56.07(2)(a)2.

VI. LOCAL CONCERNS

A. Application of Local Concerns Case

As Chapter 40B, section 23 provides, the comprehensive permit regulations specify that "Consistency with Local Needs is the central issue in all cases before the Committee." 760 CMR 56.07(1)(a). Pursuant to the comprehensive permit law, these regulations, and Committee decisions, we have long noted that "the Committee has no [] authority to hear a dispute as to whether a developer is adhering to state or federal law," *Holliston, supra,* No. 2006-16, slip op. at 10, quoting from *O.I.B. Corp. v. Braintree*, No. 2003-15, slip op. at 6-7 (Mass. Housing Appeals Comm. Mar. 27, 2006) (holding that it is not "the role of either the Board or this Committee to adjudicate compliance with state standards"), *aff'd,* No. 2006-1704 (Suffolk Super. Ct. July 16, 2007). Rather, the focus of our inquiry is on whether the Board's action is consistent with local needs. In the definition of "Consistent with Local Needs," G.L. c. 40B, § 20 states:

> requirements and regulations shall be considered consistent with local needs if they are reasonable in view of the regional need for low and moderate income housing considered with the number of low income persons in the city or town affected and the need to protect the health or safety of the occupants of the proposed housing or of the residents of the city or town, to promote better site and building design in relation to the surroundings, or to preserve open spaces, and if such requirements and regulations are applied as equally as possible to both subsidized and unsubsidized housing.

To demonstrate its denial of a comprehensive permit is consistent with local needs, the Board has the burden to prove a local concern protected by a provision of Pembroke's local requirements or regulations that is more stringent 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 Holliston,* 80 Mass. App. Ct. 406, 417, 420. Not only must a board show there is a more restrictive local requirement or regulation, but it must also show that the local rule protects against a specific harm against which the state and federal requirements do not. *Holliston,* 80 Mass. App. Ct., 406, 417; *see* 760 CMR 56.02: *Local*

Requirements and Regulations. We have described this requirement in a similar way in *Herring Brook Meadow, LLC v. Scituate*, No. 2007-15, slip op. at 25 (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." In essence, the harm the stricter local provision protects against must be a concern caused by the project, and not protected by state or federal law.

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. *Holliston,* 80 Mass. App. Ct. 405, 417, 420; *Scituate, supra,* No. 2007-15, slip op. at 23-26. As discussed below, the Board has not presented sufficient evidence on any of the issues raised to reach the threshold at which we are required to balance a local concern against the regional need for affordable housing.

B. Board's Local Concern Presentation

The Board must prove first, that there is a valid local concern that supports its denial of the comprehensive permit, and then, that the local concern outweighs the regional need for affordable housing. 760 CMR 56.07(1)(c), 56.07(2)(b)3; Pre-Hearing Order, § IV. The burden on the Board is significant: the fact that Pembroke does not meet the statutory minima regarding affordable housing establishes a rebuttable presumption that a substantial regional housing need outweighs the local concerns in this instance. 760 CMR 56.07(3)(a); Pre-Hearing Order, § II; G.L. c. 40B, §§ 20, 23. *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 *Board of Appeals of Hanover v. Housing Appeals Comm*., 363 Mass. 339, 367 (1973) ("municipality's failure to meet its minimum [affordable] housing obligations, as defined in § 20, will provide compelling evidence that the regional need for housing does in fact outweigh the objections to the proposal"). The Board argues that it has demonstrated valid local concerns, such as traffic safety, density and site constraints, lack of meaningful open and recreational space, and the project's location near sensitive environmental resources, that support its denial of the project. Board brief, p. 3.

1. Traffic and Driveways[11]

The Board's traffic expert, Mr. Müller, raised safety concerns and provided recommendations for how the developer could improve the intersection of Water Street and Church Street to accommodate the increase in traffic as a result of the project. The first concern is that the two streets intersect at a skewed angle which inhibits sight lines even if the developer were to trim vegetation in the area as it proposed. Tr. I, 27. He testified that "60% of the site's entering traffic and 80% of the site's exiting traffic will travel through" the intersection of Water Street and Church Street. Exh. 60, ¶ 19. Mr. Müller testified that he recommended altering the intersection through curbing to create an intersection as close to a 90-degree angle as possible to address his concern. He agreed that this solution would require MassDOT approval. Tr. I, 27-29. Second, he testified that there is currently no sidewalk on Water Street and recommended that the permit require "construction of a sidewalk along Water Street from the site to the existing sidewalk provided along Church Street." Tr. I, 30; Exh. 60, ¶ 22. However, construction of a sidewalk on Water Street, a public municipal way, extending from the project site to Church Street, would involve land not owned by the developer. Exh. 3, Sheet C-1. Mr. Müller testified he had a concern for pedestrians walking along Water Street being out of view of oncoming traffic and stated that adding more traffic will increase this safety concern. Tr. I, 30. On cross-examination, Mr. Müller testified that "many problems" exist at that intersection already, that Water Street is municipal road and Church Street (Route 139) is a state road; therefore, MassDOT must approve any improvements to that intersection. Tr. I, 23, 31. The Board argues that the developer has refused to commit to making the two specific improvements, above, that the Board contends are required to meet local needs.[12] Board brief, p. 5.

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[11] While the Board's brief contains the heading "traffic and driveways," it addresses only the issues of offsite sidewalks along Water Street and the Water and Church Street intersection and does not offer any argument regarding whether the Board's denial based upon the project's internal driveway widths and location of the fence at the southern entrance is supported by valid local concerns. The Board's witness, Mr. Palmieri, testified on cross-examination that Pembroke fire truck movements could be accommodated by the project design, both internally and to and from Water Street. Tr. I, 36. The Board has waived any dispute of local concerns on those issues not briefed. *See Sunderland, supra*, No. 2008-02, slip op. at 3; *Walpole, supra*, No. 2000-11, slip op. at 2 n.1; *Haverhill*, *supra*, No. 1990-11, slip op. at 19*; see also Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85-86 (1995), quoting *Lolos v. Berlin*, 338 Mass. 10, 13-14 (1958).

[12] The Board also argues that the Pembroke Zoning Bylaws, as well as G.L. c. 40A, "require that as a condition of receiving a special permit that applicants make traffic or pedestrian improvements as the

In response, Mr. Kelly testified that River Marsh has committed to work with the Town and MassDOT to implement upgrades to the intersection through pavement markings, signage, and vegetation clearing, subject to MassDOT approval. Tr. II, 134. The developer argues that its proposed vegetation clearing, pavement markings and signage would be an upgrade to existing conditions at the Water and Church Street intersection. Tr. II, 129-134; Exh. 18. Further, River Marsh argues that Water Street is a municipal road and the Board failed to meet its burden under 760 CMR 56.07(2)(b)4, which requires that if a denial is based upon the inadequacy of existing municipal services or infrastructure, the Board must prove that the installation of services adequate to meet local needs is not technically or financially feasible. *See Brierneck Realty LLC v. Gloucester,* No. 2005-05, slip op. at 19-20 (Mass. Housing Appeals Comm. Aug. 11, 2008); *Hollis Hills, LLC v. Lunenburg*, No. 2007-13, slip op. at 7-8 (Mass. Housing Appeals Comm. Dec. 4, 2009). The developer argues that the Board produced no evidence of infeasibility, and the denial on the basis of offsite sidewalks should be disregarded. Developer brief, p. 13. Furthermore, River Marsh argues that it has incorporated an internal sidewalk in its project plans as requested by the Board and its peer reviewer, and the sidewalk at issue in the Board's denial relates solely to an offsite condition. Exh. 3, Sheet C-1; Tr. I, 34-36. Even if a sidewalk was installed along Water Street to the Church Street intersection, the developer points to evidence that the existing sidewalk on Church Street is along the south side of the street and there is no traffic signal at that location, so a pedestrian would need to cross Church Street (Route 139) in order to get to the sidewalk on the other side. Exh. 19; Tr. I, 24-25.

The Board has not demonstrated that the development will result in increased pedestrian safety concerns necessitating construction of a sidewalk along Water Street or reconfiguration of the Water and Church Street intersection. The evidence shows that whatever pedestrian or traffic issues the Board alleges will be caused by the project already exist at the site. The Board has not demonstrated a significant worsening in those conditions as a result of the proposed project nor did Mr. Müller provide any specific evidence to support his claim that pedestrian safety will be

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safety needs of the community require." Exh. 41, §V (7)(A)(1); G.L. c. 40A, § 9; Board brief, p. 5. The Board's reliance on the special permit requirements in the Zoning Bylaw is misplaced. River Marsh did not need to seek a waiver of that requirement because it is not an as-of-right requirement in any zoning district in Pembroke. *See* 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").

compromised as a direct result of the project. The Board has not proven that the Town's failure to install sidewalks along Water Street from the project site to the Church Street intersection is a result of any financial or technical infeasibility. *See Hilltop Preserve Ltd. P'ship v. Walpole*, No. 2000-11, slip op. at 13 (Mass. Housing Appeals Comm. Apr. 10, 2002). Accordingly, the Board has failed to demonstrate that there are significant traffic safety issues that represent a valid local concern that outweighs the regional need for affordable housing.

2. Wetlands and North River

The Board argues that the proximity of the project's wastewater and stormwater facilities to the North River, a sensitive natural resource, supports its concern over the density of the project. The Board argues that, if the developer were to reduce the density as requested, those facilities could be moved further from the wetlands mitigating the environmental concern. Exh. 2, ¶ 24; Board brief, p. 10. The Board relies heavily upon the letters of various state legislators, which have been excluded, *see* § III, above, for its argument that it has met the burden set forth in *Transformations, Inc. v. Townsend*, No. 2002-14, slip op. at 14 (Mass. Housing Appeals Comm. Jan. 26, 2004), "to produce evidence to establish what unique features are present within the project area and to show that the project would have a definable negative impact on those features." *Id*.

The Board also contends that several of the units in the project fall within the 100-foot buffer zone of the North River wetlands. The Board incorrectly argues that Mr. Holmes' wetlands delineation was faulty due to snow cover on the ground at the time.[13] Mr. Holmes testified that DEP has no guidance or regulations on delineating wetlands in winter conditions and that it is common for him to perform such delineations with snow on the ground. Tr. II, 105. The Board points to a letter from the North & South Rivers Watershed Association, a "nonprofit environmental organization," which recommended further setbacks from the wetlands than provided in the plans "to ensure there is less potential for contamination from the stormwater system should it fail." Exh. 32. The Association stated that in some places "the limit of work is immediately adjacent to the delineation line of the wetland." *Id*. However, the Board's witness, Mr. Palmieri, testified that the developer revised its plans, which "resulted in the elimination of a

[13] The Board, in a footnote, attempts to discredit Mr. Holmes' testimony by referring to an Office of Appeals and Dispute Resolution Recommended Final Decision, which is not in evidence and which we do not consider. Board brief, p. 10, n.3.

proposed wetland crossing to the wastewater treatment plant and eliminated all work within the 300 foot Scenic River Corridor." Exh. 59, ¶ 14.

The developer argues that any environmental concerns under the WPA would have a second stage of review, and speculation regarding compliance with the WPA should not be a basis for denial. It argues that wetlands and environmental design are not valid reasons for the Board to deny River Marsh's application because there is no local bylaw requiring anything more than state law and there is no valid local concern relating to wetlands, citing *Oceanside Village, LLC v. Scituate*, No. 2005-03, slip op. at 12-13 (Housing Appeals Comm. July 7, 2007); *see* 760 CMR 56.05(8)(b)3. Mr. Holmes testified that he correctly delineated the wetland lines and North River Corridor on the project plans and, as delineated, the project is entirely outside of the corridor. Exh. 53, ¶¶ 3, 6. He also testified that River Marsh must file a NOI with respect to work within the wetlands buffer and that the delineation of the BVW was set by the SORAD. Exhs. 53, ¶ 7; 68. Accordingly, the developer argues, environmental concerns based upon wetlands or the North River, which are not governed by local bylaws or regulations, are not valid local concerns supporting a denial of the permit by the Board.

The Board makes no argument that either the wetlands or the North River Corridor are governed by local bylaws or regulations with stricter standards than the applicable state requirements. Compliance with the WPA and, if it is deemed applicable, the North River Protective Order, is based on state, rather than local, requirements, and outside the scope of local concerns. As is typical in our decisions, we include here a condition requiring the developer to comply with all applicable state and federal requirements, including these, if applicable. Accordingly, we find the Board has not demonstrated legitimate environmental local concerns with respect to the project site that outweigh the need for affordable housing. *See Zoning Bd. of Appeals of Holliston,* 80 Mass. App. Ct. 406, 420; *Weston, supra,* No. 2017-14, slip op. at 17; *Scituate, supra,* No. 2007-15, slip op. at 9.

3. Landscaping and Screening

The Board argues that the project will be intrusive to properties in the area, "making screening 'absolutely necessary.'" Board brief, p. 6; Exh. 2, ¶ 23(a). It asserts it requested a detailed landscaping plan because it is necessary to ensure that screening would be adequate from surrounding properties, but the developer failed to provide a planting plan. *Id.* Mr. Palmieri testified that "while the [developer] did submit a landscaping plan, 'no specific sizes, number or

type of plants are specified therefore the Board [could not] be certain there [would] be appropriate screening.'" Board brief, p. 6; Exh. 59, ¶ 15.

Next, the Board argues MassHousing included a recommendation in the project eligibility letter that the developer provide "a landscape plan 'to address municipal concerns, including a detailed planting plan, as well as paving, lighting and signage details and the location of outdoor dumpsters and other waste receptacles.'" Board brief, p. 5; Exhs. 1, 4. It asserts Mr. McKenzie admitted on cross-examination that the developer's landscaping plan did not designate the locations of outdoor dumpsters and waste receptacles. Board brief, pp. 5-6; Exh. 3; Tr. II, 24-25.

The Board also argues that the Town's General Bylaws require developers seeking an earth removal permit to provide information regarding vegetative cover, among other things. Board brief, p. 6; Exh. 43, Art. XXI, §3(E). Without the required landscaping plans, the Board argues it was unable to make determinations under the bylaw regarding whether earth removal will "[e]ndanger the general public health, safety or convenience or constitute a nuisance" or "[r]esult in detriment to or depreciation of neighboring properties or interfere with owners or occupants of neighboring properties in the normal use and enjoyment of their properties by reason of noise, dust, vibrations, traffic or drainage conditions." Board brief, p. 7; Exh. 43, Art. XXI, §6. Because it was unable to make either determination, the Board claims it rightfully denied the comprehensive permit. Board brief, p. 7.

In response, the developer argues that it has agreed to install a dense natural hedge of greater than six feet in height along all lot lines abutting residential properties by planting six-foot tall green giant arborvitae coniferous trees and confirmed that its final construction plans would include additional detail from a landscape architect. Exhs. 54, ¶ 9; 3, Sheet L-1; Tr. II, 21-22. It contends that with regard to landscaping and screening the Zoning Bylaw imposes "no buffering or screening requirements for the Residence A" district and that the proposed plantings comply with the requirements specified in the Business B district. Developer brief, p. 8; Exh. 54, ¶ 9. It notes that while the site is split between Residence A and Business B, no residential units are located in Business B. *Id.* Moreover, Mr. McKenzie testified that the revised plan set meets the Business B requirement and the Board's peer reviewer, Mr. Palmieri, confirmed that the revised plan set included a 10-foot-wide natural buffer. Developer brief p. 8; Exh. 59, ¶ 15. The developer did not request a waiver from the requirement under Article XXI of the General Bylaws to provide information regarding vegetative cover in connection with an earth removal

permit. Exh. 9. The developer did not address this specific requirement in its briefs, except to the extent that it argues that its final construction plans will include additional details regarding plantings and other landscaping requirements. Developer brief, p. 20; Exh. 54, ¶ 9.

The Board's evidence fails to show that the proposed 10-foot wide natural buffer is insufficient to screen neighboring properties, nor does it show that the failure to include the locations of outdoor dumpsters and waste receptacles is a local concern that outweighs the housing need. We agree with the developer that the Board points to "no relevant local bylaw or applicable state or federal law or regulation mandating screening beyond that designated by [developer's] engineers." Developer brief, p. 20. Therefore, the Board failed to identify a local interest protected by the cited provisions of the Zoning Bylaw and Zoning Bylaw that outweighs the regional need for low and moderate income housing. *Holliston*, 80 Mass. App. Ct. 406, 420; *see also Weston, supra*, No. 2017-14, slip op. at 39-40.

4. Open Space

The Board argues that the developer did not provide "any open space amenities" for the residents of the development. Board brief, p. 6; Exh. 2, ¶ 24(b). The Board maintains that this lack of open space on a property of roughly 50 acres is unacceptable under the 40B Guidelines, which provides that "[c]reative land use designs which minimize infrastructure costs and adverse environmental impacts and/or maximize resident recreational areas and meaningful open space shall be pursued whenever reasonably possible." Board brief, p. 7; Exh. 45. The Board argues that the Town's Zoning Bylaw requires in the Residence A district that, "[a]ll buildable lots must have at least 80% contiguous upland area" and that this requirement, along with the Zoning Bylaw's lot coverage, landscaping and screening requirements promotes open space. Board reply brief, p. 6-7; Exh. 41, §§ IV(1)(D)(1). [14]

The Board characterizes the open space provided by the developer as "a square on top of the subsurface infiltration system" and argues that Mr. McKenzie admitted during cross-examination that access to the open space would be limited because residents would have to walk to it, the only driveway that leads to it is not open to residents or the public, and the nearby driveway has no disabled parking access. Board reply brief, p. 7; Tr. II, 25-27. It notes that while

[14] In its reply brief, the Board cites as support §§ IV(1)(a-d) and IV(4)(a-d) of the Zoning Bylaw but those appear to be incorrect citations. *See* Board reply brief, p. 7. Section IV(1)(D)(1) includes the 80 percent minimum upland area requirement referenced by the Board. *See* Exh. 41.

Mr. McKenzie contends that modifications could be made to provide disabled access, the sidewalk that leads to the open space ends before the location where the open space begins. Access to that area of open space from the end of the sidewalk is shown on the plans as a proposed 20-foot wide crushed stone maintenance roadway and emergency apparatus turnaround that is not ADA-compliant. Therefore, the Board argues, even with the addition of disabled parking spaces, individuals with mobility disabilities would be unable to access the proposed open space. Board brief, p. 8; Tr. II, 25-27. The Board cites *Cloverleaf Apartments v. Natick*, No. 2001-21, slip. op. at 6 (Mass. Housing Appeals Comm. Dec. 23, 2002) (vacating board's denial decision because, with respect to open space, the project's target population and nearby state park provided sufficient open space) to argue that, given the likelihood of families living in the development, as well as the lack of nearby public open space, the Committee should affirm the Board's denial on the grounds that there is a lack of open space compared to the needs of the community. Board brief, p. 9.

The developer argues there are no open space or outdoor recreational requirements in the Residence A or Business B districts applicable to the project, so there is no valid local concern relating to open space. Developer brief, p. 22. However, it argues the project plans satisfy open space concerns because there is an open space grassy area over and around the subsurface infiltration system and there are yards surrounding the townhomes. *Id.;* Exh. 3, Sheet C-1. In addition, the plans show other areas of proposed open space grassy areas throughout the development, which the Board did not contest as inaccessible. *Id.* The developer notes that the Board could have conditioned an approval with additional open space if it found open space to be lacking. *Id.* Further, the developer points to the project eligibility letter, which noted "the potential for walking trails and recreational boating activities through the extensive riverfront area, if approved under the Wetlands Protection Act and North River Commission." *Id.*; Exh. 1, p. 8.

The evidence and testimony presented by the Board do not credibly support a finding consistent with the Board's argument that the Town's bylaws include a requirement for open space within the development. Section IV(1)(D)(1) of the bylaw imposes a requirement that all buildable lots must have a minimum of 80 percent contiguous upland area, *i.e.,* land not subject to the WPA, in the Residence A district but there is no minimum requirement in the Residence A district for "open space." Board reply brief, p. 7; Exh. 41, p. 14. The term "open space" is not

defined in the Zoning Bylaw. There was no testimony that the Zoning Bylaw requires a minimum amount of open space for the development. In its brief and during its cross-examination of Mr. McKenzie, the Board focused mainly on whether the open space that is provided is ADA accessible and not whether there is a local rule, regulation or bylaw that supports the Board's position that open space requirements apply to the project. Even considering the Board's reliance on the decision in *Natick, supra,* No. 2001-21, under which it argues an analysis of the needs of the development's "target population" should be considered, we find that there is sufficient open space provided within the development. The plans show open space areas around the subsurface infiltration system as well as in the yards in between and surrounding the townhome buildings as well as two larger open space areas in the side and rear areas of the development. Exh. 3, Sheet C-1. Furthermore, as noted in the project eligibility letter, there is the potential for walking trails and recreational boating activities through the extensive riverfront area. Exh. 1, p. 8.

The Board has shown no local concern supporting the denial of the comprehensive permit based on a lack of open space. *See 383 Washington Street, LLC v. Braintree Zoning Bd. of Appeals*, No. 2020-04, slip op. at 26 (Mass. Housing Appeals Comm. Mar. 15, 2022), *aff'd,* Nos. 2282CV00344, 2282CV00345 (Norfolk Super. Ct. May 24, 2023) (board cited no local requirement for outdoor recreational space; therefore, board failed to meet burden to demonstrate valid local concern). Accordingly, we rule that the Board has not met its burden of proving that open space within the project site is a valid local concern that outweighs the regional need for affordable housing.

C. Interveners' Local Concern Presentation

The Interveners must also prove the existence of a valid local concern; additionally, they must show that the project's adverse impact on the local concern harms them. They were allowed to present evidence and argument regarding several specific alleged harms to them.[15]

[15] Pursuant to the Pre-Hearing Order, the Interveners' case was limited to 1) denial of the common driveway waiver; 2) relocation of Ms. Wilson's fence; 3) landscape buffering and setbacks; and 4) stormwater runoff and septic effluent.

1. Stormwater and Wastewater

Intervener Carolyn Crossley[16] argues that the project's stormwater and wastewater systems do not comply with state stormwater and wastewater disposal standards, as they were designed based upon outdated data. Interveners brief, p. 17-18. She relies on the testimony of Interveners' hydrology expert, Scott W. Horsley, for the argument that, because more than half of the project site consists of unbuildable wetlands and shallow groundwater conditions occur throughout the site, capturing, treating, and infiltrating a large volume of stormwater and wastewater adjacent to each other with such a high water table "poses a major unresolved challenge to developing this site." *Id.*, p. 18; Exh. 61, ¶ 7. She also argues that the cross-examination testimony of the developer's experts, Mr. McKenzie and Mr. Holmes, suggests that insufficient groundwater mounding calculations and analysis had been performed, making it "impossible to determine whether the stormwater and wastewater infrastructure complies with DEP standards." Interveners brief, p. 19. Ms. Crossley argues that additional information is necessary to properly evaluate the project on this sensitive site. *Id.*, p. 18. She argues that because the stormwater and wastewater systems lack sufficient information to show compliance with state regulatory standards, the developer has failed to sustain its burden on this issue. *Id.*, p. 21. While Mr. Horsley identified the Pembroke Stormwater Bylaw Article XXXV in his pre-filed rebuttal testimony, from which developer sought a waiver, he did not identify any aspect of that bylaw that was more restrictive than state law nor did he identify any provision of that local bylaw with which the project does not comply. Exh. 62, ¶ 8.

River Marsh argues that, although the Interveners cite stormwater standards as a basis for denial and local concerns, neither raised any issue about failure to comply with local bylaws and that the only wastewater testimony they presented related solely to state standards. Developer brief, p. 26. The developer argues that there is no dispute that its stormwater and wastewater designs would require additional analysis and permitting from the DEP before construction. Tr. II, 38-39; III, 79-80. Based on the testimony presented, River Marsh argues that the Interveners have not proven any local concerns related to stormwater or wastewater. Developer brief, p. 26.

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[16] As indicated in note 15 above, Interveners Carolyn Crossley and Shannon Wilson were permitted to intervene on certain issues; landscaping and screening are the only issues they share. The Interveners' briefs do not specifically identify on whose behalf arguments are made, but we make those distinctions in our discussion for clarity.

We agree that Ms. Crossley did not cite or argue that stricter local requirements or regulations support her asserted harm. As stated above, *see* note 15, the Ruling on Intervention limited the scope of intervention on the issue of stormwater runoff and septic effluent from the site adversely impacting Ms. Crossley's property. While Mr. Horsley's testimony focused on his view that the project plans are insufficient to demonstrate compliance with state standards, state standards are not before the Committee; rather the Interveners must show harm to them from the project based on local concerns. Accordingly, Ms. Crossley has failed to demonstrate a local concern applicable to the project that outweighs the regional need for affordable housing. *Weston, supra*, No. 2017-14, slip op. at 38; *Holliston,* 80 Mass. App. Ct. 406, 417; *Scituate, supra*, No. 2007-15 slip op. at 23-26. *See also Weiss Farm Apts. v. Stoneham*, No. 2014-10, slip op. at 31 (Mass. Housing Appeals Comm. Mar. 15, 2021).

2. Wetlands and North River

The Interveners rely upon the testimony of their wetlands expert, Patrick C. Garner, who testified that the wetlands and the North River Corridor were incorrectly delineated by Mr. Holmes. Mr. Garner produced his own wetlands delineation plan, which he stated includes a stream which is a tributary to the North River, and which he alleged Mr. Holmes failed to include in his delineation. Exh. 63, ¶ 11. Mr. Garner also stated that Mr. Holmes failed to properly assess the edge of the natural bank and marsh of the North River. *Id.* As did Mr. Horsley, Mr. Garner provided extensive testimony on various definitions applicable to the North River Protective Order and stated that Mr. Holmes' determination that the Protective Order does not apply to the project is incorrect. Exhs. 63, ¶¶ 14-23; 61, ¶¶ 21-27. While Mr. Horsley, in his pre-filed rebuttal testimony, identified the Wetlands Bylaw Article XXXVI generally, from which developer sought a waiver, he did not identify any aspect of the project that conflicted with that bylaw or a specific provision thereof, stating only, broadly, that without additional testing, "it is impossible for the town (or the Committee) to evaluate the requested waivers." Exh. 62, ¶ 8.

River Marsh responds, citing *Holliston*, that the Interveners do not identify any local bylaw that justifies the Board's denial. The developer argues that much of the testimony relating to state laws "simply speculates on what additional testing may discover[] instead of demonstrating an identifiable issue." Developer brief, p. 11.

The ruling on intervention allowed Ms. Crossley to intervene on the issue of the impact of flooding runoff from the site on her farm and the wetlands on her property. Ruling on Intervention, slip op. at 11. Again, the Interveners' testimony and evidence focused on their experts' opinions that the project plans are insufficient to demonstrate compliance with state standards, while neglecting to demonstrate how River Marsh's failure to comply with any specific local requirement or regulation will directly impact Ms. Crossley's property, or that any local rules protect against likely specific relevant harms to Ms. Crossley's property. Their focus on general concerns regarding compliance with the WPA and the Protective Order are beyond the scope of their allowed intervention. Because Ms. Crossley did not raise any local requirement or regulation to support the asserted local concerns, she has failed to demonstrate how she is "substantially and specifically affected by these proceedings" with regard to how flooding runoff from the site will impact her farm and the wetlands on her property. Accordingly, she has failed to demonstrate a valid local concern.

3. Traffic Safety

The project plans call for a portion of the southerly site driveway to traverse a portion of the area where Ms. Wilson's driveway now exists. [17] Exhs. 3, Sheets Ex.-1, 3-C; 21. Ms. Wilson's driveway would be relocated to connect to the project driveway, rather than directly from Water Street. Exh. 3, Sheet C-1. In support of her concerns regarding the driveway relocation, Ms. Wilson relies upon the testimony of Maureen Finlay, P.E., who testified that the southerly site driveway's intersection with Water Street has an inside turning radius of 15 feet, which will result in fire apparatus and delivery vehicles entering the opposing lane of travel in order to exit the project site. Exh. 65, ¶¶ 7, 8. Ms. Finlay testified that a restriction prohibiting delivery trucks from using the southerly driveway would be effectively unenforceable. Exh. 65, ¶ 11. Ms. Wilson argues that, based upon Ms. Finlay's testimony, the project plans do not comply with the Massachusetts Fire Code. Interveners brief, p. 25. Other than Ms. Finlay's testimony regarding compliance with the Massachusetts Fire Code, which is a state requirement and not a contested issue and, therefore, not relevant, Ms. Wilson presented no evidence regarding safety

[17] The project site was once part of the property at 248 Water Street. Ms. Wilson's predecessor-in-interest sold the land comprising the project site to the developer's predecessor and retained the two-acre lot with the existing home, which Ms. Wilson now owns. Ms. Wilson's property has the benefit of a driveway easement and restriction over the project site land. Exh. 38.

concerns affecting her ability to access her property from the proposed relocated driveway, nor did she provide evidence or argument of any applicable local bylaw or regulation. *See* § VI.A, above. [18]

Ms. Wilson argues that the Board was correct in its decision to deny the permit based upon the safety concerns presented by the existing fence on her property at 248 Water Street interfere[ing] with the safe exiting of vehicles at the southern entrance." She notes the Board stated that "[t]he Applicant does not own this fence and therefore the impediment and safety concern remains." Exh. 2. However, Ms. Wilson presented no testimony regarding the safety impacts of the fence on her ability to enter and exit her property.

With regard to the turning radius at the southern driveway's intersection with Water Street, the developer notes that both of the Board's experts, Mr. Müller and Mr. Palmieri, confirmed that fire truck turning radii were sufficient. Exh. 27; Tr. I, 36. River Marsh agreed with Mr. Müller's suggestion that a condition restricting delivery vehicles from using the southern driveway would resolve this concern and that River Marsh would not oppose such a condition. Exhs. 27; 35; 55, ¶ 5. Based on River Marsh's agreement, we will include this condition as part of our decision. We find that credible testimony from three experts demonstrates that turning radius sizes are sufficient, and there is no local concern outweighing the need for affordable housing to justify denial based on the turning radii. Developer brief, p. 19.

The developer further argues that there is no local concern justifying the denial of the permit based upon the existing fence, which is owned by Ms. Wilson but located within the Water Street right-of-way, under the control of the Town. Exh. 27. During traffic peer review, Mr. Müller noted that the current location of the fence would create sight line issues for left hand turns out of the southern driveway. Exh. 27. The photographs included in Mr. Müller's peer review show the fence as an approximately four-foot-tall white picket fence running parallel with Water Street, beginning on the southerly side of Ms. Wilson's driveway entrance. Exhs. 11; 15. River Marsh responded that the Town should require removal of the fence, but if the fence remains, then River Marsh would agree to restrict exiting movements from this southern driveway to right turns only; Mr. Müller agreed that either scenario was acceptable. *Id*. The

[18] By ruling dated March 9, 2023, Ms. Finlay's testimony regarding compliance with the Massachusetts Fire Code was struck and, therefore, is not considered.

developer's traffic engineer, Mr. Kelly, also testified that the safety concerns regarding the fence could be solved by removing or relocating the fence or restricting egress from the southerly entrance to right turns only. Exh. 57, ¶ 9.

Based upon the evidence presented, Ms. Wilson has failed to demonstrate that the relocation of her driveway or the removal or relocation of the fence would result in safety concerns caused by the project. There was no evidence presented that relocation of a portion of Ms. Wilson's driveway from its current location to connect to the project driveway would result in unsafe conditions. Therefore, Ms. Wilson has not credibly demonstrated that there is a valid safety or other local concern that supports the Board's denial of the waiver to allow a common driveway at the project.[19] However, in lieu of the removal of the fence, which is a matter outside of the developer's control, River Marsh has agreed to take measures to restrict exiting movements from this driveway, which the Board's experts have agreed is an acceptable resolution. We accept River Marsh's agreement to Mr. Müller's suggestion of a condition restricting delivery vehicles from using the southern driveway, and we will include it as a condition to the comprehensive permit. We will also condition the permit, consistent with River Marsh's agreement, to require a right turn only at this exit.

4. Landscaping and Screening

Ms. Wilson was allowed to intervene on the issue of the impact of the proposed vegetated buffers and a six-foot-high privacy fence on her property and Ms. Crossley on the issue of setback and landscaping requirements. Testimony established that final construction plans will include additional details regarding the vegetated buffers, fencing and landscaping, as provided by a landscape architect. Exh. 3, Sheet L-1; Tr. II, 21-22. In addition, River Marsh notes that the Interveners focused their arguments on compliance with state requirements and did not point to any local bylaw or regulation that justified denial. Developer brief, p. 10. Moreover, their briefs contained no arguments regarding the impact of proposed landscaping and setbacks on either of their properties. Since issues that are not briefed are waived, the Interveners have waived their dispute on the issues of vegetated buffers, fencing and screening, setbacks, and landscaping. *See* n. 9, above. Accordingly, Ms. Wilson and Ms. Crossley have failed to demonstrate any local

[19] The relocation of Ms. Wilson's driveway, as may be necessary for the project, is subject to the parties' existing easement rights and obligations over which the Committee does not have jurisdiction.

concern that outweighs the need for affordable housing with regard to the vegetated buffers, fencing and screening, setbacks, and landscaping proposed by the developer.

D. Committee Conclusion

With regard to the local concerns they allege, even if Pembroke had applicable local requirements or regulations that are stricter than state or federal requirements, which neither the Board nor the Interveners have asserted in their briefs, they have failed to comply with the standard set by the Appeals Court in *Holliston* to identify such a stricter local requirement and to show that such stricter local requirement is necessary to provide protection against specified harms that could not be protected by the state and federal schemes. *See Holliston,* 80 Mass. App. Ct. 405, 417, 420. *See also* 760 CMR 56.02: *Local Requirements and Regulations; Scituate, supra,* No. 2007-15, slip op. at 23-26. *See, e.g., Meadowbrook Estates Ventures, LLC v. Amesbury*, No. 2002-21, slip op. at 14 (Mass. Housing Appeals Comm. Dec. 12, 2006) (holding review of innovative wastewater technology is inappropriate when there is no local regulation and a state DEP permit is required), *aff'd sub nom Town of Amesbury Bd. of Appeals v. Housing Appeals Comm.*, No. 2008-P-1240, Mass. App. Ct. Sept. 16, 2009 (Rule 1:28 decision); *Lever Dev., LLC v. West Boylston*, No. 2004-10, slip op. at 10 (Mass Housing Appeals Comm. Dec. 10, 2007) (finding board failed to identify a local rule or regulation that proposed height of buildings would violate); *9 North Walker Street Dev., Inc. v. Rehoboth*, No. 1999-03, slip op. at 4 (Mass. Housing Appeals Comm. Decision on Remand Nov. 6, 2006) (explaining board "ordinarily should not be permitted to inquire into an issue or place restrictions on affordable housing if the town has not previously regulated the matter in question" because "to allow the town to regulate such issues … would violate the Comprehensive Permit Law's provision that local 'requirements and regulations are [to be] applied as equally as possible to both subsidized and unsubsidized housing'"); *Attitash Views, LLC v. Amesbury*, No. 2006-17, slip op. at 12, n.7 (Mass. Housing Appeals Comm. Summary Decision Oct. 15, 2007), *aff'd Zoning Bd. of Appeals of Amesbury v. Housing Appeals Committee*, 457 Mass. 748 (2010) (attempt to enforce uncodified requirements with regard to outdoor design "may well also run afoul of the statutory provision that all requirements be applied 'as equally as possible to subsidized and unsubsidized housing.' G.L. c. 40B, § 20"). Furthermore, the Board and the Interveners have failed to show how any local requirement or regulation supports the asserted local concerns, and the Interveners have failed to

demonstrate how any asserted local concern substantially and specifically affects their relevant interests.

Finally, while the Board argues that our interlocutory ruling denying the Board's safe harbor claim found Pembroke inventory of affordable housing on the subsidized housing inventory to be 9.91 percent, it presented no evidence regarding regional housing stock or the number of low income persons residing in Pembroke. *See Zoning Bd. of Appeals of Sunderland v. Sugarbush Meadows, LLC*, 464 Mass. 166, 176-177; *Sunderland, supra*, No. 2008-02, slip op. at 7-8. Accordingly, we conclude that neither the Board nor the Interveners has demonstrated a valid local concern that outweighs the regional need for low or moderate income housing.

VII. 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 the application of River Marsh, LLC, and as provided in the text of this decision and conditions stated herein, and subject to the following additional conditions.[20]

1. 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 Project Plans prepared by McKenzie Engineering Group, Inc., titled "River Marsh Village Comprehensive Permit Plan in Pembroke, Massachusetts" dated Sept. 22, 2016; rev. through Oct. 12, 2021, subject to compliance with all applicable federal and state requirements. Exh. 3.

   b. The Board shall not include new, additional conditions.

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

[20] We do not consider the Board's request, made for the first time in its Response to the Proposed Decision that several additional conditions be included in the final decision. *See Simon Hill, LLC v. Norwell,* No. 2009-07, slip op. at 37 (Mass. Housing Appeals. Comm. Oct. 13, 2011) (issue waived for failure to brief cannot be revived in "comments on the proposed decision"), *aff'd sub nom. Simon Hill, LLC v. Housing Appeals Comm.,* No. PLCV2011-01319-B, Plymouth Super. Ct. Mar. 25, 2013, and cases cited. *See also* note 8, *supra.*

Requirements and Regulations.

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

e. The developer shall promptly submit to the Board and to the Conservation Commission copies of all formal and informal submissions by the developer to state and federal authorities with respect to formal or informal review and approval of construction and operation aspects of the project and proposed development, as well as all actions and decisions of those state and federal authorities made upon those submissions or otherwise in connection with this project. Issuance of a building permit will be subject to the developer's receipt of all applicable state and federal approvals required for the project.

f. All Pembroke 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 Pembroke. Submission of plans and materials to the Town for review or approval shall be to the appropriate municipal official with relevant expertise to determine whether the submission is consistent with the final comprehensive permit, such determination shall be made in a reasonably expeditious manner, consistent with the timing for review of comparable submissions for unsubsidized projects, and approval shall not to be unreasonably withheld. *See* 760 CMR 56.07(6).

g. Any specific reference to the submission of materials to Pembroke 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 official may consult with other officials or offices with relevant expertise as they deem necessary or appropriate.

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

(i) Deliveries shall be prohibited from using the southern driveway and a sign shall be posted to indicate this.

(ii) Left turns shall be prohibited from the southern driveway. The Applicant shall install a sign at the end of the southern driveway indicating that the exit is "right turn only".

2. 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.

3. Because the Housing Appeals Committee has resolved only those issues germane to G.L. c. 40B, §§ 20-23 that were 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 requirements and regulations in effect on the date of River Marsh's submission of its comprehensive permit application to the Board, pursuant to 760 CMR 56.02: *Local Requirements and Regulations,* 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 Pembroke town staff, officials, and boards shall take whatever steps are necessary to ensure that a building permit and other permits are issued to River Marsh, LLC 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 shall be in compliance with the Massachusetts Environmental Protection Act (MEPA), G.L. 30, §§ 61-62H, and 760 CMR 56.07(5)(c). Construction shall not commence until the completion of the MEPA review process as evidenced by the issuance of a final certificate of compliance or other determination of compliance by the Secretary of Energy and Environmental Affairs. If applicable, the Committee retains authority to modify this decision based upon the findings or reports prepared in connection with MEPA.

g. Design and construction in all particulars shall be in compliance with all applicable state and federal requirements.

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

i. This comprehensive permit is subject to the cost certification requirements of 760 CMR 56.00 and guidelines issued pursuant thereto by the Executive Office of Housing and Livable Communities.

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 11, 2024

Shelagh A. Ellman-Pearl, Chair

Lionel G. Romain

James G. Stockard, Jr.

Lisa V. Whelan, Presiding Officer