COMMONWEALTH OF MASSACHUSETTS

HOUSING APPEALS COMMITTEE

WARREN PLACE, LLC

v.

QUINCY ZONING BOARD OF APPEALS

No. 2017-10

SUMMARY DECISION
and
DIRECTED DECISION

August 17, 2018

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HOUSING APPEALS COMMITTEE

WARREN PLACE, LLC, Appellant v. QUINCY ZONING BOARD OF APPEALS, Appellee	)	No. 2017-10

SUMMARY DECISION and DIRECTED DECISION

I. Background and Procedural History

Warren Place, LLC (Warren) has appealed the Quincy Zoning Board of Appeal's (Board) June 28, 2017 decision denying it a comprehensive permit under G.L. c. 40B, §§ 20-23 for its proposed 40-unit apartment building complex at 54-56 Warren Avenue, 60-62 Warren Avenue, and 118-120 Old Colony Avenue, in Wollaston, a neighborhood of Quincy. Exh. 2.[1]

Warren filed an application for a comprehensive permit under Chapter 40B on March 17, 2017. The comprehensive permit application requested a number of waivers from the provisions of Quincy's zoning ordinance, including the prohibition on multifamily residential use in the Industrial B district, certain dimensional requirements and various parking requirements. Exhs. 3, 6. The Board opened a public hearing on April 25, 2017, and held an additional hearing on May 23, 2017. The Board deliberated on the application at a hearing on June 13, 2017, and voted to deny the application. It issued a written decision denying a comprehensive permit on June 28, 2017. Exh. 2. Warren appealed this decision to the Committee on July 11, 2017.

Following a conference of counsel, William Haugh, an abutter to the project site at 126 Old Colony Avenue, moved to intervene. In a ruling dated November 9, 2017, the presiding

[1] Exhibit numbers are as identified in the Pre-Hearing Order.

officer allowed Mr. Haugh to intervene on the single issue of stormwater management as it will substantially and specifically affect his property. On November 15, 2017, the Board moved to dismiss on the ground that Quincy has low or moderate income housing on more than 1.5 percent of land zoned for residential, commercial and industrial use, and its decision is therefore consistent with local needs under G.L. c. 40B, § 20. The presiding officer denied the motion to dismiss as untimely under 760 CMR 56.03(8).[2]

The parties then negotiated a Pre-Hearing Order which was issued by the presiding officer on December 14, 2017.Warren filed a motion for summary decision on December 19, 2017, when it filed its pre-filed direct testimony. Neither the Board nor Mr. Haugh filed an opposition to the motion for summary decision by the deadline of January 18, 2018. *See* 760 CMR 56.06(5)(d). Nor did the Board file any pre-filed testimony in accordance with the schedule established in the Pre-Hearing Order. On January 30, 2018, Mr. Haugh filed his pre-filed direct testimony, consisting of his own testimony and that of his expert witness. The presiding officer conducted a telephone conference with counsel on February 16, 2018 to discuss the lack of opposition to the motion for summary decision. Counsel for the Board reported that since the Board's motion to dismiss had been denied, the Board would not oppose the motion for summary decision and would not submit evidence in the hearing on the merits. Mr. Haugh reported that he had expected the Board to file an opposition to the summary decision motion. The presiding officer gave Mr. Haugh permission to file a motion for leave to file a late opposition to the motion for summary decision. The Board thereafter filed a letter dated February 23, 2018, stating that, "Given the City's prior approval of a 40A iteration of this project, the Board is hard-pressed to proffer a good faith defense to the pending motion for summary decision within the 40B framework. For this reason, the Board will not submit further filings." On the same date Mr. Haugh filed a motion for leave to file a late opposition and his proposed opposition to the motion

[2] The Board failed to assert the statutory safe harbor during the proceedings before the Board as required by the comprehensive permit regulations. 760 CMR 56.03(8). Its argument that the assertion of a safe harbor is jurisdictional and could not be waived is incorrect. *See Brewster Commons, LLC. V. Duxbury*, No. 2010-08, slip op. 6 (Mass. Housing Appeals Committee Dec. 12, 2011). The satisfaction of one of the statutory minima may be raised as an affirmative defense, as it is a basis for a determination that the decision of a board is consistent with local needs. G.L. c. 40B, § 20. Under our regulations, that affirmative defense must be raised under the procedure set forth in 760 CMR 56.03(8). We concur in the presiding officer's denial of this motion.

for summary decision. Warren filed its pre-filed rebuttal testimony, as well as an opposition to Mr. Haugh's motion for leave to file a late opposition and a Motion for a Directed Decision against both the Board and Intervener, on February 27, 2018. Neither the Board nor Intervener Haugh filed an opposition to that motion. A site visit was conducted on March 12, 2018. The evidentiary hearing was postponed pending the ruling on the motions for summary decision and for directed decision.

II. Factual Background – Undisputed Facts

The proposed 40B project consists of a single four-story building with 36 one-bedroom units and 4 three-bedroom units for a total of 40 units located on three parcels with a combined area of approximately 17,680 square feet. Pre-filed Direct Testimony of David A. Kinsella, ¶¶ 3, 30; Pre-filed Direct Testimony of John T. Gillon, P.E., ¶ 5. The project site is located in two zoning districts, Residential B and Industrial B Districts. Multifamily residential use is allowed in the Residential B district, but it is not allowed in the Industrial B district. Exh. 17; Kinsella, ¶¶ 16-17. Ten units, including one three-bedroom unit, will be set aside for low or moderate income tenants. On-site parking is proposed for 38-40 spaces, of which at least 27 will be located in a below-grade parking garage. Kinsella, ¶ 30; Gillon, ¶ 5.

In 2015, the owners of the project site had applied to the Planning Board and to the Board for approval of an unsubsidized project to construct an apartment building (2015 project). They sought site plan review under § 9.5 of the zoning ordinance and a special permit under § 5.1.17 of the ordinance for a waiver of certain parking requirements. They also applied for a use variance, dimensional variance, parking setback variance and certain findings from the Board under §§ 3.0, 3.4, 4.0 and 5.1.4 of the ordinance. Exhs. 10, 11, 16. The 2015 project initially was proposed as a single 52-unit building. The proposal was revised, reducing the number of units to 40 and the number of parking spaces to 36, and modifying the building footprint. On September 9, 2015, the Planning Board approved the application as revised and issued a special permit to reduce the parking spaces to 36. In a decision dated September 16, 2015, the Board approved the application and granted the variances and findings requested for the 2015 project as a redesigned 40-unit building. The Board required 38 parking spaces. Kinsella, ¶¶ 21-28. Exhs. 10-14.

The comprehensive permit application provided a list of requested waivers including waivers from the site plan requirements of § 9.5 of the zoning ordinance, the use provisions of

the ordinance prohibiting a multi-family dwelling in the Industrial B district, and certain dimensional and parking requirements. Exh. 6; Kinsella, ¶ 31. In its 2017 decision on the 40B comprehensive permit application, the Board made the following finding of fact: "This proposal is for 40 units. It was approved over a year ago and now they are back for a Comprehensive Permit, 40B. It went through multiple hearings then and the plans changed to accommodate concerns at that time." Exh. 2, p. 3.

III. Summary Decision

A. Standard of Review and Appellant's Motion

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

This is an appeal of a denial of a comprehensive permit. As noted in the Pre-Hearing Order, the developer's case consisted of two alternatives: "To establish a prima facie case by proving that its proposal complies with federal or state statutes or regulations or with generally recognized standards with regard to the identified specific issues of local concern [drainage/stormwater control; mass/height/shadow; traffic/safety; and parking] or
2) "Alternatively, to prove that local requirements or regulations have not been applied as equally as possible to subsidized and unsubsidized housing with regard to the above issues on grounds that the ZBA, as well as the Planning Board, approved the Unsubsidized Housing Project." Pre-Hearing Order, § IV ¶¶ 3, 4.

In this motion, Warren has proceeded on the alternative ground, the allegation of unequal treatment. It claims that the Board's decision denying a comprehensive permit was not consistent with local needs under G.L. c 40B, § 20 because the Board failed to apply local requirements and regulations as equally as possible to subsidized and unsubsidized housing in denying its proposed subsidized 40B project, while approving the 2015 unsubsidized project. G.L. c. 40B, §§ 20, 23;

760 CMR 56.07(2)(a)4.[3] As discussed below, we find that Warren is entitled to summary decision that local requirements and regulations have not been applied as equally as possible to subsidized and unsubsidized housing. Such a determination means that the Board's decision was not consistent with local needs. G.L. c. 40B, §20.[4] In the case of a denial, as exists here, if the Committee finds that the Board's decision is unreasonable and not consistent with local needs, "it shall vacate such decision and shall direct the board to issue a comprehensive permit or approval to the applicant." G.L. c. 40B, § 23.

B. Responses of the Board and Intervener

Neither the Board nor Mr. Haugh had filed any response to the motion for summary decision when the presiding officer convened a telephone conference to discuss the motion in February 2018. Thereafter, the Board submitted a letter to the Presiding Officer that "it would not oppose the motion, and had decided not to submit evidence in this case because it had no good faith basis to do so in light of its earlier approval of the 2015 project." February 23, 2018 Letter of Janet S. Petkun. This response confirms that the Board has conceded the motion for summary decision. *See Lexington Woods, LLC v. Waltham*, No. 2002-36, slip op. at 7 (Mass. Housing Appeals Committee Feb. 1, 2005) (board conceded issue by failing to introduce evidence); *Hilltop Preserve LTD Partnership v. Walpole*, No. 2000-11, slip op. at 2 n.1 (Mass. Housing Appeals Committee Apr. 10, 2002) (board conceded issue not briefed); *See also Cameron v. Carelli,* 39 Mass. App. Ct. 81, 85-86 (1995); *Sugarbush Meadow, LLC v. Sunderland*, No. 2008-02, slip op. at 3 (Mass. Housing Appeals Committee June 21, 2010), citing *An-Co, Inc. v. Haverhill,* No. 1990-11, slip op. at 19 (Mass. Housing Appeals Committee June 28, 1994) and *Lolos v. Berlin*, 338 Mass. 10, 13-14 (1958).

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[3] Additionally, under 760 CMR 56.07(2)(a)1., the developer is required to show that it has met the project eligibility requirements of 760 CMR 56.04(1). The project eligibility letter included in the record provides conclusive proof of these requirements. 760 CMR 56.04(6). *See* Exh. 1.

[4] "'Consistent with local needs', 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." G.L. c. 40B, § 20.

Mr. Haugh filed a motion for leave to file a late opposition, which was filed, along with a proposed opposition, on February 26, 2018. In that motion, he alleges that he did not learn that the Board was not filing an opposition until January 18, 2018, the date on which it was due. Mr. Haugh argues that he was prejudiced by the late notice of the Board's decision not to oppose the summary decision motion. He also notes that the Board did not file any pre-filed testimony to defend the merits of its decision to deny the comprehensive permit. Warren argues in opposition that Mr. Haugh did not seek to intervene on the unequal treatment issue, and that he inappropriately relied on the City to file an opposition.

A presiding officer may extend the time to file a pleading for good cause. 760 CMR 56.06(1)(e). Here, Mr. Haugh's request was made after the deadline for an opposition had passed. Mr. Haugh states that he relied on the Board to submit an opposition, thus accepting the Board's judgment in the place of his own. That abdication of his responsibility may not be considered good cause now.[5] Moreover, intervention is intended for parties whose interests would not be diligently represented by a board. 760 CMR 56.06(2)(b). *See Sudbury Station, LLC v. Sudbury,* No. 2016-06, slip op. at 8 (Mass. Housing Appeals Committee Rulings on Motions to Intervene April 24, 2018). In this case, the substantial and specific injury alleged by Mr. Haugh is that insufficient drainage and stormwater control will cause flooding on his property. Protecting his interest required that Mr. Haugh file his own opposition to the developer's motion. He has not provided an adequate explanation to warrant a finding of good cause to allow him to file his opposition late. Mr. Haugh's motion for leave to file a late opposition is therefore denied.

C. The Record for Summary Decision

Warren has demonstrated it is entitled to summary decision. It has the burden to show that "local requirements or regulations have not been applied as equally as possible to subsidized and unsubsidized housing." 760 CMR 56.07(2)(a)4. *See* G.L. c. 40B, § 20. The developer argues that the 2015 project previously approved and the 40B project denied by the Board are, as the Board admits, essentially the same project, except that the 40B project is subsidized, unlike the 2015 project. Warren argues that the Board's alleged local concerns were resolved for the

[5] Mr. Haugh has acknowledged he is familiar with the 2015 project. He was party to an appeal under G.L. c. 40A, § 17 of the Board's decision on the 2015 project application. Haugh proposed opposition to summary decision, ¶ 4.

unsubsidized 2015 project, demonstrating unequal treatment for the 40B project. The Board's contested issues from the Pre-Hearing Order are: 1) mass, height, and shadow; 2) parking; 3) traffic safety; and 4) drainage and stormwater control. *See* Pre-Hearing Order, § IV ¶¶ 3, 5. Warren argues that minor design changes from the 2015 project to the 40B project do not impact the local concerns raised by the Board and thus there are no material differences between the 2015 and 40B projects justifying the different treatment.

The only facts in the record are those supplied by Warren and Mr. Haugh; the Board introduced no evidence for this proceeding. The undisputed facts show that the Board approved in all material aspects essentially the same proposed development as an unsubsidized project, but denied it as a 40B project. As discussed below, the evidence in the record shows that the modifications to the project made between the two applications to the Board are not material to the concerns raised by the Board and are insufficient to support different treatment by the Board. Indeed, the Board's finding of fact that the 40B proposal was the one approved earlier admits to this conclusion. Exh. 2, p. 3. Moreover, the requested waivers from the zoning ordinance involve substantially the same local requirements for which the 2015 project received favorable action. Kinsella, ¶¶ 20-26, 31. Exhs. 3, 6, 10-16.

Height, Mass and Shadow. The Board alleges in the Pre-Hearing Order that "the Project is too large given the current character of the neighborhood." Pre-Hearing Order, § IV ¶ 5(b). Mr. Kinsella, the project architect, testified that "The [40B] Project is substantially the same as the 2015 Project, as approved by the Zoning Board and the Planning Board to include 40 units and 38 parking spaces. He stated that the only differences are attributable to the inclusion of the four three-bedroom units in place of the four-one bedroom units approved in 2015; the 40 units in the 2015 Project were all one-bedroom units." Kinsella, ¶ 34. He provided a table indicating the slight dimensional differences between the two projects in the building footprint, height, and floor area ratio (FAR). He determined that the changes in project dimensions were immaterial and therefore he relied on the same sun and shade study for the 40B hearing that he submitted for the 2015 project. Kinsella, ¶¶ 34-35, 42. On the undisputed facts we find that the dimensional changes are insignificant to the impact of the 40B project on the character of the neighborhood and should not affect the outcome of the Board's decision. The Board's 2015 decision found that the 2015 project was "not substantially more detrimental to the neighborhood than the existing

use." *See* Kinsella, ¶ 24; Exhs. 10-16. The undisputed facts afford no basis to find otherwise or that the height, mass and shadow effect of the 40B project present valid local concerns; therefore we find unequal treatment on this issue.

Parking. The Pre-Hearing Order identifies the Board's position that the parking is "insufficient to accommodate the number of apartments, potential tenants and guests which will result in on-street parking," although the Board approved the 2015 project with effectively the same number parking spaces for the proposed 40 units. Pre-Hearing Order, § IV ¶ 5(d); Kinsella, ¶¶ 27-28; Exhs 13-14. The 40B project proposes 38 parking spaces as did the 2015 project, but contemplates up to 40 if compact vehicle spaces are used.[6] Moreover, Mr. Kinsella testified that since 2013 the Board and the Planning Board have consistently waived the parking ratios ordinarily required by the zoning ordinance for unsubsidized developments. Kinsella, ¶¶ 27-28, 47, 50-52. The undisputed evidence in the record warrants our finding of unequal treatment on this issue.

Traffic Safety. The Pre-Hearing Order identifies the Board position that "the density of the Project will add to preexisting traffic problems and cause safety issues for the neighborhood." Pre-Hearing Order, § IV ¶ 5(c). First, the density of the project is not materially changed. The number of units is the same, although four units changed from one-bedroom to three-bedroom units. As noted above, the dimensions of the buildings for the two projects are not materially different. The Board and the Planning Board were required to take traffic safety into consideration in their 2015 approvals. *See* Kinsella, ¶¶ 24, 25; Exhs. 10-16. Mr. Gillon, former Director of the Quincy Traffic and Parking Department, testified on Warren's behalf that he prepared traffic impact assessments for both the 2015 project and the 40B project. He stated that the "[40B] Project featured a changed site design from the single driveway for access onto and egress from Warren Avenue in the 2015 Project. The new site design featured a circular traffic pattern with one-way access by a driveway that opens onto Warren Avenue, and one-way egress by a driveway that opens onto Old Colony Avenue. Gillon, ¶ 27. *See* Gillon, ¶ 6. As shown below, this has no significant impact on traffic safety. He testified that the 2015 study of the 52-unit version of the project, before it was reduced to 40 units, showed no significant impacts on

[6] Since the Board's contention in this proceeding is that parking is insufficient, an increase in the number of parking spaces to 40 should not have any adverse impact.

traffic attributable to the project. The developers were not required to offer new projections for the 2015 review by the Board and Planning Board after the project was reduced to a 40-unit project, as projections for the 52-unit configuration were conservative. Gillon, ¶¶ 11-27. The 2017 traffic study, based on 40 units, also shows the traffic from the project will not pose any change in the level of service at relevant intersections, or pose safety or inconvenience concerns from traffic movements in and out of the site or cause a significant increase in vehicular traffic on the neighboring streets. Therefore, based on Mr. Gillon's analysis, the proposed changes from the 2015 project to the 40B project provide no material basis for differing treatment on this issue. Gillon, ¶¶ 6, 26-35. Based on the undisputed evidence in the record we find unequal treatment on this issue.

Drainage and Stormwater Control. The Board alleges in the Pre-Hearing Order that "the drainage/stormwater control is insufficient given the size of the Project." Pre-Hearing Order, § IV ¶ 5(a). However, the Board and the Planning Board, which had reviewed the 2015 project's stormwater report based on the 52-unit configuration, did not require further information or revisions to the 2015 Stormwater Report to approve the 40-unit project in 2015. Pre-filed Direct Testimony of Michael G. Joyce, P.E., ¶¶ 12, 18. Mr. Joyce testified that the changes in building footprint for the project led to a revision of the infiltration system layout. The 2015 version had 18 infiltration units in three rows of six, and the 40B project has 18 units in two rows of nine. Joyce, ¶¶ 17, 24. Also the 40B project "represents a reduction of proposed impervious area of approximately 1,800 square feet from the plans that were the subject of the 2015 Stormwater Report." Joyce, ¶ 18. He gave his opinion that the stormwater and drainage controls for the two iterations of the project are not materially different. The Board and the Planning Board were required to take stormwater controls into consideration in their 2015 approvals. *See* Kinsella, ¶ 24, Joyce, ¶ 13; Exhs. 10-16. The undisputed evidence in the record supports our finding of unequal treatment on this issue.

Mr. Haugh's Arguments. Even though Mr. Haugh's motion for leave to file a late opposition was denied, it is clear that he offers no evidence or argument to defeat Warren's motion for summary decision. The ruling of the presiding officer on his motion to intervene

limited the scope of his intervention to stormwater management.[7] In his proposed opposition to summary decision, Mr. Haugh addresses only one issue relating to stormwater management, that the project's snow storage plan is insufficient. Haugh proposed opposition, ¶ 9. Mr. Haugh, however has introduced no facts in evidence to support this assertion. Moreover, his opposition counters his own argument since he alleges that Warren, in reaction to criticism of its snow storage plan, now intends to remove snow from the site. In any event, his allegation is not evidence. Rather, the undisputed evidence is that the developer's plan for removal of snow off site dates to 2015, according to the 2015 stormwater report prepared by Warren's engineer, Mr. Joyce. Joyce, ¶ 29; Exh. 7, p. 38. No evidence in the record shows a material change to the project with regard to snow storage; this cannot be a basis to challenge summary decision on unequal treatment grounds. His argument that Warren "ignores the fact that project review for both subsidized and unsubsidized projects changed after the risks associated with the winter of 2015 were understood," Haugh proposed opposition, ¶ 8, is unsupported by the facts in evidence and offers no legal basis for opposing summary decision.

Mr. Haugh's proposed opposition references no other factual assertions regarding stormwater management (the sole issue on which he was granted leave to intervene) that could raise a material factual issue concerning unequal treatment. He makes another argument, that requiring requirements and regulations to apply as equally as possible to both subsidized and unsubsidized housing ignores the different legal avenues for appeal of zoning board decisions under Chapter 40A and Chapter 40B. However, his criticism of the equal treatment requirement of G.L. c. 40B, § 20 affords no basis to defeat Warren's motion for summary decision. Nothing in Mr. Haugh's submission addresses the existence of any genuine issue of material fact that precludes a summary decision in favor of Warren against the Board and him. Nor has he raised any adequate argument that Warren was not entitled to summary decision as a matter of law. *See*

[7] Mr. Haugh also moved to intervene on the issues of parking and traffic impacts and light and noise impacts. He was denied leave to intervene on this issues. Ruling on Motion to Intervene of William J. Haugh, Jr.

760 CMR 56.06(5)(d).[8] Finally, Mr. Haugh argues instead that he should now be allowed to "expand his defense to all the matters on which he opposed the 2015 decision." Haugh proposed opposition, ¶ 14. His suggestion that the abdication of the Board's defense of its decision warrants granting him the right to expand his role is without merit.

Conclusion. We find that the differences between the projects are insignificant with regard to the question of unequal treatment. The material undisputed facts in the record demonstrate that the Board acted inconsistently in its treatment of the 2015 and the 40B project applications, and thus the Board failed to treat subsidized and unsubsidized housing as equally as possible within the meaning of G.L. c. 40B, § 20, and 760 CMR 56.07(2)(a)4. We find that the Board's decision to deny the comprehensive permit application was unreasonable and inconsistent with local needs. Therefore, Warren is entitled as a matter of law to summary decision on this basis. *See Brierneck Realty, LLC v. Gloucester,* No. 2005-05, slip op. at 25-26 (Mass. Housing Appeals Committee Aug. 11, 2008); *Avalon Cohasset, Inc. v. Cohasset,* No. 2005-09, slip op. at 8, 23-24 (Mass. Housing Appeals Committee Sept. 17 2007).

IV. Directed Decision

Even though it is not be necessary to reach Warren's motion for directed decision, for completeness of the record, we address this motion as well. Our regulation, 760 CMR 56.06(5)(e) states: "[u]pon a party's submission of prefiled testimony, any opposing party may move for a directed decision in its favor on the ground that upon the facts or the law the original party has failed to prove a material element of its case or defense." Warren filed a motion for directed decision on the ground that, having submitted no evidence, the Board has failed to prove the material elements of its defense of this appeal. It also argues that Mr. Haugh's evidence is inadequate to prove the materials elements of his case. Neither the Board nor Mr. Haugh filed an opposition to the motion for directed decision. In the course of a teleconference of counsel with the presiding officer, Mr. Haugh's counsel stated that he relied on the record with respect to the motion.

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[8] Mr. Haugh did not adequately brief his assertions regarding unequal treatment; those issues would be waived even if his opposition had been timely. *Sugarbush Meadow, LLC v. Sunderland, supra,* slip op. at 3, citing *An-Co, Inc. v. Haverhill, supra,* slip op. at 19 and *Lolos v. Berlin, supra,* 338 Mass. at 13-14.

As noted above with regard to summary decision, the failure of the Board and Intervener to submit any opposition to the motion indicates a concession of the merits of Warren's motion. *See Sugarbush Meadow, LLC, supra,* slip op. at 3, citing *An-Co, Inc. v. Haverhill, supra,* slip op. at 19 and *Lolos v. Berlin*, 338 Mass. 10, 13-14; *Lexington Woods, supra*, slip op. at 7; *Hilltop Preserve, supra*, slip op. at 2 n.1. *See also Cameron v. Carelli, supra,* 39 Mass. App. Ct. at 85-86.

Nevertheless, we examine the merits of the motion based on the evidence submitted by the Board and Mr. Haugh. To consider this motion, we examine whether the evidence contained in pre-filed testimony and exhibits, when considered in the light most favorable to the nonmoving party, is legally sufficient to support a decision in its favor. *See Litchfield Heights, LLC v. Peabody,* No. 2004-20, slip op at 4 (Mass. Housing Appeals Committee Jan. 23, 2006), citing *Donaldson v. Farrakhan,* 436 Mass. 94, 96 (2002) (comparing standard to summary judgment standard). "The mere existence of a scintilla of evidence" to support the nonmoving party's position is insufficient. *Donaldson, supra* at 96, quoting from *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). "[T]he evidence must contain facts from which reasonable inferences based on probabilities rather than possibilities may be drawn .... And the evidence must be sufficiently concrete to remove any inference which the [fact finder] might draw from it from the realm of mere speculation and conjecture." *Litchfield Heights, supra* at 4, *quoting Alholm v. Wareham,* 371 Mass. 621, 627 (1976) (citations omitted). The motion should be denied "[i]f, upon any reasonable view of the evidence, there is found a combination of facts from which a rational inference may be drawn in favor of the [nonmoving party]." *Litchfield Heights*, *supra* at 5, *quoting Chase v. Roy*, 363 Mass. 402, 404 (1973).

Not only did the Board not oppose the motion, it has submitted *no evidence* for hearing in this matter. The Board chose not to submit evidence for its direct case because, as its counsel asserted, it had no good faith basis to do so. We agree with Warren that the Board is deemed to have conceded the issues on which it bore the burden of production: valid local concerns with respect to stormwater control/drainage, mass, height and shadow, traffic safety and parking. It

has not provided any element of its defense against this appeal. Warren is therefore entitled to a directed decision against the Board.[9]

While Mr. Haugh was allowed to intervene on the issue of stormwater, none of the evidence he has put into the record sufficiently shows any specific injury his property will suffer from drainage or stormwater caused by the 40B project. The issue he identified in the Pre-Hearing Order was: "the drainage/stormwater control is insufficient and fails to comply with the Massachusetts Stormwater Handbook and/or Handbook: Approach to 40B Design Reviews, as applies to William Haugh who is the abutter that will be flooded." Pre-Hearing Order, § IV ¶ 7(a).

Mr. Haugh's engineering witness, James Herrick, P.E., provided a drainage study which he stated was to "Provide Analysis of existing and proposed condition water shed flows in this area to determine impact to downstream properties.... This watershed is outlined on the enclosed watershed map and comprises of about 2.87 acres." Drainage Study for Old Colony Avenue, p. 1. The study report stated that it modeled "all storms routing the drainage into the existing 18" drain pipe," assuming both pre-and post- the 40B project. *Id.* It concluded that "[s]ince the existing flows for the entire water with the exception of the 2-year storm will not be accommodated by the existing 18" drain system. The proposed storage and infiltration cannot be accomplished because of the backup of the existing 18" drainage system." [sic] The study concludes that "[t]o accommodate the drainage flow in the basin, we recommend that the 18" drainage system be replaced with a 24" drain from Warren Ave to the existing 24" drain at St. Ann's Road. This would assure capacity for all storms in this drainage basin and for proposed storage in the proposed Cultec detention area." *Id.*, pp. 2-3. Mr. Herrick also testified that the City of Quincy had noted the need for a new catch basin since March 1994, but he saw no evidence it was ever installed, referencing correspondence from a City of Quincy engineer in 1994 who noted that yards in the vicinity of the project were collecting water runoff "from all directions." Prefiled Direct Testimony of James Herrick P.E., ¶¶ 5-8 and attachments. He concluded that "[b]ased on my calculations the 18 inch drain is insufficient to handle the

[9] We note that our directed decision ruling addresses only the failure of the Board to make its case regarding local concerns. We have not considered the adequacy of the developer's *prima facie* case pursuant to 760 CMR 56.07(2)(a)2., which was not raised by any party.

additional storm runoff that will be caused by the additional impervious area if the proposed building and driveway is constructed at 118 Old Colony Avenue. Herrick, ¶ 9.

Although Mr. Herrick testified that the project will increase storm runoff, he also states that the municipal drain is inadequate. Mr. Herrick's testimony demonstrates that the infrastructure issue—the need to enlarge the drain pipe for the City stormwater system—cannot support the denial of Warren's comprehensive permit. In general, a comprehensive permit may not be denied due to the inadequacy of municipal services. *Peppercorn Village Realty Trust v. Hopkinton*, No. 2002-02, slip op. at 5 n.3 (Mass. Housing Appeals Committee January 26, 2004).[10] As Mr. Herrick testified, stormwater drainage has been a longtime ongoing problem not specific to the project site, but in the watershed area, which has been recognized but not addressed by the City. His recommendation was to replace with 18-inch drain with a 24-inch drain. In this context, the problem with inadequate drainage affecting more than the project site is "an existing infrastructure shortcoming that the [municipality] is obligated to remedy. *Hilltop Preserve Ltd. Partnership v. Walpole*, No. 2000-11, slip op. at 29 (Mass. Housing Appeals Committee April 10, 2002) (citations omitted). The evidence of a neighborhood-wide need for infrastructure improvements to a municipal drain cannot support a reasonable inference that the project will cause specific harm to Mr. Haugh's property.

Moreover, Mr. Herrick did not state where the increased runoff unable to drain into the drainage system will flow. He provided no evidence linking such an increase in runoff to any impacts specifically on Mr. Haugh's property or other properties. He did not testify regarding which downgradient properties may experience impacts or the extent of any such impacts. There is no mention of Mr. Haugh's property in Mr. Herrick's analysis, except for his statement he has viewed the Haugh property, which he identified as adjacent and downstream from the project site. Herrick, ¶ 4; Drainage Study, p. 1.

Mr. Haugh's testimony does not remedy this deficiency. He stated that "[f]rom 1987 I have seen flooding which has been mostly confined to an area about sixty feet south of my home." Pre-Filed Testimony of William Haugh, ¶ 11. He also noted correspondence identifying

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[10] If a board denies a project based on "the inadequacy of existing municipal services or infrastructure" it may seek to prove that "the installation of services adequate to meet local needs is not technically or financially feasible." 760 CMR 56.07(2)(b)4. However, the Board has not raised the inadequacy of municipal infrastructure as an issue.

29 Newton Avenue and 134/136 Old Colony Avenue as the locations having flooding. Haugh, ¶ 13-16, and attachments. He stated that his basement "has not flooded despite the significant flooding in the area. Haugh, ¶ 18. The testimony of both Mr. Haugh and Mr. Herrick and attached correspondence regarding flooding on other properties is not evidence from which a reasonable inference can be drawn that that Mr. Haugh would suffer flooding impacts as a result of the project.

As Warren has argued, the evidence does not show Mr. Haugh has the qualifications to testify regarding the potential impact of drainage conditions from the project site on his property. *See Standerwick v. Zoning Bd. of Appeals of Andover*, 447 Mass. 20, 36 (2006), citing *Barvenik v. Board of Aldermen of Newton,* 33 Mass. App. Ct. 129, 138 n.13 (1992) (discounting speculative lay witness testimony on issues of site drainage and storm drainage). Thus he is not qualified to testify that "[w]hile I am not an engineer, common sense seems to indicate that if you increase the area under the roof and driveway that will result in more water that will end up in my basement or on the south side of my home" or that "common sense seems to indicate that if instead of the water soaking into the soil in many different areas you concentrate all that water in a dry well twenty feet from my basement that I will have water problems in my basement." Haugh, ¶¶ 21-22. Moreover, these opinions are within the "realm of mere speculation and conjecture." *Litchfield, Heights, supra*, at 4, *quoting Alholm v. Wareham, supra*, 371 Mass. 621, 627, and cannot be considered. Mr. Haugh's testimony only showed the existence of a pre-existing flooding problem in the general area affecting other neighbors; he provided no admissible evidence to show that the project is likely to cause stormwater to flood his property. Therefore Mr. Haugh has not introduced sufficient evidence that his property will be adversely substantially and specifically affected by the proposed project. Additionally, as noted by Warren, Mr. Haugh introduced no evidence on the issue of whether any stormwater effects on his property, as a local concern, would outweigh the need for affordable housing, even though Warren introduced evidence on this issue. Warren is entitled to a directed decision against Mr. Haugh as well.

V. Conclusion and Order

Based upon review of the entire record and discussion above, we find that the decision of the Quincy Zoning Board of Appeals is unreasonable and inconsistent with local needs. We therefore conclude that summary decision against the Board and the Intervener shall be granted to Warren Place, LLC. We further conclude that Warren is entitled to a directed decision in its favor against both the Board and the Intervener.

The decision of the Board is vacated and the Board is directed to issue a comprehensive permit with the conditions set forth below. 760 CMR 56.07(5)(a)1.

1. The comprehensive permit shall conform to the application submitted to the Board, and the plans identified as "Warren Place 118 Old Colony Ave., 54-56 Warren Ave., & 60-62 Warren Ave. Quincy, MA 02710" comprising 14 sheets. Exhs. 3-6. *See* Kinsella, ¶ 2.

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 placed before it by the parties, the comprehensive permit shall be subject to the following further conditions:

(a) Construction in all particulars shall be in accordance with all applicable local zoning and other bylaws in effect on the date of Warren's application to the Board for a comprehensive permit, except those specified for waiver in the developer's application to the Board, waived in prior proceedings in this case, or waived by this decision.

(b) The subsidizing agency or project administrator 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 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) Construction and marketing in all particulars shall be in accordance with all presently applicable state and federal requirements, including, without limitation, fair housing requirements.

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

(f) 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.

(g) The Board shall take whatever steps are necessary to insure that a building permit is issued to the applicant, without undue delay, upon presentation of construction plans, which conform to the comprehensive permit and the Massachusetts Uniform Building Code.

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 or the Land Court within 30 days of receipt of the decision.

HOUSING APPEALS COMMITTEE

Issued: August 17, 2018

Shelagh A. Ellman-Pearl, Chair

Joseph P. Henefield

Marc Laplante

Rosemary Connelly Smedile

James G. Stockard, Jr.

Certificate of Service

I, Tanya J. Reynolds, Clerk to the Housing Appeals Committee, certify that this day I caused to be mailed, first class, postage prepaid, a copy of the within Summary Decision and Directed Decision in the case of Warren Place, LLC v. Quincy Zoning Board of Appeals, No. 2017-10, to:

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Dated: 08/17/18

Tanya J. Reynolds, Clerk
Housing Appeals Committee