

**COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE**

RAYNHAM 44 DEVELOPMENT LLC

v.

TOWN OF RAYNHAM BOARD OF APPEALS

No. 2024-09

DECISION

July 22, 2026

TABLE OF CONTENTS

I. INTRODUCTION AND PROCEDURAL HISTORY	1
II. FACTUAL BACKGROUND.....	4
III. PRE-HEARING MOTIONS.....	8
A. Summary Decision.....	8
1. Safe Harbor Pursuant to the Comprehensive Permit Law	9
2. The Board Did Not Timely Invoke Safe Harbor and Therefore Has Waived It11	
3. EOHLC's September 20, 2024, Determination	14
4. The Safe Harbor Procedure Applies Even If Developer Has Actual or Constructive Notice of a Municipality's SHI	15
5. The Committee May Not Waive the Safe Harbor Procedure	18
6. Safe Harbor Evidence on the Merits.....	19
7. Developer's Challenge to 40B Guidelines.....	22
B. Order on Motion in Limine and Presentation of Evidence	22
IV. STANDARD OF REVIEW AND THE PARTIES' BURDENS OF PROOF....	24
V. DEVELOPER'S PRIMA FACIE CASE	26
A. Traffic and Parking	27
B. Wetlands	28
C. Water and Sewer	29
1. Sewer.....	29
2. Water.....	30
D. Impact on Municipal Services	31
E. Committee Determination.....	31
VI. LOCAL CONCERNS.....	33
A. Traffic and Parking	34
B. Wetlands	38
C. Water & Sewer.....	38
1. Sewer Capacity	39
2. Sewer Infrastructure.....	45
3. Water.....	47
D. Impact on Municipal Services	50
E. Committee Determination.....	51
VII. UNEQUAL TREATMENT.....	51
VIII.REGIONAL NEED FOR AFFORDABLE HOUSING	52
IX. CONCLUSION	54

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

RAYNHAM 44 DEVELOPMENT LLC,	)	
	)	
Appellant,	)	
	)	
v.	)	No. 2024-09
	)	
TOWN OF RAYNHAM	)	
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 Town of Raynham Zoning Board of Appeals (Board) denying a comprehensive permit to Raynham 44 Development LLC (Raynham 44 or developer) for a project located off Massachusetts Route 44 in Raynham (Town) known as the Riverfront at Raynham (Project).

On January 22, 2024, the developer applied to the Board for a comprehensive permit for the construction of a 250-unit rental development. The Board opened the public hearing on the developer’s application on February 21, 2024, and after holding multiple sessions, the Board voted to close the hearing on August 14, 2024. The Board held subsequent deliberative sessions and then held a final public meeting on September 17, 2024, on which date it formally issued its written decision and filed it with the Town Clerk.

At the July 31, 2024, public hearing, the Board invoked the statutory safe harbor pursuant to 760 CMR 56.03(8)(a), on the grounds the Town had achieved and exceeded the ten percent housing unit minimum. The Board provided written notice to the developer and the Executive Office of Housing and Livable Communities (EOHLC) of the invocation of safe harbor by letter dated August 6, 2024 (Safe Harbor Notice). The developer challenged the safe harbor assertion on August 22, 2024, and EOHLC issued a determination that, since the Board had not timely

invoked safe harbor in accordance with 760 CMR 56.03(8) and 760 CMR 56.03(1), it had no regulatory basis for deciding that the Board achieved safe harbor with respect to the application. Neither the Board nor the developer appealed the EOHLC determination to the Committee.

The developer appealed the comprehensive permit denial to the Housing Appeals Committee on October 6, 2024. An initial conference of counsel was held on October 17, 2024. At the conference, Board counsel stated his intention to file a motion for summary decision asserting that the Board's denial was consistent with local needs because 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).

The Board filed a motion for summary decision on January 3, 2025, and submitted eight attached exhibits.¹ The developer filed an opposition, cross-motion for partial summary decision, and motion for an order in limine on February 3, 2025, with four attached exhibits. The Board filed a reply and an opposition to the developer's cross-motion and motion in limine on February 13, 2025. It was determined that the issues raised in this matter required more thorough analysis and discussion than had been previously conducted. Specifically, the question presented was whether the Board's failure to invoke a statutory safe harbor within 15 days of opening its hearing on the developer's comprehensive permit application, as required under 760 CMR 56.03(8), constituted a waiver of the safe harbor provision provided in G.L. c. 40B, § 20. As discussed in Section III.A below, we answered this question in the affirmative.

A status conference was held on May 6, 2025, to further discuss the parties' motions. The presiding officer orally informed the parties that the Board's motion for summary decision was denied and the developer's motion for partial summary decision was granted. Due to the novel questions raised as a result of the summary decision rulings, the presiding officer deferred the ruling on the developer's motion in limine, in which the developer sought to bar the introduction of evidence pertaining to the issue of a safe harbor at the evidentiary hearing before the Committee, and set a schedule for supplemental briefing on the developer's motion in limine. A short written order memorializing the presiding officer's rulings was issued on May 8, 2025, and

¹ The presiding officer set a briefing schedule for the motion for summary decision at the initial conference of counsel. The Board filed two separate assented-to motions to extend briefing deadlines, which the presiding officer granted.

included several specific questions to be addressed by the parties in their supplemental briefing, which the parties filed.² See *Raynham 44 Development LLC v. Raynham*, No. 2024-09 (Mass. Housing Appeals Comm. May 8, 2025 Order on Board’s Motion for Summary Decision and Developer’s Cross-Motion for Partial Summary Decision, Post-Conference Order, and Order Amending the Pre-Hearing Order) (May 8 Order); see also Section III.A.7, *infra*. In an order dated June 27, 2025, the presiding officer denied the developer’s motion in limine to exclude evidence pertaining to the Town’s safe harbor and outlined the admissible evidence to be submitted by the parties relating to the SHI, the regional need for low or moderate income housing, the rebuttable presumption that failure to satisfy a safe harbor ground demonstrates that the need for housing outweighs any local concerns, and the definition of “region” for purposes of regional need. See *Raynham 44 Development LLC v. Raynham*, No. 2024-09 (Mass. Housing Appeals Comm. June 27, 2025 Order on Appellant’s Motion in Limine and Regarding Presentation of Evidence) (June 27 Order); see Section III.B, *infra*.

Following the June 27 Order, a status conference was held on July 9, 2025, and the scheduled for filing of supplemental pre-filed testimony and exhibits, was set. The Board filed a memorandum and three additional exhibits on August 8, 2025, and the developer filed supplemental pre-filed testimony from Ashley Duval, a senior planner with RLAW, P.C., an affiliate of the developer, on September 5, 2025.

A final pre-hearing conference was held on September 30, 2025. A site visit took place on October 6, 2025, and two days of hearing for the cross-examination of witnesses took place on November 4 and November 20, 2025; 37 exhibits were entered into evidence at the hearing.³ The parties submitted post-hearing briefs and reply briefs, after which time the evidentiary record was deemed complete and the hearing terminated, pursuant to 760 CMR 56.06(7)(e)9.

² The presiding officer informed the parties at the May 6, 2025, conference that a longer written memorandum detailing the Committee’s reasoning would issue at a later date, which has been provided in Section III.A of this decision.

³ The presiding officer informed the parties during the evidentiary hearing of her intent to take official notice of EOHLC’s *Guidelines G.L. c. 40B Comprehensive Permit Projects, Subsidized Housing Inventory*, updated December 2014 (40B Guidelines) pursuant to 760 CMR 56.06(8)(b). Neither party objected and the 40B Guidelines were admitted as Exhibit 37. Tr. II, 44.

II. FACTUAL BACKGROUND

On January 22, 2024 (Application Date), the developer filed with the Board a comprehensive permit application for the Project, including all documents and information required by 760 CMR 56.05(2) (Application). Pre-Hearing Order, § II.a, ¶ 3. The Project proposes a subdivision of the property into five parcels accessed by a looped subdivision road with two access points on Massachusetts Route 44 (also known as New State Highway). Of the five new parcels, the Project would be contained on two (labeled Parcels A and B), with the remaining three parcels (Lots E1, E2, and E3) retained by their present owner. Pre-Hearing Order, § II.a, ¶ 4. Route 44 is a two-lane principal arterial roadway under Massachusetts Department of Transportation (MassDOT) jurisdiction that traverses the area in a general east-west direction with full access interchanges with Interstate 495 to the east and Route 24 to the west. Exh. 5, p. 8; Exh. 22, ¶ 32. Route 44's two travel lanes are separated by a double-yellow centerline, with five- to six-foot wide marked shoulders. Exh. 5, p. 8; Exh. 22, ¶ 32. Three intersections on Route 44 were identified as intersections through which project-related traffic would travel: Church Street, Richmond Street, and Church Street at Dean Street. Exh. 22, ¶ 31.

The Project proposes two 4-story buildings (60 units each), five 3-story walkup buildings (24 units each), and ten townhouses, as well as a clubhouse, community gardens, and walking/biking trails. Exh. 18, ¶¶ 18, 20, 22, 25-27. The Project buildings will be oriented around a "village square" to create a community feel and provide ample green space amenities for its residents. The clubhouse, community gardens, and walking trails will all connect to the square, with the clubhouse overlooking the marsh to the west. Pre-Hearing Order, § II.a, ¶ 5. The Project will consist of 250 apartments, with a mix of 75 one-bedroom units, 100 two-bedroom units, and 75 three-bedroom units. Pre-Hearing Order, § II.a, ¶ 6; Exh. 4. The Project will include 187 market rate units and 63 affordable units, which will be income restricted for households earning at or below 80% of the Area Median Income. Pre-Hearing Order, § II.a, ¶ 7. The Project includes environmentally sustainable features, including solar power generation, rain gardens and other low-impact development stormwater management best management practices, electric vehicle charging stations, bicycle storage, and rainwater collection. Pre-Hearing Order, § II.a, ¶ 8. The Project's proposed subdivision road provides two access points to the Project site, and internal site driveways provide access to all Project buildings. Pre-Hearing Order, § II.a, ¶ 9. The looped access way will provide two two-way access points that intersect the north side of

Route 44, at points approximately 715 feet and 1,600 feet west of the Route 44 bridge over the Taunton River. Exh. 22, ¶¶ 17-18. The Project proposes 500 total parking spaces, of which 50 would be dedicated visitor spaces. Pre-Hearing Order, § II.a, ¶ 10. The Project proposes to extend public sewer and water infrastructure to the Project. Pre-Hearing Order, § II.a, ¶ 11.

The easterly driveway of the project will line up with the corresponding driveway for the Raynham Riverwalk development, located across Route 44, and will form a four-way intersection, subject to permitting with MassDOT. Exh. 20, ¶ 29.⁴ The westerly site access point will be located approximately 600 feet away from this intersection. Exh. 20, ¶ 29. Both driveways will be unsignalized and under stop sign control. Exh. 22, ¶ 18.

The project site contains wetland resource areas and the proposed development will require two wetland stream crossings. Tr. I, 96. The two crossings will be implemented by means of open bottom culverts with headwalls and wingwalls, and an additional culvert near the easterly access driveway of the Project is also proposed. Exh. 20, ¶ 32.

Raynham does not have its own sewerage treatment facility. Exh. 2, p. 5. Raynham has an Intermunicipal Agreement (IMA) with the City of Taunton to accept and treat Raynham's wastewater, which allows for a maximum average daily flow of 1.3 million gallons of wastewater per day. Exhs. 20, ¶ 42; 31, Exh. 3. Raynham's current average flow is nearing 1 million gallons per day, which does not include approximately 1,125 properties that have yet to connect into the municipal sewer system but have sewer service available. *Id.*, Exhs. 2, p. 5; 31, ¶¶ 8-10. The IMA has a 25-year term that runs from October 1, 2006, through September 30, 2031. Exh. 31, Exh. 3, p. 9. Pursuant to the IMA, Raynham discharges flow to Taunton through two pumping stations: one on Route 44 that connects to Taunton's Dean Street interceptor, and one on South Street East that connects to East Taunton. Exh. 31, ¶ 9.

The project proposes to connect to existing town sewer infrastructure by tying into an 8-inch sewer line on Leonard Street at Carol Drive and installing a 3-inch sewer force main down Leonard Street and Route 44 from the project site, originating at a sewage pump station located on the project site. Exhs. 21, ¶ 4; 3, Sheets C-120, 121, 122. The Project is estimated to generate an additional 50,000 to 60,000 gallons per day (gpd) in water demand. Exh. 31, Exh. 2.

⁴ The Raynham Riverwalk development is now known as Larkwood. Tr. I, 104. For purposes of this decision, we continue to refer to it as Raynham Riverwalk.

Prior to the developer's submission of its application for the comprehensive permit, the developer, through its attorney, presented information about the proposed project at two Board of Selectmen meetings held on August 22, 2023, and October 24, 2023. Exh. 28, Exh. 1 (August 22, 2023, and October 24, 2023, Board of Selectmen minutes). At the August 22, 2023, Board of Selectmen meeting, developer's counsel stated his belief that the Town's current SHI was 8.5 percent. *Id.* Mr. Joseph Pacheco, the Vice Chair of the Selectboard, questioned if the developer was aware of another Chapter 40B development (Broadway Crossing) which recently had received a letter of project eligibility and would result in Raynham meeting ten percent on the SHI. *Id.* The developer's counsel stated that even if Raynham achieved a safe harbor as a result of another project, the developer would still continue its project. Mr. Pacheco further requested that the Town Administrator confirm whether the Town had achieved the ten percent housing unit minimum safe harbor, and what steps the Town needs to take to declare safe harbor status. *Id.*

At the October 24, 2023, Selectmen meeting, the Board members discussed the project again, referring to it as the Riverfront Raynham project. *Id.* Mr. Pacheco stated that with other ongoing Chapter 40B development, the Town would exceed the 10 percent housing unit minimum safe harbor. *Id.* The board voted to submit a letter to MassHousing, the subsidizing agency, stating their wish that the project not move forward. *Id.*⁵

On December 26, 2023, the Raynham Town Administrator submitted a request to EOHLC via email that new units in the Broadway Crossing development be added to the Town's SHI. Exh. 30, Exh. 3.

On February 15, 2024, a staff person with the Southeastern Regional Planning and Economic Development District (SRPEDD) contacted the Town Administrator via email stating she had been able to confirm with EOHLC that the units in the Broadway Crossing development had been included on the Town's SHI and attached a copy of the SHI report showing an SHI of 12.69 percent. *Id.*; Exh. 34.

After issuing notice in accordance with M.G.L. c. 40A, § 11, on February 21, 2024, the Board opened a public hearing regarding the Project (Public Hearing). Pre-Hearing Order, § II.a, ¶ 12. The Public Hearing was thereafter continued by the Board to additional sessions held on

⁵ The minutes of the October 24, 2023, Selectboard meeting do not indicate whether developer or its counsel were present or spoke on the record. Exh. 27, Exh. 1.

March 27, 2024, May 29, 2024, July 10, 2024, July 31, 2024, and August 14, 2024, on which date the Board voted to close the Public Hearing. Pre-Hearing Order, § II.a, ¶ 13. During the course of the Public Hearing, the Board voted to retain a peer review consultant – J.C. Engineering, Inc. – to review the Project. Pre-Hearing Order, § II.a, ¶ 14. At the February 21, 2024, hearing, a Board member asked for a confirmation of the Town’s current SHI. Exh. 9(a), p. 5 (February 21, 2024 Board of Appeals minutes) . The developer’s attorney stated the current inventory showed the Town at less than 10 percent, while the Town Administrator stated it was 12.69 percent. *Id.*

At the July 31, 2024, session of the Public Hearing, the Board voted to invoke “Safe Harbor” pursuant to 760 CMR 56.03(8)(a). Pre-Hearing Order, § II.a, ¶ 15. On August 7, 2024, the Board issued notice to EOHLC and the developer purporting to invoke this Safe Harbor (Safe Harbor Notice). Pre-Hearing Order, § II.a, ¶ 16. On August 22, 2024, the developer filed with EOHLC and the Board notice of its objection to the Safe Harbor Notice. Pre-Hearing Order, § II.a, ¶ 17.

The Board held deliberative sessions regarding the Project on August 28, 2024, September 4, 2024, and September 11, 2024. Pre-Hearing Order, § II.a, ¶ 18. On September 11, 2024, the Board voted to issue a decision denying approval of the Project. Pre-Hearing Order, § II.a, ¶ 19. The Board held a further public meeting on September 17, 2024, on which date it formally issued a decision dated September 17, 2024 (Decision) denying approval of the Project. Pre-Hearing Order, § II.a, ¶ 20. The Decision was filed with the Raynham Town Clerk on September 17, 2024. Pre-Hearing Order, § II.a, ¶ 21. In the Decision, the Board cited six concerns supporting its denial of the Project: lack of sewer infrastructure; lack of water infrastructure and water contamination; traffic, traffic safety, and parking; adequacy of utility infrastructure and its ability to accommodate the Project; and the sufficiency of the Project filings. The Board also raised its invocation of the Safe Harbor as a reason supporting the denial. Pre-Hearing Order, § II.a, ¶ 22.

On September 20, 2024, EOHLC issued a letter titled “Safe Harbor Decision, The Riverfront at Raynham Comprehensive Permit Application Located at 0 New State Highway, Raynham, MA,” stating the following:

Since the Board did not issue the safe harbor notice in a timely manner (over five months past the deadline) in accordance with 760 CMR 56.03(8) and 760 CMR 56.03(1), EOHLC does not have

a regulatory basis for deciding that the Board achieved safe harbor with respect to the Application. In this context, EOHLC's inaction shall not be deemed to be a determination in favor of either party under 760 CMR 56.03(8).

Exh. 16, Exh. 3. The Board did not file an interlocutory appeal to the Committee within 20 days of EOHLC's determination. On October 6, 2024, the developer appealed the comprehensive permit denial to the Committee.

Additional facts may be discussed throughout the decision below.

III. PRE-HEARING MOTIONS

As stated in Section I, *supra*, several questions were raised during the pre-hearing process relating to the specific issues to be addressed at the hearing and the parties' respective burdens of proof. These questions were discussed orally at the May 6, 2025, status conference and addressed in the May 8 and June 27 orders.

A. Summary Decision

The presiding officer on May 6, 2025, advised the parties that a memorandum detailing the reasoning for the denial of the Board's motion for summary decision and the grant of the developer's cross-motion for partial summary decision would issue at a later date. We now include that reasoning and summary decision determination as part of this decision.⁶

Pursuant to 760 CMR 56.06(5)(d), "any party may move ... for a summary decision in the moving party's favor upon all or any of the issues that are the subject of the appeal." 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 Reg. of Architects*, 414 Mass. 1, 7 (1992); *Warren Place, LLC v. Quincy*, No. 2017-10, slip op. at 4 (Mass. Housing Appeals Comm. Aug. 17, 2018), *aff'd sub nom. Haugh v. Housing Appeals Comm.*, Norfolk Super. Ct. No. 1882CV01167, Aug. 7, 2019.

⁶ References to briefs and exhibits throughout Section III.A (such as "Board Exh." or "developer mem.") are to the briefs and exhibits filed in the summary decision record. Otherwise, references are made to exhibits admitted at the hearing.

1. Safe Harbor Pursuant to the Comprehensive Permit Law

The comprehensive permit statute and regulations provide that hearings before 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; 760 CMR 56.07(1)(b). “Consistent with local needs” is a term of art defined by the comprehensive permit law and regulations that, among other things, provides a balancing of local requirements and regulations (that 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) against the regional need for low and moderate income housing. *See* G.L. c. 40B, § 20; 760 CMR 56.02. “If the Committee finds, in the case of a denial, that the decision of the Board was not Consistent with Local Needs, it shall vacate such decision and shall direct the Board to issue a Comprehensive Permit to the Applicant.” 760 CMR 56.07(5)(a)1.

The statute and regulations provide certain “safe harbors” by which board decisions are deemed consistent with local needs; one of which, at issue here, is the 10 percent minimum affordable housing threshold (10 percent threshold or statutory minimum). *See* G.L. c. 40B, § 20 (“[r]equirements or regulations shall be consistent with local needs when imposed by a board of zoning appeals after comprehensive hearing in a [municipality] where low or moderate income housing exists which is in excess of ten per cent of the housing units....”); 760 CMR 56.03(1)(a) (“[a] decision by a Board to deny a Comprehensive Permit ... shall be upheld if ... as of the date of the Project’s application the municipality has achieved one or more of the Statutory *Minima*, in accordance with 760 CMR 56.03(3)”). The statute is silent as to a procedure for adjudicating whether a municipality has met the 10 percent threshold. The comprehensive permit regulations fill this statutory gap.⁷

In the absence of detailed statutory guidance, EOHLC promulgated regulations to provide a procedure for a municipality to invoke safe harbor. 760 CMR 56.03(8)(a) provides, in full:

⁷ The statute is also silent as to when in the comprehensive permit process the percentage of affordable housing should be calculated for safe harbor purposes. As discussed in Section III.A.2, *infra*, the validity of the comprehensive permit regulations’ safe harbor calculation date has been set by the comprehensive permit regulation, challenged, and ultimately upheld by the Supreme Judicial Court.

If a Board considers that, in connection with an Application, a denial of the permit or the imposition of conditions or requirements would be consistent with local needs on ... [safe harbor] grounds ... it must do so according to the following procedures. Within 15 days of the opening of the local hearing for the Comprehensive Permit, the Board shall provide written notice to the Applicant, with a copy to [EOHLC], that it considers that a denial of the permit or the imposition of conditions or requirements would be consistent with local needs, the grounds that it believes have been met, and the factual basis for that position, including any necessary supportive documentation. If the Applicant wishes to challenge the Board's assertion, it must do so by providing written notice to [EOHLC], with a copy to the Board, within 15 days of its receipt of the Board's notice, including any documentation to support its position.... [EOHLC] shall thereupon review the materials provided by both parties and issue a decision within 30 days of its receipt of all materials. The Board shall have the burden of proving satisfaction of the grounds for asserting that a denial or approval with conditions would be consistent with local needs, provided, however, that any failure of [EOHLC] to issue a timely decision shall be deemed a determination in favor of the municipality. This procedure shall toll the requirement to terminate the hearing within 180 days.

760 CMR 56.05(3) provides, in relevant part, “[i]f the Board wishes to deny an application on one or more of the [safe harbor] grounds ... it must do so in accordance with the procedure set forth in 760 CMR 56.03(8), or it shall be deemed to have waived its rights.” Even if a board does not intend to deny a comprehensive permit on safe harbor grounds, but rather to consider the application on the merits and to grant an application and impose conditions and requirements, it must still follow the procedure in 760 CMR 56.03(8) in order for those conditions to be deemed consistent with local needs.⁸

While a board bears the burden of proving it is entitled to safe harbor, the comprehensive permit regulations provide a presumption in its favor. EOHLC maintains a Subsidized Housing Inventory (SHI), a list compiled by EOHLC containing the count and percentage of low or moderate income housing units by city or town. 760 CMR 56.02: *Subsidized Housing Inventory*. The regulations provide that, for the purpose of calculating whether a municipality's SHI-eligible housing units exceeds the 10 percent threshold, “there shall be a presumption that the latest SHI contains an accurate count of SHI Eligible Housing and total housing units.” 760 CMR 56.03(3)(a). A party may introduce evidence to rebut this presumption, pursuant to the safe

⁸ The same is true where, as here, a board considers an application on the merits and ultimately decides to deny it based on local concerns grounds rather than on safe harbor. It still must follow the procedure in 760 CMR 56.03(8)(a) in order for its denial to be deemed consistent with local needs.

harbor procedure of 760 CMR 56.03(8), which EOHLC shall review on a case-by-case basis, applying the standards of eligibility for the SHI set forth in 760 CMR 56.03(2). *Id.*

760 CMR 56.03(8)(b) sets the safe harbor calculation date. The percentage of SHI-Eligible Housing units in a municipality is calculated “as of the date of the Project’s application.” *Id.* 760 CMR 56.03(8)(c) provides an expedited appeal procedure by which either a board or developer may “appeal a decision issued by [EOHLC] pursuant to 760 CMR 56.03(8)(a)” by filing an interlocutory appeal with the Committee within 20 days of its receipt of the decision, with a copy to the other party and to EOHLC.

2. The Board Did Not Timely Invoke Safe Harbor and Therefore Has Waived It

It is undisputed that the Board did not invoke safe harbor through the regulatory procedure, which is necessary to ascertain whether the SHI is accurate and to give the developer the opportunity to rebut it at the time of the local hearing. The Board did not notify the developer or EOHLC within 15 days of opening the public hearing of the Board’s intention to deny the application on ground that the Town had satisfied the statutory minima under 760 CMR 56.03(3)(a). The parties agreed that the Board opened the public hearing on the developer’s comprehensive permit application on February 21, 2024. Pre-Hearing Order, § II, ¶ 12. The hearing was continued with additional sessions, and it was not until the July 31, 2024, public hearing that the Board invoked the statutory safe harbor pursuant to 760 CMR 56.03(8)(a), on the grounds the Town had achieved and exceeded the ten percent housing unit minimum. Pre-Hearing Order, § II, ¶¶ 13, 15. The Board did not provide the written Safe Harbor Notice to the developer and EOHLC until August 6, 2024 (Safe Harbor Notice). Board Exh. 6. When the developer challenged the invocation of safe harbor to EOHLC, the Board further failed to appeal EOHLC’s determination. The Board, however, argues below that EOHLC’s determination was not an “appealable” decision, and therefore its failure to appeal the determination to the Committee should not affect the validity of their safe harbor assertion. Board Mem., pp. 8-9; Board Reply, p. 5.⁹

Although the Board did not invoke the statutory safe harbor within 15 days of the opening of the local hearing and did not timely appeal EOHLC’s determination on its safe harbor

⁹ References to the Board’s Reply in Section III.A are to the Board’s Reply to the Developer’s Opposition to the Board’s Motion for Summary Decision, filed February 13, 2025.

assertion to the Committee, the Board argues this is a case of substance versus process. It asserts that when a town has met its obligations under Chapter 40B for the provision of affordable housing, its substantive rights should not be superseded by alleged procedural missteps. Board Reply, p. 2. It claims that once a municipality meets or exceeds ten percent on the SHI, appeal of a comprehensive permit denial is barred regardless of whether procedural defects exist in any assertion of the safe harbor. *Id.* The Board relies on *Taylor*, arguing that once a town reaches the ten percent threshold, and its board of appeals denies a comprehensive permit, “then the application process is effectively terminated.” Board Reply, p. 6, citing *Taylor v. Housing Appeals. Comm.*, 451 Mass. 149, 151-152 (2008). Pursuant to G.L. c. 40B, § 20, the Board argues the Committee is thus “without authority to order that a [board] grant a comprehensive permit...” and the Board can deny a permit with “impunity.” Board Reply, p.7, citing *Board of Appeals of Hanover v. Housing Appeals. Comm.*, 363 Mass. 339, 367 (1973); *Taylor*, 451 Mass. 149, 151 (2008).

The developer argues the comprehensive permit regulations provide a clear procedure for invoking the housing unit minimum safe harbor and, by failing to adhere to it, the Board has waived any claim of safe harbor. Dev. Mem., p. 5. 760 CMR 56.05(3) states that “[i]f the Board wishes to deny an application on one or more of the grounds set forth in 760 CMR 56.03(1), it must do so in accordance with the procedure set forth in 760 CMR 56.03(8), or it *shall* be deemed to have waived its rights.” (emphasis added). The developer argues the regulatory provisions outlining the appeal of an EOHLC decision on a safe harbor claim to the Committee contain similar mandatory language: “[i]f either the Board of the Applicant wishes to appeal a decision issued by [EOHLC] pursuant to 760 CMR 56.03(8)(a) ... that party *shall* file an interlocutory appeal with the Committee ... within 20 days of receipt of the decision....” Dev. Mem., p. 6, citing 760 CMR 56.03(8)(c) (emphasis added). The use of “shall” in both provisions implies a mandatory or imperative obligation in the developer’s view, imposing an obligation on the Board that cannot be waived or excused by the Committee. Dev. Mem., p. 7, citing *Matter of Medford Zoning Bd. of Appeals and DIV Fellsway, LLC*, No. 2020-07, slip op. at 4 (Mass. Housing Appeals Comm. Oct. 10, 2023) (stating an agency must comply with its own regulation) and *McIntyre v. Zoning Bd. of Appeal of Braintree*, 94 Mass. App. Ct. 204, 207 (2018) (appeal deadline strictly enforced as prerequisite to tribunal’s ability to hear appeal). The developer emphasizes this is a case where the Board failed to timely invoke the safe harbor in writing, as

required, by waiting more than five months after the public hearing had opened. Dev. Mem., p. 8. Instead, the Board proceeded to review the project on the merits, engaged in peer review, and required the developer and its representatives to appear at multiple hearing sessions, incurring significant costs. *Id.*, pp. 8-9.

There is no dispute that the Board did not invoke safe harbor through the regulatory procedure. The comprehensive permit regulations are clear; a board's failure to invoke safe harbor results in waiver of its safe harbor claim. As discussed above, 760 CMR 56.05(3) provides that "[i]f the Board wishes to deny an application on [safe harbor] grounds ... it must do so in accordance with the procedure set forth in 760 CMR 56.03(8) *or it shall be deemed to have waived its rights.*" (emphasis added). "Where the language of a statute is plain and unambiguous, it is conclusive as to legislative intent" and courts must construe "a properly promulgated regulation ... in the same manner as a statute." *Matter of Est. of Mason*, 493 Mass. 148, 151-152 (2023) (internal citations omitted); *see Zoning Bd. of Appeals of Greenfield v. Housing Appeals Comm.*, 15 Mass. App. Ct. 553, 559 (1983) (in construing regulations with regard to G. L. c. 40B, "[a] reasonable regulation of an administrative agency which is clear and unambiguous on its face must, like a comparable statute, be applied according to its terms").

Further, the Board's reliance on *Taylor* is misplaced. It argues that where a municipality has reached the ten percent housing unit minimum threshold, and its board of appeals denies a developer's comprehensive permit application, the application process is effectively terminated. Board Mem., pp. 11, 15. Once the 10 percent statutory minimum has been achieved, the Board claims it may "deny comprehensive permits with impunity" and the Committee has no authority to order a board to issue the permit. *Id.*, p. 11, citing *Taylor*, 451 Mass. at 151. *Taylor*, however, does not stand for this proposition, as the issue was that "the act [did] not specify the date for calculating when a city or town has met the ten per cent threshold." *Id.*, at 152. The Court observed that "[i]n the absence of specific treatment in the statute, DHCD has attempted to deal with the question by a regulation setting forth a calculation date." *Id.* Therefore, we disagree with the Board's assertion that *Taylor* allows for a board to effectively terminate a developer's comprehensive permit application process once it claims a statutory safe harbor and denies the application.

3. EOHLC's September 20, 2024, Determination

On September 20, 2024, EOHLC issued a letter titled "Safe Harbor Decision, The Riverfront at Raynham Comprehensive Permit Application Located at 0 New State Highway, Raynham, MA," in response to the developer's challenge of the Board's invocation of the housing unit minimum safe harbor. Exh. 16, Exh. 3. The letter summarizes the regulatory procedure for invoking safe harbor grounds pursuant to 760 CMR 56.03(8), specifically that "if a Board considers that, in connection with an Application, a denial of the permit ... would be consistent with local needs because one or more of the grounds set forth in 760 CMR 56.03(1) have been met ... the Board must, within 15 days of the opening of the local hearing for the Comprehensive Permit, provide written notice to the Applicant, with a copy to EOHLC, that it considers that a denial of the [comprehensive] permit ... would be consistent with local needs." *Id.*

The parties do not dispute that the developer filed its comprehensive permit application on January 22, 2024, the Board opened the local hearing on February 21, 2024, and the Board provided its written Safe Harbor Notice on August 6, 2024. In its September 20, 2024 determination, EOHLC stated that "[s]ince the Board did not issue the safe harbor notice in a timely manner (over five months past the deadline) in accordance with 760 CMR 56.03(8) and 760 CMR 56.03(1), EOHLC does not have a regulatory basis for deciding that the Board achieved safe harbor with respect to the Application. In this context, EOHLC's inaction shall not be deemed to be a determination in favor of either party under 760 CMR 56.03(8)." *Id.*

The Board argues EOHLC's letter was not a clear and unequivocal determination "on the merits" as to the timeliness of the Board's assertion of safe harbor under 760 CMR 56.03. Board Mem., p. 8; Board Reply, p. 5. It describes EOHLC's statement that it "does not have a regulatory basis for deciding that the Board achieved safe harbor" as neutral language that suggests limitations to EOHLC's role, and that it lacked "subject matter jurisdiction" to make a determination regarding safe harbor. Board Mem., pp. 8-9. The Board interprets this letter as an acknowledgment that EOHLC could not issue a binding determination on timeliness or on whether the Board achieved the statutory safe harbor, and therefore there was no formal decision from which it could appeal to the Committee. *Id.*, p. 9. Because in its view "...EOHLC declined to assess the merits of [s]afe [h]arbor, no appealable decision was rendered, and ... no obligation to file an interlocutory appeal arose." Board Reply, p. 5.

The developer argues the Board's obligation to timely commence an interlocutory appeal to the Committee within twenty days of EOHLC's determination is mandatory under the comprehensive permit regulations. Dev. Mem., p. 9, citing 760 CMR 56.03(8)(c). It points out the Board provided no supporting case law in support of its assertion that EOHLC's September 20, 2024, determination did not establish any basis for such an appeal. *Id.*, p. 10. Instead, the developer interprets this letter as EOHLC asserting it was unable to determine whether the Board had established a meritorious safe harbor claim because the Board invoked it approximately five months past the deadline, and therefore it had been waived and evaluation of the merits was moot. *Id.*, p. 10.

The September 20, 2024, letter from EOHLC is titled a "Safe Harbor Decision" in its memorandum line, making it clear it is EOHLC's decision issued in response to the developer's challenge under 760 CMR 56.03(8)(a). *See* Exh. 16, Exh. 3. There is no requirement in the comprehensive permit regulation that EOHLC is limited to only certain findings or language in its decisions on a Board's assertion of safe harbor in order to establish a basis for appeal to the Committee. EOHLC issued a decision on the developer's challenge to the Board's assertion of safe harbor in which it stated, among other things, that the Board's assertion was not timely. If the Board was dissatisfied or disagreed with any part of this decision, the regulations are clear and unambiguous that the proper course is to file an appeal with the Committee within 20 days. *See* 760 CMR 56.03(8)(c). Therefore, the Board failed to timely appeal EOHLC's determination to the Committee pursuant to the process required under the comprehensive permit regulations. *See* 760 CMR 56.03(8)(c). The consequence of the failure to timely appeal as required under the regulations is discussed below in Sections III.A.4-5 and B.

4. The Safe Harbor Procedure Applies Even If Developer Has Actual or Constructive Notice of a Municipality's SHI

As previously stated, based on the summary decision record before us, it is clear the Board did not follow the regulatory procedure under 760 CMR 56.03(8)(a) to invoke a safe harbor, or to appeal EOHLC's safe harbor determination to the Committee under 760 CMR 56.03(8)(c). However, the Board argues the Town had in fact achieved the 10 percent housing unit minimum safe harbor as of the date of the developer's comprehensive permit application. Board Mem. p. 12. It claims this information was conveyed and made known to the developer, and therefore, the developer had constructive notice, at least, of the safe harbor. Board Mem., p. 12. The Board asserts that because the developer allegedly had notice, constructive or otherwise,

that the Board would be invoking the housing unit minimum safe harbor, any failure to follow the process outlined in 760 CMR 56.03(8)(a) was a procedural oversight that should not deprive the Town of the safe harbor protection. *Id.*

Specifically, the Board points to two instances where the Town's safe harbor status was discussed at Board of Selectmen meetings held on August 22, 2023, and October 24, 2023, with counsel for the developer present. *Id.*, citing Board Exhs. 2, 4. Because the Board of Selectmen members raised the possibility that the Town had already achieved the 10 percent statutory safe harbor during those two meetings while developer's counsel was present, the Board argues developer had timely notice, constructive or otherwise, that it intended to invoke the safe harbor.¹⁰ Board Mem., p. 12. The Board also cites the first hearing on the developer's comprehensive permit, held on February 21, 2024, where members discussed with Board's counsel the Town's current SHI and the fact that the Board believed it to exceed ten percent.¹¹ *Id.*; Exh. 28, Exh. 1; Exh. 9(a). The Board provided written notice to the developer, dated August 6, 2024, that the Town had achieved the ten percent housing unit minimum safe harbor, citing a July 3, 2024, SHI report issued by EOHLC showing the Town had reached 15.07 percent. Board Exh. 6. The Board further stated the letter "shall serve as notice of the Board's claim of safe harbor, and the Board will deny the comprehensive permit in the future due to having reach the [s]tatutory [m]inima. The hearing shall remain open with respect to the claim of safe harbor and to address all other issues and concerns." Exh. 24, Exh. 1 (emphasis omitted).

The developer argues the Board failed to invoke a safe harbor within 15 days of opening the public hearing on February 21, 2024, in violation of 760 CMR 56.03(8)(a), and then compounded its error by failing to timely commence an interlocutory appeal of EOHLC's determination to the Committee. Dev. Mem., pp. 6-7. It argues that statements made by public officials at public meetings regarding the Town's SHI are irrelevant, because there is no

¹⁰ At the August 22, 2023, Board of Selectmen meeting, one member referenced another potential 40B development, Broadway Crossing, and stated it "will place Raynham over the 10% requirement." Board Exh. 2. The Board of Selectmen at that meeting moved to request the Town Administrator to report back to them whether the Town had achieved the 10 percent statutory safe harbor due to Broadway Crossing. *Id.* At the October 24, 2023, Board of Selectmen meeting, the members again stated that several proposed 40B developments were "expected to put the Town over the 10% required affordable housing." *Id.*

¹¹ At the February 21, 2024, meeting before the Board of Appeals, the members asked what the Town's current SHI percentage was. Board Exh. 5. The Town Administrator was present and answered that it was 12.69 percent, while developer's counsel stated EOHLC's SHI reported a number below 10 percent. *Id.*

authority or procedure allowing for informal or constructive notice of the invocation of safe harbor by other local boards or officials. *Id.*, p. 6 n.3. Further, even if such statements were sufficient to put the developer on notice that Town officials believed the Town had achieved the statutory safe harbor, the developer contends that this was still not communicated to EOHLC, since 760 CMR 56.03(8)(a) specifically requires written notice of safe harbor to both the developer and EOHLC. *Id.*

The developer also points out that the statements made by other local officials relied on by the Board do not contain an explicit invocation of the housing unit minimum safe harbor. *Id.* The statements captured in the minutes for the two Board of Selectmen meetings show only that those officials believed the Town may have achieved a safe harbor, but no statements were made confirming the Board planned to invoke the safe harbor in relation to developer's comprehensive permit application. *Id.* The developer argues whether or not local officials believed the Town had achieved a safe harbor is immaterial if there has been no formal invocation of a safe harbor and notes a board may decline to invoke a safe harbor even if the town qualifies for one. *Id.*, citing 760 CMR 56.03(1) ("a Board may at its sole discretion elect to proceed with the full local hearing, and ultimately to approve a Comprehensive Permit, even though one or more of the [safe harbors] have been met"). Accordingly, even if a developer here had notice that the Town may have qualified for a safe harbor, there was no guarantee that the Board would automatically invoke it. *Id.*

We note that 760 CMR 56.03(3) provides a mechanism not only for a Board to give notice of an assertion of safe harbor but also provides an opportunity for the accuracy and validity of the safe harbor to be resolved as early as possible. This regulatory process alerts a comprehensive permit applicant that a town believes it has achieved a statutory minimum and triggers the applicant's opportunity to review and challenge this claim. Section 56.03(3)(a) states the "presumption that the latest SHI contains an accurate count of SHI Eligible Housing and total housing units," and it provides a procedure by which a party can challenge this presumption for specific properties. The pertinent language of 760 CMR 56.03(3)(a) reads, "[i]n the course of a review procedure pursuant to 760 CMR 56.03(8), a party may introduce evidence to rebut this presumption, which [EOHLC] shall review on a case-by-case basis, applying the standards of eligibility for the SHI set forth in 760 CMR 56.03(2)." This demonstrates that the presumption not only applies to the count of SHI eligible properties, but also to the properties themselves and

their eligibility as SHI eligible housing. *See Matter of North Reading Zoning Bd. of Appeals and NY Ventures, LLC*, No. 2019-11, slip op. at 28 n.22 (Mass. Housing Appeals Comm. Decision on Interlocutory Appeal Oct. 10, 2023); *Matter of Waltham Zoning Bd. of Appeals and Alliance Realty Partners*, No. 2016-01, slip op. at 28 (Mass. Housing Appeals Comm. Decision on Interlocutory Appeal Feb. 13, 2018). 760 CMR 56.03(8) requires written notice of safe harbor to EOHLC as well as to the developer. Through the interlocutory appeal process provided under 760 CMR 56.03(8), parties may rebut the SHI's presumed accuracy and ultimately give the Committee the opportunity to determine if the SHI has been properly calculated by EOHLC. *See West Wrentham Village, LLC v. Wrentham*, No. 2005-04, slip op. at 3 (Ruling on Mot. to Dismiss July 13, 2005) (citing earlier provision of the regulations, 760 CMR 31.04). Because the Board did not properly and timely invoke its safe harbor and then failed to appeal a safe harbor determination to the Committee, the Board deprived the developer of its opportunity to rebut the accuracy of the SHI and additionally deprived the Committee of its opportunity to determine whether the SHI was accurate. The regulations provide that the procedure for adjudicating a safe harbor commences with the Board's safe harbor claim. The regulations do not provide a process for a developer to bring an independent preemptive challenge to a potential future safe harbor claim. Therefore, whether the developer had actual or constructive notice that the Town's SHI met the housing unit minimum is immaterial, since it was outside the regulatory procedure in 760 CMR 56.03.

5. The Committee May Not Waive the Safe Harbor Procedure

The comprehensive permit regulations identify when and under what circumstances specific regulatory provisions may be waived by the Committee. The regulations specifically exclude the safe harbor procedural requirements from those provisions that may be waived: 760 CMR 56.08(2) states that "[EOHLC] or, in the event of an appeal before the Committee, the presiding officer may waive any provision of 760 CMR 56.00 *except for* 760 CMR 56.02, 760 CMR 56.03, 760 CMR 56.07(2)(c), 760 CMR 56.07(3)(b), 760 CMR 56.07(5)(a), and 760 CMR 56.08, when in the judgment of [EOHLC] or the presiding officer strict compliance with such provision will result in an undue hardship and will be inconsistent with the purposes of M.G.L. c. 40B, §§ 20 through 23." (emphasis added). Therefore, we are barred by this provision from considering equitable arguments in support of waiving the safe harbor procedures, for example, that a Board failed to follow the procedure through inadvertence. The regulations make clear the

safe harbor provisions of 760 CMR 56.03 cannot be waived and other forms of notice outside of this regulatory structure are irrelevant.

Further, as we noted above in Section III.A.4, 760 CMR 56.03(3) provides a mechanism not only for a Board to give notice of an assertion of safe harbor but also provides an opportunity for the accuracy and validity of the safe harbor to be resolved as early as possible. Section 56.03(3)(a) states the “presumption that the latest SHI contains an accurate count of SHI Eligible Housing and total housing units,” and it provides a procedure by which a party can challenge this presumption for specific properties. The pertinent language of 760 CMR 56.03(3)(a) reads, “[i]n the course of a review procedure pursuant to 760 CMR 56.03(8), a party may introduce evidence to rebut this presumption, which [EOHLC] shall review on a case-by-case basis, applying the standards of eligibility for the SHI set forth in 760 CMR 56.03(2).” Through the interlocutory appeal process provided under 760 CMR 56.03(8), parties may rebut the SHI’s presumed accuracy and ultimately give the Committee the opportunity to determine if the SHI has been properly calculated by EOHLC. *See West Wrentham Village, supra*, No. 2005-04, slip op. at 3. By failing to follow the required regulatory process to invoke a safe harbor, the Board deprived the developer of its opportunity to rebut the accuracy of the SHI to EOHLC and if necessary, to the Committee to obtain a decision on whether the SHI was accurate.

Because 760 CMR 56.03 cannot be waived, equitable arguments based on a developer’s actual or constructive notice of a safe harbor claim by a board or other local officials cannot excuse the Board’s failure to properly invoke safe harbor. Accordingly, we conclude that the Board’s failure to comply with the procedural requirements of 760 CMR 56.03(8) to assert a safe harbor constituted a waiver of the statutory safe harbor for the housing unit minimum, and the matter was required to proceed with a hearing on the merits of whether the Board’s decision was consistent with local needs.

6. Safe Harbor Evidence on the Merits

For the purposes of calculating whether the city or town's SHI Eligible Housing units exceed 10 percent, there is a presumption that the latest SHI contains an accurate count of SHI Eligible Housing and total housing units; a party may introduce evidence to rebut this presumption. 760 CMR 56.03(3)(a); *see Matter of Pembroke and River Marsh LLC*, No. 2019-04, slip op. at 3 (Mass. Housing Appeals Comm. Summary Decision July 20, 2020), citing *Alliance Realty Partners, supra*, No. 16-01, slip op. at 28. The party challenging the SHI bears

the burden of producing evidence to rebut its presumed accuracy, which may include challenges to specific properties themselves and their eligibility for inclusion on the SHI. *Matter of Braintree and 383 Washington Street*, No. 2017-05, slip op. at 28 (Mass. Housing Appeals. Comm. Decision on Interlocutory Appeal June 27, 2019), citing *Standerwick v. Zoning Bd. of Appeals of Andover*, 447 Mass. 20, 34 (2006).

The developer argues that, even if the Committee reaches the merits of the Board's safe harbor claim, it should still enter summary decision against the Board and in favor of the developer because it failed to carry its burden of proof. Dev. Mem., p. 10, citing 760 CMR 56.03(5). To prove the Town's current SHI calculation, the Board provides two reports dated February 15, 2024, and July 3, 2024, which the developer characterizes as "informal calculations." *Id.*, pp. 10-11.¹² Both reports post-date the comprehensive permit application date of January 22, 2024. The developer claims the Board has not provided evidence that the Town was eligible for the housing unit minimum safe harbor as of the application date. *Id.*, p. 11.

The Board claims that prior to the comprehensive permit application submission, the Town Administrator contacted EOHLC on December 26, 2023, with a request to add new housing units to the Town's SHI, following the grant of a comprehensive permit for a 240-unit rental development with 60 affordable units located at 251 Broadway Crossing in Raynham. Board Mem., p. 14, citing Board Exh. 4. The inclusion of the requested units would have resulted in an SHI calculation of 12.69 percent. *Id.* The Board argues this calculation was confirmed on February 15, 2024, when a staff person with the Southeastern Regional Planning and Economic Development District (SRPEDD) contacted the Town Administrator stating she confirmed with EOHLC that the units at 251 Broadway Crossing had been included on the Town's SHI and attached a copy of the SHI report. Board Exh. 4.¹³ The Board did not provide any

¹² The developer further argues the Board has provided no "backup information or data of any kind to independently prove the underlying SHI-eligibility of the units reflected on either [report]." *Id.*, p. 11.

¹³ Based on the chain of emails the Board provided, it appears that EOHLC on or around January 22, 2024, requested from SRPEDD or the Town a copy of the Project Eligibility Letter relating to 251 Broadway Crossing, describing the affordability restriction term. *Id.*

communication from EOHLC in response to its December 26, 2023, request, but did attach a copy of the Town's SHI report, dated February 15, 2024, showing a total of 12.69 percent. *Id.*¹⁴

As of June 29, 2023, the date of the Town's most recent SHI report, the Town had reached 8.5 percent and had not achieved the statutory minima safe harbor. Board Exh.7.

Because the Town's request to add new units to the SHI was submitted on December 26, 2023, and the SHI was formally updated as of February 15, 2024, the Board argues the February 15, 2024, calculation of 12.69 percent "is a more accurate reflection of the Town's SHI at and around the time of the [developer's] application for a comprehensive permit" on January 22, 2024. Board Mem., pp. 14, citing Board Exh. 5. Therefore, having reached the ten percent threshold, the Board argues it may deny a comprehensive permit and the Committee has no authority to overturn that denial and grant the permit. *Id.*, p. 15, citing G.L. c. 40B, § 20 and *Taylor*, 451 Mass. at 151-152. The Board claims exceeding the ten percent threshold bars comprehensive permit appeals under Chapter 40B, and that no procedural or regulatory oversights or defects should preclude the Board's safe harbor claim.¹⁵ Board Mem., p. 16. Once the statutory safe harbor has been reached, the Board asserts it can deny comprehensive permits "with impunity." Board Reply, p. 7, citing *Taylor*, 451 Mass. at 151.

¹⁴ The Board further argues the February 15, 2024, SHI calculation was not accurate and that EOHLC mistakenly omitted at least 134 units of affordable housing. Board Mem., pp. 14-15. The SHI was later updated on July 3, 2024, to reflect an SHI total of 15.07%. Board Exh. 8. However, the relevant date at issue in this matter is the SHI calculation at the time of the developer's comprehensive permit application on January 22, 2024.

¹⁵ The Board also argues it should not be precluded from invoking the housing unit minimum safe harbor because any regulatory or procedural missteps were due to "EOHLC's failure to provide [an] accurate SHI for the Town..." Board Mem., p. 16. It claims "any delay in formal notice [of the safe harbor] was due to extraordinary circumstances, including reliance on inaccurate SHI data provided by EOHLC." *Id.* Any "delay in processing the SHI update was out beyond the Town's control and should not be held against the Town to its detriment." Board Reply, p. 8. However, the SHI is updated by EOHLC once every two years, or "more frequently *if information is provided by the municipality or otherwise received and verified by [EOHLC].*" See 760 CMR 56.03(2)(f) (emphasis added). EOHLC reviews information provided by the town; it does not provide any data itself to towns other than the SHI report. The summary decision record contains no evidence from the Board that EOHLC incorrectly or inaccurately calculated the Town's SHI as of the date of the developer's comprehensive permit application, or that such review extended beyond the typical review period. The record shows that the Town submitted a request for additional units to be added on December 26, 2023, this request was reviewed, and a revised SHI calculation was confirmed on February 15, 2024. Therefore, as developer correctly notes, the Board had confirmation as of February 15, 2024, that the Town had achieved an SHI of 12.69 percent, before the 15-day deadline to invoke safe harbor under 760 CMR 56.03(8)(a) had commenced. Dev. Mem., p. 8.

Although the developer argues the Board indisputably waived its right to invoke the housing unit minimum statutory safe harbor, it alternatively argues that, should the Committee reach the merits of the Board's safe harbor claim, the Board failed to carry its burden of proof establishing the Town's appropriate SHI total as of the date of the comprehensive permit application. Dev. Mem., pp. 10-11.

7. Developer's Challenge to 40B Guidelines

In the event evidence on the Town's SHI may be introduced at the hearing, the developer argues the SHI calculation, as provided by EOHLC's "Guidelines – G.L. c. 40B Comprehensive Permit Projects – Subsidized Housing Inventory" ("40B Guidelines") improperly allow for the inclusion of market rate, non-affordable units. Dev. Mem., p. 12. Specifically, the 40B Guidelines provide that if at least 25 percent of units in a rental development qualify as affordable units, then all of the units in that development shall be eligible for inclusion on the SHI. *Id.*, citing 40B Guidelines, Section II.A.2.b.1. The developer asserts neither Chapter 40B nor its implementing regulations provide for the inclusion of market rate housing on the SHI. *Id.* Because the 40B Guidelines directly contradict the Chapter 40B statute and regulations, the developer argues they are invalid and of no legal force and effect. *Id.*, pp. 12-13, citing *Attorney General v. Town of Milton*, 495 Mass. 183 (2025). The developer notes that Raynham's SHI contains several rental developments in which all units in the project are counted on the SHI, because at least 25 percent of the units are affordable; if the 40B Guidelines are deemed invalid, this would drastically reduce the Town's SHI below 10 percent. Dev. Mem., p. 15.

This question was also deferred until the evidentiary hearing. Once the scope of allowed evidence had been determined, and a hearing held, the developer was free to raise legal arguments relating to the validity of the 40B Guidelines in its post-hearing briefing. As discussed in Section VIII, *infra*, we do not reach the developer's arguments regarding the validity of the 40B Guidelines.

B. Order on Motion in Limine and Presentation of Evidence

As noted above in Section I, the parties were ordered to submit supplemental briefing on the developer's motion in limine. *See* May 8 Order. The specific questions to be briefed by the parties directly addressed the issues raised by the developer here as to what evidence, if any, should be admitted regarding the Town's SHI status, what presumptions may be drawn from such evidence, what evidence regarding "regional need" should be included, and how should

region be defined. Therefore, the issue of the sufficiency of evidence relating to the SHI was deferred to the evidentiary hearing with the parties allowed to address the merits of the evidence presented in post-hearing briefing. Having found the Board waived the housing unit minimum safe harbor, the question remained what evidence could be heard on the regional housing need, and the balancing of that need with local concerns.

The June 27 Order explicitly noted that the regional need burden of proof becomes relevant if a valid local concern has been established. *See* June 27 Order, p. 3, citing 760 CMR 56.07(2)(b) (“...the Board shall have the burden of proving, first, that there is a valid ... Local Concern which supports [] denial, and then, that such Local Concern outweighs the Housing Need.”). The presiding officer further ruled that evidence of the SHI was admissible *for purposes of demonstrating the regional need for low-and moderate-income housing*. *Id.* While it is presumed accurate, the parties were directed they could offer evidence to rebut this presumption. Additionally, to establish that its denial decision was consistent with local needs, the Board carries the burden of first proving there is a valid local concern that supports its denial and that such local concern outweighs the housing need, pursuant to 760 CMR 56.07(2)(b).

While the Board is required to introduce evidence of the housing need to be weighed against local concerns, the developer also has an interest in showing the housing need. Therefore, both the Board and developer were directed to introduce evidence regarding housing need, and to specifically include evidence on the number of low-income persons residing in Raynham. *See* 760 CMR 56.07(3)(b)1. (“...the weight of the Housing Need will be commensurate with the regional need for Low or Moderate Income Housing, considered with the proportion of the municipality’s population that consists of Low Income Persons”). The Order states that pursuant to 760 CMR 56.07(3)(a), “proof that a municipality has failed to satisfy any of the [safe harbor] grounds ... shall create a rebuttable presumption that there is a substantial need for affordable housing which outweighs Local Concerns” and confirmed that this presumption applies if the evidence shows the Town has not met a statutory or regulatory safe harbor. *See* June 27 Order, p. 3. The parties were allowed to, and did, provide argument in their post-hearing briefs on whether this presumption applies if the evidence shows the Town has in fact met its “minimum housing obligations” under G.L. c. 40B, § 20 and 760 CMR 56.03(3)(a). However, as we find below that the Board did not carry its burden regarding Local Concerns, we do not ultimately reach the question of whether those concerns are sufficient to outweigh the regional need for affordable

housing which includes the question of the accuracy of the Town's SHI. 760 CMR 56.07(1)(b), 56.07(2)(b); *104 Stony Brook, LLC v. Weston*, No. 2017-14, slip op. at 41 (Mass. Housing Appeals Comm. June 22, 2023), *aff'd sub nom. City of Cambridge v. Housing Appeals Comm., et al.*, No. 2381CV02105 (Middlesex Super. Ct. June 10, 2025), *appeal docketed* Nos. 2025-P-0986, 2025-P-1007 (Mass. App. Ct. Aug. 12, 2025); *Avalon Cohasset, Inc. v. Cohasset*, No. 2005-09, slip op. at 22 (Mass. Housing Appeals Comm. Sept. 18, 2007).

IV. STANDARD OF REVIEW AND THE PARTIES' BURDENS OF PROOF

When the Board denies a comprehensive permit, the ultimate question before the Committee is whether the Board's decision is reasonable and consistent with local needs. G.L. c. 40B, §§ 20, 22; 760 CMR 56.07(1). The comprehensive permit regulations have set out the different requirements and burdens assigned to the developer and the board. 760 CMR 56.07(2) and (3).

In the case of a denial, the developer may establish a *prima facie* case by proving, with respect to the aspects of the project which are in dispute, that its proposal complies with federal or state requirements, 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); *for detailed discussion see 104 Stony Brook, supra*, No. 2017-14, slip op. at 12-16; *SLV School Street, LLC v. Manchester By-The-Sea*, No. 2022-14 (Mass. Housing Appeals Comm. Dec. 3, 2024), *aff'd sub nom. Town of Manchester By-the-Sea v. Massachusetts Housing Appeals Comm., et al.*, No. 2577CV0002 (Essex Super. Ct. Feb. 11, 2026) (approving Committee's approach to *prima facie* case); *River Marsh, supra*, No. 2019-04, slip op. at 6-10. Further, "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).¹⁶ A developer need make only a minimal showing for the *prima facie* case in the hearing before the Committee under the comprehensive permit regulations, and the Committee has consistently considered the developer's *prima facie* case based solely on evidence supplied by the developer.

¹⁶ Alternatively, a developer may prove that local requirements and regulations have not been applied as equally as possible to subsidized and unsubsidized housing. 760 CMR 56.07(2)(a)4; G.L. c. 40B, § 20. General Laws Chapter 40B, § 20, provides that local rules and regulations cannot be deemed "consistent with local needs" unless they are "applied as equally as possible to both subsidized and unsubsidized housing." *See* 760 CMR 56.07(2)(a)4. The developer raised this argument in the Pre-Hearing Order and carries the burden of proving such unequal treatment. *Id.*; Pre-Hearing Order, p. 5-6; *see* Section VII, *infra*.

See id. (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); *104 Stony Brook*, *supra*, No. 2017-14, slip op. at 12-16.¹⁷

If the developer sustains its burden, the burden shifts to the Board to prove a valid local concern that supports the denial and that the concern outweighs the regional housing need. 760 CMR 56.07(2)(b)2; *see also, e.g., 104 Stony Brook*, *supra*, No. 2017-14, slip op. at 11. It is therefore incumbent on the Board to identify a local interest protected by a local requirement or regulation that is more restrictive than state and federal requirements, and to demonstrate that safeguards provided by the local requirement with respect to that local interest afford greater protection against the asserted harms of the project than those afforded by state or federal regulation. *See SLV School Street*, *supra*, No. 2022-14, slip op. at 4; *104 Stony Brook*, *supra*, No. 2017-14, slip op. at 38, citing *Holliston*, *supra*, 80 Mass. App. Ct. 406, 420; *Herring Brook Meadow, LLC v. Scituate*, No. 2007-15, slip op. at 25 (Mass. Housing Appeals Comm. May 26, 2010), *aff'd sub nom. Scituate v. Herring Brook Meadow, LLC*, 84 Mass. App. Ct. 1132 (Rule 23.0 decision 2014, formerly Rule 1:28).

¹⁷ While the Board has challenged some of the evidence in support of the prima facie case, we consider those arguments in the context of addressing the alleged local concerns. But even if we were to consider that evidence to discredit the developer's prima facie presentation, we find it is insufficient to do so successfully, in light of our standard for the prima facie case. "It may suffice for the developer to simply introduce professionally drawn plans and specifications." *Sugarbush Meadow, LLC v. Sunderland*, No. 2008-02, slip op. at 5 n.4 (Mass. Housing Appeals Comm. June 21, 2010), *aff'd sub nom. Zoning Bd. of Appeals of Sunderland v. Sugarbush Meadows, LLC*, 464 Mass. 166 (2013), quoting *Tetiquet River Village, Inc. v. Raynham*, No. 1988-31, slip op. 9 (Mass. Housing Appeals Committee Mar. 20, 1991). "[E]xpert testimony directly addressing the matter in issue is more than sufficient to establish the developer's prima facie case." *Sugarbush Meadow*, *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"). Additionally, 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." *Zoning Board of Appeals of Holliston v. Housing Appeals Comm.*, 80 Mass. App. Ct. 406, 416, citing *Board of Appeals of Hanover v. Housing Appeals Comm.*, 363 Mass. 339, 381 (1973).

If a more restrictive local requirement or regulation exists, the Board must show that the stricter requirement is necessary to protect against specified harms that could not be protected by the state and federal schemes. *See 104 Stony Brook, supra*, No. 2017-14, slip op. at 17, citing *Holliston*, 80 Mass. App. Ct., 406, 417, 420; 760 CMR 56.02: *Local Requirements and Regulations*. More is required than simply noting a particular local bylaw or regulation. *See 104 Stony Brook, supra*, No. 2017-14, slip op. at 38-39, citing *Holliston*, 80 Mass. App. Ct. 406, 419 (“where the DEP is charged with providing for the protection of health, safety, public welfare, and the environment ... the board must be able to demonstrate that its local concerns will not be met by the State standards enforced by the DEP”).¹⁸

V. DEVELOPER’S PRIMA FACIE CASE

In accordance with 760 CMR 56.07(2)(a)2, the developer is required to prove “with respect to only those aspects of the Project that are specifically identified in the Pre-Hearing Order as being in dispute, that its proposal complies with federal or state statutes or regulations or with generally recognized standards as to matters of health, safety, the environment, design, open space, or other matters of Local Concern.” Pre-Hearing Order, § IV, p. 5. The Pre-Hearing Order set out the issues in dispute for this appeal for which the developer is required to make a prima facie case. Pre-Hearing Order, p. 5-6.¹⁹

The developer argues it has met its burden of establishing a prima facie case that the project complies with generally recognized standards and has demonstrated compliance with all applicable statewide and federal standards. Developer brief, pp. 7-12. The developer presented plans as well as expert testimony from five witnesses on applicable state and federal requirements, which is discussed further below as it relates to each local concern raised by the Board.

¹⁸ In balancing a valid local concern against the regional need for affordable housing, a town’s failure to meet the statutory minima under G.L. c. 40B, § 20 establishes a rebuttable presumption of a substantial housing need that outweighs local concerns. *See Herring Brook, supra*, No. 2007-15, slip op at 3, citing *Board of Appeals of Hanover v. Housing Appeals Comm.*, 363 Mass. 339, 367 (1973) (failure to meet statutory minimum housing obligations “will provide compelling evidence that the regional need for housing does in fact outweigh the objections to the proposal”); *Woburn Board of Appeals v. Housing Appeals Comm.*, 66 Mass. App. Ct. 1109 (2006), F.A.R. denied, , *Board of Appeals of Woburn v. Housing Appeals Comm.*, 447 Mass. 1107 (2006).

¹⁹ The Pre-Hearing Order, drafted by the parties and issued by the presiding officer, identified the following as the areas for which the developer was responsible for making a prima facie case: traffic, wetlands, water and sewer, and impact on municipal services. Pre-Hearing Order, § IV, pp. 5-6.

As discussed below, our review of the developer's evidence demonstrates that the developer has provided expert testimony, detailed plans describing the project, and evidence of future compliance with applicable state and federal law for the local concerns asserted by the Board. Such evidence is sufficient to meet the requirements for the *prima facie* case as established by the comprehensive permit regulations and Committee decisions.

A. Traffic and Parking

The developer presented testimony from Jeffrey S. Dirk, a professional engineer with over 30 years of experience in traffic engineering and transportation planning. Exh. 22, ¶¶ 1-2. Mr. Dirk, the managing partner of Vanasse & Associates, Inc. (VAI) served as the developer's traffic consultant and provided an assessment of the project's existing and proposed traffic and transportation conditions. Developer brief, p. 11; Exh. 22, ¶ 6. Mr. Dirk testified that the project "will comply with all applicable federal and state legal requirements and engineering best practices as to, without limitation, traffic and safety, access, and parking." *Id.*, ¶ 13.

The project includes a subdivision of land, with a looping subdivision access way providing frontage to each of the five new lots, and Mr. Dirk stated this subdivision road will be installed and designed in accordance with Town standards for subdivision roads and will be suitable for acceptance as a public way. *Id.*, ¶¶ 13, 16.

The developer submitted a Traffic Impact Assessment (TIA) that was prepared by VAI "in accordance with MassDOT's TIA Guidelines and the standards of the Traffic Engineering and Transportation Planning professions for the preparation of such reports." Exhs. 5; 22, ¶ 28. Mr. Dirk testified the project's roadways will be "fully compliant" with state fire code requirements as to fire access roads. Exh. 22, ¶ 21. While it is intended that the eastern entrance to the project will be aligned with the future entrance to Raynham Riverwalk development across Route 44, to the extent the driveways would be offset, an adequate intersection would still be maintained in accordance with the acceptable standards, subject to MassDOT review and approval. Exh. 12, p. 1. The developer agreed that certain traffic features would adhere to acceptable standards and be subject to MassDOT review and approval. *See Id.* Mr. Dirk also testified that VAI's analysis, which included calculating both stopping sight distance (SSD) and intersection sight distance (ISD) measurements, determined that the project's driveways with Route 44 will exceed, or can be made to exceed, the American Association of State Highway and Transportation Officials' (AASHTO) recommended minimum sight distances Exh. 22, ¶¶ 63-64.

The project's future traffic conditions and impacts were analyzed consistent with MassDOT TIA Guidelines. *Id.*, ¶ 45.

The developer also presented testimony from Daniel Riggs, a licensed architect retained by the developer to prepare architectural and landscaping plans for the project. Exh. 18, ¶¶ 1, 12. Regarding parking, Mr. Riggs testified the project will include 500 parking spaces, with accessible parking spaces provided in the amount, locations, and specifications required by federal and state law. Developer brief, p. 8, citing Exh. 18, ¶¶ 24, 32; Exhs.3; 4, Sheets A000, A002.

Both Mr. Dirk and Mr. Riggs credibly testified the traffic and parking plans complied with acceptable standards and specifications required under federal and state law, as well as best practices. Based on Mr. Dirk's and Mr. Riggs' testimony, and the evidence presented by the developer, we find the developer has met its *prima facie* case on traffic and parking.

B. Wetlands

The developer introduced testimony from Matthew Moyen, a professional engineer licensed since 2018 with over 18 years of experience in civil engineering design and regulatory permitting. Exh. 20, ¶¶ 1, 3-4. Mr. Moyen is a civil engineer employed by Tetra Tech, the firm retained by the developer to prepare civil engineering plans for the project. *Id.* Mr. Moyen testified that the developer filed an abbreviated notice of resource area delineation (ANRAD) with the Raynham Conservation Commission for the purpose of locating all wetlands on and in proximity to the property, conducting a field delineation in accordance with Massachusetts Department of Environmental Protection (DEP) methodologies. *Id.*, ¶¶ 13, 14. The Conservation Commission issued an order of resource area delineation (ORAD) confirming the location of wetlands resources and their applicable buffer zones on January 11, 2024. Developer brief, p. 9; Exh. 20, ¶¶ 14-15 and Exh. 5. He stated that the developer intends to file the Notice of Intent required under the Wetlands Protection Act (WPA) within the coming months, in accordance with G.L. c. 131, § 40 and 310 CMR 10.05(4)(e) (noting that the developer was required to wait until the Board's review of the project was complete before filing). Exhs. 20; ¶ 16; 11, p. 3.²⁰ Mr.

²⁰ While Raynham has a local wetlands bylaw, the Board has not alleged nor provided any evidence that it is any stricter than the WPA, and the developer has sought waivers of the local wetlands protection bylaw to the extent the local requirements exceed or differ from the Wetlands Protection Act. *See* Exhs. 6, p.8; 8(f) (Raynham Wetlands Protection Bylaw); 11, pp. 2-3 (discussion of project conformance with town wetlands protection bylaw).

Moyen testified that two necessary stream crossings over wetland areas will be implemented by open bottom culverts designed in accordance with MassDEP stream crossing standards. Exh. 20, ¶ 32.

Based on the testimony and evidence presented by the developer, we find the developer has met its prima facie case on wetlands. The developer demonstrated it will comply with all applicable state and federal requirements and stated it will file required notices with DEP and is agreeable to the Board “conditioning approval...on the receipt of an Order of Conditions under the [WPA].” Exh. 11, pp. 3, 5; Exh. 20, ¶ 24; see *104 Stony Brook, supra*, No. 2017-14, slip op. at 27 (finding developer met prima facie case through representation it would file required notice of intent with DEP and agreement to comply with applicable state and federal requirements).²¹

C. Water and Sewer

Mr. Moyen testified that the project will comply with all applicable federal and state legal requirements as to stormwater management, building code requirements, environmental laws and regulations. Exh. 20, ¶ 24. Although public water and sewer infrastructure is not currently available at the project site, he stated that the developer proposed to extend such infrastructure to the project site at its own costs in order to connect the project to these utilities, if needed. Exh. 20, ¶ 25, citing Exh. 3. Mr. Moyen further testified that the public water system had sufficient capacity to accommodate the Project. Exhs. 20, ¶ 74; 21, ¶ 47

1. Sewer

The developer presented preliminary plans demonstrating that the project will include extension of sewer lines to the Project. Developer brief, p. 10, citing Exh. 3, Sheets C120, 121, 122; Exh. 20, ¶ 33. The developer argues that it has presented sufficient evidence to demonstrate that the Project can connect to the existing sewer system without exceeding the Town’s capacity currently allowed under the IMA and therefore will not violate that agreement. Developer brief, p. 11. The developer proposes connecting to existing public sewer infrastructure at an existing sewer line along Leonard Street at Carol Drive. Exhs. 20, ¶ 41; 3, Sheets C-120, 121, 122.

²¹ We also include a condition mandating such compliance with applicable federal and state requirements in this decision in Section IX. See *104 Stony Brook, supra*, No. 2017-14, slip op. at 27 (inclusion of condition mandating compliance with federal and state requirements satisfied Committee that developer met its prima facie burden).

Mr. Moyen testified he obtained information from the Town's Board of Sewer Commissioners (BSC) indicating that the total amount of wastewater sent by the Town to Taunton under the IMA from January 1, 2023, to December 31, 2023, was 333.62 million gallons per day, equaling approximately 920,000 gallons of average daily flow. Exh. 20, ¶ 53. He anticipates the project will have a sewer demand of approximately 30,000 gallons per day on average, which, when combined with the Town's existing average daily flow of 920,000 gallons per day, would not exceed the 1.3 million gallon per day cap imposed under the IMA. *Id.*²² Further, he testified that the town would still have sufficient remaining capacity to accommodate the Broadway Crossing and Raynham Riverwalk projects as well as the estimated 1,125 properties that pay betterments for an opportunity to tie into the public sewer system in the future. *Id.*; Tr. II, 58. He estimated Broadway Crossing and Raynham Riverwalk will have a combined sewer demand of 50,000 gallons per day, while the estimated 1,125 other properties will have a demand of approximately 170,000. *Id.* Even when the anticipated flow from the additional 40B projects and 1,125 individual properties are added to the project's estimated average daily flow, Mr. Moyen testified the town will still have more than 130,000 gallons per day of available sewer flow capacity. Exh. 21, ¶ 29 n.3. We find the testimony and evidence provided by the developer is sufficient to establish its prima facie case with respect to sewer capacity.²³

2. Water

Regarding water, Mr. Moyen testified that the developer proposed installation of all necessary infrastructure needed to connect to the Town's water system, and that the Town's existing water system had "sufficient capacity to accommodate the Project – even taking into account the Riverwalk [Raynham] and Broadway Crossing projects that are not currently

²² Even when we accept the Board's estimate of the project's anticipated sewer demand of 50,000 gpd, *see* Section VI.C.1, *infra*, rather than Mr. Moyen's estimate of 30,000 gpd, the project could still be accommodated within the remaining 130,000 gpd of available capacity, according to Mr. Moyen's testimony.

²³ The developer met the relatively low standard required for a prima facie case. The Board's arguments regarding sewer and water capacity are substantive arguments that are addressed below in the context of whether the Board has proven a local concern that outweighs the need for affordable housing. Although the Board's estimated flows for some of the identified property categories differ from the developer's, as discussed further below in Section VI.C.1, they do not result in a total exceeding the 1.3 million gpd allowed under the IMA.

connected to the water system.” Exh. 20, ¶¶ 73, 74. Although public water infrastructure is not currently available at the Project site, he stated the developer proposed extending public water infrastructure to the site at its own cost in order to connect to those utilities. *Id.*, ¶ 8. Mr. Moyan explained that public water will be provided through installation of a new 12-inch water main along Route 44 connecting with existing municipal infrastructure at the intersection of Church Street and Route 44, approximately 1,200 feet from the project. *Id.*, ¶ 38. The developer presented preliminary plans depicting the Project’s proposed water infrastructure system and connections. Developer brief, p. 10, citing Ex. 3, Sheets C120, 121, 122; Exh. 20, ¶ 33. The developer acknowledged that permits will be required from MassDOT for in order to connect to the Town’s water system along Route 44. Exh. 11, p. 5. We find the testimony and evidence provided by the developer, including its preliminary utility plans, is sufficient to establish its prima facie case with respect to water capacity.

D. Impact on Municipal Services

As discussed further below in Section V.E, the Board does not dedicate significant argument to challenging the developer’s prima facie case. Other than one brief assertion that the developer failed to carry its prima facie burden because it provided only preliminary plans for the project, the Board provided no further argument or briefing. Such generalized statements are inadequate to preserve arguments, and therefore the Board has waived a claim that the developer failed to establish a prima facie case with regards to alleged impacts on municipal services. *See Wall Street Development Corp. v. Walpole*, No. 2021-04, slip op. at 7 n.3 (Mass. Housing Appeals Comm. Feb. 28, 2024).

E. Committee Determination

As stated above, the Pre-Hearing Order identified the various issues of local concern asserted by the Board, for which the developer was required to make a prima facie case. The Board argues the developer failed to carry its prima facie burden because “its preliminary plans, architectural drawings, traffic study, and expert testimony rely on generalized assertions of future compliance rather than demonstrating actual adherence to applicable standards.” Board reply, pp. 20-21, citing *Zoning Bd. of Appeals of Wellesley v. Ardmore Apartments Ltd. Partnership*, 436 Mass. 811, 815-816 (2002). However, expert testimony directly addressing the matter in issue is more than sufficient to establish the developer’s prima facie case. *See, e.g., 383 Washington Street, LLC v. Braintree*, No. 2020-04, slip op. at 7 (Mass. Housing Appeals.

Comm. Mar. 15, 2022), citing *Sugarbush Meadow, LLC, supra*, No. 2008-02, slip op. at 9; *100 Burrill Street, LLC, supra*, No. 2005-21, slip op. at 7. (citations omitted).

The Board argues the developer has failed to provide critical and necessary information as to alleged effects of the project on the town's sewer and water capacity, and that various plans provided by the developer were preliminary and lacked engineering detail. Board brief, pp. 20, 21, citing Exh. 35. It asserts the developer's prima facie showing is deficient because its preliminary plans, drawings and testimony rely on "generalized assertions of future compliance." *Id.*, p. 20.

Although Committee regulations and precedent suggest that plans alone can, in fact be sufficient to satisfy the prima facie case, in this case the developer also has submitted expert prefiled testimony and other exhibits in support of its assertion that the project complies with state or federal requirements or generally accepted standards. *See* 760 CMR 56.07(2)(a)2; *Tiffany Hill, Inc. v. Norwell*, No. 2004-15, slip op. at 8-9 (Mass. Housing Appeals Comm. Sept. 18, 2007), citing *Oxford Housing Authority v. Oxford*, No. 90-12, slip op. at 4 (Mass. Housing Appeals Committee Nov. 18, 1991) ("[t]he Committee has made clear, since its earliest cases that 'plans submitted for comprehensive permit approval are preliminary and need not be as detailed as final construction drawings'.... On appeal before the Committee, to establish a prima facie case, the plans must be sufficient to both permit the Committee to evaluate the proposal with regard to aspects that are in dispute, and to permit full cross-examination by the Board.").

Based on the testimony provided by the developer's witnesses, the developed site plans, and evidence and documentation submitted regarding the project's traffic, wetlands impact, water and sewer capacity, and impact on municipal services, we find the developer met the standard required for a prima facie case. The Board's arguments regarding, among other things, alleged impacts on the Town sewer and water capacity are substantive arguments that we address further below in the context of whether it has proven a local concern that outweighs the regional need for affordable housing. The developer must comply with all applicable federal and state requirements, as it is required to do and, as is our custom, we include a condition mandating such compliance in Section IX. *See River Marsh, LLC v. Pembroke*, No. 2019-04, slip op. at 16 (Mass. Housing Appeals Comm. Apr. 11, 2024).

VI. LOCAL CONCERNS

When a developer appeals the denial of a comprehensive permit, the question before the Committee is whether the decision is consistent with local needs. 760 CMR 56.07(1). Since the developer has established a prima facie case that the project complies with state or federal law or generally recognized standards, the burden shifts to the Board to prove a valid local concern that supports the 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); Pre-Hearing Order, § IV.

As stated in *Holliston, supra*, 80 Mass. App. Ct. 406, 420: “[i]t is incumbent on the [B]oard...to identify a local interest protected by those aspects of the by-law that are stricter than [state law] and demonstrate that such interest outweighs the regional need for low and moderate income housing.” The Board must show that the local concern set out in local bylaws or regulations applies to the proposed development, and that the specific interests identified in the local regulation are important at the project site. *Weiss Farm Apartments, LLC v. Stoneham*, No. 2014-10, slip op. at 31 (Mass. Housing Appeals Comm. Mar. 15, 2021), *aff’d* No. 2181CV00818 (Middlesex Super. Ct. July 21, 2022), citing *Herring Brook Meadow, supra*, No. 2007-15, slip op. at 26. The Pre-Hearing Order drafted by the parties and issued by the presiding officer sets out the four specific local concerns at issue in this appeal. *See* Pre-Hearing Order, § IV, pp. 6-10.²⁴

If the Board has not articulated the local concern, and, where there is a state regulation, has not shown the local requirement to be stricter than the state standard, nor explained the purpose of the stricter standard and its applicability to the project or the project site, 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. *Weiss Farm Apartments, supra*, No. 2014-

²⁴ The developer argues the Board did not identify any local regulations or requirements that are more protective than federal or state law for the alleged local concerns, and therefore those local concerns should be dismissed. Developer brief, pp. 13, 17, 19, 22, 26 (citing 760 CMR 56.02: *Local Requirements and Regulations*; *Oxford*, slip op. at 5; *Weston*, slip op. at 25); Developer reply, pp. 10-11. Issues not raised in the pre-hearing order are excluded from consideration. *722 Main Street, LLC v. Oxford*, No. 2021-11 (Mass. Housing. Appeals Comm. Mar. 20, 2025) slip op. at 30 n.38; *O.I.B. Corp. v. Braintree*, No. 2003-15 (Mass. Housing. Appeals Comm. Mar. 27, 2006) slip op. at 6 n.6, *aff’d*, No. 2006-1704 (Suffolk Super. Ct. July 16, 2007). But we address on the merits each local concern asserted by the Board in any event.

10, slip op. at 31. As discussed below, the Board has not presented sufficient evidence on the issues raised to reach the threshold at which we are required to balance a local concern against the regional need for affordable housing.

A. Traffic and Parking

As stated in the Pre-Hearing Order, the Board's concerns regarding traffic and traffic safety relate to the project's location on Route 44, as well as the proposed onsite parking. *See* Pre-Hearing Order, § IV, p. 7. Specifically, the Board raises concerns that the project:

...would increase traffic along Route 44 ... that does not meet average safety requirements. This section of Route 44 is substandard and additional traffic will further degrade the pavement, which...will require additional maintenance and repairs and increase exposure for motor vehicle accidents. The [Board] was also concerned with certain parking spaces and ... recommended the realignment of parking spaces on Parcel B and traffic calming devices.

See Pre-Hearing Order, § IV, p. 7.

The arguments offered by the Board are based on the TIA, which it alleges failed to "include traffic from future developments on the remaining parcels" if they are permitted in the future. *Id.* The Board did not provide any specific bylaws, local requirements, or other standards on which its traffic and parking concerns were based.

The Board presented testimony from John L. Churchill, Jr., a licensed professional engineer and professional land surveyor whose firm was retained by the Board to provide peer review services during the local hearing. Exh. 35, ¶¶ 1-3. Mr. Churchill has approximately 25 years of experience providing municipalities and private clients with professional engineering and land surveying services. *Id.*, Exh. 1. His firm's peer review included a review of the TIA. *Id.*, ¶¶ 13, 16.

Mr. Churchill testified that the developer's project plans were preliminary and conceptual, lacking the engineering detail necessary for him and his firm to conduct an engineering review. Board brief, p. 21-22, citing Exh. 35, ¶¶ 11, 15; Tr. I, 66 ("[i]t was hard ... to do ... an engineering review with the plans that were submitted.... It was impossible"). He testified this plan was inconsistent with good engineering practice for a definitive subdivision. Board brief, p. 22, citing Tr. I, 77 ("[a]s a design engineer and as good engineering practice...I wouldn't design a parking spot in a 50 foot right of way layout with a 24-foot travel width.... It

creates a safety issue....”). In addition to the parking issues discussed below, he alleged there were still issues with the project’s site circulation, lane widths, and traffic calming devices that remained unresolved by the developer. Board brief, p. 21; Exh. 35, ¶ 17; *see also* Exhs. 10A, 10B.

Of particular concern to Mr. Churchill was the planned perpendicular parking spaces, which would require vehicles to reverse into the project’s planned looped access way. Board brief, pp. 21-22; Exh. 35, ¶ 16. His firm recommended “a realignment of parking spaces because a portion of parking required vehicles to back into a primary roadway that would create a hazard to pedestrians and vehicles.” *Id.*, ¶ 13, 16. The proposed design included “parking spots that are perpendicular and within the right of way of a roadway,” which Mr. Churchill testified was a “safety issue” and that he would not have designed the Project to include such parking. Tr. I, 75-76. Although his firm confirmed, during the peer review process during the local hearing before the Board, that it was satisfied with the responses provided by Vanasse & Associates, *see* Exh. 13, Mr. Churchill stated on cross-examination that the traffic study was based on traffic count. Tr. I, 76. In his view, the study presented during peer review did not address the alignment of parking spaces on the site. *Id.*

The Board also alleged the TIA was “materially inadequate” because it failed to account for cumulative traffic impacts from potential future development on the adjacent parcels in the planned subdivision. Board reply, p. 20. The Board appears to allege concerns relating to emergency access. For example, on cross-examination, Mr. Dirk was questioned whether certain analyses had been provided for review to the appropriate town department as to the “suitability for emergency access on the roadways and to the buildings.” Tr. II, 48-49. However, the Board provided no further briefing or explanation on this issue, nor did it address Mr. Dirk’s earlier testimony that the project’s roadways will be “fully compliant” with state fire code requirements as to fire access roads as well as installed and designed in accordance with Town standards for subdivisions. Exh. 22, ¶ 13, 16, 21.

The developer argues the Board failed to identify a local regulation or requirement that is more protective than federal or state law, the waiver of which would result in the local concern relating to traffic and safety. Developer brief, p. 13. In its view, the Board’s reliance on the TIA as the basis for the local concern does not fall within the definition of a local requirement or regulation under 760 CMR 56.02 and must be dismissed. *Id.* Alternatively, the developer argues

even if the Board properly identified a local requirement or regulation that, if waived, would cause the alleged local concern, the Board failed to counter the developer's expert testimony and evidence. It asserts the Board has introduced no evidence or testimony in support of its claims that the Project will increase traffic along Route 44 or that the areas the Project will connect with Route 44 are unsafe, substandard, and will result in increased exposure for motor vehicle accidents. *Id.*, p. 14. Although the Board introduced testimony from Mr. Churchill, the developer argues his expertise falls within the areas of general civil engineering and land surveying, and that the Board provided no evidence of particular expertise or specialization in the areas of traffic or transportation safety. *Id.*

The developer presented evidence primarily through the testimony of Mr. Dirk, who stated the TIA showed that the Project would not result in a significant impact or increase on traffic in areas near the development. Exh. 22, ¶¶ 56, 65 (testifying that "VAI determined that Project-related traffic volume changes...are anticipated to range from increases of 0.9 to 2.78 percent during the peak periods....When dispersed over the peak-hours, such increases would not be expected to result in a significant impact (increase) on motorist delays or vehicle queuing outside of the immediate study area that is the subject of the [TIA]"). He also testified that Route 44 traffic would not be significantly affected by the Project. Exh. 22, ¶ 65. Although two intersections on Route 44 (Richmond Street and Church Street) currently have higher than average motor vehicle crash rates, he testified this was independent of the Project, and that this would be mitigated through the implementation of recommendations in a road safety audit completed in connection with the Raynham Riverwalk project, as well as through recommendations for the Richmond Street intersection that will be implemented as part of the Project. *Id.*

Regarding parking concerns, Mr. Dirk testified that the perpendicular parking proposed by the developer is common among circulating roadways in multifamily residential developments and is not typically a cause for concern due to the low speeds and volume of vehicles traveling through the area. Exh. 23, ¶ 10. He stated the roadway and parking layout is "essentially the equivalent of a parking lot driveway on private property," and is "consistent" with the design practices used on similar ways. *Id.*, ¶ 11. The developer has also provided mitigation measures in response to concerns raised by the Board regarding traffic and parking, which were reviewed and accepted during the peer review process. Specifically, a letter to the

Board from Mr. Churchill's firm noted that the developer's revised plans "continue to include street parking that will require backing of vehicles into the roadway," but notes that "calming traffic devices on either end of parking areas" have been provided, and that its comments have been "addressed." Tr. I, 78.; Exh. 35, Exh. 3, p. 2. Mr. Dirk testified that the traffic calming measures proposed by the developer (raised crosswalks, speed tables, signage, and curving road layout) will physically ensure that traffic will reduce speed, and are acceptable solutions for reducing travel speeds. Exh. 23, ¶¶ 21-22.

He also testified that several recommendations from the TIA relating to traffic and safety issues have been incorporated into the developer's plans, including siting the easterly Project driveway opposite the driveway to the Raynham Riverwalk development, widening driveways and reconfiguring the westerly Project driveway, the latter two which will require MassDOT approval. Exh. 22, ¶ 66. For those recommendations requiring MassDOT approval, the developer plans to apply for such as part of its application for a Highway Access Permit. *Id.* Based on the analysis conducted by VAI, Mr. Dirk testified the Project could be accommodated within the existing transportation infrastructure in a safe and efficient manner, provided the recommendations outlined in his testimony were implemented. *Id.*, ¶ 68.²⁵

Ultimately, we find the testimony of Mr. Dirk presented by the developer to be more credible regarding the project's traffic and parking safety. Mr. Churchill is a well-qualified and credible expert with extensive experience in professional engineering and land surveying services. However, his background did not indicate more specialized experience in traffic and transportation safety, and his testimony appeared contradictory to statements and representations provided to the Board by his firm during the peer review process. *See* Exh. 10(b), p. 2 (stating revised plans continue to include parking requiring backing into the roadway but applicant had provided traffic calming devices); Exh. 13 (email stating peer reviewer satisfied with applicant's responses and had no further comments). Mr. Dirk provided thorough testimony regarding the Project's expected impact on traffic, its proposed plan for parking, as well as several mitigation measures and other recommendations the developer planned to implement. We therefore find the Board has not demonstrated a local concern with regard to traffic and parking that outweighs the need for affordable housing.

²⁵ Mr. Dirk also noted that a realignment of the parking spaces could be implemented, although he did not agree that it was necessary. Exh. 23, ¶ 24.

B. Wetlands

The Board raised concerns regarding the wetland resource areas located on the project site. As stated in the Pre-Hearing Order, the Board argues “There are wetland issues on the site of the project that have not been considered or addressed by the Conservation Commission.” *See* Pre-Hearing Order, § IV, p. 7. The Board did not identify a specific local requirement, regulation or bylaw on which it relied, but reiterated generally that the project had not been considered by the Conservation Commission. *Id.* While the developer sought waivers of the town’s local wetlands bylaw, *see* Exh. 6, the Board did not identify this bylaw in the Pre-Hearing Order or provide any argument as to whether it is more protective than state or federal law as the basis for its local concern.

The developer argues that because the Board did not introduce any evidence or testimony regarding alleged wetlands impacts, this local concern has been waived. Developer brief, pp. 17-18. We agree. The Board’s reference to the project needing review by the Conservation Commission is not a local requirement or regulation on which to base a local concern. The developer presented evidence that it will comply with state requirements under the Wetlands Protection Act, asserting it is “undisputed that the [p]roject will require an order of conditions under the [WPA].” *Id.*, p. 18, citing Exh. 20, ¶ 16, Tr. I, 96-97. Such review, however, cannot occur until the developer has received all other obtainable permits, pursuant to 310 CMR 10.05(4)(e). Developer brief, p. 18 (stating that obtaining a permit under Chapter 40B means the applicant has received a determination from the Board granting or denying such permit and, if denied, has appealed to the Committee). The Board’s witness, Mr. Churchill, agreed with this process, confirming on cross-examination that the developer is required to seek such approval from the Conservation Commission that the project complies with state regulations. Tr. I, p. 97.

In any event, because the Board did not provide sufficient evidence or briefing on wetlands impacts, we find this local concern has been waived. *See Bay Watch Realty Trust v. Marion Board of Appeals*, No. 2002-28, slip op. at 9 n.13 (Mass. Housing Appeals Comm. Dec. 5, 2005); *SLV School Street, supra*, No. 2022-14, slip op. at 18, n. 10.

C. Water & Sewer

The Board argues it has demonstrated a valid local concern regarding the Town’s water and sewer capacity, specifically that the Town lacks the sewer and water infrastructure to accommodate the project’s anticipated flow and the project would impose undue burdens and

costs on the Town. Board brief, p. 18. It alleges the additional demand from the project would cause the Town to violate the terms of the existing IMA with Taunton. Board reply, p. 19.

The Board provided testimony from expert witnesses Robert Carey and Jon R. Chase. Exhs. 31; 32. Mr. Carey is the Superintendent for the Raynham Sewer Department. Exh. 31, ¶ 1. He has served in that position since 2018 and has over 25 years of professional experience in the wastewater field with the Town of Raynham Sewer Department. *Id.*, ¶ 2. Mr. Chase is the Superintendent for the Raynham Center Water District and has served in that position since 2018. Exh. 32, ¶ 1. He has over 40 years of experience in the water treatment and distribution field. *Id.*, ¶ 2.

1. Sewer Capacity

The Board's concerns regarding the project's impact on its sewer system relate to both its existing sewer infrastructure as well as available capacity under the IMA with the City of Taunton. *See* Pre-Hearing Order, § IV, p. 8. As stated in the Pre-Hearing Order, the Board based its local concern on:

...the cumulative wastewater demands of several 40B projects in various stages of development in town.... The IMA allows for a maximum average daily flow of 1.3 million gallons of wastewater per day and Raynham's current average is nearing 1 million gpd (not accounting for the current 1,125 properties not connected to the sewer system. The [Town] must consider the additional wastewater flow from current projects, including previously approved 40B projects, as well as other properties with access to sewer, but not yet connected. These projects and properties place Raynham close to the 1.3 million [gpd] average and the IMA wastewater allotment would not support additional wastewater flow of the developer's project.

Pre-Hearing Order, § IV, p. 8

The IMA allows for Raynham to discharge a maximum average daily flow of 1.3 million gpd of wastewater to Taunton for treatment and disposal through Taunton's facilities and has a 25-year term that runs from October 1, 2006, through September 30, 2031. Exh. 31, Exh. 3. The parties agree that the Town's current average flow is approaching 1 million gpd: Mr. Carey testified the town's average daily flow rate is approximately 960,000 gpd, while Mr. Moyer testified the average daily flow is approximately 920,000 gpd. Tr. I, 34; Exh. 31, ¶ 10; Tr. II, 53; Exh. 20; Exh. 21, ¶ 20. This leaves approximately 300,000 gpd remaining, and the parties

dispute whether this can sufficiently accommodate the developer's project and other properties identified by the Board. Exhs. *Id.*, ¶¶ 18-19; 31.

The Board argues the Town has insufficient sewer capacity to accommodate the project, and the project would impose undue burdens and costs on the Town due to its lack of capacity. *See* Board brief, p. 18. The Board relies on the testimony of Mr. Carey. Exh. 31. He testified that the IMA limits the Town's maximum average daily wastewater flow to 1.3 million gpd, and its current flow was nearing 1 million gpd. *Id.*, ¶ 10. He stated that the Town's current average daily flow total did not include approximately 1,125 properties within Raynham that have sewer access but have not yet opted to connect to the Town's system. *Id.* He emphasized that sewer capacity must be reserved for the 1,125 existing properties that have access to Town sewer service but have yet to connect, and that these properties must be prioritized. *Id.*, ¶¶ 20-21; Tr. I, 15-16.²⁶ The Board asserts that it must take into account all properties with existing or potential rights to connect to the public sewer system when determining an equitable allocation of sewer resources and must reserve capacity for the 1,125 properties that have not yet connected. Board brief, p. 19; Board reply, p. 22. It categorizes these properties as having "outstanding commitments" that will significantly reduce the Town's available sewer capacity. Board brief, p. 20.

A comparison of the parties' estimates of the sewer needs and capacity of the Town is below:

Project Flow Rates	Board	Developer
Developer's project	55,000 gpd ²⁷	30,000 gpd ²⁸
Riverwalk Raynham	n/a ²⁹	50,000 gpd (Exh. 20, includes Broadway Crossing)

²⁶ "Q: ...could [you] explain...what you [are] referring to...when you refer to these 1,125 properties? A: These properties are homes...or maybe some commercial properties...along with some projects that were already pre-approved. These properties have paid betterments for sewer infrastructure throughout town. So we have commitments to them that we have to reserve capacity for." Tr. I, 14-15.

²⁷ Tr. I, 32-33.

²⁸ Mr. Carey based his calculation of the Project's estimated flow on Title V standards of 110 gpd per bedroom. Tr. I, 32-33. The Project has 500 bedrooms, resulting in his estimated total. *Id.*; Pre-Hearing Order, § II.a, ¶ 6; Exh. 4. Mr. Moyen did not provide a specific breakdown of his calculation of the Project's estimated flow of 30,000 gpd. *See* Exh. 20, ¶ 53; Tr. II, 58.

²⁹ Mr. Carey testified he already included the expected flow from the Riverfront Raynham project in his estimate of the Town's average daily flow rate of 960,000 gpd. Exh. 31, ¶ 10; Tr. I, 34.

Broadway Crossing	40,040 gpd ³⁰	50,000 gpd (Exh. 20, includes Riverwalk Raynham) ³¹
1,125 properties	Estimated 200,000+ gpd (200,000 to 290,000) ³²	170,000 gpd (Exh. 20, Exh. 21 ¶ 18); Exh. 21, ¶ 25; Tr. II, p. 58
Current Town average daily flow	960,000 gpd	920,000 gpd ³³
Maximum average daily flow under IMA	1,300,000 gpd	1,300,000 gpd
Remaining capacity	44,960 gpd (using 200,000+ estimate); 4,960 gpd (using 240,000 gpd); -45,040 gpd (if using 290,000 gpd)	130,000+ gpd ³⁴

As we most recently noted in *722 Main Street, LLC v. Oxford Zoning Board of Appeals*, No. 2021-11, slip op. at 22 (Mass. Housing Appeals Comm. Mar. 20, 2025), issues relating to the adequacy of sewer services have become increasingly common over the years. *722 Main Street, supra*, No. 2021-11, slip op. at 22, and cases cited. We acknowledged that “[o]ngoing development is stretching municipal services to the point where any additional burden, whether from affordable housing or other forms..., can present hardship.” *Id.*, citing *Hilltop Preserve Ltd. P’ship v. Walpole*, No. 2000-11, slip op. at 3 (Mass. Housing Appeals Comm. Apr. 10, 2002).

We appreciate the difficulties faced by the Town of Raynham and other municipalities across the state in allocating their remaining available sewer capacity. However, as we stated in *722 Main Street*, a town may not prioritize available sewer capacity for future projects over earlier affordable housing developments. *722 Main Street, supra*, No. 2021-11, slip op. at 25. The Board attempts to do just that, arguing that the 1,125 properties that have not yet connected to the system should be prioritized ahead of the developer’s Project. Board brief, p. 19; Board reply, p. 22; Exh. 31, ¶¶ 21-22. But the Board has not submitted evidence or testimony that any

³⁰ Tr. I, 23-24; Exh. 16, Exh. 2, p. 4.

³¹ Mr. Moyen testified that he estimated the average daily flow rate of Broadway Crossing and Riverwalk Raynham projects collectively. Exh. 20, ¶ 53. He did not provide a specific estimate for each project.

³² Mr. Carey estimated that the 1,125 properties that could connect to the Town’s sewer system would generate anywhere between 200,000 to 290,000 gpd. Tr. I, 15 (“Q: Do you have an estimate of how much flowage [you need to reserve] for these properties? A: 200 some odd thousand....We were upward of 240,000 or so...maybe 290,000.”).

³³ The developer’s witness, Mr. Moyen, relied on calculations from the town sewer department showing that, from January 1, 2023, to December 21, 2023, the town achieved an average daily flow rate of 920,000 gallons per day (gpd). Exh. 21, ¶ 20; Tr. II, 53, 56-57.

³⁴ Exh. 21, p. 7 n.3.

of these 1,125 properties have requested or obtained sewer connection permits before the developer submitted its comprehensive permit application. Tr. I, 16 (Board expert testifying that “some” of the 1,125 properties have applied but “a lot” have not). The Board has demonstrated only that these 1,125 properties have paid a betterment, which is an assessment on their property, rather than formally applying for a permit to connect to the public sewer system.³⁵

Under traditional land use law, Chapter 40B, and Committee precedent, a town is generally obligated to provide services on an equal basis to all residents. *722 Main Street, supra*, No. 2021-11, slip op. at 28, citing *Avalon Cohasset, Inc., supra*, No. 2005-09, slip op. at 14, citing *Rounds v. Board of Water & Sewer Comm’rs of Wilmington*, 347 Mass. 40, 44 (1964). If reasonable sewer capacity is shown to be available, an applicant for a comprehensive permit has a right to the sewer connection, and a town cannot postpone “presently sought” connections to prioritize connections “contemplated for the future.” *722 Main Street, supra*, slip op. at 28, citing *Clark v. Bd. of Water & Sewer Comm’rs of Norwood*, 353 Mass. 708, 710 (1968).

In this case, the Board has not proven that it is entitled to prioritize the 1,125 unconnected properties over the comprehensive permit project. The developer has shown there is sufficient capability for the project to connect to the Town’s sewer system, with the expansion of sewer infrastructure to be carried out by the developer at its own cost. Developer brief, p. 22; Exh. 20, ¶¶ 25, 38-41; Exh. 3, Sheets C-120, 121, 122 and Figure 1. Accordingly, when calculating the Town’s remaining available sewer capacity under the 1.3 million gpd cap imposed by the IMA, we do not include the projected needs of these 1,125 unconnected properties. As a result, even if we accept the highest estimates and calculations put forth by the Board of the Town’s current and anticipated sewer needs and those of the Project, we find the Town still has sufficient capacity available to accommodate the Project.

Project Flow Rates	Board	Accepted Estimate for Committee Calculation
Developer’s project	55,000 gpd ³⁶	55,000 gpd

³⁵ See Tr. I, 16 (“Q: What do you mean by...betterments? A: ...they are assessed a certain value to allow the cost of the sewer infrastructure [installed in front of their property].... It would be assessed to their property. I don’t know if it’s collected actually as a property tax... [or] they can actually appropriate it in their taxes or they can pay outright....A lot of them are residences that have not utilized a sewer system but again have the right to.”)

³⁶ Tr. I, 32-33.

Riverwalk Raynham	n/a ³⁷	n/a
Broadway Crossing	40,040 gpd ³⁸	40,040 gpd
1,125 properties	Estimated 200,000+ gpd (200,000 to 290,000) ³⁹	Not included
Current Town average daily flow	960,000 gpd	960,000 gpd
Maximum average daily flow under IMA	1,300,000 gpd	1,300,000 gpd
Remaining capacity	44,960 gpd (using 200,000+ estimate); 4,960 gpd (using 240,000 gpd); -45,040 gpd (if using 290,000 gpd)	244,960 gpd

Even when using Mr. Carey's estimates of 55,000 gpd for the Project's flow and the town's current average daily flow of 960,000 gpd, both higher than the estimates put forth by Mr. Moyaen, the calculation still results in almost 250,000 gpd available under the 1.3 million gpd cap under the IMA. Therefore, we find that the Board has failed to establish a local concern with regard to sewer capacity that outweighs the regional need for affordable housing.⁴⁰

Alternatively, assuming the Board had established there was inadequate sewer capacity for the additional flow generated by the Project, the Board must also prove "that the installation

³⁷ Mr. Carey testified he already included the expected flow from the Riverfront Raynham project in his estimate of the Town's average daily flow rate of 960,000 gpd. Exh. 31, ¶ 10; Tr. I., 11.

³⁸ Tr. I, 23-24; Exh. 16 Exh. 2, p. 4.

³⁹ Mr. Carey estimated that the 1,125 properties that could connect to the Town's sewer system would generate anywhere between 200,000 to 290,000 gpd. Tr. I, 15 ("Q: Do you have an estimate of how much flowage [you need to reserve] for these properties? A: 200 some odd thousand.... We were upward of 240,000 or so... maybe 290,000."). Because we do not include the 1,125 properties in our calculation, the estimated flow for these properties is not relevant.

⁴⁰ Other than the Broadway Crossing and Raynham Riverwalk projects, the Board did not present evidence regarding any other specific projects that are purported to have pending or existing sewer permit applications, including any specific properties out of the 1,125 currently unconnected properties. But we note that, to the extent there may be any competing sewer permit applications, the Board shall ensure that this Project is given consideration in conformity with the same local requirements and regulations as are applied to all other applicants, explicitly providing that this Project has priority for sewer connection over any other applications for sewer connections submitted after the date of the developer's filing its comprehensive permit application. *See 722 Main Street, supra*, No. 2021-11, slip op. at 31, citing *Bay Watch Realty, supra*, No. 2002-08, slip op. at 25 n.24 (ordering board to allow project to connect to town sewer, but noting if there is waiting list for such connections, project must be placed on list in same manner as other applicants); *Peppercorn Village Realty Trust v. Hopkinton*, No. 2002-02, slip op. at 13 (Mass. Housing Appeals Comm. Jan. 26, 2004) (if town continues to allow sewer connections or implements waiting list, affordable housing development must be treated equally to all other development proposals in either situation).

of services adequate to meet local needs is not technically or financially feasible.” 760 CMR 56.07(2)(b)4. “Financial feasibility may be considered only where there is evidence of unusual topographical, environmental, or other physical circumstances which make the installation of the needed service prohibitively costly.” *Id.* Although the Board raises this argument in the Pre-Hearing Order, it did not substantively address this argument in its post-hearing briefing nor did it provide sufficient supporting evidence or testimony. *See* Pre-Hearing Order, § IV, p. 9. The Board asserts the Town cannot obtain more sewer capacity from the City of Taunton but does not provide substantive briefing or evidence other than cursory statements and limited testimony. *See* Board reply, p. 22. Mr. Carey testified that upon the IMA’s expiration in 2031, the Town would “certainly have to renew the IMA,” but was not aware of any specific planning efforts of engagement with Taunton to negotiate and believed Taunton in any event would be unwilling to increase the Town’s allowed daily flow. Tr. I, 20-21.

The developer argues the Board’s failure to provide sufficient evidence as to the purported lack of feasibility waives its arguments on this issue. We understand, as we stated in *722 Main Street*, that diminishing sewer capacity is an issue not just for Raynham but for many municipalities across the state. *722 Main Street, supra*, No. 2021-11, slip op. at 24-25. However, the Town “may not block the development of affordable housing by refusing to fulfill its normal obligations.” *Id.*, citing *Dexter Street, LLC v. North Attleborough, supra*, No. 2000-01, slip op. at 16 (Mass. Housing Appeals Comm. July 12, 2000), citing *Mapleleaf Dev. Assocs. v. Haverhill*, No. 1988-14, slip op. at 22 (Mass. Housing Appeals Comm. Jan. 27, 1993) (stating municipality cannot use lack of capacity for which it has duty to remedy as grounds to deny permit, and argue it cannot afford to fix issue); *see also Lever Dev. LLC v. West Boylston*, No. 2004-10, slip op. at 21-25 (Mass. Housing Appeals Comm. Dec. 10, 2007); *Franklin Commons v. Franklin*, No. 2000-09, slip op. at 11 (Mass. Housing Appeals Comm. Sept. 27, 2001); *Hilltop Preserve Ltd. P’ship, supra*, No. 2000-11, slip op. at 25-26, 29 (if inadequacy results from townwide problem or existing infrastructure problem, town must find remedy instead of denying permit); *Peppercorn Village Realty, supra*, No. 2002-02, slip op. at 1, 12 (despite shortage, town must provide municipal service to affordable housing development on same terms as other users). The Board has not presented detailed evidence or testimony regarding the alleged costs or feasibility of expanding or increasing the Town’s sewer capacity. Furthermore, as stated above, our regulations provide that when the Board raises inadequate capacity as a local concern, it not only

has the burden of proving that inadequacy of services is a valid local concern that outweighs the regional need for housing, but it also has the additional burden of proving that due to unusual practical circumstances the installation of adequate services is not technically or financially feasible. 760 CMR 56.07(2)(b)4; *see SLV School Street, supra*, No. 2022-14, slip op. at 61, citing *Oceanside Village, LLC v. Scituate*, No. 2005-03, slip op. at 12 (Mass. Housing Appeals Comm. July 17, 2007); *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), *aff'd* 464 Mass. 38 (2013). The Board has not provided any evidence that the installation of adequate services is not technically or financially feasible. Therefore, we find that the Board has not demonstrated that the installation of adequate municipal services is not technically or financially feasible.⁴¹

2. Sewer Infrastructure

The Board also raised concerns over the Town's alleged lack of sewer infrastructure, arguing major off-site upgrades would be needed to accommodate the project. Board brief, p. 19. These potential upgrades include the expansion of sewer mains, force mains, and pump stations. *Id.*, citing Exh. 31, ¶ 12; Tr. I, 21-23.

Mr. Carey testified as to the Town's concerns regarding the alleged lack of sewer infrastructure available for the Project. Exh. 31, ¶ 12. He asserts that the Project was not included in any previous sewer service planning, and stated that major infrastructure improvements would be required, including improvements on increases in the flow-handling capabilities for existing sewer mains, force mains, and at least four existing sewerage pumping stations in the Town. Exh. 31, ¶¶ 12, 15. In his opinion, the closest available sewer connection for the Project is a

⁴¹ Further, even if the Board had established that the Project's estimated sewer flow would result in the Town exceeding the cap under the IMA, and that expansion of the flow under the IMA was technically or financially infeasible, the developer in this case offered to accommodate on-site wastewater disposal. Developer brief, p. 24. Mr. Moyon testified that it would be feasible to include an on-site septic system as an alternative to public sewer access. Exhs 20, ¶ 65; 21, ¶ 31. Mr. Carey also acknowledged that an on-site wastewater treatment system would be "preferred" and "would alleviate [his] concerns with the sewer department, ...the sewer system, with the IMA." Tr. I, pp. 29-30. An on-site sewer disposal system in fact was recommended by the Town's Sewer Commission during local hearing process. *See* Exh. 31, Exh. 2 ("[w]e recommend that the applicant utilize an onsite sewerage disposal system."). However, we note that a developer's burden to offer mitigation measures only becomes necessary if the Board establishes a valid local concern, which, in this case as it relates to sewer capacity and infrastructure, we find the Board has not. *See Tiffany Hill, Inc. v. Norwell*, No. 2004-14, slip op, at 27 (Mass. Housing Appeals Comm. Sept. 18, 2007).

two-inch low-pressure sewer line which is not capable of handling the additional wastewater flow from the Project. *Id.*, ¶ 15. Although he acknowledged that the developer proposed constructing its own force main westerly along Route 44 and connecting into a manhole in the Carol Drive vicinity, he testified this raised immediate concerns for the capacity of at least three existing pumping stations to handle the additional wastewater (Pine Street, Whippoorwill Drive, and Old King Street pumping stations). *Id.*, ¶ 16. In his view, these stations would require significant improvements in order to handle the additional flow. *Id.*

The developer proposes to connect to the public sewer system by tying into an existing sewer manhole and 8-inch sewer line at Leonard Street and Carol Drive, as well as installing a 3-inch sewer force main down Leonard Street and Route 44 from the Project site. Exh. 21, ¶ 4. The sewer force main will originate at a sewage pump station located on the Project site. *Id.* The developer agrees that this infrastructure is required and is willing to complete it at its expense. Exhs. 20, ¶ 25; 21, ¶ 5. In addition to the sewer main and pump station, the developer has proposed to install at its own expense “all necessary sewer infrastructure and upgrades needed to connect to the Town’s sewer system.” Exh. 20, ¶ 63.

Mr. Carey is a well-qualified expert with significant experience in municipal wastewater management. However, his testimony did not present the specific and detailed analysis regarding the Project’s alleged sewer infrastructure deficiencies required to establish a local concern.⁴² Further, his testimony is belied by the fact that he was unaware of certain options offered by the developer regarding the Project’s sewer needs, some of which matched his own recommendations. Tr. I, 24 (“Q: Are you aware that the developer has proposed to make these improvements at its cost? A: No, I’m not aware of them proposing to make any of these changes.”); *Id.*, 27 (“Q: ...you were not aware at the time you made this statement that the developer has proposed to make these improvements at its cost? A: At the time of this, possibly not.”). The evidence presented establishes that the Town has sufficient remaining capacity under the IMA to accommodate the Project, as well as the developer’s ability and willingness to undertake mitigation measures to address that Board’s concerns regarding sewer infrastructure, including the cost of undertaking necessary improvements or upgrades. Accordingly, the Board

⁴² The letters referenced in his pre-filed testimony, from the Town Sewer Commission to the Board and dated February 2, 2024, and July 8, 2024, contained general statements repeating that “major infrastructure improvements” would be required to accommodate the additional flow from the Project, with no additional explanation. Exh. 31, Exhs. 2, 3.

has not presented sufficient evidence of a local concern regarding sewer infrastructure that outweighs the regional need for affordable housing.

3. Water

Similar to its concerns regarding the Town's sewer system, the Board's concerns regarding the project's impact on its water system relate to both its existing infrastructure as well as available capacity, affected by contamination issues that have forced a closure of a portion of the water supply. *See* Pre-Hearing Order, § IV, pp. 7-8; Board brief, pp. 20-21. The Board did not cite to a specific rule or regulation on which its concern was based. Instead, the Board stated its local concern was based on the fact that:

...there is no water infrastructure currently serving the [s]ite and that additional information would need to be provided by the district's consulting engineer to confirm water availability and necessary improvements for capacity. The district would expect this information to be provided at the Applicant's expense. Since there is no water infrastructure in the area...the District would need a study done to confirm water availability and determine what infrastructure improvements would be needed to accommodate the project while not affecting existing customers. Also, the District is dealing with a water contamination issue which forced closure of a portion of the water supply and may have effects on current and future projects.

See Pre-Hearing Order, § IV, pp. 7-8.

The Board relies on the testimony of its expert, Mr. Chase, who testified there is currently no existing water infrastructure at the Project site, and that extending water service to the site would require "significant" infrastructure work, including construction along Route 44. Exh. 32, ¶ 13. Because the current water system does not extend to the Project site, "extensive" work would be required both in and along Route 44. Exh. 32, Exh. 3.

Mr. Chase also testified that the Town is experiencing an ongoing water contamination issue which has resulted in the closure of part of the water supply. Exh. 32, ¶ 11. He anticipated that the contamination issue would be resolved in early 2027. Exh. 32, Exh. 2 (stating in an email to Mr. Moyer that "[t]he [w]ater [d]istrict is currently dealing with a PFAS issue which has forced [the Town] to shut down two of [its] large production wells. This has put a serious cap on the amount of available water to new projects."). He stated that, beginning in 2022, testing indicated that two of the Town's major water supplies had elevated level of PFAS, sometimes

referred to as “forever chemicals.” Tr. I, 48. Three wells were identified as having extremely high levels, and were taken out of service, resulting in a loss of approximately 1 million gpd of water capacity. Tr. I, 48-49. He testified that while the Town did receive state funding for the construction of water treatment plants, the plants are at least two years away from completion. Tr. I, 49.

However, much of Mr. Chase’s testimony focuses on the alleged lack of information provided by the developer regarding the Project and the proposed water infrastructure, rather than specific issues he had identified with the Project. He testified that he submitted letters to the subsidizing agency as well as the Board in his capacity as Water Superintendent. Exh. 32, ¶ 6. He noted in these letters that the Town Water District had “very little information” on this project, making it hard to comment on the availability of water service at the time. *Id.*, Exh. 1. These concerns relate to the purported inadequacy of information and detail being made available from the developer, rather than an inadequate water supply. Tr. I, 42.⁴³ However, he stated that he was unaware that the developer was required to provide preliminary plans at that particular stage of permitting in the Chapter 40B process, and acknowledged that if the Project had been approved with a condition that the developer provide the information he sought, it would resolve his concerns. Tr. I, 44.

Mr. Chase also had not been made aware that the developer could provide water via wells located on the Project site, if public water was unavailable or not feasible. Tr. I, 51. He acknowledged that if the developer was able to provide on-site water supply, his concerns would be resolved. Tr. I, 52.⁴⁴

On behalf of the developer, Mr. Moyen testified that Town’s water system had sufficient capacity to accommodate the Project. Exh. 20, ¶ 74. Public water would be provided through

⁴³ “Q: [y]ou discuss your concern as stated in your November 6, 2023 letter about the lack of information that was available regarding this project...and that it made it difficult to comment on the availability of water....Is that a fair summary of your concern about this project?

A: Yes.

Q: Would you describe that concern as a statement ...not that the water supply was inadequate, just that you needed more information, is that fair to say?

A: Yes, that’s correct.”

⁴⁴ “Q: If the developer...were able to provide on-site water supply, would that resolve your concerns about supply of water to the site?

A: If he can supply his own, if the developer could supply their own water, yes.... [I]t would basically take the water district out of the loop.”

installation of a new 12-inch water main on Route 44, connecting to existing infrastructure at the intersection of Route 44 and Church Street. *Id.*, ¶ 38. This would use a “looped” water system rather than a “dead end” system, therefore avoiding possible sedimentation build up and the periodic flushing of the system required to maintain it. *Id.*, ¶¶ 39-40; Tr. I, 48. He testified that this type of system would also provide redundant water service to the Riverwalk Raynham site across the street, thereby improving the reliability of water service and eliminating the need for town resources to periodically flush the water lines. Exh. 20, ¶ 40. All necessary infrastructure needed for connection to the water system would be installed by the developer at its own cost. *Id.*, ¶ 73.

Alternatively, Mr. Moyen also testified that even if the Board had demonstrated that the Project could not connect to the public water system, the developer could provide for on-site water via wells on the Project site itself. Exh. 20, ¶ 75. He provided a sketch plan depicting how the site could accommodate such a system. *Id.*, Exh. 10 (Onsite Public Water Supply Sketch Plan showing water storage tanks, a pump house and wells located to the east of the proposed buildings).

We acknowledge that municipalities face similar pressures on their water supplies as with their sewer and wastewater systems. In this case, however, we find that the Board has not established that the Town has insufficient water capacity in order to serve the Project. Despite its assertions it has demonstrated the Town cannot accommodate the Project’s water needs, it provided only general arguments. Board brief, p. 21; Board reply, p. 19. Although the Board claims the ongoing PFAs contamination issue has resulted in the loss of 1 million gpd of available capacity, no further calculations or data was provided to prove the Project’s water needs could not be accommodated. Even assuming the Board had established there was inadequate water capacity for Project, as noted above in Section VI.C.1, the Board must then prove “that the installation of services adequate to meet local needs is not technically or financially feasible.” 760 CMR 56.07(2)(b)4. The developer has established it is willing and able to complete the necessary water infrastructure and upgrades at its own cost. The developer has also maintained that the Project could be served by an on-site well system, constructed by the developer, as a measure to mitigate any water supply concerns. Developer brief, pp. 20-21. Accordingly, we find the Board has failed to establish a local concern with regard to water capacity and infrastructure that outweighs the regional need for affordable housing

D. Impact on Municipal Services

As stated in the Pre-Hearing Order, the Board's concerns regarding municipal services related to the project's location on Route 44 as well as alleged burdens on Town emergency services, including police and fire departments. *See* Pre-Hearing Order, § IV, p. 8. Specifically, the Board raised concerns that the project will "overburden the Town's currently under-resourced emergency services...including police and fire.... The Town has related safety concerns as well given the project's location on a busy stretch of Route 44 [T]he [d]eveloper's project...with only one entrance and exit along Route 44... will increase the number of motor vehicle accidents in the area." Pre-Hearing Order, § IV, p. 8.

This alleged local concern is vague and speculative. The Board did not identify a specific local requirement or regulation more protective of federal or state law on which its local concern was based and instead stated there is "[n]o specific bylaw or regulation, just the current projects and state of the police and fire departments." *Id.* The Board introduced testimony of several Select Board members, who testified regarding generalized concerns over overburdened police and fire departments, delayed emergency response times, and increased public school enrollments. *See, e.g.,* Exh. 28, ¶¶ 19-20, 22(a-d).⁴⁵

However, the testimony and evidence presented by the Board provided no detail or data in support of these claims, outside of general statements and concerns that municipal services will be overburdened. The Board's argument on this local concern was also brief and general and did not provide specific evidence or testimony on the burden expected to be imposed on local fire and police services outside of the general statements included in witness testimony. *See* Board brief, pp. 17-18; Board reply, p. 19. We agree with the developer that the Board has failed to introduce evidence or argument sufficient to support this local concern. *See* Developer brief, pp. 14-15; *see* Exh. 17, ¶¶ 5, 6. The lay opinion testimony of municipal officials provides no basis on which to conclude alleged impact on municipal services is a local concern and we give it little weight. Accordingly, we find the Board's purported local concerns regarding municipal services were not sufficiently argued and are therefore waived. *See SLV School Street, supra*, No. 2022-14, slip op. at 18 n.10, citing *Sugarbush Meadow, LLC, supra*, No. 2008-02, slip op. at 3; *Hilltop Preserve Ltd. P'ship, supra*, No. 2000-11, slip op. at 2 n.1; *An-Co, Inc. v. Haverhill*, No.

⁴⁵ To the extent the Board's concerns regarding municipal services include concerns regarding traffic safety or water and sewer capacity, those arguments are addressed in Sections VI.A and C, *supra*.

1990-11, slip op. at 19 (Mass. Housing Appeals Comm. June 28, 1994); *Autumnwood, LLC v. Sandwich*, No. 2005-06, slip op. at 13 n.12 (Mass. Housing Appeals Comm. Decision on Remand Mar. 8, 2010) (noting argument not sufficiently briefed to allow meaningful consideration is deemed waived).⁴⁶

E. Committee Determination

With regard to the four alleged local concerns, the Board failed to demonstrate any valid local concerns applicable to the project, much less that such a concern outweighs the need for affordable housing. It did not identify any applicable local requirements or regulations that are stricter than state or federal requirements. With regard to the alleged local concerns regarding wetlands on the project site, the Board did not provide sufficient evidence or briefing on wetlands impacts and therefore waived this concern. The Board's arguments relating to alleged negative impacts on municipal services fails for the same reason: they were not sufficiently argued and were therefore waived.

VII. UNEQUAL TREATMENT

In the Pre-Hearing Order, the developer raised the issue of unequal treatment regarding the application of the reasons cited by the Board for its denial of the comprehensive permit. *See* Pre-Hearing Order, § IV, pp. 4-5. General Laws c. 40B, § 20 provides that local rules and regulations cannot be deemed "consistent with local needs" unless they are "applied as equally as possible to both subsidized and unsubsidized housing." The developer argues the Board's treatment of the project constitutes unequal treatment of subsidized housing developments. Developer brief, p. 34; developer reply, p. 16. It specifically identifies the project located at 251 Broadway in Raynham, known as Broadway Crossing, as receiving what it alleges was an "expedited" comprehensive permit approval in December 2023, without raising any of the issues

⁴⁶ Alternatively, had the Board provided sufficient supporting testimony or evidence regarding the purported burden on the town's municipal services, we note that impact on a town's finances is not relevant under G.L. c. 40B. *See Marion Village Estates, LLC v. Marion Zoning Board of Appeals*, No. 2022-01, slip op. at 6 (Mass. Housing Appeals Comm. Summary Decision Mar. 24, 2023) citing *Woodcrest Village Assocs. v. Maynard*, No 1973-13, slip op. at 27-28 (Mass. Housing Appeals Comm. Feb, 13, 1974), *aff'd Board of Appeals of Maynard v. Housing Appeals Comm.*, 370 Mass. 64, 68 (1976) (strain on municipal facilities or increase in municipality's financial burden insufficient ground for denial of permit); *Hilltop Preserve Ltd. Partnership, supra*, No. 2000-11, slip op. at 26, 29 (cost of necessary municipal services not element of concept of consistency with local needs).

or concerns the Board cited in its review of the developer's project. *See* Pre-Hearing Order, § IV, pp. 5-6.

Ms. Duval testified that the Board opened its public hearing on Broadway Crossing on October 4, 2023, and held three more hearings in November and December, with the meetings in December including substantive discussion of approximately 15-20 minutes each. Exh. 16, ¶ 17 n.1. Unlike with the developer's project, the Board did not require a traffic study for Broadway Crossing and the Board's approval of the Broadway Crossing comprehensive permit included no traffic-related conditions. *Id.*, ¶ 53. She also identified a second project – the Raynham Riverwalk project located across the street from the project at issue here – as one that elicited no similar concerns regarding traffic. *Id.*, ¶ 52.

The developer has the burden of proving such unequal treatment. 760 CMR 56.07(2)(a)(4). However, other than somewhat cursory statements, the developer did not substantively address unequal treatment in its brief. Because this issue was not briefed, it is therefore waived. *SLV School Street, supra*, No. 2022-14, slip op. at 3 n.1; *River Stone, LLC v. Hingham*, No. 2016-05, slip op. at 24 n.19 (Mass. Housing Appeals Comm. Sept. 23, 2022), citing *Sugarbush Meadow, supra*, No. 2008-02, slip op. at 3; *Hilltop Preserve Ltd. P'ship, supra*, No. 2000-11, slip op. at 2 n.1; *An-Co, Inc, 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).

Further, we note that 760 CMR 56.07(2)(a)4 provides that a developer must show that local requirements and regulations have not been applied equally to subsidized and *unsubsidized* housing. The projects identified by the developer, Broadway Crossing and Raynham Riverwalk, are subsidized projects that received a comprehensive permit under Chapter 40B. The developer has not identified or substantively briefed any unsubsidized projects it alleges received different treatment. *See SLV School Street, supra*, No. 2022-14, slip op. at 3 n.1 (because developer only compared project at issue and commercial non-residential space, it did not properly compare subsidized and unsubsidized housing for purposes of unequal treatment).

VIII. REGIONAL NEED FOR AFFORDABLE HOUSING

In the case of a denial of a comprehensive permit, the central issue in an appeal to the Committee is whether the decision was consistent with local needs. 760 CMR 56.07(1)(b). The Board must prove there is a valid health, safety, environmental, design, open space, or other local

concern which supports the denial, and that such local concern outweighs the regional need for affordable housing. *See* 760 CMR 56.07(2)(b)2. As discussed above in Section III, the Board's waiver of the safe harbor in this case (and therefore the irrebuttable presumption of consistency with local needs) raised novel questions concerning the evidence to be heard on the regional housing need, and the balancing of regional need with local concerns. *See* Order on Motion in Limine, p. 1. Both the Board and developer were directed to offer evidence relevant to the purported housing need in the region, for purposes of balancing it against the Board's alleged local concerns. *Id.*, p. 3. The determination of the regional housing need, if reached, would be analyzed without the irrebuttable presumption of consistency with local needs. *See* Section III.B, *supra*.

The Board dedicated much of its post-hearing brief to arguments regarding the Town's SHI percentage on the date of the filing of developer's comprehensive permit application. Board brief, pp. 6-9. It reiterates its argument that as a result, the Town had satisfied the safe harbor and therefore the Committee lacks authority to overturn the Board's denial. Board reply, p. 2. Even if the Board is correct that the Town's SHI was above ten percent as of the date of the developer's comprehensive permit application, the Town's SHI alone is insufficient to demonstrate regional need, and the Board conceded it had waived any reliance on statutory and regulatory safe harbors under 760 CMR 56.03(8) and 56.05(3). Board brief, p. 3.

The developer argues the Board has failed to prove a valid local concern, and therefore the question of whether the local concerns outweigh the regional need is moot. Developer brief, pp. 26-27; developer reply, pp. 10-11. Alternatively, had the Board established a valid local concern, the developer argues it is clearly outweighed by regional housing needs. *Id.*, pp. 8-9. It challenges the accuracy of the Town's SHI calculation as improperly including market rate rental units, as well as the validity of the G.L. c. 40B Comprehensive Permit Projects, Subsidized Housing Inventory, updated December 2014 (40B Guidelines) authorizing such policy. *Id.*, pp. 6-7.

The Committee's May 8 Order was clear that, because the Board failed to follow the regulatory procedure under the comprehensive permit regulations, it waived its right to invoke statutory and regulatory safe harbors. *See* May 8, 2025 Order, p. 2. The subsequent June 27 Order on Motion in Limine addressed the evidence to be presented to establish the regional housing need but stated such evidence would be weighed by the Committee against local

concerns. *See* Order of Motion in Limine, p. 3. The regional need burden of proof only becomes relevant if a valid local concern has been established. *See id.*, citing 760 CMR 56.07(2)(b) (“...the Board shall have the burden of proving, first, that there is a valid ... Local Concern which supports [] denial, and then, that such Local Concern outweighs the Housing Need.”).

Therefore, because we find that the Board has not sustained its burden of proving a valid local concern that supports the denial of the comprehensive permit, we need not reach the question of whether those concerns are sufficient to outweigh the regional need for affordable housing. 760 CMR 56.07(1)(c), 56.07(2)(b); *104 Stony Brook, supra*, No. 2017-14, slip op. at 41; *Avalon Cohasset, Inc. supra*, No. 2005-09, slip op. at 22.

IX. 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 the developer, as modified, and as provided in the text of this decision and subject to the following conditions:⁴⁷

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

2. The comprehensive permit shall conform to the application submitted to the Board, as modified by the developer, the text of this decision, and the following conditions.

- a. The development shall be constructed substantially as shown on the Project Plans prepared by Tetra Tech entitled “The Riverfront at Raynham 0 New State Highway and 0 Leonard Street Raynham Massachusetts”, Sheets C-001through C-122 and Figure 1 (Exh. 3), revised through May

⁴⁷ *See* G.L. c. 40B, § 23 (“The board of appeals shall carry out the order of the hearing appeals committee within thirty days of its entry and, upon failure to do so, the order of said committee shall, for all purposes, be deemed to be the action of said board, unless the petitioner consents to a different decision or order by such board.”).

22, 2024, and “The Riverfront at Raynham Route 44, Raynham MA January 18, 2024 Comp. Permit Plan Submission” (Exh. 4), subject to compliance with all applicable federal and state requirements.

- 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 developer’s submission of its comprehensive permit application to the Board, consistent with this decision pursuant to 760 CMR 56.02: *Local Requirements and Regulations*.
 - d. The developer shall submit final construction plans for all buildings, roadways, stormwater management systems, and other infrastructure to Raynham town entities, staff, or officials for final comprehensive permit review and approval pursuant to 760 CMR 56.05(10)(b).
 - e. All Raynham 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 Raynham. 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).
3. Should the Board fail to carry out this order within thirty days, then, pursuant to G.L. c. 40B, § 23 and 760 CMR 56.07(6)(a), this decision shall for all purposes be deemed the action of the Board.
4. Because the Housing Appeals Committee has resolved only those issues 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 zoning and other bylaws in effect on the date of developer’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 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 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. All construction shall be consistent with detailed construction plans and specifications reviewed and approved by the subsidizing agency.
- e. The Board and all other Raynham town staff, officials, and boards shall promptly take whatever steps are necessary to ensure that building permits and other permits are issued to the applicant, without undue delay and in conformity with the standard permitting practices applied to unsubsidized housing in Raynham, upon presentation of construction plans, pursuant to 760 CMR 56.05(10)(b), that conform to the comprehensive permit and the Massachusetts Uniform Building Code.
- f. Design and construction in all particulars shall be in compliance with all applicable state and federal requirements.
- g. Construction and marketing in all particulars shall be in accordance with all applicable state and federal requirements, including without limitation, fair housing requirements.
- h. This comprehensive permit is subject to the cost certification requirements of 760 CMR 56.00 and 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

July 22, 2026

/s/ Lisa V. Whelan
Lisa V. Whelan, Chair

/s/ Lionel G. Romain

Lionel G. Romain

/s/ James G. Stockard, Jr.

James G. Stockard, Jr.

/s/ Caitlin E. Loftus

Caitlin E. Loftus, Presiding Officer