C O M M O N W E A L T H O F M A S S A C H U S E T T S

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

WALL STREET DEVELOPMENT CORPORATION

v.

WALPOLE ZONING BOARD OF APPEALS

No. 2022-08

DECISION

April 13, 2026

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C O M M O N W E A L T H O F M A S S A C H U S E T T S

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

WALL STREET DEVELOPMENT CORP. Appellant,	)	
v.	)	No. 2022-08
WALPOLE ZONING BOARD OF APPEALS, Appellee.	)	

DECISION

I. INTRODUCTION AND PROCEDURAL HISTORY

This is an appeal to the Housing Appeals Committee pursuant to G.L. c. 40B, § 22, of a decision by the Walpole Zoning Board of Appeals (Board) denying a comprehensive permit to Wall Street Development Corp. (Wall Street or developer) for a project located on Darwin Lane in Walpole.

On September 17, 2021, the developer applied to the Board for a comprehensive permit for the construction of 28 townhouse condominium units within six buildings, to be known as the Residences at Darwin Commons. The Board opened the public hearing on the developer's application on October 13, 2021, and notified the developer and the Department of Housing and Community Development (DHCD)[1] in writing by letter dated October 18, 2021, that it considered a denial of the requested permit to be consistent with local needs pursuant to 760 CMR 56.03(1)(b) and 56.03(4), due to receipt of a Certification of Approval dated September 10, 2021, certifying the Town's compliance with its Housing Production Plan (HPP). The developer

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

appealed the invocation of safe harbor to DHCD on October 31, 2021, and DHCD determined that the Board met its burden of proving safe harbor based on the certified HPP as defined under 760 CMR 56.03(1)(b) and 56.03(4). Exh. 1, pp. 1-2.

The developer did not appeal this determination to the Committee and instead reconvened with the Board for the continued public hearing on December 15, 2021, at which time the developer proposed a revised project of 12 single-family homes. The Board proceeded with the hearing on the revised plan, reserving its right to deny the project based on its safe harbor, and on January 19, 2022, it closed the public hearing and voted to deny the revised project. Exh. 1, pp. 1-2.

The developer resubmitted a second comprehensive permit application on April 28, 2022, for the 28-unit town home project, and the Board opened the public hearing on May 25, 2022. Exh. 1. Relying again on DHCD's certification of approval of the Town's compliance with its Housing Production Plan, the Board denied the permit. The developer filed an objection with DHCD, challenging the Board's safe harbor assertion on June 13, 2022. In a determination dated July 7, 2022, DHCD determined that the Town had not established a safe harbor under 760 CMR 56.03(1). The Board filed an interlocutory appeal to the Committee on July 26, 2022. The Committee found the Board was not entitled to invoke the safe harbor under 760 CMR 56.03(1)(b) and 56.03(4) and remanded the matter back to the Board for continuation of the proceeding on the comprehensive permit application. *See Matter of Walpole and Wall Street Development Corp.*, Nos. 2022-08, 2022-09, slip op. at 16 (Mass. Housing Appeals Comm. Summary Decision May 11, 2023).

The hearing before the Board resumed on June 26, 2023, and was continued various times through June 5, 2024. The Board closed the hearing on June 5, 2024, continued its deliberation to June 17, 2024, and ultimately voted to deny the comprehensive permit, citing concerns relating to the Town's public water supply, specifically impacts to the groundwater and drinking water well quality. The written decision was filed with the Town Clerk on June 24, 2024. *See* Exh. 1.

The developer appealed the Board's decision to the Committee on July 11, 2024. The hearing commenced with the initial conference of counsel on August 1, 2024. On September 25, 2024, the presiding officer granted the motion of Joseph Moriarity and David Vlacich, two homeowners whose properties abut the project site, to participate as interested persons pursuant

to 760 CMR 56.06(3)(c). Pursuant to 760 CMR 56.06(7)(d)(3), the parties negotiated a pre-hearing order, which the presiding officer issued on October 8, 2024.[2] The parties submitted pre-filed direct and rebuttal testimony of five witnesses. On April 29, 2025, the developer moved to strike the pre-filed testimony of two of the Board's witnesses, Sean Reardon and Scott Horsley, which the presiding officer denied in an order dated July 8, 2025.

A final pre-hearing conference was held on August 12, 2025. A site visit and one day of hearing for the cross-examination of witnesses took place on August 19, 2025. 86 exhibits were entered into evidence at the hearing, including four exhibits (Exhibits 80, 81, 85 and 86) that were admitted *de bene* at the start of the hearing with a deferred ruling.[3] *See* Section III, *infra*. The parties submitted post-hearing briefs, with reply briefs filed on October 20, 2025. Copies of Exhibits 85 and 86 were filed electronically in accordance with the Committee's rules on electronic filing on November 6, 2025, at which time the evidentiary record was deemed complete and the hearing terminated, pursuant to 760 CMR 56.07(e)(9). [4]

The Board and Interested Persons requested the issuance of a proposed decision, as well as an opportunity for oral argument before the Committee in accordance with G.L. c. 30A, § 11(7) and 760 CMR 56.06(e)(9) and 56.06(7)(f). The Committee issued a proposed decision, and the Board and Interveners filed joint objections thereto. The developer did not file any objections or comments. The motion for oral argument before the Committee is denied.

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[2] The Pre-Hearing Order was amended on November 19, 2024, and May 13, 2025, to reflect changes in the parties' witnesses and the hearing schedule. The site visit and hearing dates were continued several times upon the joint or assented-to motions of the parties to pursue possible alternative dispute resolution.

[3] 310 CMR 22.00 was originally listed as Proposed Exhibit O. We routinely accept relevant current state regulations as applicable law in our proceedings without their being introduced into evidence. *See Wall Street Dev. Corp. v. Walpole Zoning Bd. of Appeals,* No. 2021-04, slip op. at 16 n.10 (Mass. Housing Appeals Dec. Feb. 28, 2024), citing G.L. c. 30A, § 6 ("[t]he contents of the Massachusetts Register shall be judicially noticed and, without prejudice to any other mode of citation, may be cited by volume and page number"); *see also Commonwealth v. Bones,* 93 Mass. App. Ct. 681, 685 (2018), *rev. den.,* 480 Mass. 1109 (2018) (stating courts are required to take judicial notice of, among other things, the Code of Massachusetts Regulations); *Perini Corp. v. Building Inspector of North Andover,* 7 Mass. App. Ct. 72, 78 n.10 (1979) (stating court can take notice of regulations accessible to it as a state publication) and 760 CMR 56.06(8)(b)(1) ("[o]fficial notice may be taken of such matters as might be judicially noticed by the courts of the United States ….").

[4] The Board and Interested Persons submitted a joint post-hearing brief and reply brief, referred to herein as "Board brief" and "Board reply."

II. FACTUAL BACKGROUND

The project is a 28-unit home ownership townhouse development with six buildings in total, located at the end of Darwin Lane, a public way that connects to Common Street in the Town's Residence B Zoning District[5] and Water Resource Protection Overlay District (WRPOD). Pre-Hearing Order, p. 2; Exhs. 48, Sheet C-2; 67, ¶ 8. The project site covers approximately 3.45 acres of land, and has approximately 100 feet of frontage on Darwin Lane, a cul-de-sac. Pre-Hearing Order, p. 2; 68, ¶ 8. Access to the project will be provided by a road connecting to Darwin Lane between the abutting lots of Mr. Vlacich at 31 Darwin Lane, northeast of the project site, and Mr. Moriarty at 28 Darwin Lane to the east. Exh. 48, Sheets C-2, C-3. Darwin Lane runs approximately 865 feet from the intersection with Common Street to the cul-de-sac and has a paved width of approximately 26 feet. Exhs. 67, ¶ 8; 30, p. 1. Drainage on Darwin Lane is directed to two existing infiltration basins located behind houses at 27 and 31 Darwin Lane. Exh. 30, p. 1. The project will be served by Town water and sewer: an existing eight-inch diameter water main on Darwin Lane will be extended into the development, and an existing sewer main on Darwin Lane will also be extended and connected to a proposed sewage lift station at the project. Exhs. 30, p. 2; 67, ¶ 19-20.

The project site abuts several residential lots to the north and southeast. Exh. 48, Sheet C-2. To the west, the project abuts property owned by the Town of Walpole, which is a wellhead protection zone for the Town's Washington Well #5 (also identified as Well 08G), a source of public drinking water; the Town's abutting lot is categorized as a Zone I of the WRPOD and as defined in 310 CMR 22.02 (Drinking Water Regulations). 310 CMR 22.02(1): *Zone I*; Exhs. 1, p. 4; 30, p. 2; 48, Sheet C-2; 67, ¶ 16; 68, ¶ 15; 69, ¶ 4. The project itself lies within a Zone II wellhead protection area as defined in 310 CMR 22.02, which is also an "Area 1" as defined in the WRPOD bylaw.[6] Exhs. 21, p. 2; 67, ¶ 16; 67(i); 69, ¶ 4; 70, ¶ 4; Tr. I, 64. The project site is wooded, presently undeveloped, and slopes downward approximately 40 feet to the southwest toward a set of power transmission lines, School Meadow Brook, and associated wetlands. Exhs. 68, ¶ 8; 70, ¶ 4. It is underlaid by deposits of sand and gravel, and swamp deposits that form a

[5] A Residence B District is an area for medium density and single-family residential land use. Exh. 2, p. 14 (§ 4(2)(A)(3)).

[6] As discussed below in note 29, the parties dispute whether part of the project is also within Zone I under 310 CMR 22.02.

productive aquifer along School Meadow Brook, a source of drinking water for the Town. Exh. 68, ¶ 8. The project will result in impervious coverage well above the 15% identified in the state regulation as the threshold above which a system of artificial recharge is required so there will be no degradation of groundwater. Exhs. 67, ¶ 34; 69, ¶, 6.[7]

Additional facts are discussed throughout the decision below.

III. DISPUTED EXHIBITS

The developer sought to admit eleven contested exhibits at the start of the hearing, originally marked as Exhibits A through L.[8] The Board sought to admit three contested exhibits, originally marked as Exhibits M through O. Following the admission of several contested exhibits by agreement of the parties at the beginning of the hearing, four exhibits remained contested.[9] The presiding officer admitted the four exhibits *de bene* at the hearing, heard oral argument on their admissibility, deferred rulings, and invited the parties to provide any additional argument in their briefing. The four exhibits were marked as Exhibits 80, 81, 85, and 86.

As an administrative body, the Committee has discretion to admit evidence that may not be admissible in a court; the credibility and weight afforded such evidence is a matter for the Committee. *See* G.L. c. 30A, § 11(2); *River Marsh, LLC v. Pembroke*, No. 2019-04, slip op. at 4 (Mass. Housing Appeals Comm. Apr. 11, 2024). In considering admitting evidence that is exclusively hearsay in administrative proceedings, the question is not whether it is admissible under judicial rules of evidence, but whether the evidence has indicia of reliability and probative value. *See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n*, 401 Mass. 526, 530 (1988); *River Marsh, LLC v. Pembroke Zoning Board of Appeals,* No. 2019-04, slip op. at 4 (Mass. Housing Appeals Comm. Feb. 28, 2024); *104 Stony Brook, LLC v. Weston*, No. 2017-14, slip op. at 8-9 (Mass. Housing Appeals Comm. June 22, 2023). The admission of hearsay is

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[7] Board's witness testified the project would result in 46.6%, while the developer's witness testified to 44.8%, but he also agreed that his number was "very close" to the Board's number. Exh. 67, ¶ 34; Tr. I, 99.

[8] One of the developer's proposed exhibits, Proposed Exhibit D, is a duplicate of Proposed Exhibit A and was removed by agreement.

[9] The parties agreed to the admission of Proposed Exhibits A through G as Exhibits 73 through 79. Proposed Exhibits J, K, and L were admitted by agreement as Exhibits 82, 83, and 84, respectively.

discretionary under the more relaxed rules of evidence governing administrative proceedings, and the Committee is "experienced in evaluating opinion testimony and determining the weight to be given to the supporting evidence." *Weston*, No. 2017-14, *supra*, slip op. at 8-9, citing *100 Burrill Street, LLC v. Swampscott*, No. 2005-21, slip op. at 2 n.2 (Mass. Housing Appeals Comm. June 9, 2008); *see Mattbob, Inc. v. Groton*, No. 2009-10, slip op. at 4 (Mass. Housing Appeals Comm. Dec. 13, 2010) (Committee may allow hearsay nature of evidence to affect weight given to it).

Exhibit 80 is a list of special permits issued by the Walpole Planning Board pursuant to the WROPD bylaw: 17 from 2013-2024 and three before 2013, with copies of each decision. The Board initially objected to Exhibit 80 as hearsay, stating it had only received the list of the special permit decisions, but not copies of the decisions themselves, at least five days before the hearing. Tr. I, 10-11. The developer clarified that the decisions had been timely provided to the Board but agreed the exhibit could be admitted *de bene* to provide opposing counsel an opportunity to review and address whether they would be fully admitted later. Tr. I, 12. Both parties agreed that if the documents were public records, they would be admissible. At the conclusion of the hearing, the Board's counsel agreed to their admission into evidence. Tr. I, 144. Exhibit 80 is admitted into evidence.[10]

Exhibit 81 is an environmental resources evaluation of the project site, dated August 4, 2021, prepared by EcoTec, Inc. Environmental Consulting Services for the developer. The review included an onsite inspection and provided descriptions of the site topography, vegetation, wetlands, water supply protection areas, and protected species. Exh. 81. At the hearing, the Board objected to this exhibit as hearsay, arguing it is a report from a witness that should have been identified as an expert available to be cross-examined. Tr. I, 16. The developer argued it did identify a wetlands science expert witness, Dr. Jacobs, and that this report, Exhibit 81, is part of the universe of materials and files that were reviewed by their expert witnesses. Tr. I, 16.[11] It argued any objections to the exhibit are based more on weight and credibility rather than inadmissibility. Tr. I, 17. Exhibit 81 is admitted and will be afforded such credibility and

[10] The Board counsel's agreement to Exhibit 80 was subject to confirmation of the identity of the documents. The presiding officer asked the Board's counsel to confirm in writing that there were no objections to Exhibit 80 after an opportunity to review. Tr. I, 144. He provided no further information on this point.

[11] However, Dr. Jacobs does not appear to specifically cite or refer to this report in his pre-filed testimony.

weight as determined by the Committee in its discretion. *See River Stone, LLC v. Hingham*, No. 2016-05, slip op. at 4 (Mass. Housing Appeals Comm. Sept. 23, 2022).

Exhibit 85 is an email exchange between the Town's Director of Public Works and Catherine Sarafinas-Hamilton, an employee of the Massachusetts Department of Environmental Protection (DEP) Drinking Water Program. The Town contacted DEP for comments or guidance regarding any potential impacts the project may have on the Town's public water supply. Exh. 85. The DEP employee stated the Town adopted its WRPOD bylaw consistent with DEP's regulations at 310 CMR 22.21(2), and that both the Drinking Water regulations and the WRPOD bylaw limit the impervious surfaces of residential developments, and that exceeding the limit of 15% or 2500 square feet of lot coverage on a parcel requires a system of artificial recharge. She further confirmed the project is adjacent to the Zone I area of Well #5 and is in a Zone II as defined under the Drinking Water Regulations. The email exchange is brief: the DEP employee did not provide specific commentary on the project itself, but noted that the considerations of the Town's Board of Water and Sewer Commission and the Board's peer review consultant "are consistent with protecting public drinking water quality and are supported by [DEP's] Drinking Water Program; in particular fencing the Zone I, reducing fertilizer use, and not locating contaminated snow piles near the well." Exh. 85. At the hearing, the Board argued Exhibit 85 should be admitted because the Committee "commonly introduces evidence from [DEP] without requiring a subpoena" as it is a state agency, and the individual had been clearly identified. Tr. I, 22. The developer argued Exhibit 85 is hearsay, even if it was reviewed or relied upon to support an expert witness' opinion. Tr. I, 21. To the extent her testimony was necessary, the developer stated the Board should have called the employee as a witness. Tr. I, 21-22. Exhibit 85 is admitted and will be afforded such credibility and weight as determined by the Committee in its discretion. *See Hingham*, No. 2016-05, *supra*, slip op. at 4.

Exhibit 86 is a short memo from the Town's Board of Water and Sewer Commission to the Board dated May 23, 2022, summarizing its concerns and comments on the project. Specifically, the Commission recommended several conditions to be imposed should the project be approved, such as requiring fencing along the Zone I boundary, a reduction in proposed units, limiting excavation, handling of snow removal, and restrictions on the use of fertilizer. The Board argued Exhibit 86 should be admitted as a public record from the Commission, which provided comments as part of the review process before the Board. Tr. I, 23. The developer

objected to these exhibits as hearsay and distinguished between public records and documents that are official documents created by a public entity. Tr. I, 21. As this was a memorandum to the Board, and is a public record similar to Exhibit 80, Exhibit 86 is admitted into evidence.

IV. MOTION TO DISMISS FOR LACK OF JURISDICTION

On August 18, 2025, the Board move to dismiss the appeal for lack of jurisdiction. At the start of the hearing on August 19, 2025, the presiding officer heard oral arguments on the motion, deferred the ruling, and directed the parties to incorporate further arguments into their post-hearing briefs. Tr. 5-6.

One ground relied on by the Board in its denial of the comprehensive permit is the developer's alleged failure to satisfy the requirements of the state Drinking Water regulations, specifically 310 CMR 22.21(2)(b)7. Board Motion to Dismiss, p. 1; Exh. 68(o). 760 CMR 22.21(2)(b)7 states that wellhead protection zoning and non-zoning controls submitted by a municipality to the DEP, pursuant to 310 CMR 22.21(1)(a-m), shall prohibit certain land uses within wellhead protection Zones II or III, unless they are designed in conformance with specific performance standards. In this case, the Board argues the developer failed to demonstrate compliance with § 22.21(2)(b)7 for its proposed land use that "result[s] in the rendering impervious of more than 15% or 2500 square feet of any lot or parcel, whichever is greater, unless a system for artificial recharge of precipitation is provided that will not result in the degradation of groundwater quality." 310 CMR 22.21(2)(b)7.

Noting that the Committee is limited under Chapter 40B to granting waivers of local rules and regulations, but not state laws, the Board asserts the restrictions imposed on the project site pursuant to 310 CMR 22.00 cited above are statewide requirements that establish the local municipality as the permitting authority through 310 CMR 22.21(2)(a) and 22.21(2)(b). Board brief, p. 12; Board reply, p. 3; Tr. I, 34. It argues that if DEP was the entity enforcing those wellhead protection regulations, "there would be no question that [the Committee] cannot override [DEP's] enforcement decisions." Board brief, p. 12. Under this structure, DEP does not review or approve stormwater systems outside of wetland areas but instead relies on local boards to enforce drinking water regulations codified in their local bylaws and regulations. Board brief, p. 13. In the Board's view, compliance with the Town's WRPOD bylaw and groundwater protection regulation is required by state law, and the Board has been designated the permitting

authority under the state regulations and, as such, the Committee should defer to the Board as it would any other state agency. Board reply, p. 2-3.[12]

The Town has implemented both a zoning control through its WRPOD, and a non-zoning control in the form of its groundwater protection regulation. Board brief, p. 13. The Board asserts that because it acted as the designated local permitting authority pursuant to 310 CMR 22.21(2)(b), essentially in DEP's place, its decision is not reviewable by the Committee, as a decision by DEP would also not be reviewable. Board brief, p. 13.

The developer first argues that the Board did not properly raise or preserve the jurisdictional issue in the motion to dismiss[13] or local concerns relating to the Groundwater Protection Regulation in the Pre-Hearing Order and instead listed only the expectation that it may file an appeal of the Committee's safe harbor ruling or a motion to dismiss if the developer has not complied with Massachusetts Environmental Policy Act (MEPA) and Environmental Notification Form (ENF) filing requirements. Developer brief, p. 7. And, on the merits, the developer asserts the Drinking Water Regulations do not strip the Committee of any jurisdiction to hear this appeal. Developer brief, p. 8. The regulation relied on by the Board, 310 CMR 22.21, imposes requirements that a municipality enact zoning controls for certain uses of land. *Id*. 310 CMR 22.21(1) provides the approval process for the construction, expansion, or replacement of a public water supply, and this process includes the implementation of local zoning and non-zoning controls. *Id*. The regulation requires local officials, when applying for state approval of the well as a public water source, to confirm that local "zoning and nonzoning controls" are in place that meet the state requirements to prohibit identified land uses unless specified standards are met, in order to protect water quality.[14] Here, the Town has enacted the WRPOD as part of its zoning bylaws. Developer brief, p. 8, citing Exh. 2, § 12. Therefore, the developer argues, the

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[12] *See* § VII.A.2.c and note 15, *infra*, for further discussion on the Board's arguments relating to the Town's local groundwater protection regulation.

[13] For the reasons stated in the Board's motion and brief, we consider its arguments. *See* Board brief, pp. 12-13.

[14] The DEP Drinking Water Regulations encompass the possibility of exceptions since they require "written notice to the Department of any and all local by-laws, ordinances, rules and regulations that allow for the grant of a variance, waiver or exemption from any of the wellhead protection zoning or nonzoning controls submitted to the Department…." 310 CMR 22.21(2)(c). While the Town has implemented a special permit provision in its local bylaw, it does not provide for variances or other exceptions.

WRPOD bylaw as a local zoning bylaw is incorporated into the comprehensive permit application and properly within the Committee's jurisdiction. Developer brief, p. 9.

While the Board is correct that adjudicating compliance with state laws and regulations is not within the Committee's jurisdiction, at issue in this matter is a local zoning bylaw, the WRPOD, and a local Board of Health groundwater protection regulation, which the Board contends impose stricter requirements than those established in the state Drinking Water Regulations.[15] Board brief, pp. 3-4, 10-11. The Board argues these two local provisions protect the Town's public drinking water supply by limiting the amount of a lot's impervious surface coverage to no more than 15%, or 2,500 square feet (s.f.), whichever is greater, unless it can be demonstrated that the quality of the underlying groundwater will not be degraded. Board brief, pp. 3-4. The WRPOD requires a special permit for such use, while the groundwater protection regulation is administered by the Board of Health.

A comprehensive permit proceeding is a proceeding to determine whether the development of a project of low or moderate income housing should be approved or denied. As part of that determination, a board, and on appeal, the Committee, examine whether a board's approval or denial of a comprehensive permit is consistent with local needs, in essence, whether there are valid local concerns necessitating the denial of requested waivers or the impositions of

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[15] The Board argues its local Board of Health Regulation relating to groundwater protection, Chapter 665, §§ 665-1 – 665-7 of its general bylaws, imposes stricter standards than applicable state regulations. Although the Board asserts the Board of Health regulation is a local requirement that is "stricter than state standards," and imposes "stricter local standards than the state," as discussed below, the Board has not shown how the Board of Health groundwater protection regulation is in fact stricter than the state Drinking Water Regulation. Board brief, pp. 3-4.

The developer counters the Board did not include this issue in the Pre-Hearing Order, and instead only identified the WRPOD bylaw as a local requirement or regulation supporting its asserted local concerns. Developer brief, pp. 18-19; Developer reply, p. 9.

However, although the Board did not identify the Board of Health regulation in the Pre-Hearing Order, we note that neither the Pre-Hearing Order nor any other order explicitly states that any issues not included would be considered waived. The Groundwater Protection bylaw is almost identical to the WRPOD, which allows higher amounts of impervious coverage of a lot if the integrity of the underlying groundwater resources will not be degraded, and the parties' arguments as they relate to the applicability of the WRPOD bylaw equally apply to the Groundwater Protection bylaw. Therefore, we consider the Board's arguments relating to the Groundwater Protection bylaw. *See, e.g.*, Exh. 72, ¶ 23 (Dr. Jacobs testifying Groundwater Protection bylaw entirely redundant of WRPOD bylaw requirements). The Groundwater Protection bylaw is also identical to the Drinking Water Regulations. *See* 310 CMR 22.21(2)(b)7.

conditions, that outweigh the need for affordable housing. G.L. c. 40B, §§ 20, 22; 760 CMR 56.05(4)(a).[16]

In this appeal, the question of compliance with state requirements is addressed in the developer's prima facie case, which we discuss below. That DEP has required municipalities to establish local zoning or non-zoning controls does not deprive this Committee of jurisdiction to review local requirements that are stricter than state law. The Board must justify its denial of the comprehensive permit by identifying a valid local concern that supports the denial, and that such a concern outweighs the regional affordable housing need. *See Zoning Board of Appeals of Holliston v. Housing Appeals Comm*., 80 Mass. App. Ct. 406, 417-419 (2011). The Board must show that a local requirement is stricter than such state standards and explain its purpose and applicability to the proposed project in order to demonstrate a valid local concern. *See Weston*, No. 2014-10, slip op. at 30 (Mass. Housing Appeals Comm. Mar. 15, 2021).[17] Therefore, there are still issues within the Committee's jurisdiction in this matter, and the Board's motion to dismiss is denied.

Finally, to the extent the Board argues that the Stormwater Handbook requires compliance with all local bylaws and regulations, conferring on those provisions the authority of state law, that theory is mistaken. *See* Board brief, pp. 10, 13-15. "In 1996, the Massachusetts [DEP] issued the Stormwater Policy that established Stormwater Management Standards aimed at encouraging recharge and preventing stormwater discharges from causing or contributing to the pollution of the [waters] of the Commonwealth." Exh. 121, Stormwater Handbook Vol. I, p. 1. These Stormwater Standards have been codified as regulations. *See, e.g.,* 310 CMR

[16] The Board asserts, without citation to authorizing language, that it is the designated local permitting authority under 310 CMR 22.21(2)(b) in place of DEP, suggesting a role similar to that of a local conservation commission addressing state wetlands requirements. *See* Board brief, p. 12; Board motion to dismiss, p. l. *But see generally* 310 CMR 22.03 (including explicit designations for DEP enforcement of violations of this regulation). If a local zoning board is the entity expressly designated to enforce a state regulation and to include its determination on that issue as part of its comprehensive permit decision, in that narrow context, the Committee should be empowered to review it. For this reason, we have noted our acceptance of credible testimony that the project complies with the Drinking Water Regulation. *See* note 44, *infra.*

[17] *See Rising Tide Dev., LLC v. Sherborn*, No. 2003-24 (Mass. Housing Appeals Comm. Mar. 27, 2006) (noting that "…there are specific state regulations for wastewater treatment facilities and open space in a Zone-II area, and those regulations will be enforced in any case").

10.05(6)(k; 314 CMR 9.06(6)(a).[18] "In 1997, MassDEP published the Massachusetts Stormwater Handbook *as guidance on the Stormwater Policy*." Exh. 121, Stormwater Handbook Vol. I, p. 1. (emphasis added). Though not only are the Stormwater Standards included as part of DEP regulations and the Stormwater Handbook is also referenced in the state regulations, the language cited by the Board appears in a table in the Handbook, and not in Standard 6. *See* Exh. 121, p. 2; 310 CMR 10.05(6)(k)(6).

The Stormwater Handbook, in its explanation of Stormwater Standard 6, states that "[p]roponents must comply with local source water protection ordinances, bylaws, and regulations." Stormwater Handbook, Vol. I, Table CA 3. [19] Regardless of whether compliance with local rules is a requirement of the Handbook or the state regulations in which it is referenced,[20] that broad requirement does not deprive the Committee of our ability to waive local rules and regulations pursuant to Chapter 40B. The Handbook does not prohibit waiver of local rules, and to imply such a prohibition would allow municipalities to avoid their Chapter 40B responsibilities by enacting unreasonably restrictive requirements that prohibit affordable housing development.[21] Moreover, to the extent the Handbook conflicts with Chapter 40B, Chapter 40B, a state statute, would prevail over guidance issued or regulations promulgated by DEP. *See Telles v. Comm'r of Ins.*, 410 Mass. 560, 564 (1991) ("an administrative board or officer has no authority to promulgate rules and regulations which are in conflict with the

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[18] The Stormwater Handbook states, the ten "Stormwater Management Standards have been incorporated in the Wetlands Protection Act Regulations, 310 CMR 10.05(6)(k) and the Water Quality Certification Regulations, 314 CMR 9.06(6)(a)." *Id.*

[19] Notably, that same table also provides that "Developers can comply with these land use controls by designing, constructing, operating and maintaining a stormwater management system in compliance with the Stormwater Management Standards."

[20] *See* 301 CMR 26.00 (Coastal Pollutant Remediation Program); 310 CMR 10.00 (Wetlands Protection); 310 CMR 27.00 (Underground Injection Control Regulations); 314 CMR 9.00 (Water Quality Certification); 974 CMR 4.00 (Devens Enterprise Commission Industrial Performance Standards). Notably, the Handbook is not referenced in 310 CMR 22.00, the Drinking Water regulations that are at issue here.

[21] In affirming a Committee decision, the Superior Court recently rejected a similar argument based on state law. *See Town of Manchester-By-The-Sea v. Housing Appeals Comm.*, No. 2577CV0002, slip op. at 22-23 (Essex Super. Ct. Feb. 11, 2026) ("to rule that a municipality can bar use variances in its zoning bylaws and then point to G.L. c. 40A, § 10, as a means to prevent the construction of affordable housing would entirely swallow the Legislature's long recognized intent in enacting [Chapter 40B which] is to provide relief from exclusionary zoning practices which prevented the construction of badly needed low and moderate income housing in the Commonwealth") (cleaned up).

statutes or exceed the authority conferred by the statutes by which such board or office was created"), quoting *Bureau of Old Age Assistance of Natick v. Commissioner of Pub. Welfare*, 326 Mass. 121, 124 (1950).

Moreover, DEP's regulations provide that "310 CMR 10.21 through 10.37 do not change the requirement of any other Massachusetts statute or by-law. A proposed project must comply with all *applicable* requirements of other federal, state and local statutes and by-laws…." 310 CMR 10.24(4)(a) (emphasis added). DEP's regulations are clear that the Drinking Water Regulations do not change or supersede the law of Chapter 40B. *See id*. The Drinking Water Regulations require only that the developer provide a system for artificial recharge of precipitation that will not result in the degradation of groundwater quality. *See* 310 CMR 22.21(2)(b)(7).

As discussed below, we find the developer's project design will comply with the local rules and requirements in the form of the Town WRPOD and Groundwater Protection bylaw.[22]

V. 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 applicable 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, LLC v. Weston*, No. 2017-14, slip op. at 12-16 (Mass. Housing Appeals Comm. June 22, 2023), *aff'd sub nom. City of Cambridge v. Housing Appeals Committee, et al.*, No. 2381CV02105 (Middlesex Super. Ct. June 10, 2025) *appeals docketed,* Nos. 2025-P-0986, 2025-P-1007 (Mass. App. Ct. Aug. 12, 2025); *SLV School Street, LLC v. Manchester By-The-Sea*, No. 2022-14 (Mass. Housing Appeals Comm. Dec. 3,

[22] *See Surfside Crossing, LLC v. Nantucket,* No. 2019-07 (Mass. Housing Appeals Comm. Apr. 13, 2026), decided today, which addresses the same Drinking Water Regulation and its relationship to local requirements.

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, LLC v. Pembroke*, No. 1019-04, slip op. at 6-10 (Mass. Housing Appeals Comm. Apr. 11, 2024). 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).[23] 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. *See id.,* slip op. at 12 (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); *Weston, supra,* No. 2017-14, slip op. at 12-16.[24]

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[23] Alternatively, a developer may prove that local requirements and regulations have not been applied as equally as possible to subsidized and unsubsidized housing. G.L. c. 40B, § 20; 760 CMR 56.07(2)(a)4. 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. 3; *see* Section VIII, *infra*.

[24] 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, it would not be sufficient 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." *Sunderland, supra,* No. 2008-02, slip op. at 9; *Canton Property Holding, LLC v. Canton*, No. 2003-17, slip op. at 22 (Mass Housing Appeals Comm. Sept. 20, 2005) (expert testimony that design will comply with state stormwater management standards is sufficient to establish prima facie case). *See also Oxford Housing Auth. v. Oxford*, No. 1990-12, slip op. at 5 (Mass. Housing Appeals Comm., Nov. 18, 1991) (plans must be sufficient to permit Committee to evaluate proposal with regard to aspects that are in dispute and to permit full cross-examination); *Watertown Housing Auth. v. Watertown*, No. 1983-08, slip op. at 5, 10-12 (Mass. Housing Appeals Comm. June 5, 1984) ("requirements are to be applied in a common sense, rather than an overly technical manner in context of establishing prima facie case"). And the Appeals Court has confirmed that "[i]t has long been held that it is unreasonable for a board to withhold approval of an application for a comprehensive permit when it could condition approval on the tendering of a suitable plan that would comply with State standards." *Holliston,* 80 Mass. App. Ct. 406, 416, citing *Board of Appeals of Hanover v. Housing Appeals Comm.,* 363 Mass. 339, 381 (1973).

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., Stony Brook, supra*, No. 2014-14, 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 Manchester-By-The-Sea,* No. 2022-14, *supra,* slip op. at 4; *104 Stony Brook, supra,* No. 2017-14, slip op. at 38, citing *Holliston,* 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).

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*, 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").

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 Scituate*, No. 2007-15, *supra*, slip op. at 3, citing *Board of Appeals of Hanover v. Housing Appeals Committee,* 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 Committee*, 66 Mass. App. Ct. 1109 (2006), F.A.R denied, *Board of Appeals of Woburn v. Housing Appeals Committee,* 447 Mass. 1107 (2006).

VI. DEVELOPER'S PRIMA FACIE CASE

In accordance with 760 CMR 56.07(2)(a)2, the developer was 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, p. 3. 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. 3.[25] As discussed below, our review of the developer's evidence demonstrates that the developer has provided detailed plans describing the project, including the proposed stormwater management system, providing evidence of future compliance with applicable state and federal law for the local concerns asserted by the Board. Such evidence was sufficient to meet the requirements for the prima facie case as established by the comprehensive permit regulation and Committee decisions.

A. Developer's Presentation

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. 9, 14. The developer presented testimony from John Glossa, P.E., its project engineer who has over 45 years of professional experience in civil engineering, including surveying and stormwater management, and previous employment as assistant town engineer and town engineer for the Towns of Norwood and Walpole, respectively. Exh. 67(a). Mr. Glossa prepared a site development plan for the project and testified the project is located outside the Zone I 400-foot radius surrounding the Town's Well #5 on the adjacent lot. Exhs. 48; 67, ¶¶ 8, 16. He stated he designed a proposed stormwater system that would capture, convey, and mitigate the surface runoff generated from the project's roofs, driveways, roadway, and other areas, and promote 100% infiltration of post-development stormwater. Exhs. 67, ¶¶ 10, 13-14, 18; 67(g). He testified the implementation of this stormwater system, together with the developer's Operation and Maintenance Plan (O&M Plan), would

[25] The Pre-Hearing Order, drafted by the parties and issued by the presiding officer, identified the following as the issue for which the developer was responsible for making a prima facie case: "whether the [p]roject encroaches on a nearby wellhead and results in any impact upon the quality of the Town of Walpole's drinking water." Pre-Hearing Order, p. 3 (Appellant/Applicant's Case).

result in rates of runoff from the project that would be less than the runoff experienced under the existing conditions. Exh. 67, ¶ 14. He stated he developed the proposed stormwater system in accordance with best management practices and in compliance with state requirements for such systems. Exhs. 67, ¶¶ 14, 18; 67(g) (Stormwater Report); Developer brief, p. 10. He also testified that the only potential impacts to water quality may result from stormwater discharge or lawn maintenance practices, and that the project's plan includes a qualified landscape company that provides greater control than the unregulated surrounding environment. Exh. 67, ¶ 23. Further, he stated the project's design already includes mitigation measures that will address potential sources of pollution to the greatest extent possible, with appropriate pavement and rooftop infiltration and the minimization of the open parking of automobiles. Exh. 67, ¶ 50. Finally, he testified that the project fully complies with the Town's WRPOD bylaw, which incorporates the requirements of the DEP Drinking Water Regulation. Exh. 68, ¶ 32, 34, 44, 60-61.

The developer also presented testimony from Dr. Bruce Jacobs, P.E., an engineer and environmental consultant whom it engaged to assess potential impacts to the Town's water supply and well system. Developer brief, p. 11; Exh. 68. [26] Dr. Jacobs has over 35 years of experience in civil engineering, including environmental engineering, water resource assessment, and stormwater management plan review. Exh. 68(a). Dr. Jacobs reviewed the NGI Report, the site plans, stormwater report, and other materials submitted to the Board as well as the materials prepared by Mr. Glossa. Exhs. 30-31; 68, ¶¶ 5-7, 15-17. He also prepared his own independent assessment of the aquifer impacts. Exh. 68, ¶ 6; 68(jj). Dr. Jacobs testified that the stormwater system designed for the project by Mr. Glossa fully complies with state stormwater standards and that project plans comply with industry best management practices. Exh. 68, ¶¶ 21, 26, 29, 34, 44, 60-61. In his view, the proposed project design mitigates to the greatest possible extent any concerns about stormwater infiltration negatively impacting groundwater supply. Exh. 68, ¶¶ 41-44.

[26] The developer originally engaged Jay Billings of Northeast Geoscience, Inc. to perform environmental and geological services for the project. Exh. 68, ¶ 3; Developer brief, p. 11, n.2. As part of those duties, Mr. Billings prepared an aquifer impact analysis report dated February 5, 2024 (NGI Report). Exhs. 68, ¶ 3; 68(c). Unfortunately, Mr. Billings died during the pendency of this appeal and the developer moved to replace him with Dr. Jacobs. *See* Order on Appellant's Assented-to Motion to Amend the Pre-Hearing Order, Nov. 19, 2024. The developer retained Dr. Jacobs to perform two analyses: to review Mr. Billings' NGI analysis for accuracy and reliability and to prepare an independent report assessing potential impacts of the project on the aquifer. Exhs. 68, ¶ 5, 15; 68(jj).

The Board argues that, although the comprehensive regulations allow for the submission of preliminary plans as part of its comprehensive permit application, the developer's burden for its prima facie case cannot be carried "on the adequacy of its plans alone." Board brief, p. 8, citing 760 CMR 56.05(2). In this case, the Board argues the developer has failed to provide critical and necessary information as to alleged effects of the project on groundwater quality and water supply. Board brief, pp. 8-9. Further, the Board asserts that the materials provided by Dr. Jacobs cannot be relied on to demonstrate compliance with applicable state and federal standards because he adopted the NGI Report prepared by Mr. Billings rather than producing his own report. Board reply, p. 3.

Mr. Glossa prepared a Stormwater Management System and Stormwater Management Report analyzing the pre-development and post-development stormwater flows and volumes associated with the project, following the guidelines provided by the DEP Stormwater Standards. Exhs. 67, ¶ 10; 67(g). He gave his professional opinion that the project meets all requirements of state stormwater standards and industry best practices and would mitigate volume and peak rates of runoff for storms up to and including the 100-year event under post-construction conditions. Exh. 67, ¶¶ 14, 31-37, 49, 52. He stated he designed a proposed stormwater system that would capture, convey, and mitigate the surface runoff generated from the project's roofs, driveways, roadway, and other areas, promoting 100 percent infiltration of post-development stormwater. *Id*., ¶¶ 13-14, 18. He testified the implementation of this Stormwater System, together with the developer's O&M Plan, would result in rates of runoff from the project that would be less than the runoff experienced under the existing conditions. *Id*., ¶ 14. Mr. Glossa's stormwater system design includes deep sump catch basins that will collect and trap sediment, grease, and oil, maintained by regular removal of the collected sediment. *Id*., ¶ 18. His design also includes the use of Stormceptor separator units, which are designed to remove sediment, grease, and oil and require regular maintenance to remove the trapped sediment. Exhs. 67, ¶ 18; 68, ¶ 20. Additionally, it includes drain manholes, headwalls, a drainage infiltration basin, drainage infiltration basis isolator units, a drainage infiltration trench and retaining walls. Exh. 44, p. 18. A portion of the roof drainage, which he and Dr. Jacobs argue is considered clean water under the Massachusetts Stormwater Handbook, will bypass the treatment of the Stormwater System

and be routed directly to an infiltration trench along the southern boundary of the property. Exh. 67, ¶ 22; Exh. 68, ¶ 21.[27]

The project's Stormwater System incorporates pretreatment and infiltration best management practices (BMPs), including deep sump catch basins, the Stormceptor units, porous pavement, an infiltration basin and infiltration trench. Exhs. 30;44; 68, ¶ 25. It does not include a treatment BMP. Dr. Jacobs testified that this provides adequate storage volumes to retain and recharge the first inch of runoff and remove the required percentage of total suspended solids (TSS) from runoff. Exh. 68, ¶ 27. He also reiterated that the proposed system will implement several of the BMPs provided in the Stormwater Handbook, referencing the deep sump catch basins, Stormceptors, porous pavement use, and the infiltration basin and infiltration trench. Exh. 68, ¶ 25. The developer further provided a report stating that stormwater will be treated in accordance with the Stormwater Handbook and would meet the specific requirements for percentage of TSS to be removed. Exh. 30. Mr. Glossa reiterated his opinion during cross-examination that the project's proposed stormwater management system is designed to adequately protect stormwater, and that it complies with the state Stormwater Standards. Tr. I, 97-98.

B. Board's Criticism

The Board argues that its witnesses have demonstrated that the project will not meet Stormwater Standard 6. As noted above, we review the prima facie case based solely on the developer's evidence. However, even assuming we were to consider the Board's evidence, it does not discredit the developer's prima facie case. As we have stated, in *Weston, supra,* No. 2017-14, slip op. at 12-15, and cases cited, we evaluate the sufficiency of the developer's prima facie case solely on the evidence it submits, not that of the opposing party. Although Committee precedent suggests 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. Based on the testimony provided by the developer's two experts, Mr. Glossa and Dr. Jacobs, the developed site plans, and evidence and documentation submitted regarding the

[27] Mr. Glossa stated that pursuant to Table RR of the Stormwater Handbook, roof runoff may be infiltrated without pretreatment because roof runoff is considered clean water and will bypass treatment to be routed directly to the infiltration basin, reducing flows in proposed treatment structure, and thereby increasing their capacity and longevity. Exhs. 67, ¶ 19, citing Exh. 8 (Table RR); 68, ¶ 21.

project's stormwater management system design, we find the developer met the standard required for a prima facie case. The Board's arguments regarding alleged impacts on the Town water supply 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.

VII. 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, p. 4.

The burden on the Board is significant: the fact that Walpole does not meet the statutory minima regarding affordable housing establishes a rebuttable presumption that a substantial regional housing need outweighs the local concerns in this instance. G.L. c. 40B, §§ 20, 23; 760 CMR 56.07(3)(a).

As stated in *Holliston,* "[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." 80 Mass. App. Ct. 406, 420. 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. *See Stoneham, supra*, No. 2014-10, slip op. at 31, citing *Scituate, supra*, No. 2007-15, slip op. at 26.

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 or 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. *Stoneham, supra,* 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. Board's Local Concern Presentation

1. Potential Impacts on Town Public Drinking Water Supply

The primary local concern at issue in this case relates to the project's alleged impact on the Town's drinking water supply and the applicability of the WRPOD bylaw, which the Board asserts is stricter than the Drinking Water Regulations.[28] Board brief, p. 3.

The Board provided testimony from two expert witnesses, Scott Horsley and Sean Reardon, P.E. Mr. Horsley is a water resources consultant with over 35 years of experience in water resources management, whose review focused on the project's potential impacts on public drinking water. Exh. 69, ¶¶ 1-2. Mr. Reardon is a professional engineer with over three decades of experience in civil engineering, including stormwater infrastructure, who was retained by the Board to peer review the developer's comprehensive permit application. Exh. 70, ¶¶ 1-2. Although Mr. Horsley acknowledged the project is in a Zone II, he stated it is only 500 feet from the closest well, and the short distance will provide less opportunity for attenuation of pollutants before they reach the well. Exh. 69, ¶¶ 4, 19. Mr. Reardon testified this project would be the closest development to any public water supply well in the Town. [29] Exh. 70, ¶ 4.

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[28] The Board also claimed that the Groundwater Protection Regulation is stricter than the Drinking Water Regulation. Board brief, p. 3.

[29] The Board appears to argue that a portion of the project falls within Zone I, as defined under 310 CMR 22.02(1) of the Drinking Water Regulations, rather than Zone II. *See* Board brief, p. 17-18. During cross-examination, the Board's counsel questioned Mr. Glossa regarding the project's property boundary with the abutting Town property. On some plans and maps, the Zone I 400-foot radius is shown as encroaching onto the project's lot. Exhs. 85; 70, ¶ 4; 30, Figures 2-3; Tr. I: 62, 66. The Board argues in addition to maps used in the Northeast Geoscience report provided to the Board (Exh. 30), the MassGIS database and the Town's official Assessor's Map also depict the project's boundary as extending into the Zone I radius. Board brief, p. 17. For example, on Figure 2 in the Northeast Geoscience report dated February 5, 2024, the Zone I wellhead protection area is marked as a blue circular line that crosses over the western corner of the project site. Exh. 30. The Board argues the discrepancy, where the project site is shown on some plans as falling partially within the Zone I, indicates it is too close to protected area for Well #5. Board brief, pp. 15-17.

However, as Mr. Glossa explained during cross-examination, he conducted a survey to measure the distance between the Well #5 wellhead and the project's property line and confirmed none of the project's lot area fell within the Zone I radius. Tr. I: 72: 9-73: 12. This data was used for preparation of his site plans and analysis, and Mr. Glossa at no time determined the project site extended into the Zone I area. Tr. I: 82. He did not prepare the plans used in the Northeast Geoscience report. Tr. I: 138. He testified that no part of the lot owned by the developer falls within the Zone I area, and that the property line instead

The DEP promulgated the Drinking Water Regulations, 310 CMR 22.00, for the protection of groundwater used as a source of public drinking water supply. This regulation sets forth the standards required for approval of a public water supply well and identifies specific protected wellhead zones. *See* 310 CMR 22.02(1); 22.21; Exhs. 30, p.2; 68, ¶ 30; 68(o); 71, ¶ 7. Zone I is the area within 400 feet of a well, an area that must be owned or controlled by the water supplier and on which land uses are prohibited other than those directly related to the provision of public drinking water or that have no significant adverse impacts on water quality. 310 CMR 22.02; 22.21(1)(a); Exh. 68, ¶ 30. As noted in § II, *supra,* the project abuts a Zone I area, which is the property owned by the Town where Washington Street Well #5 is located. Exhs. 68, ¶ 12; 68(f).

As defined under the Drinking Water Regulations, Zone II is the broader area of an aquifer that contributes water to a well under the most severe pumping and recharge conditions that can be realistically anticipated.[30] *See* 310 CMR 22.02. Sections 22.21(2)(a)–(b) prohibit certain land uses in a Zone II, such as landfills, automobile junkyards, and storage of hazardous materials. A Zone II area is one in which water-borne contaminants are presumed to have a relatively high chance of reaching the water supply well in that area, and therefore stormwater runoff must be treated to a greater degree than it is in non-protected areas. Exhs. 68, ¶ 30; 68(o); *see Rising Tide Development, LLC v. Sherborn*, No. 2003-24, slip op. at 19 (Mass. Housing Appeals Comm. Mar. 27, 2006). At issue in this case is the prohibition in a Zone II area of any "land uses that result in the rendering impervious of more than 15% or 2500 square feet of any

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follows the Zone I boundary line. Tr. I: 72: 9-12. We find Mr. Glossa's testimony on this point to be credible and accept it. The Committee is generally reluctant to rule on title questions that fall outside our jurisdiction. *See Cloverleaf Apartments, LLC. v. Natick*, No. 2001-21, slip op. at 7 n.3 (Mass. Housing Appeals Comm. Dec. 23, 2002); *Hamilton Housing Auth. v. Hamilton*, No. 86-21, slip op. at 89, (Mass. Housing Appeals Comm. Dec. 15, 1988) ("[t]he Committee does not have jurisdiction over land titles"). If there is a dispute over the correct property line, that is an issue left to the courts. *See Cloverleaf, supra,* No. 2001-21, citing *Billerica Dev. Co. v. Billerica*, No. 87-23, slip op. at 18-19 (Mass. Housing Appeals Comm. Jan. 23, 1992) In any event, we note that even if there were a boundary discrepancy, which we do not find, Mr. Glossa's testimony and evidence confirmed there is no development activity planned in the Zone I area, and therefore the asserted discrepancy has no relevance. Tr. I: 139: 6-8; Developer brief, p. 23; Developer reply, p. 11.

[30] A Zone II is bounded by the groundwater divides that result from pumping the well and by the contact of the aquifer with less permeable materials such as till or bedrock. In some cases, steams or lakes may act as recharge boundaries. In all cases, Zone II shall extend upgradient to its point of intersection with prevailing hydrogeologic boundaries…. The Zone II must include the entire Zone I area…." 310 CMR 22.02: *Zone II.*

lot of parcel, whichever is greater, unless a system for artificial recharge of precipitation is provided that will not result in the degradation of groundwater quality." 310 CMR 22.21(2)(b)7. The project itself is in a Zone II area. Exh. 70, ¶ 4.

a) Water Resource Protection Overlay District (WRPOD)

The Drinking Water Regulations provide a procedure for municipalities to submit to DEP for review local zoning and non-zoning controls relating to wellhead protection and approval. 310 CMR 22.21; Board brief, p. 3; Exh. 69, ¶ 7 (stating Drinking Water Regulations require towns to adopt Zone II wellhead protection regulations to protect public drinking water). Pursuant to 310 CMR 22.21, the Town adopted the WRPOD bylaw, which is Section 12 of the Town's current zoning bylaw. Exhs. 2, p. 85; 30, p 2.; 67(i); 70, ¶ 7. The WRPOD bylaw protects the quality and quantity of the Town's drinking water supply and defines distinct areas of aquifer recharge and land use limitations within those areas. Exhs. 2, p. 85; 30, p. 2; 68, ¶ 31.

The WRPOD delineates five areas of aquifer recharge, including a Zone I Wellhead Protection Area and an Area 1 Existing Water Supply Area. Exh. 2, p. 85. The WRPOD's Zone I Wellhead Protection Area encompasses the area surrounding a well out to a radius of 400 feet and is equivalent to the Zone I area defined in 310 CMR 22.00. Exh. 68, ¶ 31.[31] The WRPOD's Area 1 Existing Water Supply Area is consistent with the Zone II area defined in 310 CMR 22.00 and is defined as the "[a]rea of pumping influence of all existing municipal wells within the Town, confirmed by long-term pump test or by stabilized water levels after maximum duration pumping," and "[t]he cones-of-depression and respective areas of influence and recharged generated by the municipal wells after [180] days of continuous pumping at the currently utilized capacities…." Exhs. 2, p. 85; 68, ¶ 31; Tr. I, 64. The project lies within "Area 1" as defined under the WRPOD, equivalent to the Zone II. Exhs. 21, p. 2; 67, ¶ 16; 67(i); 69, ¶ 4; 70, ¶ 4; Tr. I, 64.

The WRPOD bylaw allows impervious coverage of more than 15% of a lot by special permit: "[e]ach of the following uses shall require a Special Permit: …(5) [a]ny residential use that will render impervious more than fifteen percent (15%) or two thousand five hundred (2,500) square feet of any lot, whichever is greater…." Exh. 2, p. 89, § 12(3)(C). Section 12(4)

[31] Section 12(2)(D)(1) of the Town Zoning Bylaw defines a Zone I Wellhead Protection Area as "[t]he protective radii around public water supply wells and well fields as defined by 310 CMR 22.02."

provides the procedure for issuance of special permits in the WRPOD, and lists the materials required to be submitted with the permit application. Exhs. 2, p. 90; 68, ¶ 33. Included in the list of required application materials are the following items:

- Where applicable, "all necessary engineering reports that demonstrate compliance with the Massachusetts Stormwater Policy, as amended;" Exh 2, p. 90 (§ 12(4)(A)(10));[32] and
- An "analysis by a technically qualified expert, such as a registered professional engineer, certifying that the integrity of the underlying groundwater resources will not be degraded." Exh. 2, p. 90 (§ 12(4)(A)(12)).

Pursuant to Section 12(4)(B), the special permit granting authority[33] transmits copies of the special permit application to various other local boards, including the Board of Health, who have 35 days to provide written recommendations. Failure to respond in writing creates a presumption that the agency has no comment on the project. *Id*. The special permit may be approved if the SPGA finds that the proposed use, among other things, "will not adversely affect an existing or potential water supply." Exh. 2, p. 91 (§ 12(4)(C)).

b) <u>Groundwater Protection</u>

The Town also adopted local Board of Health regulations, Chapter 665 of the Town Bylaw, titled "Groundwater Protection," pertaining to the protection of groundwater and the Town public drinking water. Exh. 69, ¶ 8; 69(a); Board brief, p. 3. The local Groundwater Protection regulation closely follows the WRPOD language and is identical to the Drinking Water Regulation language.

The Groundwater Protection regulation delineates different zones and areas similarly to the WRPOD. A Zone 2 area under the groundwater protection regulation is defined as: "[t]hat area of an aquifer which contributes water to a well under the most severe pumping and recharge conditions that can be realistically anticipated (180 days of pumping at approved yield, with no recharge from precipitation)…." Exh. 69(a) (§ 665-3). This Zone 2 definition is the same as an Area 1 Existing Water Supply Area under the WRPOD and as a Zone II area as defined in 310

[32] The Zoning Bylaws do not appear to define Massachusetts Stormwater Policy.

[33] The Planning Board is the special permit granting authority (SPGA) except if the requested special permit would expand, change, or otherwise modify a lawfully existing previously permitted use within an existing building, in which case the Board of Appeals shall be the SPGA. Exh. 2, p. 85, § 12(C).

CMR 22.00.[34] Prohibited in a Zone II are "any land uses that result in impervious cover of more than 15% or 2,500 square feet of any lot, whichever is greater…unless a system of artificial recharge or precipitation is provided that will not result in the degradation of groundwater quality." Exh. 69(a) (§ 655-4(E)).

To more clearly compare the similarities between the relevant regulations at issue, each section pertaining to the treatment of impervious coverage is provided below:

Regulation	Allowed Uses	Relevant Definition of Area Where Project is Located
DEP Drinking Water Regulation	"Wellhead protection zoning and nonzoning controls…shall collectively prohibit [in Zone II]…land uses that result in the rendering impervious of more than 15% or 2500 square feet of any lot or parcel, whichever is greater, unless a system for artificial recharge of precipitation is provided that will not result in the degradation of groundwater quality." 310 CMR 22.21(2)(b)7.	"Zone II means that area of an aquifer that contributes water to a well under the most severe pumping and recharge conditions that can be realistically anticipated (180 days of pumping at approved yield, with no recharge from precipitation)." 310 CMR 22.02: Zone *II*; Exh. 68(o).
WRPOD Bylaw	"…the following uses shall require a Special Permit[:] ,,,[a]ny residential use that will render impervious more than fifteen percent(15%) or [2,500] square feet of any lot, whichever is greater…." Exh. 2, p. 89, § 12(3)(C)(5)	"Area 1 Existing Water Supply Area: Area of pumping influence of all existing municipal wells within the Town, confirmed by long-term pump test of by stabilized water levels after maximum duration pumping. The cones-of-depression and respective areas of influence and recharge generated by the municipal wells after [180] days of continuous pumping at the currently utilized capacities." Exh. 2, p. 85, § 12(2)(D)(2); Exh. 67(i).
Groundwater Protection Bylaw	"Land uses that will result in impervious cover of more than 15% or 2,500 square feet of any lot, whichever is greater, are prohibited, unless a system of artificial recharge of precipitation is provided that will not result in the degradation of groundwater quality." Exh. 71(d): Walpole General Bylaw § 665-4(E).	Zone 2: "That area of an aquifer which contributes water to a well under the most severe pumping and recharge conditions that can be realistically anticipated (180 days of pumping at approved yield, with no recharge from precipitation)." Exh. 71(d): Walpole General Bylaw § 665-3; Exh. 69(a).

[34] Because the zone categories are essentially identical, the parties appear to use "Zone II" as a catchall for the area where the project is located throughout the testimony and briefs submitted, without making consistent distinctions between the following three categories, all of which are substantively similar, if not identical: 1) Zone II under the Drinking Water regulations 310 CMR 22.00; 2) an Area 1 of the WRPOD; and 3) a Zone 2 under the groundwater protection bylaw, which are substantially the same defined areas.

2. Whether the Town Has Stricter Local Rules Than the State Regulations

The Board argues the project's proposed impervious surface coverage exceeds 15% and will result in degradation of the groundwater quality and contamination of the integrity of the Town's public drinking water supply, in violation of its WRPOD and Groundwater Protection regulation. Both local regulations prohibit impervious lot coverage of more than 15% or 2,500 square feet, whichever is greater, unless there will be no degradation of the underlying groundwater quality, with the Groundwater Protection regulation specifying that a system of artificial recharge of precipitation be provided. Exhs. 2, § 12; 71(d). As discussed below, the Board claims both of these local bylaws are stricter than the state Drinking Water Regulations.

The Board must demonstrate there is a local concern that is protected by the Town's local regulation or requirement that is stricter than is required under state or federal law. *See Manchester-by-the-Sea*, No. 2022-14, *supra*, slip op. at 36, citing 760 CMR 56.02: *Local Requirements and Regulations* (defined as provisions that "are more restrictive than state requirements"); *see also Holliston,* 80 Mass. App. Ct. 406, 417, 420.

The Board has the burden of proving both the existence of such a local concern and that it outweighs the need for affordable housing. *Scituate*, *supra,* No. 2007-15, slip op. at 9 (Mass. Housing Appeals Comm. May 26, 2010). It is not sufficient to solely argue the project does not meet the local regulation: the Board must also demonstrate why the stricter local requirement must be applied to protect a local concern. *Green View Realty, LLC v. Holliston*, No. 2006-16, slip op. at 19, n.21 (Mass. Housing Appeals Comm. Jan. 12, 2009), *aff'd Holliston*, 80 Mass. App. Ct. 406 (2011). A board must provide evidence of how the proposed development would have a more detrimental impact if certain local requirements are waived than if it is built to state standards, and it must show that that impact is sufficiently great to outweigh the regional need for housing.

a) Whether the WRPOD Is Stricter Than the State Drinking Water Regulations

The parties disagree regarding whether the WRPOD bylaw is stricter than the state regulation. They both provided witness testimony opinion on the meaning and purpose of the WRPOD bylaw. The Board argues the bylaw imposes a stricter standard than the state Drinking Water Regulations in three ways. First, it alleges it restricts residential development in that particular district to only single-family dwellings where "no more than 15 percent (15%) … of

the building lot is rendered impervious" by right, while only allowing other uses, such as multi-family development, under a special permit. Board brief, p. 10, citing Exh. 2, p. 86 (§ 12(3)(A)(2)(d)); Tr. I, 100-101. In its view, this limits residential uses to applicable single-family dwellings, not multi-family developments. Board brief, p. 10-11. Second, it argues the WRPOD only authorizes impervious lot coverage of more than 15 % for those single-family residential uses by special permit and a finding by the special permit granting authority that the proposed use "will not adversely affect an existing or potential water supply." Board brief, p. 4, 11, citing Exh. 2, p. 91, §§ 12(3)(C)(5), 12(4)(C)(3) (stating the WRPOD bylaw, whether by right or special permit, imposes additional obligations on uses in a Zone II not found in the state regulation). It asserts that the developer's proposed stormwater system fails to meet the requirement under the WRPOD bylaw that the higher impervious lot coverage will not result in the degradation of the integrity of the underlying groundwater. Board brief, p. 11. Third, it argues that the WRPOD requires that all roof runoff from new construction must be recharged to groundwater. Tr. I, 101.

The Board relies primarily on the expert testimony of Mr. Reardon. He stated that the WRPOD bylaw is stricter than the state regulation in two respects: first, it only allows the development of single-family developments by right but does not allow multifamily developments like the project at issue here. Exh. 70, ¶ 7, citing Exh. 2, p. 86. Second, he stated it requires that "[a]ll roof runoff from new construction… shall be recharged to the groundwater. Exh. 70, ¶ 7, citing Exh. 2, p. 87 (§ 12(3)(A)(2)(d)).[35] He also testified that the WRPOD bylaw imposes a stricter impervious coverage limit than the Drinking Water Regulations: while under the state regulation, impervious coverage in a Zone II can exceed 15% if the applicant proves there is no resulting degradation of groundwater quality, he stated 15% is the maximum limit under the WRPOD "regardless of any impact to groundwater quality." Exh. 70, ¶¶ 5, 8.

[35] Section 12(3)(A)(2) states that "[t]he following uses are allowed by-right within the WRPOD, provided all necessary permits, orders, or approvals required by local, state or federal laws shall have been obtained…[in an] Area 1[:] Residential development of single family dwellings if such dwelling is connected to or is to be connected to the public sewer at the time of construction, such that no more than fifteen percent (15%) or [2,500] square feet, whichever is greater, of the building lot is rendered impervious. All roof runoff from new construction of any addition to an existing residence that adds more than [600] square feet of impervious cover to a building shall be recharged to the groundwater. The recharge system shall be designed by a Registered Professional Engineer and shall be capable of recharging at least the first [1] inch of runoff from the roof." Exh. 2, p. 86, (§ 12(3)(A)(2)).

Mr. Reardon's testimony did not provide a persuasive explanation of the bylaw. Although some uses are not specifically listed as allowed by right in an Area 1 under Section 12(3)(A)(2), certain uses, including residential uses rendering a lot more than 15% impervious, may be allowed by special permit if the applicant can certify the integrity of the underlying groundwater will not be degraded. Exh. 2, p. 89. He did not address the special permit provision of the WRPOD bylaw or how it conforms with his assertion that the WRPOD bylaw prohibits impervious lot coverage of more than 15% regardless of the impact to groundwater quality. He asserted that the developer has "sought a waiver to increase the impervious coverage" limit of the WRPOD bylaw, *see* Exh. 70, ¶ 9, although the WRPOD is not included in the developer's list of requested waivers, and the developer claims it can satisfy the WRPOD requirements. Exh. 4 Developer brief, p. 11. Mr. Horsley referred to a "maximum allowed impervious area" of 15% allowed under the WRPOD bylaw. Exh. 69, ¶ 6. Mr. Reardon testified that, because the project is in a Zone II area, the impervious surface area coverage is limited to no more than 15%. Exh. 70, ¶¶ 5-7.

The developer's experts, Mr. Glossa and Dr. Jacobs, disagree with Mr. Horsley's and Mr. Reardon's interpretation of the 15% impervious coverage threshold contained in the Drinking Water Regulations and the WRPOD bylaw. Exh. 71, ¶ 9. As the developer argues, both the Drinking Water regulations and the WRPOD bylaw allow for greater coverage *if* certain criteria are met. 310 CMR 22.21(2)(b) allows for more impervious coverage if "a system for artificial recharge of precipitation is provided that will not result in the degradation of groundwater quality." 310 CMR 22.21(2)(b)7; Exh. 71, ¶¶ 9-10, citing Exh. 70, ¶¶ 5-7. The WRPOD bylaw similarly allows for more than 15% impervious surface area in its corresponding Area I Existing Water Supply Area by special permit. Exhs. 2, p. 90; 67, ¶ 32; 68, ¶ 32; 71, ¶ 10; 72, ¶ 9. Section 12(4)(A)(10) of the WRPOD bylaw lays out the special permit application requirements, which includes, among other things, the submission of any necessary engineering reports that demonstrate compliance with the Massachusetts Stormwater Policy and Standards and an expert analysis that integrity of the underlying groundwater will not be degraded. Exh. 2, p. 90.

The Board, however, asserts that "all experts agreed" that the WRPOD and Groundwater Protection bylaws are more stringent than state standards. Board brief, p. 10, citing Exh. 69, ¶ 23; Exh. 70, ¶ 7, and Tr. I, 65-66. Upon review, Mr. Horsley testified only as to the "Walpole Health Regulation" as being more stringent and did not address the WRPOD bylaw. While Mr. Reardon

testified the WRPOD bylaw was stricter, his testimony on that point overall was general and did not clearly identify in what respects. Further, we do not read the exchange cited from Mr. Glossa's cross-examination as clearly stating agreement that the WRPOD bylaw is stricter.[36]

Mr. Glossa acknowledged the possibility that a municipality may impose stricter standards than state regulations, but he did not state he viewed the WRPOD bylaw as one such stricter bylaw. In a later exchange, he explicitly stated that he did not agree that the WRPOD bylaw is more restrictive than state requirements.[37]

The bylaw language relating to roof runoff addresses the use of single-family development, allowed by right in an Area 1: "residential development of single family dwellings…. All roof runoff from new construction or any addition to an existing residence that adds more than six hundred (600) square feet of impervious coverage shall be recharged to the groundwater." Exh. 2, p. 86, § 12(3)(A)(2)(d). The allowance, by special permit, of residential uses rendering more than 15% of a lot impervious does not contain similar conditional language. Exh. 2, p. 90, § 12(3)(C)(5). The three regulations at issue—the state Drinking Water Regulations, the WRPOD bylaw, and the Groundwater Protection bylaw—allow for residential development where more than 15% of the lot will be rendered impervious if a system for artificial recharge of precipitation is provided that will not result in the degradation of

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[36] "Q: Just to clarify further…. The fact is the Walpole bylaw for water protection has to be at least equally protective to the Code of Massachusetts Regulations, is that fair?
A: That's correct, yes.
Q: The municipality can be more restrictive but not less restrictive?
A: Yes."
Tr. I, 65-66.

[37] "Q: Do you agree with Mr. Reardon that the requirements of the [WRPOD] have the same 15 percent impervious coverage provision as the state regulations, but they are more restrictive than the state regulations in three respects…. One, it allows by right development of single-family dwellings but not multi-family dwellings. Two, requires "[a]ll runoff from new construction shall be recharged to groundwater. Also, that a third more restrictive respect is that under the state regulations impervious coverage within Zone 2 can exceed 15 percent if the applicant proves no degradation of water quality, while under the [WRPOD] 15 percent is the maximum limit of impervious coverage, regardless of impacted groundwater. You don't agree with that?"
A: No.
[…]
Q: What part do you not agree with?
A: All three."
Tr. I, 100-102.

groundwater quality.[38] Although Mr. Reardon argues the fact that the WRPOD bylaw only allows certain land uses by right and others by special permit makes it stricter than the state regulation, the criteria allowing such use—impervious coverage of more than 15% of a lot provided the groundwater will not be degraded—is the same as under the Drinking Water Regulations. *See* Exh. 70, ¶ 7.

While the Committee, as an administrative adjudicatory body, may at its discretion admit and hear testimony of local officials, including opinions on the proper interpretation of a bylaw, it is not required to give such interpretations deference in every instance. *Braintree, supra,* No. 2020-03, slip op. at 4-5. Instead, the Committee's role is to evaluate the testimony and assign the weight and credibility it deems appropriate. *Id.* Further, an incorrect interpretation of a bylaw by a local board or official is not entitled to deference, and the Committee should interpret the intent of the bylaw in light of its language. *Braintree,* No. 2020-03, *supra,* slip op. at 4-5, citing *Drummey v. Falmouth*, 87 Mass. App. Ct. 127, 130 (2015). Under § 12(3)(C)(5) of the WRPOD bylaw, *any* residential use in the WRPOD that will render impervious more than 15 percent or 2,500 square feet of any lot, whichever is greater, requires a special permit, and an applicant must submit an expert analysis certifying that the integrity of the underlying groundwater resources will not be degraded. Exh. 2, p. 90 (§12(4)(A)(12)) (italics added). This language tracks 310 CMR 22.21(2)(b)(7), which allows residential uses that render impervious more than 15% of the lot only if a stormwater system is provided that will not result in the degradation of groundwater quality. The state and local standards are the same, and requiring a special permit as the zoning control does not elevate the local bylaw to a stricter standard.[39] Even assuming the special permit requirement in the WRPOD that an expert submit analysis and certification to establish that the groundwater will not be degraded—is stricter than that in the Drinking Water Regulations, we find that the developer's submission met this requirement. Additionally, the

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[38] The developer has requested a waiver of the limitation in a Residence B zoning district to buildings of three units or fewer in order to construct multifamily housing. *See* Exh. 4 (List of Requested Exemptions and Waivers) (developer requests waiver of Table 5.B.3.d.iiii in Town zoning bylaw which prohibits the following use in a Residence B: "*Residential: dwelling for occupancy by more than three (3) families* ….").

[39] Even if the developer was seeking a waiver of any special permit requirements in this case, none is needed, as "[z]oning waivers are required solely from 'as-of-right' requirements of the zoning district where the project is located; there shall be no requirement to obtain waivers from the special permit requirements of the district." 760 CMR 56.05(7).

requirement that "[a]ll roof runoff from new construction…shall be recharged to the groundwater" may be stricter, but since it is addressed to single-family residential use, the Board has not shown that it is applicable.[40]

b) Even if the WRPOD Bylaw Is Stricter Than the State Regulation, the Board Has Not Shown That the Local Provisions Protect Local Concerns in a Manner that is not Protected by State Standards

Even if aspects of the bylaw were stricter than the state requirements, the Board has not carried its burden of proving the existence of a local concern that outweighs the need for affordable housing regarding those requirements. *See Hingham*, *supra,* No. 2016-05, slip op. at 37, citing *Scituate*, *supra*, No. 2007-15, slip op. at 25. Identifying the existence of a stricter bylaw is not sufficient: "[i]t is incumbent on the board…to identify a local interest protect by those aspects of the by-law that are stricter than the [state requirement] and demonstrate that such interest outweighs the regional need for low and moderate income housing." *Stoneham, supra*, No. 2014-10, slip op. at 31, citing *Holliston*, 80 Mass. App. Ct. 406. To justify a denial of a comprehensive permit on this basis, the board must identify a specific local concern that i) supports the denial; (ii) is not adequately addressed by compliance with state standards; and (iii) outweighs the regional need for housing. *Reynolds*, 88 Mass. App. Ct. 339, 348 (2015), citing *Holliston*, 80 Mass. App. Ct. 406, 417-419.

Demonstrating a project violates a stricter bylaw is not enough; a board must show how the local bylaw protects a local interest "over and above" the protections afforded by the state requirements. *See Stoneham*, *supra,* No. 2014-10, slip op. at 31, citing *Holliston*, 80 Mass. App. Ct. 406, 420. If the Board has not articulated the local concern, nor identified the specific applicable local requirement, and, where there is state regulation, has not shown a local requirement to be stricter than the state standard, nor explained the purpose of the stricter standard or 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. *See Stoneham*, *supra,* No. 2014-10, slip op. at 31.

[40] In any event, the developer must still comply with all applicable federal and state laws and requirements, and compliance with such is made a condition of any comprehensive permit the Committee orders to be issued.

c) The Groundwater Protection Regulation Is Not Stricter Than the State Drinking Water Regulations

Mr. Horsley's testimony focused primarily on the Groundwater Protection regulation.[41] He asserted that it is stricter than the state standard because it "prohibits [within Zone II wellhead protection areas] impervious coverage over 15% in order to protect groundwater quality near the wells." Exh. 69, ¶ 10. He stated it applies a "higher performance standard" to projects that exceed the 15 percent threshold, because the percentage of impervious surface coverage is "directly related to the mass loading of pollutants to groundwater." Exh. 69, ¶ 11. In other words, he testified "this project will generate three times the amount of stormwater pollutants compared to a project on the same property that met the 15 percent impervious cover requirement." *Id*., ¶ 11.

Mr. Horsley asserts the Groundwater Protection regulation places a burden on applicants, if their project will exceed more than 15% impervious lot coverage, to prove that it will not introduce greater loads of pollutants into the drinking water supply and degrade water quality. Exh. 69, ¶¶ 15, 20. In his view, the purpose of the Town Groundwater Protection regulation is to prevent degradation of the groundwater underlying the project site: "[t]he logic of the [Groundwater Protection regulation] is that if all properties within the contributing area (Zone II) comply with the 15% limit on impervious surfaces, and stormwater drainage is designed in compliance with the [Massachusetts] Stormwater Standards, that the cumulative pollutant load will be acceptable. However, if the amount of impervious surfaces significantly increases (for example, triples) that the pollutant load and risk of drinking water contamination would be unacceptable." Exh. 69, ¶ 18.

This provision appears to be consistent with the Drinking Water regulation, which allows for more than 15% impervious coverage if a "system for artificial recharge of precipitation is provided that will not result in the degradation of groundwater quality" in identical language. 310 CMR 22.21(2)(b)7. Mr. Horsley himself noted the language of the complete provision later in his testimony, stating that the local regulation provides "[l]and uses that result in impervious cover of more than 15% or 2,500 square feet of any lot, whichever is greater, are prohibited; unless a system of artificial recharge of precipitation is provided that will not result in the degradation of groundwater quality." Exh. 69, ¶ 10. Mr. Horsley did not otherwise explain how

[41] Mr. Reardon's prefiled testimony did not address the Groundwater Protection regulation.

this language shows the Town regulation is stricter than state requirements, where the language is the same. Nor did he provide specific evidence or support for his assertion that this project will generate three times the amount of stormwater pollutants compared to a project on the same property that does not exceed the 15% threshold. Exh. 69, ¶ 11.

Accordingly, we find that the Board has not demonstrated the Groundwater Protection regulation is stricter than the standard provided in the state Drinking Water Regulations. Both the state regulation and local Groundwater Protection regulation allow for uses that result in impervious coverage of a lot of more than 15% or 2,500 square feet, whichever is greater, unless a system of artificial recharge of precipitation is provided that will not result in the degradation of groundwater quality. The Groundwater Protection regulation does not contain any additional requirements, such as an expert analysis that the groundwater will not be degraded, that are included in the WRPOD bylaw. The language contained in both the state regulation and the local Groundwater Protection provisions is virtually identical:

Groundwater Protection Regulation - § 655-4(E)	Drinking Water Regulation – 310 CMR 22.21(2)(b)7.
"Land uses that result in impervious cover of more than 15% or 2,500 square feet of any lot, whichever is greater, are prohibited; unless a system of artificial recharge of precipitation is provided that will not result in the degradation of groundwater quality."	"Wellhead protection zoning and nonzoning controls…shall collectively prohibit the siting of…land uses that result in the rendering impervious of more than 15% of 2500 square feet of any lot, whichever is greater, unless a system for artificial recharge of precipitation is provided that will not result in the degradation of groundwater quality."

The Board has provided no evidence or testimony establishing how the Groundwater Protection regulation applies a stricter standard and therefore has failed to demonstrate a valid local concern under this regulation applicable to the project.

3. Project's Proposed Stormwater Management System

The Board argues the project's proposed stormwater management system design is insufficient and fails to comply with state Stormwater Standards, specifically Standard 6. The Board asserts Standard 6 explicitly requires compliance with any local rules and regulations, which includes any local regulations that are stricter than the state standards. Board brief, p. 10, citing Exh. 67(e), p. 10 ("[p]roponents must comply with local source water protection ordinances, bylaws, and regulations"). Therefore, it claims, because the project does not comply with the WRPOD bylaw or the Groundwater Protection regulation, it cannot comply with Stormwater Standard 6 and poses a danger to the Town's public water supply. Board brief, pp. 10, 11, 13. Since the developer already must comply with state requirements, the scope of the

Committee's review is limited to asserted local concerns based on local requirements and regulations. *See Holliston*, *supra,* No. 06-16, slip op. at 9-10 ("…our focus is on local concerns, and nothing in Chapter 40B suggests that we should consider environmental issues raised under state and federal law"); *see also 104 Stony Brook, supra*, No. 2017-14, slip op. at 28. More specifically, the local concerns analysis addresses only that part of the local bylaw that is stricter than the state requirement. *See Holliston*, 80 Mass. App. Ct. 406, 420 ("…it was incumbent on the board … 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…."). More particularly, they are required to demonstrate that safeguards provided by the local requirement with respect to that local interest afford greater protect against the asserted harms of the project than those afforded by state or federal regulation. *See id.*

The Board's experts, Mr. Horsley and Mr. Reardon, testified the project's stormwater system design does not comply with Stormwater Standard 6 in their opinion. Exhs. 69, ¶ 12, 21, 24; 70, ¶ 13. Both witnesses disputed the developer's assertions that its system complied with Standard 6. Board brief, p. 13-14; Board reply, p. 4. This standard requires that:

> [s]tormwater discharges within the Zone II or Interim Wellhead Protection Area of a public water supply, and stormwater discharges near or to any other critical area, require the use of the specific source control and pollution prevention measures and the specific structural stormwater best management practices determined by [DEP] to be suitable for managing discharges to such areas, as provided in the Massachusetts Stormwater Handbook….

Exh. 67, ¶ 11; 67(e). The Board claims Standard 6 requires enhanced stormwater treatment for discharges into a Zone II wellhead protection area that the project's proposed stormwater system lacks. Board brief, p. 13. It points to specific structural BMPs that are listed in Table CA 3 Standard 6 of the Stormwater Handbook called "Treatment BMPs" that the project's proposed system does not include. Board brief, p. 14, citing Exh. 8, p. 18. Because the project includes no Treatment BMPs from Table CA 3, the Board argues the project violates Standard 6 and would result in pollutants contaminating groundwater. Board brief, p. 15.

However, neither Mr. Reardon nor Mr. Horsley specifically identified which best management practices the project needed to implement to comply. Nor do they cite any provision or requirement in the Handbook that mandates that at least one BMP from each

category must be implemented. Mr. Horsley testified that, because the project will exceed the 15% impervious coverage threshold by a factor of three, the pollutants introduced into the groundwater can also be expected to be three times greater than a smaller project, and therefore this should be interpreted as "degradation" of groundwater quality, but he provided no specific data or findings demonstrating that the project will result in such degradation. Exh. 69, ¶ 6, 13. Finally, Mr. Reardon testified that the revisions proposed by Mr. Glossa to replace portions of the impervious surfaces with permeable porous pavement will substantially increase the potential for degradation of the water supply, because porous pavement provides no treatment of stormwater prior to discharge, posing a greater risk than originally designed. Exh. 70, ¶ 15.

Although Mr. Reardon takes issue with the developer's characterization of runoff from a building roof as "clean," Mr. Glossa and Dr. Jacobs testified that the state stormwater standards allow for several instances where runoff may be considered "uncontaminated." Exhs. 71, ¶ 18, citing Exh. 71(e), (f) (references in the stormwater handbook to roof runoff as "uncontaminated" and "relatively free of pollutants"); 72, ¶ 11 (Dr. Jacobs stating technical references in stormwater standards are clear that rooftop runoff generally is considered clean according to commonly accepted engineering practices).

Mr. Horsley described the project's proposed stormwater management system, which includes use of water quality units referred to as "Stormceptors" as "minimal." Exh. 12, ¶ 12. Mr. Horsley testified that while a Stormceptor will remove particulates (an estimated 80% of total suspended solids), it does not provide any treatment of dissolved pollutants. Exh. 69, ¶ 12. However, he stated stormwater runoff from impervious surfaces contains a broader range of pollutants other than total suspended solids, such as metals, hydrocarbons, pathogens, nitrates and PFAS (per- and polyfluoroalkyl substances, sometimes referred to as "forever chemicals"). Exh. 69, ¶¶ 13, 24, 31; *see* Exh. 59, p. 4. Like Mr. Horsley, Mr. Reardon took issue with the developer's proposed use of Stormceptors, testifying they are principally designed to remove suspended solids from stormwater, but will not remove dissolved contaminants like PFAS. Exh. 70, ¶ 11.

Mr. Reardon disputes Mr. Glossa's assertion that approximately half of the impervious coverage that will come from the development's rooftops is considered "clean" under the MA Stormwater Standards and therefore allowed to bypass the treatment system and be directly infiltrated to groundwater. Exh. 70, ¶ 12, citing Exh. 67, ¶ 22. He stated that, while in some cases

the DEP Stormwater Standards do not require treatment of roof runoff prior to discharge, it does not consider such runoff to be clean and in some cases limits the use of metal roofs in sensitive areas such as a Zone II. Exh. 70, ¶ 12. He noted the project will use asphalt shingle roofing that could contain harmful contaminants to the public drinking water supply, particularly if infiltrated directly into the aquifer untreated as currently designed. Exh. 70, ¶ 12.

Mr. Reardon further disagreed with Mr. Glossa's assertion that the project's stormwater system complies with Standard 6. Exh. 70, ¶ 13.[42] Stormwater Standard 6 states "[s]tormwater discharges within the Zone II or Interim Wellhead Protection Area of a public water supply, and stormwater discharges near or to any other critical area, require the use of the specific source control and pollution prevention measures and the specific structural stormwater best management practices determined by the Department [of Environmental Protection] to be suitable for managing discharges to such areas, as provided in the Massachusetts Stormwater Handbook…." Exh. 67, ¶ 11; 67(e).[43]

Mr. Reardon stated the proposed stormwater system omits use of specific structural BMPs to treat runoff prior to discharge. Exh. 70, ¶ 13; Board brief, p. 13, citing Exh. 67(e), p. 30. He asserted none of the treatment BMPs provided in the "table under Stormwater Standard 6" have been incorporated into the project's stormwater system design. Exhs. 67(e), p. 19; 70, ¶ 13. Stormwater Standard 6 includes a table of three types of applicable BMPs: pretreatment BMPs, treatment BMPs, and infiltration BMPs. Exhs. 8, p. 19; 67(e), p. 19. The Board asserts that at least one BMP from each category must be included in the stormwater system to comply with Stormwater Standard 6, but the proposed system does not contain any treatment BMPs. Board brief, p. 14; Exh. 70, ¶ 13.

The Board argues that Stormceptors are unable to remove dissolved contaminates found in stormwater, like PFAS compounds, and therefore the developer's Stormwater System and O&M Plan fail to satisfy the requirements applicable to discharging stormwater in a Zone II. Exh. 70, ¶ 11. Mr. Reardon disputed the developer's characterization of certain roof drainage as "clean," arguing that while in some cases, the Stormwater Standards do not require treatment of

[42] Because the project is in a Zone II, it must comply with Stormwater Standard 6. Exh. 70, ¶ 13.

[43] Stormwater Standard 6 further requires that stormwater discharge within a Zone II requires the use of a treatment system that removes 80% of total suspended solids prior to discharge, and, with the exception of runoff from non-metal roofs, the system must provide for at least 44% of total suspended solids removal prior to discharge to the infiltration structure. Exh. 67(e), p. 26.

roof runoff prior to discharge, they do not consider such runoff to be clean and in some cases limit the use of metal roofs in sensitive areas such as a Zone II. Exh. 70, ¶ 12. Mr. Horsley testified that while a Stormceptor can remove particulates (i.e., total suspended solids) it does not provide any treatment of dissolved pollutants. Exh. 69, ¶¶ 1; 12. He asserted that stormwater runoff from impervious surfaces contains a broad range of pollutants that can lead to degradation of groundwater, and the developer has failed to demonstrate that the project will not cause such degradation. *Id*., ¶ 15.

Dr. Jacobs disputed Mr. Reardon's testimony that the proposed use of permeable porous pavement by the developer will substantially increase the potential for degradation of the water supply. Exh. 72, ¶¶ 12-15. Dr. Jacobs noted that the use of porous pavement is included as a BMP in the Stormwater Handbook and, he stated, would not have a significant effect on a residential development like the project. Exhs. 72, ¶ 14; 72(d). He testified that various methods for implementation of stormwater standards, including the BMPs for pretreatment and treatment, are provided in Volume 2 of the Stormwater Handbook, and that the project incorporates several of these methods. Exh. 68, ¶ 25. Further, in contradiction to Mr. Horsley's testimony, Dr. Jacobs stated:

> …it is true that the generated runoff will roughly scale with the proportion of impervious area, …it [is] not necessarily the case that the pollutant load will scale with the amount of impervious surface area. The pollutant load is a complex function of land use, site design, landscaped area, and implemented treatment technologies. It is my expert opinion that Mr. Horsely has not addressed the complex interplay of these factors and instead presents – incorrectly – a purely linear assessment of potential pollutant load that does not account for land use, site design, landscaped, area, and implemented treatment technologies, and that is not possible to offer an opinion without addressing these issues.

Exh. 72, ¶ 27.

Ultimately, we find the testimony of Mr. Glossa and Dr. Jacobs to be more credible regarding the proposed stormwater system and its compliance with state Stormwater Standards and we accept it.[44] The Board's witnesses are also well-qualified experts, but we conclude that their testimony did not establish noncompliance with the applicable state standards rising to the

[44] The credible testimony of the developer's witnesses shows compliance with state Stormwater Standards, but we condition this decision on that compliance in any event.

level of a local concern. Mr. Horsley and Mr. Reardon testified regarding the possibility that the stormwater management system will not remove all pollutants, including PFAS, and therefore poses a risk to the public drinking water supply. Exhs. 69, ¶¶ 21, 23-25, 31; 70, ¶¶ 11-13. But these assertions do not establish that the project's stormwater system thereby fails to comply with the applicable state standards. The stormwater system designed for the project incorporates elements explicitly identified in the Stormwater Handbook as sufficient: deep sump catch basins, Stormceptor units to filter sediment, oil, and grease, and an infiltration trench and basin. *See* Exh. 8, p. 309 (Stormwater Handbook, Vol. 3, "Documenting Compliance") (describing example of compliant system as including deep sump catch basins, oil/grit separators, and infiltration basins). Further, as an expert witness, Dr. Jacobs may rely on reports prepared by another. He testified that he reviewed the NGI Report prepared by Mr. Billings, and he also prepared his own independent report. Exh. 68, ¶ 5. Accordingly, it was not improper for him to rely on or reference the report in his testimony. *See Weiss Farm Apartments, LLC v. Stoneham*, No. 2014-10, slip op. at 20-21, n.16 (Mass. Housing Appeals Comm. Mar. 15, 2021), *aff'd sub nom. Stoneham Bd. of Appeals v. Housing Appeals Comm.,* No. 2181-CV-00818 (Middlesex Super. Ct. July 21, 2022), citing *Department of Youth Servs. v. A Juvenile*, 398 Mass. 516, 531 (1986) ("[a]n expert is allowed to base an opinion on facts or data not in evidence if the facts or data are independently admissible and are a permissible basis for an expert to consider in formulating an opinion."); *Commonwealth v. Greineder*, 454 Mass. 580, 583 (2011) (ruling admissible expert opinion of doctor relying on test results obtained by non-testifying analyst to form basis of doctor's opinion).

We find the testimony of Mr. Glossa and Dr. Jacobs overall to be more credible than that of the Board's witnesses, which was more speculative. The testimony offered by the Board did not establish a definable impact that the proposed project would have on the public drinking water supply or that it would not comply with the Town's local WRPOD and Groundwater Protection bylaws. *See SLV School Street, LLC v. Manchester-by-the-Sea*, No. 2022-14, slip op. at (Mass. Housing Appeals Comm. Dec. 3, 2024) (finding board did not establish project's alleged impact on wetlands area). The Board failed to identify any specific concern that will not be adequately addressed by compliance with state standards.

Therefore, the Board has not identified a local regulation that is stricter than the state Drinking Water Regulation or established that their local regulation addresses a deficiency or

gap in the state regulation such that it establishes a valid local concern. *See 518 South Ave, LLC v. Weston*, No. 2022-12, slip op. at 20 (Mass. Housing Appeals Jan. 23, 2025). *Manchester-by-the-Sea*, No. 2022-14, *supra*, slip op. at 43 (stating consideration of state standards outside Committee's local concerns analysis, except to extent shown local requirement is stricter). Accordingly, the Board has not demonstrated a local concern that outweighs the need for affordable housing relating to the public drinking water supply with respect to the proposed project.

4. The Board's Reliance on *Reynolds* is Inapposite

The Board compares this matter to the issues present in *Reynolds v. Zoning Bd. of Appeals of Stow,* 88 Mass. App. Ct. 339. In *Reynolds*, an abutter challenged the grant of a comprehensive permit, arguing development of the project would result in elevated nitrogen levels in the private wells on his and neighboring properties and therefore it was unreasonable for the board to waive certain restrictions contained in its bylaw. *Id*. The Appeals Court found that there was sufficient evidence that the system would contaminate the groundwater such that unacceptable levels of nitrogen would reach an abutter's well and that compliance with state standards was insufficient to protect the groundwater from being contaminated by the project. *Id*. at 349.[45] *Reynolds* held that reliance on private wells for drinking water "supports the inference that the area at issue, including the locus and the neighboring residential homes, is dependent on clean groundwater." *Id*. at 344. Maintaining clean groundwater servicing local private wells under those circumstances was an important local health issue, the Appeals Court found, that was not adequately protected by compliance with applicable state standards. *Id*. at 350.

It is incumbent on the Board to introduce evidence to demonstrate site specific concerns about groundwater contamination or any other rationale that would support its contention the issue is a local concern outweighing housing need. *See River Stone, supra*, No. 2016-05, slip op. at 45, citing *White Barn Lane, LLC v. Norwell*, No. 2008-05, slip op. at 18 (Mass. Housing Appeals Comm. July 18, 2011); *Herring Brook Meadow*, No. 2007-15, slip op. at 26 (Mass.

[45] Specifically, the Court found the evidence showed it was "more likely than not" that the project would cause excessive nitrogen levels at a specific neighboring well, and therefore it was "unreasonable to conclude that the local need for affordable housing outweighed neighbor's health concerns." *Reynolds*, 88 Mass. App. Ct. 339, 350. The Court held that compliance with state standards was insufficient to protect the groundwater from being contaminated by the project. *Id*. at 349.

Housing Appeals Comm. May 26, 2010). It is not enough to assert only that a proposed project violates a local bylaw.

The Board argues it has demonstrated the project site has several characteristics that render it unsuitable for development, including permeable soils, a steep slope, and a sensitive location adjacent to six intersecting Zone I areas of other town public water supply wells. Board brief, p. 15-16, citing Exh. 70, ¶ 4. It states, as in *Reynolds*, the project is within a water resource protection overlay district, has been designed in excess of allowed density and impervious coverage limits, and the developer is requesting waivers from local bylaws and regulations intended to protect the town's water resource protection overlay district. Board brief, p. 19, citing *Reynolds,* 88 Mass App. Ct. 339, 340.

In *Reynolds* the abutter presented specific evidence of an actual harm to public health and safety and the court found it was "more likely than not" that the proposed development would cause excessive nitrogen levels at a neighbor's well. *Reynolds,* 88 Mass. App. Ct. 339, 349. The abutter successfully established that compliance with the applicable state standards alone would be insufficient to protect the groundwater from unacceptable levels of nitrogen contamination. *Id*. *Reynolds*, however, is distinguishable from the current circumstances since not only was the risk of groundwater contamination in the Stow's Water Resource Protection District from an on-site sewage disposal system as well as from stormwater, but also because there was a clear finding that the violation of the local bylaw was, based on undisputed calculations, more likely than not to cause excessive nitrogen levels in the nearby well. *Id.* at 349-350. Here, while the Board presented some evidence through the testimony of Mr. Reardon and Mr. Horsley, it did not establish a specific link or evidence linking development of the project to actual harm to the Town well and referred only to general pollutants and passing references to specific pollutants. For example, Mr. Horsley testified that proposing to increase the impervious surface area coverage by more than three times the 15% threshold would result in a corresponding threefold increase in pollutants that, if not treated properly, would degrade the public water quality. Exh. 69, ¶¶ 13, 24. He described the dissolved pollutants "routinely found" in stormwater and stormwater runoff as including nitrates, PFAS and gasoline derivatives, among others. Exh. 69, ¶ 24. Mr. Horsley and Mr. Reardon testified that the amount of impervious coverage and amount of pollutant load directed into the groundwater are directly, linearly correlated, and that the more

surface area rendered impervious, the more stormwater is generated, and thus the higher the pollutant load. Exhs. 69, ¶¶ 11, 19; 70, ¶ 5.

Although there is testimony from Mr. Horsley and Mr. Reardon of possible risks to drinking water, this situation is clearly distinguishable from *Reynolds*. Leaching of stormwater here is different from the septic leaching, and detailed calculations have not been provided as they were in *Reynolds*. Neither Mr. Horsley nor Mr. Reardon provided specific links, data analysis, or further calculations that supported their statements.[46] Their testimony was more speculative and failed to provide direct links that would support or establish how the WRPOD is specifically applicable to this project, protecting interests not otherwise protected under state standards. Moreover, while *Reynolds* also involved a water resource protection overlay district and assertions of a stricter local requirement similar to the Board's assertions in this case, its analysis focused on very specific risks tied to excessive nitrogen levels for which state standards were insufficient to eliminate. Neither witness's testimony adequately identified a similarly specific risk linked to the proposed development. Their testimony, at best, demonstrated a possibility of a public health risk to the well and falls short of the likelihood identified in *Reynolds* or the level of possibility identified in *River Stone* that was also found lacking. *See River Stone, supra, LLC v. Hingham*, No. 2016-05, slip op. at 46 (Board demonstrated possibility of serious risk that was less than shown in *Reynolds*).

We find that the Board has failed to demonstrate that its asserted local concern regarding impact or contamination of the nearby well and areas outweighs the regional need for low or moderate income housing. *See River Stone, supra,* No. 2016-05, citing *9 North Walker St. Dev., Inc. v. Rehoboth*, No. 1999-03, slip op. at 11-13 (Mass. Housing Appeals Comm. June 11, 2003) (board failed to establish nitrogen loading was local concern that outweighed need for affordable housing).

VIII. UNEQUAL TREATMENT

In the Pre-Hearing Order, the developer raised the issue of unequal treatment regarding the application of the WRPOD bylaw. *See* Pre-Hearing Order, p. 3. General Laws c. 40B, § 20

[46] The developer argues, as testified by its expert Dr. Jacobs, one cannot claim of a direct linear assessment of pollutant load to increased impervious surface area without accounting for land uses, site design, landscaping, and treatment technologies, which Mr. Horsley does not specifically address. Developer brief, p. 27, citing Exh. 72, ¶¶ 26-27; Developer reply, p. 9-10.

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 has the burden of proving such unequal treatment. 760 CMR 56.07(2)(a)(4).

The developer submitted into evidence a list of 17 special permits issued by the Planning Board pursuant to the WROPD bylaw from 2013-2024, and three special permits issued prior to 2013, together with copies of each decision. *See* Exh. 80. Mr. Glossa briefly mentions these special permits in his prefiled testimony, stating since the adoption of the WRPOD, many commercial and residential projects have been granted a special permit for projects with more than 15% of impervious lot area. Exh. 67, ¶ 29. A note on the list of special permits states that "each of the special permits granted to exceed 15% or 2,500 s.f. of impervious surfaces are for commercial developments." Exh. 80, (Part 2), pp. 2, *but see* Exh. 80, (Part 2), pp. 54-56 (Section 12 special permit for an "Age Qualified Village" of 30 residential units granted despite "render[ing] more than 15% impervious coverage."). The comparison against commercial projects does not implicate concerns of unequal treatment, *See Oxford*, No. 2021011, slip op. at 28, n.36.[47]

However, other than the submission of Exhibit 80, the developer did not address unequal treatment in its brief. Because this issue was not briefed, it is therefore waived. *River Stone, supra,* No. 2016-05, slip op. at 24, n.19, citing *Sunderland, supra,* No. 2008-02, slip op. at 3; *Hilltop Preserve Ltd. P'ship v. Walpole,* No. 2000-11, slip op. at 2 n.1 (Mass. Housing Appeals Comm. Apr. 10, 2002); *An-Co, Inc. v. Haverhill,* No. 1990-11, slip op. at 19 (Mass. Housing Appeals Committee Jun. 28, 1994); *see also Cameron v. Carelli,* 39 Mass. App. Ct. 81, 85-86 (1995), quoting *Lolos v. Berlin,* 338 Mass. 10, 13-14 (1958).

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

[47] Although comparison to commercial developments does not apply for an unequal treatment analysis, it may be that a different application of a legal standard to this project compared to other projects of any kind in the Town raises questions of unlawful action by the Town.

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:[48]

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 and the following conditions.

   a. The development shall be constructed substantially as shown on the Project Plans prepared by Glossa Engineering Inc. (Exh. 48) entitled "A Comprehensive Permit M.G.L. c. 40B The Residences at Darwin Common in Walpole, MA August 13, 2021", revised through May 9, 2024, 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 Walpole town entities, staff, or officials for final comprehensive permit review and approval pursuant to 760 CMR 56.05(10)(b).

   e. All Walpole 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 Walpole. Submission of plans and materials to the Town for

[48] *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.").

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 Walpole 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 Walpole, 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

April 13, 2026

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

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