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

104 STONY BROOK, LLC

v.

WESTON ZONING BOARD OF APPEALS

No. 2017-14

DECISION

June 22, 2023

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

104 STONY BROOK, LLC, Appellant,	)	
v.	)	No. 2017-14
WESTON ZONING BOARD OF APPEALS, Appellee.	)	

DECISION

I. INTRODUCTION

This is an appeal to the Housing Appeals Committee pursuant to G.L. c. 40B, § 22, of a decision by the Weston Zoning Board of Appeals (Board) denying a comprehensive permit to 104 Stony Brook, LLC (SBLLC or developer).

This appeal has proceeded before the Committee with an unusual focus. The Board has devoted its entire case to the question of whether the developer can comply with all applicable federal and state requirements, rather than on demonstrating there are valid local concerns that outweigh the regional need for affordable housing. Chapter 40B requires us to determine whether, "in the case of a denial … the decision of the board of appeals was reasonable and consistent with local needs." G.L. c. 40B, § 23. Here, for almost the first time,[1] we must decide whether the Board's permit denial can be reasonable and consistent with local needs if its evidence and arguments supporting denial are based solely on federal and state regulatory compliance issues, rather than a municipality's local concerns, as expressed in its requirements

[1] *See Green View Realty, LLC v. Holliston,* No. 2006-16 slip op. at 11 (Mass. Housing Appeals Comm. Jan. 12, 2009) (ruling where board had not shown local bylaws regulated remediation of brownfields site that was regulated by state and federal law, Committee need not consider "either whether the developer proved its *prima facie* case or whether the Board has established counterbalancing local concerns in response").

and regulations. *See* 760 CMR 56.02: *Local Requirements and Regulations.* That issue, which we address directly in this decision, requires us to review, clarify, and reconfirm the developer's prima facie case standard that we have historically applied under the comprehensive permit regulations, and to consider what, if any, recourse may be available to a zoning board that is unhappy with a Chapter 40B project because of concerns that are highly regulated at the state and federal level, but not locally. As discussed below, we clarify the standard for the prima facie provision of 760 CMR 56.07(2)(a), rule that SBLLC has met this requirement, and conclude that the Board has failed to demonstrate a valid local concern, much less a local concern that outweighs the need for affordable housing.[2]

In overturning the Board's decision, we are mindful that there are numerous state and federal environmental requirements potentially applicable to the project that are both technical and complex. Because we confirm our precedents ruling that "the Committee has no [] authority to hear a dispute as to whether a developer is adhering to state or federal law,"[3] we leave to state and federal authorities to determine and enforce their requirements that ultimately apply to the project. Our decision does not negate the developer's obligation to comply with all such applicable requirements; on the contrary, we include conditions in our decision to ensure such compliance. Further, the Board and others concerned with the compliance of SBLLC with applicable federal and state requirements may undertake available measures with regard to those requirements.

II. PROCEDURAL HISTORY

SBLLC originally proposed to develop a 154-unit rental apartment building, with 39 units restricted as affordable units, on a 2.1-acre site it owns at 104 Boston Post Road, near the intersection of state Route 20 (also known as Boston Post Road) and state Route 128 (Interstate 95) in Weston, Massachusetts. Pre-Hearing Order, § II.3; SBLLC Exh. C. As required by the comprehensive permit regulations, SBLLC submitted the proposed project to the Massachusetts Housing Finance Agency (MassHousing) on November 23, 2016, for a determination of project

[2] As discussed below, we also determine the City of Cambridge, an intervener in this appeal for limited purposes, also failed to demonstrate a valid local concern.

[3] *Holliston, supra,* No. 2006-16, slip op. at 9, citing *O.I.B. Corp. v. Braintree*, No. 2003-15, slip op. at 6-7 (Mass. Housing Appeals Committee Mar. 27, 2006).

eligibility pursuant to G.L. c. 40B, §§ 20-23 and 760 CMR 56.04(2). Pre-Hearing Order, § II.6. SBLLC received that determination of project eligibility from MassHousing to build 154 units of rental housing on the property, by letter dated February 21, 2017, thereby fulfilling the project eligibility requirements of 760 CMR 56.04(1). Pre-Hearing Order, § II.2, 8.

On February 22, 2017, SBLLC submitted an application to the Board for approval of a comprehensive permit to construct a 150-unit rental development on the parcel. Board Exh. 1, p. 6. The redesigned project of 150 rental units includes 38 units to be restricted as affordable units for low or moderate income persons. Pre-Hearing Order, § II.12, citing Board Decision, pp. 8, 20.

The Board opened the public hearing on the developer's application on April 6, 2017, and held additional hearing sessions on May 2 and 22, June 19, July 10 and 17, and September 13, 2017, and conducted a site walk on July 7, 2017. Pre-Hearing Order § II.13. Following the hearing, the Board issued a decision denying the comprehensive permit, which was filed with the Weston town clerk on October 23, 2017. Pre-Hearing Order § II.1.

SBLLC appealed the Board's decision to the Committee on November 9, 2017. An initial conference of counsel was held on November 27, 2017. Following the conference, the parties filed cross motions for summary decision. On March 21, 2019, the presiding officer initially assigned to this matter denied the Board's motion and granted the developer's motion in part. The Board moved for reconsideration, which was denied by the Committee's chair, then the presiding officer.[4] She thereafter granted, in part, the motion to intervene of the City of Cambridge (Cambridge) and, pursuant to 760 CMR 56.06(7)(d)3, the parties then negotiated a draft pre-hearing order, which the presiding officer issued on August 10, 2020. In preparation for hearing, the parties submitted pre-filed direct and rebuttal testimony of nine witnesses. All parties filed motions to strike with respect to prefiled testimony and certain exhibits. For the reasons discussed below, none of the specified testimony or exhibits will be struck.

On September 18, 2020, the Committee conducted a site visit and between November 6, 2020, and April 1, 2021, the Committee conducted 14 days of hearings to permit cross-examination of witnesses.[5] One hundred three exhibits were entered into evidence. Following

[4] The Committee's chair became the presiding officer on March 22, 2019.

[5] All hearing sessions were conducted virtually as a result of the Covid-19 pandemic.

the presentation of evidence, the parties submitted post-hearing briefs and reply briefs. The Board and Cambridge requested the issuance of a proposed decision, which was issued on March 29, 2023, and to which the Board and Cambridge each filed objections. The Board also requested oral argument before the full Committee. That request for oral argument is denied.

III. FACTUAL BACKGROUND

The site on which the proposed project would be developed contains approximately 2.1 acres at 104 Boston Post Road. Pre-Hearing Order § II.11. In its current state, the property is occupied by a three-story wood frame building, known as the Sibley House. A paved driveway slopes toward a wetlands resource area located at the southerly end of the site. There are 12 parking spaces, one outbuilding, a septic system and leaching field, as well as grassed lawn, wooded areas, and areas of ledge outcrop. SBLLC Exhs. ZZ, ¶ 7; B, Sheet 1 (Existing Conditions).

The project site is located in Business Districts A and B, a commercial and office district of Weston under the Weston Zoning By-law, across from the Weston Corporate Center. The site abuts commercial and industrial properties to the north and east, and, to the south and west, the Stony Brook and Stony Brook Reservoir which, together with the land surrounding them, are owned by Cambridge. Pre-Hearing Order § II.5.

The Stony Brook and Stony Brook Reservoir, are both considered "Class A" surface waters pursuant to 314 CMR 4.05(3)(a) and are protected as "Outstanding Resource Waters." The proposed development is within the state-designated "Zone A" ("400 foot lateral distance from the upper boundary of the Bank of a Class A Surface Water Source") of the Stony Brook and Stony Brook Reservoir. SBLLC Exh. B, Sheet C-3B. *See* 310 CMR 22.02: *Zone A*; 314 CMR 4.05(3)(a). After MassHousing issued the project eligibility letter, SBLLC received comments and a determination from the Weston Conservation Commission that a portion of the project (as originally designed) was located in the 200-foot jurisdictional riverfront and wetlands resource areas under the state Wetlands Protection Act (WPA), G.L. c. 131, § 40. Pre-Hearing Order § II.10. After receiving that determination, SBLLC redesigned the project to remove it from within the 200-foot area. SBLLC Exhs. B; C; ZZ, ¶ 9. The redesigned project will be developed on approximately 1.7 of the total 2.l acres at the site. The developer's stormwater management expert, Timothy Williams, P.E., testified that no work is proposed to disturb the

existing bordering vegetated wetlands, the Stony Brook or Stony Brook Reservoir, or any land within the 200-foot riverfront buffer to the Stony Brook; all project and construction activities will be completely outside the wetlands resource areas. SBLLC Exhs. ZZ, ¶ 10; B, Sheet C-2A (Layout and Materials Plan). The southerly portion of the site will remain wooded and undeveloped. The proposed project as submitted to MassHousing received the unanimous support with conditions of the Weston Affordable Housing Partnership and Weston Affordable Housing Trust. Pre-Hearing Order, § II.7.

The proposed project will include 150 rental units, 38 of which will be affordable, in one building "consisting of three-, four-, and five-stories over two parking levels and a below-grade utility level." Pre-Hearing Order, § II.12. The project will include pervious paver driveways, landscaped areas, grading, an underground pipe detention/infiltration drainage system, underground utilities, and associated site work. SBLLC Exhs. ZZ, ¶ 11; B, Sheets C-2A (Layout and Materials Plan); C-4 (Utilities Plan); C-3A (Grading & Spot Grades Plan); C-3B (Drainage Plan).

IV. MOTIONS

A. Motions Ruled on Before the Issuance of the Pre-Hearing Order and the Evidentiary Hearing

1. Ruling on Cross Motions for Summary Decision

Before the preparation of the Pre-Hearing Order, the developer filed a motion for summary decision on the grounds that it had established its prima facie case and that the Board would be unable to demonstrate first, that its denial of the comprehensive permit was based on a valid local concern and then that such local concern outweighs the housing need. The Board filed a cross motion for summary decision that it had met its burden of proof to establish that valid health, safety, and environmental local concerns exist that outweigh the housing need. The former presiding officer's ruling on the cross motions for summary decision granted the developer's motion regarding SBLLC's prima facie case as to traffic improvements but denied the motion regarding stormwater and wastewater treatment issues.[6] The ruling also denied the

[6] The Board did not pursue traffic issues in the hearing.

Board's motion for summary decision.[7] Ruling on Parties' Motions for Summary Decision, March 21, 2019.

That ruling also raised, but did not address, the question whether the definition of "local needs" in G.L. c. 40B, § 20, includes the needs of another municipality's residents, while noting the Committee had previously raised issues involving the interest or involvement of other municipalities or residents or other municipalities.[8] *See Sugarbush Meadow, LLC v. Sunderland,* No. 2008-02, slip op. at 10 (Mass. Housing Appeals Comm. June 21, 2010) (considering availability of neighboring town's ladder truck to assess fire safety measures), *aff'd sub nom v. Zoning Bd. of Appeals of Sunderland v. Sugarbush Meadow, LLC,* 464 Mass. 166, 182-183 (2013); *Rising Tide Development, LLC v. Sherborn,* No. 2003-24, slip op. at 19-21 (Mass. Housing Appeals Comm. Mar. 27, 2006) (dismissing board argument that town's two-acre minimum lot size requirement served to protect water supply for neighboring Holliston and supported local concern, noting state regulations for wastewater treatment facilities and open space in Zone II protection area for public water supply addressed groundwater protection); *CMA, Inc.* v. *Westborough,* No. 1989-25. slip op. at 2 n.1 (Mass. Housing Appeals Comm. June 25, 1992) (discussing and ultimately denying intervention of neighboring Shrewsbury on issue of traffic, noting legislature "would have included neighboring town participation in the comprehensive permit process had it so desired"); *Line Street Assoc. v. Southampton,* No. 1983-06, slip op. at 6-8 (Mass Housing Appeals Comm. Nov. 22, 1985) (rejecting board argument that project's leachate posed threat to quality of underlying aquifer that fed into neighboring

[7] The former presiding officer's denial of summary decision requests by both the developer and the Board did not finally decide the issues involved. Indeed, the denial required the matters to be submitted for evidence at the hearing. The Committee has the ultimate authority to decide an appeal. *See* 760 CMR 56.06(7)(e)2.

[8] The ruling also ordered SBLLC to file either an Environmental Notification Form (ENF) with the Executive Office of Energy and Environmental Affairs (EOEEA) pursuant to 301 CMR 11.01(4)(a) or seek an advisory opinion from the Secretary of EOEEA under 301 CMR 11.01(6). SBLLC then requested an advisory opinion; it received a response from EOEEA on May 15, 2019, that the proposed project is subject to review under the Massachusetts Environmental Protection Act (MEPA). SBLLC Exh. GG. The comprehensive permit regulations provide that a Committee decision may issue before the issuance of a final MEPA certificate, as long as the decision states that the comprehensive permit shall not be implemented until the Committee has fully complied with MEPA, and that the Committee shall retain authority to modify the decision based upon the findings or reports prepared in connection with MEPA. 760 CMR 56.07(5)(c). Accordingly, we include this requirement in our decision.

Easthampton's water supply, noting state regulation addresses location and construction of leaching systems).

2. Ruling on Cambridge's Motion to Intervene

On June 12, 2019, following the ruling on the cross motions for summary decision, Cambridge moved to intervene, seeking to participate with regard to all issues. In its motion it stated it originally had decided not to intervene because it believed the Board would address its concerns, but it chose to seek intervention in light of questions raised in the summary decision ruling regarding whether the Board could address the protection of the residents of Cambridge, a separate municipality, as a "local concern." Cambridge Motion to Intervene, pp. 1, 7. Ruling on Parties' Motions for Summary Decision at 12-14. The presiding officer noted that "[i]n light of the question raised in the summary decision ruling regarding the scope of local concerns, [Cambridge's] motion to intervene was not unduly delayed." For this reason, she granted Cambridge's motion in part, allowing limited participation in this proceeding to address local concerns, specifically "with respect to the impacts of the wastewater treatment facility and stormwater management on its property and the water supply for the residents of [Cambridge]."[9] Ruling on City of Cambridge's Motion to Intervene, November 26, 2019. The ruling on the motion to intervene also made clear that "[t]he Committee's grant of intervener status does not constitute a finding that the intervener has proved aggrievement; rather it simply allows the intervener to demonstrate in proceedings before the Committee, the intervener's substantial and specific aggrievement by waivers of local regulation and removal of requirements that represent legitimate local concerns." [10] *Id.* That ruling did not allow Cambridge to participate on the issue of the developer's prima facie case.

B. Pending Motions

1. Motions to Strike Evidence

Following the filing of the parties' pre-filed direct and rebuttal testimony and before the commencement of the evidentiary hearing, the parties each filed various motions to strike

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[9] Since the Cambridge-owned drinking water supply is located within Weston, this ruling did not resolve the question of whether the "needs" of residents of another municipality may be considered as "local needs." *See* discussion, *supra*, in § IV.A.1.

[10] Committee member James G. Stockard, Jr., a resident of Cambridge, has recused himself from participation in this matter.

evidence, including pre-filed testimony and exhibits. The Board moved to strike portions of the pre-filed testimony of each of SBLLC's witnesses, and it moved to strike certain exhibits referenced in the Pre-Hearing Order as well as SBLLC Exhibits F and R. Cambridge moved to strike portions of prefiled testimony of SBLLC's witnesses, Meredith Zona, P.E., and Timothy Williams, P.E., as well as statements contained in SBLLC Exhibit R, containing an email chain between Ms. Zona and an official of the Massachusetts Department of Environmental Protection (DEP). The developer moved to strike the entirety of the testimony of the Board's witness, Weston's Town Planner, Imaikalani Aiu, and portions of testimony of the Board's water resources management consultant, Scott Horsley, including exhibits attached to his testimony. These motions raised various grounds for striking the evidence, including, among others, that the evidence constitutes impermissible hearsay, improper conclusions of law, improper opinion testimony, and speculation; and that testimony is not based on evidence or first-hand knowledge or is inflammatory.

a) Motions to Strike Evidence Based on Hearsay

In general, the Committee, as an administrative body, has discretion to admit testimony that would not be appropriate in a court and it has the power to determine the credibility and weight to be assigned to such testimony. *See* G.L. c. 30A, § 11(2). In administrative proceedings, "evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs." *Id. See River Stone, LLC v. Hingham,* No. 2016-05, slip op. at 21 (Mass. Housing Appeals Comm. Sept. 23, 2022) (admitting hearsay where board had opportunity to cross-examine expert witness regarding source of data in land valuation report, noting experts may base testimony on data collected and provided by others), *appeal pending, Hingham Zoning Bd. of Appeals and Town of Hingham v. Housing Appeals Comm.,* Land Ct. No. 22PS000551, citing *Weiss Farm Apts. v. Stoneham,* No. 2014-10, slip op. at 21-24 (Mass. Housing Appeals Comm. Mar. 15, 2021) (denying board's motion to strike expert testimony that relied on hearsay where testimony demonstrated reasonableness of witness's review and confirmed information in hearsay report), *aff'd sub nom, Town of Stoneham Zoning Bd. of Appeals v. Housing Appeals Comm., et al.,* Middlesex Super. Ct. No. 2181CV00818 July 21, 2022. We view hearsay evidence "through a lens of reasonableness and if it meets the administrative standard, it may be admitted and considered." *River Stone, supra,* No. 2016-05, slip op. at 21. The admission of hearsay is 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." *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).

In an administrative proceeding, when faced with evidence that is exclusively hearsay, the question would not be whether such evidence is admissible or inadmissible based on 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). With regard to the contested statements of DEP officials, those statements are not solely submitted for the truth of the statements contained therein.[11] The challenged statements in testimony of Mr. Williams, Mr. Klein, and Ms. Zona, as well as emails from DEP officials, reflect a course of communication between the developer's experts and DEP, evidencing efforts by the developer to determine DEP's requirements for the project and its plans to meet those requirements; for these non-hearsay purposes, the evidence is admissible. *See* SBLLC Exhs. ZZ, ¶ 23; BBB, ¶ 16; R; EE; Tr. IX, 117. Further, it is reasonable for the developer to submit evidence of its reliance on information from DEP in those communications concerning aspects of the project that might be reviewed by the state agency. Such statements have probative effect to show that discussions occurred and were productive, not that they represent binding and final determinations of the agency regarding compliance with the WPA or other agency regulations and standards. The motions to strike SBLLC Exhibits R and EE are denied; these are admitted for all non-hearsay purposes. With regard to the hearsay statements in testimony of Ms. Zona, Mr. Klein, and Mr. Williams regarding their understanding of statements made by DEP officials, those are admitted for all purposes subject to our determination of the weight, if any, assigned to them. The motions to strike these hearsay statements are denied.

[11] During the hearing, counsel for SBLLC stated that SBLLC Exhibits R and EE, emails from the DEP official, were not offered for the truth, but for corroboration of Ms. Zona's testimony regarding meetings with DEP officials and the project materials DEP had reviewed. Tr. I, 84, 88, 91.

b) Motions to Strike Evidence Based on Credibility, Personal Knowledge, Expertise and Settlement Negotiations

In addition to asserting hearsay, Cambridge moved to strike SBLLC Exhibit R on the ground that it is a product of settlement negotiations in a related litigation in which it was unable to participate. Cambridge cites no legal authority for its argument, and its motion is denied on that ground as well.

SBLLC moved to strike in its entirety the testimony of Imaikalani Aiu, Cambridge's planner, on several grounds: it is not shown to be based on personal knowledge; opinions regarding engineering, traffic, stormwater management, and wastewater engineering are not within his area of expertise, and the testimony is based on state principles, not local bylaws. SBLLC Motion to Strike (filed September 15, 2020). The Board moved to strike SBLLC's witness testimony on the ground that it contains inappropriate conclusions of law, speculation, is argumentative and lacks firsthand knowledge.

The testimony objected to by the parties contains improper legal conclusions and includes statements with little or no reliability. Also, the Board's and Cambridge's evidence regarding the interpretation of state and federal requirements is not relevant to the developer's prima facie case, as discussed below, and is not considered on that issue. However, the inclusion of this evidence in the evidentiary record under the rules governing administrative proceedings does not prejudice the parties, as the Committee is experienced in evaluating and weighing such testimony. Therefore, in the exercise of our discretion, we deny these motions. *See 100 Burrill St. v. Swampscott,* No. 2005-21, slip op. at 2, n.1 (Mass. Housing Appeals Comm. June 9, 2008).

2. Board's Motion for Directed Decision

During cross-examination of the developer's witnesses, the Board moved several times for a directed decision on the ground that the developer had failed to make a prima facie case that its project would comply with state or federal requirements. Tr. IV, 52; V, 122; VIII, 63-64; IX, 72; *see* Board brief, p. 11. The presiding officer took the initial motion under advisement, as well as the renewals of the motion, one of which was joined by Cambridge. Tr. VIII, 64. The Board renewed its motion in its post hearing brief. The motion is denied, as we discuss below.

V. STANDARD OF REVIEW AND THE PARTIES' BURDENS

The Comprehensive Permit Law provides the standard for an appeal of a board's denial of a comprehensive permit, stating: "[t]he hearing by the [Committee] shall be limited to the issue of whether, in the case of the denial of an application, the decision of the board of appeals was reasonable and consistent with local needs…." G.L. c. 40B, § 23. This is the central principle and purpose of the proceeding before the Committee.[12]

The comprehensive permit regulations, 760 CMR 56.00, *et seq.*, add the following with respect to the developer's case before the Committee:

> In the case of a denial, the [developer] may establish a *prima facie* case by proving, with respect to only those aspects of the Project which are in dispute (which shall be limited), in the case of a Pre-Hearing Order, to contested issues identified in the pre-hearing order, that its proposal complies with federal or state statutes or regulations, or with generally recognized standards as to matters of health, safety, the environment, design, open space, or other matters of Local Concern.

760 CMR 56.07(2)(a)2.

The regulations also set out the Board's case: "In the case of denial, the Board shall have the burden of proving, first, that there is a valid health, safety, environmental, design, open space, or other Local Concern which supports such denial, and then, that such Local Concern outweighs the Housing Need." 760 CMR 56.07(2)(b)2. The comprehensive permit regulations, 760 CMR 56.07(2)(a)2 and (b)2, do not explicitly specify that the provision providing for the developer's prima facie case is a prerequisite for the Board's obligation to demonstrate local concerns; however, Committee decisions have stated that if the developer establishes a prima facie case, the burden shifts to the board to prove a valid local concern that supports the denial. *See, e.g., Sunderland*, *supra,* No. 2008-02, slip op. at 5; *Green View Realty, LLC v. Holliston,* No. 2006-16, slip op. at 9 (Mass. Housing Appeals Comm. Jan. 12, 2009), *aff'd sub nom. Holliston v. Housing Appeals Comm.,* 80 Mass. App. Ct. 406 (2011), *F.A.R. den.,* 460 Mass. 1116 (2011);

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[12] "The comprehensive permit act was intended to remove various obstacles to the development of affordable housing, including regulatory requirements that had been utilized by local opponents as a means of thwarting such development in their towns. *See Zoning Bd. of Appeals of Wellesley v. Ardemore Apartments Ltd. Partnership,* 436 Mass. 811, 814–815, 820–824, [] (2002); *Board of Appeals of Hanover v. Housing Appeals Comm.,* 363 Mass. 339, 347–355, [] (1973); Rodgers, Snob Zoning in Massachusetts, 1970 Ann. Survey of Mass. L. 487, 487–489." *Dennis Hous. Corp. v. Zoning Bd. of Appeals of Dennis*, 439 Mass. 71, 76 (2003).

Hanover R.S. Ltd. P'ship v. Andover, No. 2012-04, slip op. at 5 (Mass. Housing Appeals Comm. Feb. 10, 2014).

A. Application of Prima Facie Case

In a long line of cases, the Committee has consistently ruled that developers need make only a minimal showing for the prima facie case in the hearing before the Committee under the comprehensive permit regulations. "[A] *prima facie* case may be established with a minimum of evidence." *100 Burrill Street, LLC v. Swampscott*, No. 2005-21, slip op. at 7 (Mass. Housing Appeals Comm. June 9, 2008) (prima facie case established where expert testified regarding design to fit diverse character of neighborhood), quoting *Canton Housing Auth. v. Canton*, No. 1991-12, slip op. at 8 (Mass. Housing Appeals Comm. July 28, 1993). "For example, 'it may suffice for the developer to simply introduce professionally drawn plans and specifications.'" *Sunderland, supra,* No. 2008-02, slip op. at 5 n.4, quoting *Tetiquet River Village, Inc. v. Raynham*, No. 1988-31, slip. op. 9 (Mass. Housing Appeals Committee Mar. 20, 1991). *See Eisai, Inc. v. Housing Appeals Committee,* 89 Mass. App. Ct. 604, 610 (2016) (regulatory scheme governing applications for comprehensive permits requires only preliminary plans showing that proposal conforms to generally recognized standards) (citation omitted). "[E]xpert testimony directly addressing the matter in issue is more than sufficient to establish the developer's *prima facie* case." *Sunderland, supra,* No. 2008-02, slip op. at 9; *Canton Property Holding, LLC v. Canton*, No. 2003-17, slip op. at 22 (Mass Housing Appeals Comm. Sept. 20, 2005) (expert testimony that design will comply with state stormwater management standards is sufficient to establish prima facie case). *See also Oxford Housing Auth. v. Oxford*, No. 1990-12, slip op. at 5 (Mass. Housing Appeals Comm., Nov. 18, 1991) (plans must be sufficient to permit Committee to evaluate proposal with regard to aspects that are in dispute and to permit full cross-examination); *Watertown Housing Auth. v. Watertown*, No. 1983-08, slip op. at 5, 10-12 (Mass. Housing Appeals Comm. June 5, 1984) ("requirements are to be applied in a common sense, rather than an overly technical manner in context of establishing prima facie case"). And the Appeals Court has confirmed that "[i]t has long been held that it is unreasonable for a board to withhold approval of an application for a comprehensive permit when it could condition approval on the tendering of a suitable plan that would comply with State standards." *Holliston, supra,* 80 Mass. App. Ct. 406, 416, citing *Board of Appeals of Hanover v. Housing Appeals Comm.,* 363 Mass. 339, 381 (1973).

This prima facie rule is in place not as a "technical requirement to be fulfilled by the developer. [Rather] [t]he prima facie requirement exists both so that this Committee will have a clear idea of the proposal before it, and so that the Board has a fair opportunity to challenge it." *Tetiquet River, supra,* No. 1988-31, slip op. at 11. *See also Transformations, Inc. v. Townsend*, No. 2002-12, slip op. at 10-11 (2004) ("it is not necessary for an applicant to obtain permits or acquire final state or federal approval in order for an applicant to be granted a comprehensive permit or to establish its prima facie case in the case of a denial"); *Oxford Housing Auth. v. Oxford*, *supra,* No. 1990-12, slip op. at 4-5 ("Since design work involves substantial costs for the developer, it is unreasonable to require completed plans before the comprehensive permit is issued"). In *Tetiquet,* the only case in which the Committee ruled that a developer had failed to meet the requirement, the Committee noted that the developer had failed to meet a very low bar, stating "it may suffice for the developer to simply introduce professionally drawn plans and specifications." *Id.* at 9.

This minimum standard is important, because in proceedings before the Committee and under 760 CMR 56.07(2)(a)2, a "prima facie case" is a special term of art—it is not intended to require a developer to provide sufficient evidence in detail regarding each aspect of every potentially applicable state and federal requirement to demonstrate it could meet a burden of ultimate persuasion of compliance with all state and federal requirements, as would occur if it bore the ultimate burden of proof of the issue in this appeal. Here, the matters on which § 56.07(2)(a)2 states the developer may make the preliminary prima facie showing, general compliance with state or federal requirements or generally accepted standards, are not ones on which it has the ultimate burden of proof before the Committee, since the Committee has neither the responsibility nor the authority to finally determine such compliance. *See Hanover, supra,* 363 Mass. 339, 379;[13] *Board of Appeals of North Andover v. Housing Appeals Comm.,* 4 Mass. App. Ct. 676, 680 (1976) (stating "…nothing in [G.L. c. 40B, §§ 20-23] or in [*Hanover, supra,* 363 Mass. 339] … suggests that the Housing Appeals Committee has been empowered with

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

authority to override or ignore laws passed by the Legislature or regulations validly promulgated by the Commonwealth's various boards, departments, agencies or commissions." The prima facie case is a burden of production: to introduce "evidence sufficient to form a reasonable basis for a [decision] in that party's favor*." Tiffany Hill, Inc. v. Norwell*, No. 2004-15, slip op. at 6 (Mass. Housing Appeals Comm. Sept. 18, 2007) (internal citations omitted). Thus, "[p]rima facie evidence, in the absence of contradictory evidence, requires a finding that the evidence is true… even in the presence of contradictory evidence, however, the prima facie evidence is sufficient to sustain the proposition to which it is applicable." *Id*.

This burden of production must be consistent with the language of the 760 CMR 56.07(2)(a)2, which describes the developer's case as proving compliance with federal *or* state standards *or* generally accepted standards. The regulation's use of the disjunctive "or," makes it clear this is not a requirement to prove compliance with every state and federal requirement that many be applicable, particularly when viewed in the context of this entire provision.[14] *See Moronta v. Nationstar Mortg., LLC*, 476 Mass. 1013, 1014 (2016) (use of word "or" to separate prongs of statute indicates prongs are alternatives and either one would be sufficient on its own and it is not necessary to establish both), citing *Eastern Massachusetts St. Ry. Co. v. Massachusetts Bay Transp. Auth.,* 350 Mass. 340, 343 (1966) (word "or" is given disjunctive meaning "unless the context and the main purpose of all the words demand otherwise").

Our longstanding interpretation that the regulation requires a minimum showing serves the purpose of having the developer provide sufficient information to allow the Board to make its local concerns case. *Tetiquet River, supra,* No. 1988-31, slip op. at 11. "[E]ven where plans were incomplete, a developer that proposed to modify its plans to comply with State and Federal statutes or regulations had established a prima facie case." *Zoning Bd. of Appeals of Woburn v. Housing Appeals Comm.,* 92 Mass. App. Ct. 1115 (2017) (Rule 1:28 decision), citing *Holliston, supra,* 80 Mass. App. Ct. 406, 416. In *Woburn,* the Appeals Court ruled that "where the developer here plans to comply with all applicable noise regulations, [the Appeals Court]

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

similarly conclude[s] the HAC did not err in finding that the developer had established a prima facie case." *Woburn, supra,* 92 Mass. App. Ct. 1115. *See Holliston, supra,* 80 Mass. App. Ct., 406, 415-416 (to extent preliminary plans submitted are lacking or in fact admittedly do not comply with current State regulations or standards, developer's proposal does not end with plans when the developer proposes to make all modifications necessary to achieve compliance with state regulations).

Moreover, in cases in which a developer may not have correctly addressed every aspect of compliance with state or federal requirements, we have emphasized that "the requirement … is for a preliminary presentation [and] where it is possible to improve the presentation and satisfy the Board's objections by a condition in the comprehensive permit, we will include it." *Billerica Development Co. v. Billerica,* No. 1987-23, slip op. at 34-35 (Mass. Housing Appeals Comm. Jan. 23, 1992) (where board attacked drainage report that was "the cornerstone of the presentation, on the ground that it contains errors and faulty assumptions" Committee resolved question with condition in its decision). *See also Tetiquet River, supra,* No. 1988-31*,* slip. op. at 3, 5-6 (if there is question about sufficiency of developer's submission, Committee may address issue by attaching condition to address it). Such a condition may include a requirement that approval of a comprehensive permit is subject to compliance with applicable federal and state requirements.

In light of these precedents, we examine the testimony and exhibits submitted by the developer for our review of the prima facie case. *See Tiffany Hill, supra,* No. 2004-15, slip op. at 3, 6 (presiding officer denied motion for directed decision submitted on developer's pre-filed testimony; Committee ruled that evidence at hearing did not affect that ruling). Here, both the Board and Cambridge[15] undertook to supply evidence from their witnesses regarding the developer's prima facie case, opining about both the evidence submitted by the developer and about the state and federal regulations they argue are relevant to this issue. This extensive

[15] Cambridge was allowed intervention solely for the purpose of addressing the impact of the project's stormwater and wastewater systems upon its property within Weston and upon Cambridge residents (if it was demonstrated that protection of Cambridge residents is within the scope of local needs). Cambridge's evidence and arguments against the developer's prima facie case exceeded this scope. Even if this issue were within the scope of Cambridge's intervention, as noted above, in § IV.B.1, its evidence interpreting state and federal requirements, like that of the Board, is not relevant to this issue. And its arguments are no more persuasive than those of the Board.

testimony, which significantly lengthened the hearing, is not relevant. We consider the developer's prima facie case based solely on evidence supplied by the developer.

Additionally, this case unfortunately presents an example in which compliance with state or federal requirements overshadowed the issue of local concerns in the parties' presentations.[16] As we stated above, the Committee has no authority to determine whether a project will comply with state or federal requirements; nor may we waive any requirement of state or federal law. Any project we approve must still comply with all applicable federal and state requirements. *See, e.g., Tiffany Hill, supra,* No. 2004-15, slip op. at 11.

As discussed below, our review of the developer's evidence demonstrates that the developer has provided detailed plans describing the project, including the stormwater management system and the wastewater treatment facility and has been engaged in a conscientious and ongoing effort to address state and federal requirements, including providing evidence of future compliance with applicable state and federal law. That evidence is sufficient to establish its prima facie case on this record.

B. Application of Local Concerns Case

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

Rather, the focus of our inquiry is on whether the Board's action is consistent with local needs. For that analysis to take place, the Board has the burden to prove a local concern protected a provision of Weston's local requirements or regulations that is more stringent than what is required under state or federal law. 760 CMR 56.02: *Local Requirements and Regulations* (defined as provisions that "are more restrictive than state requirements"); *see also Holliston,*

[16] We also note that this hearing was regularly punctuated throughout, and ultimately further lengthened, by vitriol between counsel for the Board and the developer.

supra, 80 Mass. App. Ct. 406, 417, 420. Not only must a board show there is a more restrictive local requirement or regulation, but it must also show that the local rule protects against a specific harm against which the state and federal requirements do not. *Holliston, supra,* 80 Mass. App. Ct., 406, 417; *see* 760 CMR 56.02: *Local Requirements and Regulations.* We have described this requirement in a similar way in *Herring Brook Meadow, LLC v. Scituate*, No. 2007-15, slip op. at 25 (Mass. Housing Appeals Comm. May 26, 2010), where we held that a board had to show that the local bylaw or regulation applies to the proposed development, and "that the specific interests identified in [the local rule] are important at the site." In essence, the harm the stricter local provision protects against must be a concern caused by the project, and not protected by state or federal law.

If the Board has not articulated the local concern, nor shown its relationship to a specific applicable local requirement, nor demonstrated the relevant harm at from the proposed development, the Board has failed to demonstrate a valid local concern applicable to the project, much less that such a concern outweighs the need for affordable housing. *Holliston, supra,* 80 Mass. App. Ct. 405, 417, 420; *Scituate, supra,* No. 2007-15, slip op. at 23-26.

As discussed below, even if Weston had a more restrictive local requirement or regulation, which the Board has not asserted, the Board has failed to comply with the standard set by the Appeals Court in *Holliston* that it show that such stricter local requirement is necessary to provide protection against specified harms that could not be protected by the state and federal schemes. *See Holliston, supra,* 80 Mass. App. Ct. 405, 417, 420. *See also* 760 CMR 56.02: *Local Requirements and Regulations; Scituate, supra,* No. 2007-15, slip op. at 23-26. *See, e.g., Meadowbrook Estates Ventures, LLC v. Amesbury*, No. 2002-21, slip op. at 14 (Mass. Housing Appeals Comm. Dec. 12, 2006) (holding review of innovative wastewater technology is inappropriate when there is no local regulation and a state DEP permit is required), *aff'd sub nom Town of Amesbury Bd. of Appeals v. Housing Appeals Comm.*, No. 2008-P-1240, Mass. App. Ct. Sept. 16, 2009 (Rule 1:28 decision); *Lever Dev., LLC v. West Boylston*, No. 2004-10, slip op. at 10 (Mass Housing Appeals Comm. Dec. 10, 2007) (finding board failed to identify local rule or regulation that proposed height of buildings would violate); *9 North Walker Street Dev., Inc. v. Rehoboth*, No. 1999-03, slip op. at 4-5 (Mass. Housing Appeals Comm. Decision on Remand Nov. 6, 2006) (explaining board "ordinarily should not be permitted to inquire into an issue or place restrictions on affordable housing if the town has not previously regulated the matter in

question" because "to allow the town to regulate such issues … would violate the Comprehensive Permit Law's provision that local 'requirements and regulations are [to be] applied as equally as possible to both subsidized and unsubsidized housing'"); *Attitash Views, LLC v. Amesbury*, No. 2006-17, slip op. at 12, n.7 (Mass. Housing Appeals Comm. Summary Decision Oct. 15, 2007) (attempt to enforce uncodified requirements with regard to outdoor design "may well also run afoul of the statutory provision that all requirements be applied 'as equally as possible to subsidized and unsubsidized housing.' G.L. c. 40B, § 20"), *aff'd*, No. 2007-5046, Suffolk Super. Ct. Jan. 7, 2009; *LeBlanc v. Amesbury*, No. 2006-08, slip op. at 9 (Mass. Housing Appeals Comm., May 12, 2008), *aff'd*, No. 0884CV02631, Suffolk Super. Ct. June 12, 2008; *Princeton Dev., Inc. v. Bedford*, No. 2001-19, slip op. at 11-12 (Mass. Housing Appeals Comm. Sept. 20, 2005) (finding board's decision to deny waiver of stricter wetlands bylaw was reasonable).

VI. DEVELOPER'S PRIMA FACIE CASE

A. Developer's Presentation

SBLLC argues that it made its prima facie case that the project complies with all applicable federal or state statutes or regulations as to matters of health, safety, the environment, design, open space, or other matters of local concern for the disputed aspects of the project, namely the stormwater and wastewater management systems.[17] SBLLC submitted detailed plans for the stormwater management system and the proposed wastewater treatment facility (WWTF); reports and other information regarding the anticipated impact of the proposed stormwater management system and the WWTF; responses of experts to peer review concerns at the local hearing; and direct and rebuttal testimony of three professional engineers, Timothy Williams, P.E., who addressed stormwater management, and Meredith Zona, P.E., and Kevin Klein, P.E., who addressed the proposed WWTF. SBLLC presented pre-filed testimony and exhibits attesting that either the project will comply with particular state or federal requirements, or that certain state requirements asserted by the Board are not applicable to the project. SBLLC Exhs. B Sheet ABB-1 (requiring adherence to all permit conditions provided by governing agencies); D, Drainage Report, Introduction, p. 1 (proposed stormwater management system will comply

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

with DEP stormwater standards and Weston's Stormwater Management Regulations to the maximum extent practicable); D, Stormwater Report Checklist, p. 7;[18] BBB, ¶ 42.

1. Stormwater Management

SBLLC presented evidence that the project is not governed under the state WPA, G.L. c. 131, § 40, the wetlands protection regulations, 310 CMR 10.00, or the DEP stormwater management standards. The developer relies on the April 26, 2017, memorandum to the Board from the Commission in connection with Board's hearing on the developer's comprehensive permit application. SBLLC Exh. C. That memorandum stated:

> Wetland Protection Act Jurisdiction
>
> The original plans submitted to the Board of Appeals showed that almost the entire Riverfront Area on the lot would be developed. However, a revised plan, dated March 28, 2017 shows that all work has been moved outside of Riverfront Area. According to 310 CMR 10.02 (2)(d) "Activities Outside of Areas Subject to Protection under M.G.L. c. 131, § 40 and the Buffer Zone - Any activity proposed or undertaken outside the areas specified in 310 CMR 10.02(1) and outside the Buffer Zone is not subject to regulation under M.G.L. c. 131, § 40 and does not require the filing of a Notice of Intent unless and until that activity actually alters an area Subject to Protection under M.G.L. c. 131, § 40.
>
> Therefore, at this time, it appears that Conservation Commission review will not be necessary since the Applicant has moved all the proposed work outside the 200-foot Riverfront Area.

SBLLC Exh. C.

The developer also relies on testimony of Mr. Williams, the developer's engineer, regarding the stormwater management system. Mr. Williams has over 20 years' experience in the planning, design and permitting of numerous public, and private sector projects, including commercial, residential, and mixed-use developments. He is the owner of Allen & Majors Associates (A&M), a civil and environmental engineering services firm engaged by SBLLC to assist with the design and engineering of the project. Mr. Williams testified that he had direct supervision and oversight of the preparation and certification of the engineered project plans. SBLLC Exhs. A; ZZ, ¶¶ 1-6; SBLLC brief, p. 10.

Mr. Williams testified that the redesigned project was entirely removed from the jurisdictional wetlands resource areas and therefore is not subject to the WPA, or the wetlands

[18] The developer's completed DEP Checklist for Stormwater Report, on which the developer stated that certain DEP standards are not fully met, specifically identifies Standards 1, 8, 9 and 10 and states they these standards "must always be fully met." Exh. D, Stormwater Report Checklist, p. 7.

protection regulations, 310 CMR 10.00. He stated that A&M has designed the project's stormwater management system in keeping with good engineering practice so that it will meet or exceed the stormwater standards of the DEP, as well as Weston's stormwater management regulations to the maximum extent practicable. SBLLC Exhs. AAA, ¶ 15; B; ZZ, ¶¶ 13-20; D.[19]

Mr. Williams stated that the project's stormwater management system consists of roof drains, drain manholes, underground piping, deep sump catch basins, a hydro-dynamic separator with phosphorus treatment, a solid corrugated metal pipe to convey and mitigate runoff, and a new detention basin that will discharge through "an outlet control structure/level spreader design with varying outlet elevations … to dissipate outlet velocities to the maximum extent practicable to mitigate any potential scouring or erosion on the slope leading to the Stony Brook and Stony Brook Reservoir." SBLLC Exh. ZZ, ¶ 17. The entire system will be within the Zone A of the Stony Brook and Stony Brook Reservoir but outside the 200-foot riverfront area. It will use Best Management Practices (BMP) "to effectively handle stormwater runoff from the site, as shown in A&M's Drainage Report." SBLLC Exhs. AAA, ¶ 11; ZZ, ¶¶ 4, 12, 14, 16, 19; B, Sheet C-3B; D.

Mr. Williams stated that as designed, the stormwater management system will "reduce the peak flow rates generated from the site, and improve the overall water quality as compared to existing conditions…." SBLLC Exh. ZZ, ¶ 14; *see also* SBLLC Exhs. D, p. 5; ZZ, ¶ 16; AAA, ¶ 19; SBLLC brief, p. 9. He stated that the project's stormwater management system would be "a significant improvement over the existing conditions at the site, which presently allow unmitigated and untreated stormwater containing contaminants from the paved surfaces, to flow downgradient from the site towards the wetlands resources area at the southerly end of the site, with a high potential for scouring and erosion." SBLLC Exhs. ZZ, ¶ 12; AAA, ¶¶ 12; *see* SBLLC brief, p. 12. He also testified that the earlier proposed infiltration system was replaced with this full stormwater detention system in response to peer review comments about the lack of existing soil testing, but that "soil conditions can be confirmed once the final subgrade for the project is established, and soil testing can be used to confirm the underlying soil conditions. If suitable, infiltration will be reincorporated into the final design for the system." SBLLC Exh. ZZ, ¶ 15. He stated that "no increased stormwater discharges will be introduced by the Project into the

[19] SBLLC also argues that the DEP Stormwater Management Standards, including Standards 3 and 6, are not applicable to the project. SBLLC Exhs. ZZ, ¶ 23; E; SBLLC brief, p. 15.

Town's municipal drainage system," and "the Project actually reduces the rate and volume of stormwater discharge to the Town's Sibley Road stormwater drainage system." SBLLC Exhs. AAA, ¶ 13; D. p. 5.

Mr. Williams also stated that the project is not subject to the Massachusetts Clean Waters Act, G.L. c. 21, §§ 26-53, "because there is no proposal to discharge dredged or fill material or dredged materials disposal … to the waters of the United States within the Commonwealth and no filling of wetland resource areas." Exh. ZZ, ¶ 14; *see* SBLLC Exhs. ZZ, ¶ 23; AAA, ¶ 9. He stated that "the stormwater for the Project is detained by the stormwater management system, and only discharges to the ground not to surface water. From there it has to travel approximately 200 feet to reach surface water of the Stony Brook reservoir." SBLLC Exh. ZZ, ¶ 24; AAA, ¶ 9; *see* SBLLC Exh. B, Sheet C-3B (Drainage Plan).

Mr. Williams testified that the project is not subject to the Watershed Protection Act or 313 CMR 11.00, Watershed Protection Regulations, because they "govern land use and activities within specified critical areas of the Quabbin Reservoir, Ware River and Wachusett Reservoir watersheds…." Exh. AAA, ¶ 14; *see* SBLLC Exh. F, pp. 3-4. He also stated it is not subject to 314 CMR 9.00 and would not need a 401 Water Quality Certification. SBLLC Exh. ZZ, ¶¶ 19, 22.

SBLLC argues that 310 CMR 22.00 (Drinking Water) is not applicable to the project, relying on Mr. Williams' testimony that 310 CMR 22.20(c)(l) does not apply because the proposed project does not propose to expand the Class A surface water source, which would be the Stony Brook Reservoir, or provide a new drinking water source. SBLLC Exh. AAA, ¶ 17.

Finally, SBLLC relies on Mr. Williams' testimony regarding a conversation he had with the DEP's regional coordinator at the Bureau of Water Resources concerning the project's stormwater management system. Mr. Williams stated this individual said the project was not subject to either the wetlands protection regulations, 310 CMR 10.00, or the clean water regulations, 314 CMR 9.06(6)(a). SBLLC Exh. ZZ, ¶ 23. Mr. Williams stated that the DEP official's view that the project is not subject to the wetlands protection regulations or the clean water regulations was consistent with his 25 years of experience with "such permitting."[20] *Id.* With regard to this statement, its primary relevance is in demonstrating communication between

[20] We have already ruled that statements attributed to DEP officials in the testimony of SBLLC's experts are admitted into evidence, leaving their weight and credibility for our consideration. *See* § IV.B.1.

the developer's experts and the DEP regarding compliance with state requirements, and it makes clear Mr. William's view that the project is working toward compliance with applicable DEP requirements for stormwater management, not that DEP has made any final determination.[21] He also stated that the developer will be required to file a National Pollution Discharge Elimination System (NPDES) General Permit Notice of Intent (NOI) and a Stormwater Pollution Prevention Plan (SWPPP) with both the U.S. Environmental Protection Agency (EPA) and the DEP, which may provide additional input on the Construction General Permit, since the project will indirectly discharge stormwater to Outstanding Resource Waters.[22] SBLLC Exhs. ZZ, ¶ 23; AAA, ¶ 26; B, Sheet ABB-1; D, Stormwater Report Checklist, pp. 6, 8; E. Mr. Williams also stated the project can be conditioned to meet Cambridge's concerns, as set out in the peer review of Kleinfelder Engineering. SBLLC Exh. K.

2. Wastewater Treatment Facility

The developer proposes to use a wastewater treatment system consisting of an evaporative wastewater treatment facility (WWTF). SBLLC Exh. YY, ¶ 9. Stantec was retained by SBLLC to assist with the development of the proposed WWTF with evaporators for the project. *Id*., ¶¶ 7, 9; SBLLC Exh. BBB, ¶ 7. Meredith Zona, P.E., an associate at Stantec, and her colleague, Kevin Klein, P.E., an environmental engineer, and a senior associate at Stantec, worked together on the project. They provided testimony describing their work in the design of the WWTF and consulting with DEP regarding approval of the system. SBLLC Exh. YY, ¶¶ 1, 9. Ms. Zona is a LEED accredited professional engineer, specializing "in planning, design, and construction of wastewater and storm water management facilities, with a focus on wastewater collection, pumping, and treatment, energy efficiency, renewable energy, and water and biosolids reuse." SBLLC Exhs. BBB, ¶ 2; O.

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[21] In the context of the record, including Mr. Williams' testimony that he had not then shared the stormwater management report with the DEP official, Tr. V, 73-74, we do not consider this to be evidence that the DEP has formally concluded the project is not subject to the WPA; rather, we credit Mr. William's testimony regarding his understanding based on his extensive experience pertaining to compliance with state requirements.

[22] The developer's completed August 11, 2017, DEP Checklist for Stormwater Report stated that the "NPDES Multi-Sector General Permit covers the land use and the SWPPP will be submitted prior to the discharge of stormwater to the post-construction stormwater BMPs." SBLLC Exh. D, Stormwater Report Checklist, p. 6. It also included a post-construction operation and maintenance plan and a long-term pollution prevention plan with measures to prevent illicit discharges, with an illicit discharge compliance statement attached. *Id.,* p. 8.

According to Ms. Zona, the WWTF would be located in the basement below the parking garage of the building and would treat and dispose of wastewater and sewage created in the building through an on-site system. The WWTF System has a design flow of 25,850 gallons per day (gpd).[23] SBLLC Exh. BBB, ¶¶ 11, 17. In the WWTF as designed, wastewater effluent generated from the project residences will flow into a pretreatment tank located within the basement. After going through a treatment process, liquid waste would be pumped to thermal evaporators and vented outside of the building through an exhaust stack in the form of water vapor. Waste solids would be removed by septage hauling. SBLLC Exh. BBB, ¶¶ 21-24. Ms. Zona stated the WWTF "has been designed to use the OVIVO microBLOXTM MBR treatment system for organic matter and nitrogen reduction, which produces a quality of effluent that meets effluent limitations for Class A Water Reuse consistent with the MassDEP Reclaimed Water Standard (314 CMR 20.00)." *Id.,* ¶ 12. She stated the WWTF is a "zero discharge" system under state regulations, "because the proposed design contains all piping and treatment and disposal units within the building, there will be no sewer line construction or connection, and no subsurface tanks, leaching facility, or underground sewers will be required. *Id.,* ¶ 15. She also stated that because there would be no surface water or groundwater discharge from the proposed system, it is not subject to any DEP wastewater discharge permits as long as the design plans do not change, because "evaporators for disposal of the wastewater effluent … eliminate[] the need for discharge of treated wastewater effluent to sewers, groundwater or surface water resources." *Id; see id.,* ¶ 16. She did note that "some atmospheric deposition of the vaporized effluent may occur for the described weather conditions, such as precipitation, resulting in some of the vaporized effluent reaching the Stony Brook and Stony Brook Reservoir…." SBLLC Exh. CCC, ¶ 27. *See* SBLLC Exhs. S; R.

In designing the WWTF, Ms. Zona and Mr. Klein had several meetings with DEP officials to review the proposed WWTF.[24] Exhs. BBB, ¶ 7; YY, ¶¶ 9, 12. Ms. Zona stated the

[23] Ms. Zona noted that "[s]ystems with design flow of greater than 10,000 gpd are governed by the state, not local boards of health, in accordance with Section 15.003(2) of Title 5." SBLLC Exh. BBB, ¶ 11.

[24] We have denied Cambridge's motion to strike Mr. Klein's statement at the hearing that at a meeting with DEP officials, the officials "agreed with us at that time that a Groundwater Discharge Permit wasn't necessary and a Surface Water Discharge Permit wasn't necessary; and that our air discharge using the evaporators is regulated by the air quality but does not require a permit due to the size and the limitations." Tr. IX, 117. As with Mr. Williams' testimony regarding statements by a DEP official, we do not credit this testimony as demonstrating a final determination of DEP. *See* note 21, *supra*.

WWTF has been designed in compliance with the criteria in the DEP "Guidelines for Design, Construction, Operation and Maintenance of Small Sewage Treatment Facilities with Land Disposal" (Guidelines), "one of the main standards for design of such WWTFs in the state." SBLLC Exh. CCC, ¶ 22; *see* SBLLC Exh. P. Stantec prepared a conceptual design report "in accordance with the Guidelines, including all aspects of the project's WWTF System as requested by DEP." *Id.,* ¶¶ 8, 9; *see* SBLLC Exh. S. Ms. Zona testified that "[i]n addition to the referenced Guidelines, the WWTF System will also be operated in accordance with 314 CMR 12:00 - *Operation, Maintenance and Pretreatment Standards for Wastewater Treatment Works and Indirect Dischargers,* and 257 CMR 2.00- *Certification of Operators of Wastewater Treatment Facilities,* which requires facility operation by a Certified Wastewater Treatment Plant Operator." SBLLC Exh. BBB, ¶ 19. She also stated the project has already made changes to the system in response to DEP requests, that the final design of the WWTF and evaporators will be submitted to DEP "for review and comment and any necessary approvals," and the developer will further comply with DEP's requests regarding the final design of the system, and any remaining or additional requested changes will be made a part of the WWTF during final design and are subject to final review by DEP. SBLLC Exh. BBB, ¶ 20; *see* SBLLC Exhs. CCC, ¶¶ 8-11; YY, ¶¶ 12, 17; S (Conceptual Design Executive Summary); R; EE.

Ms. Zona also stated the WWTF is designed to meet reuse quality effluent in accordance with 314 CMR 20.00, Reclaimed Water Permit Program and Standards, and "[i]f future regulations allow, the Project may be able to reuse approximately 30 percent of the effluent for toilet flushing and evaporate the remainder. The sewage flows to a WWTF, just not one with a groundwater or surface water discharge. The WWTF System thus complies with 248 CMR 10.00." Exh. CCC, ¶ 12.

Ms. Zona stated "the WWTF System does not require permitting under 314 CMR 3.00, 5.00 and 7.00, and will not require a permit under 314 CMR 8.00 because it is not a Hazardous Waste Management Facility." [25] SBLLC Exh. CCC, ¶ 15. She testified that the WWTF System's location does not violate the Guidelines and it would meet minimum acceptable setback

[25] SBLLC argues that the proposed project is not subject to 314 CMR 3.00 or 5.00, or 314 CMR 4.00, Massachusetts surface water quality standards, because the project is not located in a jurisdictional resource area, and there will be no direct discharge to either surface water or to groundwater from the stormwater management system. SBLLC brief, p. 41; SBLLC reply brief, p. 4; SBLLC Exhs. ZZ, ¶¶ 23-28; YY ¶¶ 16-17; BBB, ¶¶ 9-11, 16; CCC ¶¶ 8-11, 30; S.

distances established in the Guidelines. *Id.,* ¶¶ 21-22. She stated further that "[m]anaging wastewater onsite is gaining momentum nationwide as a sustainable option that allows communities to meet housing and business needs without overtaxing existing infrastructure such as municipal sewers, wastewater pumping stations, and WWTFs," also noting "there is ample precedent for locating a WWTF System within an occupied building. Even within the Town of Weston, one of the nursing/assisted living facilities houses a WWTF System in its basement - Norumbega Point at Weston." *Id.,* ¶ 21.

B. Board's (and Cambridge's) Challenge to Developer's Presentation

In response, the Board contends that the project cannot comply with the following state and federal provisions regarding stormwater and wastewater management to which the project is subject. Cambridge's role in arguing against the developer's prima facie case exceeded the scope of its permitted intervention and we do not consider its arguments regarding the developer's prima facie case. *See* note 14, *supra.*

Requirements related to Stormwater Management:

1) G.L. c. 131, § 40, Wetlands Protection Act, 310 CMR 10.00, Wetlands Protection Regulations, and DEP Stormwater Management Standards 3 and 6;
2) 313 CMR 11.00, Watershed Protection Regulations;
3) 310 CMR 22.00, Drinking Water;
4) EPA/DEP MS4 Permit. The Board argues that compliance with the following Weston bylaws and regulations is required to comply with the MS4 Permit issued to Weston:
    a) Article XXVII Stormwater and Erosion Control Bylaw generally;
    b) Article XXVII Stormwater and Erosion Control Bylaw, Section VI, as it relates to drinking water protection;
    c) Article XXVII Stormwater and Erosion Control Bylaw (low impact development requirements);
    d) Zoning Bylaw § VI.D.2, Business B District dimensional requirements regarding lot coverage;
    e) Stormwater & Erosion Control Regulations, § 7.0, Design Standards (depth to high groundwater); and
    f) Stormwater & Erosion Control Regulations, § 7.0, Design Standards (peak rates and volumes).

Requirements related to Wastewater Treatment Facilities:

1) 314 CMR 12.00, Operation, Maintenance and Pretreatment Standards for Wastewater Treatment Works and Indirect Discharges;

2) 314 CMR 3.00, Surface Water Discharge Permit Program;

3) 314 CMR 4.00, Massachusetts Surface Water Quality Standards;

4) 314 CMR 5.00, Ground Water Discharge Program;

5) 314 CMR 7.00, Sewer System Extension and Connection Permit Program;

6) 314 CMR 20.00, Reclaimed Water Permit Program and Standards;

7) 248 CMR 10.00, Uniform State Plumbing Code; and

8) DEP Guidelines for Small Wastewater Treatment Facilities.

In opposing the developer's case, the Board relies extensively, and inappropriately, on testimony of its own witnesses and exhibits submitted into evidence, which are immaterial to consideration of the prima facie case, as discussed above in § IV.B.1 and § V.A. *See* 760 CMR 56.07(2)(a)(2).

The Board also argues that cross-examination testimony of the developer's experts shows the project cannot comply with state or federal requirements and SBLLC therefore failed to establish a prima facie case. For example, it argues that the developer's position that it does not have to comply with the WPA, and its regulations and stormwater management standards, is contradicted by Mr. William's testimony that "[w]e have to file our EPA Notice of Intent for General Construction Permit through the EPA. And because the site discharges to an OWR, again, Stony Brook and Stony Brook Reservoir, we have to file, I believe it's a WM15 needs to get filed with the MassDEP as well as the EPA for review and signoff." Tr. IV, 73; Board brief, p. 27.

Finally, the Board cites to a number of local bylaws and regulations, which are discussed more fully in § VII (Local Concerns), *infra*, which it argues are mandated by the federal and state MS4 Permit. Board brief, pp 31-39. It asserts that the MS4 Permit requires compliance with the DEP Stormwater Management Standards 3 and 6. It relies on this to argue that the developer cannot comply with the local rules and therefore, the project's noncompliance with each of these Weston bylaws or regulations would be a violation of state or federal law, demonstrating the developer cannot establish its prima facie case.

C. Committee Analysis

We rule that SBLLC has presented sufficient evidence to meet the standard of 760 CMR 56.07(2)(a)2 and the Pre-Hearing Order. As discussed above, the prima facie showing in our proceedings is to provide the Committee and the Board sufficient information so that the

Committee and the Board know what the developer is proposing. The submission by SBLLC does that and more. The developer presented plans, including information relating to the disputed stormwater management system and the WWTF, as well as expert testimony on applicable state and federal requirements. SBLLC's expert, Mr. Williams, relied upon the memorandum from the Weston Conservation Commission that because all proposed work for the redesigned project is outside the 200-foot riverfront area, the WPA, and thus, the wetlands protection regulations and the Stormwater Handbook, did not apply to the project.[26] SBLLC Exhs. AAA, ¶ 15; B; C; ZZ, ¶¶ 13-20; D.

The developer reached out to DEP regarding both the stormwater and wastewater aspects of the project and has engaged in a dialog with that agency regarding compliance issues. SBLLC's experts described their communications with DEP regarding stormwater management and the WWTF, as well as the developer's work to meet DEP requirements. SBLLC has stated it will comply with all applicable state and federal requirements, while noting those state requirements its experts believed did not apply. It has also stated it will file a required notice of intent with DEP and the EPA. The cross-examination testimony of the developer's experts regarding applicability of and compliance with various state and federal requirements does not alter our determination.[27] *Tiffany Hill, supra,* No. 2004-15, slip op. at 6. This is consistent with our previous decisions. Moreover, the developer has agreed to comply with all applicable state and federal requirements, as it is required to do, and to oversight by DEP. Therefore, if the project is subject to additional state requirements, it will be obligated to comply with them. Since we include a condition mandating such compliance, we are satisfied that the developer has met the requirements of 760 CMR 56.07(2)(a)2.

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[26] On cross-examination by the Board, Mr. Williams stated he was unaware whether the Conservation Commission had seen the revised drainage report, dated August 11, 2017. Tr. V, 43. However, Mr. Williams also testified that with the redesigned drainage system "[a]ll the proposed work is outside the jurisdictional resource areas under the control of the Conservation Commission." Tr. V, 106.

[27] We disagree with the Board's characterization of the testimony of the developer's witnesses. In general, the witnesses testified, and the developer submitted argument, regarding the applicability of the identified state and federal requirements to the project. To the extent the developer's witnesses stated the project would not comply with certain state provisions, ultimately the interpretation of these contested requirements, and whether the project is subject to them, is the responsibility of the DEP, not the Committee. It is clear from the record that the developer's witnesses disagree with the Board's interpretation of various provisions of state regulations. Under our standard, these statements on cross-examination, viewed in the context of the developer's entire presentation, did not undercut the adequacy of its submission. *Tiffany Hill, supra,* No. 2004-15, slip op. at 6.

We hold that the prima facie case does not require proof of, or even explicit testimony showing compliance with, every applicable federal or state statute, regulation, or guideline. The developer's evidence demonstrates to us that it has made a conscientious effort to address state and federal requirements and has included evidence of its experts of intent to comply with state and federal law, as well as generally accepted standards, as shown in its plans, reports and testimony. No more is required.[28]

Additionally, the Board's (and Cambridge's) exploration of the details of every state and federal requirement they consider applicable takes the Committee proceedings into an area beyond the purpose of the prima facie case. The Committee cannot ultimately determine whether a project will comply with state or federal requirements; nor may we waive any provision of state or federal law. *See North Andover, supra,* 4 Mass. App. Ct. 676, 680; *O.I.B. Corp. v. Braintree*, *supra,* No. 2003-15, slip op. at 6-7. This exercise has unnecessarily distracted the Committee from local concerns, which are the issues on which we are required to focus, as we stated in *Holliston, supra,* No. 2006-16:

> …our focus is on local concerns, and nothing in Chapter 40B suggests that we should consider environmental issues raised under state and federal law. On the contrary, the Committee has no [] authority to hear a dispute as to whether a developer is adhering to state or federal law.

Id. at 9-10. *See Board of Appeals of Woburn v. Housing Appeals Comm.*, 451 Mass. 581, 584 (2008) ("[t]he structure of the act "reflects the Legislature's careful balance between leaving to local authorities their well-recognized autonomy generally to establish local zoning requirements ... while foreclosing municipalities from obstructing the building of a minimum level of housing affordable to persons of low income").

Additionally, the DEP has been involved in discussions with SBLLC regarding both the stormwater management system and the WWTF. The DEP is tasked with enforcement of applicable statutes and regulations, and the Board and Cambridge can rely on this. If DEP fails to do so, either Weston or Cambridge may seek whatever remedies and take any actions that are available to ensure enforcement of such requirements. Where, as here, the Board and Cambridge argue the project cannot be constructed without violating state requirements, "[i]f that turns out

[28] The developer and its experts clearly believe they can and will comply with state and federal requirements; to invest time and resources in a proposal that is likely to fail for lack of compliance with these requirements would not make sense.

to be true, the developer will … bear the risk that the project cannot go forward." *Woburn*, *supra,* 92 Mass. App. Ct. 1115 n.6.

For the reasons stated above, the plans, pre-filed testimony and other evidence submitted by the developer were sufficient to make the preliminary showing and we conclude that SBLLC has satisfied the requirements of 760 CMR 56.07(2)(a)2 with regard to the stormwater management system and the WWTF. The evidence introduced at the hearing did not alter this result. *See Tiffany Hill, supra,* No. 2004-15, slip op. at 6.

Finally, in our *Holliston* decision, we stated that "despite all of the evidence introduced, [the Committee] need not consider the substance of these issues—either whether the developer proved its *prima facie* case or whether the Board has established counterbalancing local concerns in response—because … we conclude that the Holliston Zoning Bylaws do not regulate the remedial activity proposed…." *Holliston, supra,* No. 2006-16, slip op. at 11-12. Here, where we have a situation comparable to that in *Holliston,* we consider another factor in evaluating the Board's challenge to the developer's prima facie case—whether the Town has locally regulated the matters asserted by the Board and Cambridge in a manner that is more restrictive than the state and federal regulatory scheme. As discussed below, the Board and Cambridge have not presented evidence of such a more stringent local requirement or regulation applicable to stormwater management or wastewater management to support a valid local concern for which a prima facie case should be made. Thus, they have failed to prove there is a valid local concern applicable to this proposal. Under these circumstances, the Pre-Hearing Order may not require the developer to make a prima facie case if there is no applicable valid local concern. *See* Pre-Hearing Order, § IV.3. This is important because consistency with *local* needs is the central issue in our proceedings, and the matter on which we are expected to make a determination. G.L. c. 40B, § 23. Where the developer has stated it will comply with all applicable state and federal requirements, it would be inconsistent with our role under Chapter 40B to uphold the Board's denial of a comprehensive permit application because of disputes regarding the interpretation and applicability of various state and federal requirements that must be determined by the appropriate state and federal agencies.

In addition to the condition that we customarily include in our decisions requiring compliance with all applicable state and federal requirements, we will specifically require the developer to provide copies to the Board and the Conservation Office of all permit and other

approval or review requests made to state and federal authorities, and all decisions of those state and federal authorities made upon those requests or otherwise in connection with this project.

Since we determine the developer has made its prima facie case based on its pre-filed testimony and exhibits, we deny the Board's motion for directed decision.

VII. LOCAL CONCERNS

A. Board's Local Concern Arguments

The Board's brief focuses almost exclusively on a long list of state and federal requirements it alleges SBLLC must, but cannot, meet. As to local concerns, the Board stated in the Pre-Hearing Order its belief that non-compliance with state standards is a sufficient local concern. It asserted that "as the proposed project does not comply with state law governing wastewater disposal or stormwater management and discharge, identification of "Local Concerns" is irrelevant to these proceedings." Pre-Hearing Order, § IV. This assertion is wrong as a matter of law.

The Board cites to a number of local regulations, which it argues are federally- and state-mandated. Board brief, pp. 31-38. It relies on this to argue that noncompliance with each of these Weston bylaws or regulations would violate state or federal law. It also states that:

> as these regulations are mandatory under federal and state law, they cannot be viewed as simply "local regulations" that a board or the Committee may waive Rather, these regulations embody federal and state requirements; as a practical matter, they *impose* federal and state standards. A board of appeals is not at liberty to waive such regulations, because in so doing, it would impermissibly waive a federal or state requirement. This is outside the authority of a board of appeals under G.L. c. 40B; it is equally outside the authority of the Committee.

Id. In its brief, the local requirements and regulations cited by the Board as applicable to local concerns are the following requirements contained in Article XXVII, Weston Stormwater and Erosion Control Bylaw, § VI: 1) Incorporation of DEP Stormwater Standard 3 (Recharge to Groundwater); 2) Incorporation of DEP Stormwater Standard 6 (Buffer to Drinking Water Source); 3) Requirement to integrate Low Impact Development (LID) and better site design; and 4) Zoning dimensional requirements limiting building coverage to 25% of lot area, Zoning Bylaw § VI.D.2 (Business B District Dimensional Requirements). The Board also cited Stormwater & Erosion Control Regulations, § 7.0, Design Standards (Depth to High Groundwater) and Stormwater & Erosion Control Regulations, § 7.0, Design Standards (Peak

Rates and Volumes). Board brief, pp. 32-38; Board Exh. 20. The Board does not contend that any of these local requirements provide more stringent protections of wastewater management and stormwater management than the state and federal requirements it and Cambridge cite.[29] Rather, it argues that these local requirements are mandated by federal law:

> The federal Safe Drinking Water Act likewise requires municipalities to impose local regulations for the protection of drinking water sources such as the Cambridge Reservoir. The Town of Weston is currently in compliance with these state and federal requirements, having adopted the local regulations called for by state and federal law. The Town will be *out of compliance* if this Project is approved, because the Project does not meet these federally- and state-mandated standards. Horsley, pp. 6-7. The following are local regulations adopted by the Town of Weston, *in fulfillment of the mandates of the federal Safe Drinking Water Act and the Massachusetts Drinking Water Regulations*, with which the Project cannot and does not comply: [citing the above local requirements].

Board brief, p. 32.

1. Article XXVII Stormwater and Erosion Control Bylaw

The Board argues that Article XXVII Stormwater and Erosion Control Bylaw, § VI, incorporates DEP Stormwater Standard 3 (Recharge to Groundwater), and that § VI, as it relates to drinking water protection, incorporates and imposes DEP Stormwater Standard 6 (Buffer to Drinking Water Source). The Board makes no argument that this local provision establishes stricter standards than state requirements; instead, the Board argues it is required by the state/federal MS4 Permit. Therefore, the Board has failed to establish a valid local concern with respect to this requirement. [30] Board Exhs. 12; 26, § II.A.4 (¶¶ 22-52); Board brief, pp. 32-34.

The Board also argues that this bylaw, with respect to low impact development requirements, incorporates DEP Stormwater management requirements to integrate low impact development and better site design requirements. It claims the bylaw requires developers to integrate LID and better site design into their projects and that this imposes a Massachusetts Stormwater Management Standard providing that project proponents "must consider

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[29] The Board also suggests generally that there is a concern regarding drinking water, but this apparently is based more on federal laws than on Weston requirements. In any event, it did not argue that any specific Weston bylaw or regulation provides more stringent drinking water protections than existing state and federal requirements.

[30] The Board argues that the project's discharge of stormwater into Weston's stormwater system subjects the project to the requirements of the EPA/Massachusetts MS4 Permit granted to Weston, and that the MS4 permit requires concurrence with the DEP Stormwater Standards. Board brief, pp. 13, 15, 40.

environmentally sensitive site design and low impact development techniques to manage stormwater." Board Exhs. 12; 26, ¶¶ 45, 47-48; 20; Board brief, pp. 35-36. Since the Board makes no argument that this bylaw establishes stricter standards than state requirements, but instead argues it is required by the MS4 Permit, the Board has failed to establish a valid local concern supported by this bylaw generally or with regard to the specific provisions cited. Board Exhs. 12; 20; 26, ¶¶ 29-43; Board brief, pp. 32-36.

2. Zoning Bylaw § VI.D.2, Business B District Dimensional Requirements regarding Lot Coverage

The Board, relying on testimony of Mr. Horsley, contends the Weston Zoning Bylaw § VI.D.2, Business B District dimensional requirements, limits building lot coverage to 25% of lot area, and it argues that this provision implements the requirements of the MS4 Permit for water supply protection and violation of the lot coverage minimum is inconsistent with the MS4 permit. Board brief. p. 36., Exh. 26, ¶ 49. Since the Board makes no argument that this bylaw establishes a stricter standard than what is required by the MS4 Permit, the Board has failed to establish a valid local concern with respect to this requirement.

3. Stormwater & Erosion Control Regulations, § 7.0

The Board argues that the Town's Stormwater & Erosion Control Regulations, § 7.0, Design Standards (Depth to High Groundwater), require a minimum of separation from detention structures of at least two feet to high groundwater. It argues that the depth to groundwater regulation implements the requirements of the Town's MS4 permit for water supply protection, and that "[v]iolation of the depth to groundwater minimum is inconsistent with the MS-4 permit and renders the Town noncompliant with this federal and state permit." Board brief, p. 37. It also argues that § 7.0(e) of the regulations requires that, "[p]rojects are to be designed such that the peak rates of stormwater runoff and volumes in the post development conditions are less than in the pre-development conditions" and this provision imposes DEP Stormwater Management Standard 2. *Id*. However, since the Board makes no argument that these provisions establish stricter standards than the state requirement, but instead argues they are required by the MS4 Permit, the Board has failed to establish a valid local concern with respect to these requirements.

Overall, the Board argues that the developer cannot comply with applicable state and federal requirements, and that this "evidence of regulatory noncompliance proved that the Board's decision was 'consistent with local needs,' and therefore must be upheld." Board brief,

p. 73. None of the Board's arguments demonstrates a valid local concern under the *Holliston* standard. The Board appears to suggest that its major concern is that Weston would be out of compliance with the MS4 Permit in granting this comprehensive permit. That, even if it is the case, would not establish a valid local concern. In any event, the Board could have conditioned its approval on the developer's compliance with all applicable aspects of the MS4 permit and all other applicable state and federal requirements. Therefore, we determine the Board has failed to demonstrate a valid local concern.

B. Cambridge's Local Concern Arguments

Cambridge argues that the protection of its public drinking water supply is a valid local concern that supports the Board's denial of the comprehensive permit.[31] In support, it cites *Reynolds v. Stow,* 88 Mass App. Ct. 339, 350 (2015) ("plaintiff has identified an important local health issue, maintaining clean groundwater servicing local private wells…"); *Prime v. Zoning Bd. of Appeals of Norwell*, 42 Mass. App. Ct. 796, 802 (1997) (protection of an aquifer); *Goddard v. Board of Appeals of Concord*, 13 Mass. App. Ct. 1001 (1982) (rescript opinion) (protection of groundwater). It also notes that the intervention ruling recognized that "[t]he protection of public drinking water is a cognizable interest found within G.L. c. 40B." *Id.,* slip op. at 6. Cambridge cites the following Weston bylaws and regulations as applicable: Weston Stormwater and Erosion Control Bylaw, § I.A; Weston Stormwater and Erosion Control Regulations, § 1.0. [32] Board Exhs. 12; 20.

Additionally, Cambridge points to the definition of "Consistent with local needs" in G.L. c. 40B, § 20, which requires "[consideration of] the number of low income persons in the city or

[31] Alternatively, Cambridge argues that SBLLC asserts that *no* state or federal permits are required to construct the stormwater system and the WWTF, and if this is true, Cambridge's public drinking water supply would not be adequately protected by the developer's "purported compliance with applicable state statutes and regulations." Cambridge brief, p. 49. Aside from the fact that this is more a challenge to the developer's prima facie case than a local concerns argument, Cambridge ignores the fact that ultimately DEP and the EPA will determine what state and federal permits are required as they are the entities that established the applicable regulatory schemes. This argument does not support an assertion of a local concern.

[32] Cambridge notes that it is not necessary in this proceeding to identify Cambridge laws and rules regarding the protection of Cambridge's public drinking water supply. Cambridge brief, p. 49 n.32. Cambridge is correct in this regard, as for analysis of local concerns, the only local requirements and regulations that would be applicable are those adopted by Weston, as the Board has the authority to waive such requirements.

town affected and the need to protect the health or safety … of the residents of the city or town….” It claims that the statutory reference to the “residents of the city or town” includes the residents of another municipality, and thus it is proper to consider residents of Cambridge as persons in the “city or town affected.” Cambridge brief, pp.46-47; Cambridge reply brief, pp. 20-21.

The Stony Brook and Stony Brook Reservoir, owned by Cambridge, are part of Cambridge’s public drinking water system. Cambridge relies on the Stony Brook Reservoir and the Hobbs Brook Reservoir as the two major reservoirs for its public drinking water supply outside the city. Water from the Hobbs Brook Reservoir flows into the Stony Brook Reservoir through the Stony Brook to the Fresh Pond Reservoir in Cambridge. Cambridge Exhs. N, ¶¶ 10-26; JJ, ¶ 7; KK, ¶¶ 19-20; O; Z; AA; BB (St. 1884, c. 256, § 1). Cambridge asserts that the construction and operation of stormwater management system, and the construction, operation, and maintenance of the WWTF would cause harmful water quality impacts on the Stony Brook Reservoir, and consequently Cambridge’s public drinking water supply.

Cambridge makes a number of arguments alleging the stormwater system would cause harmful water quality impacts on the Reservoir because the stormwater system would create an erosive soil condition on the slope below the level spreader. It refers to testimony of its stormwater expert, Rob Kenneally, that an erosive soil condition would develop within the riverfront area, a protected resource under the WPA, downgradient of the outfall of the detention basin. This, he testified, would cause the removal of soil and other granular material from the ground surface. Cambridge Exhs. T; LL, ¶ 21.

Cambridge also argues the project will cause an increase in impervious area resulting in generation of larger volumes of stormwater that would be unable to infiltrate and recharge groundwater because of shallow bed rock conditions on the site. Cambridge brief, pp. 8, 50; SBLLC Exh. D, Drainage Report, § 4.0; Cambridge Exhs. U, Drainage Deficiency Analysis, Fig. 1; LL, ¶¶ 29-30. Mr. Kenneally stated that the reservoir depends upon groundwater recharge rates and subsurface discharge to the reservoir for replenishment, and loss of infiltration and recharge from the increased impervious area would adversely impact Cambridge’s public drinking water. SBLLC Exh. LL, ¶¶ 27-31. SBLLC’s expert Mr. Williams disputed this assertion as unsupported, noting the proximity of state Route 20 and Interstate 95 to the Stony

Brook and Stony Brook Reservoir pose greater threats to the city's water supply. SBLLC Exh. AAA, ¶ 34.

Cambridge also argues that the WWTF would cause damaging impacts on its drinking water supply, resulting from contaminants of emerging concern (CECs) and other pollutants it alleges would be in the vaporized effluent discharged from the WWTF. Tr. VII, 81, 83; VIII, 9, 12, 53. Relying on testimony of Ms. Zona and its own witness, Dingfang Liu, Ph.D., P.E., B.C.E.E., Cambridge argues that the effluent vapor discharged from the WWTF would reach the Stony Brook and the Stony Brook reservoir through "direct atmospheric deposition, condensation and precipitation." SBLLC Exh. CCC, ¶ 27. Ms. Zona testified that the vaporized effluent would travel in various directions depending on climate conditions, including toward the Stony Brook and Stony Brook Reservoir and the surface area within the watershed of the Stony Brook and Stony Brook Reservoir. Tr. VIII, 52; IX, 52, VII, 72-74; *see* Cambridge Exh. NN, ¶ 14. Cambridge and SBLLC dispute whether effluent vapor of "reuse" quality is acceptable; Cambridge argues that DEP regulations provide that water reclaimed from wastewater is not safe for human consumption. Tr. VII, 109-110, 112-113, 119-120; VIII, 98; IX, 27; SBLLC Exh. BBB, ¶¶ 12-13; Cambridge Exh. NN, ¶ 80. Mr. Liu, a senior principal engineer at Kleinfelder, a consulting firm specializing in planning, engineering, architecture, environmental science, project management and sustainability, testified that effluent vapor from the WWTF would contain CECs, including pharmaceutical and personal care products (PPCPs), and would ultimately make their way to the Stony Brook and Stony Brook reservoir and Cambridge's public drinking water system, making users of the drinking water exposed to the harmful effects of these CECs. Cambridge Exhs. NN, ¶¶ 1, 85-87; OO, ¶¶ 17-2; F, I, J, K, L. Cambridge argues that its water treatment systems could not remove all inorganic contaminants, and it may be difficult to remove organic chemical contaminants. Tr. II, 148-151. It argues Ms. Zona did not calculate the quality of the vaporized effluent discharged by the WWTF, but it acknowledges her testimony that tests would be conducted during the final design of the WWTF to determine the presence of CECs in the effluent vapor, and that the developer would work with DEP on the final design. Cambridge brief, pp. 52-53; *see* Tr. VII, 81, 83, 112-113, 116; VI, 118-121. Ms. Zona stated the developer anticipates a monitoring program for the WWTF, including monitoring of effluent vapors. Mr. Liu stated that this would not prevent CECs being vented from the WWTF. SBLLC Exh. CCC, ¶ 41; Cambridge Exh. OO, ¶ 22.

Additionally, Cambridge argues that any failure of the WWTF, causing unplanned discharges, would pose a serious risk to Stony Brook and the Stony Brook Reservoir, potentially causing the city to incur a substantial financial cost. Since the evaporators use natural gas, it argues, if there is a gas outage for a prolonged period of time, wastewater generation would exceed onsite storage capacity and would require off-site disposal by waste hauling tanker trucks, potentially requiring pumping of wastewater effluent to such vehicles multiple times a day. Cambridge brief, pp. 57, 61-62. Mr. Liu testified that any leak or spill during removal of solids, waste activated sludge, or wastewater effluent, resulting from operator error, equipment failures or pipeline defects, would flow directly to the Stony Brook or Stony Brook Reservoir, come into contact with stormwater runoff that would flow to these resources, or enter groundwater through infiltration. Mr. Liu stated that the likelihood of failure is increased because the WWTF would be operated constantly. Cambridge Exhs. NN, ¶¶ 88-90; B, pp. 30-31, 39; Tr. VIII, 37-39. Cambridge argues, citing its witness, Stephen Corda, Director of the Cambridge Water Department, that the safety features Ms. Zona described do not account for what would happen in the event of a system failure occurring simultaneously with a power or internet failure that prevents remote control of the WWTF while operators are offsite. Cambridge Exh. KK, ¶ 8; Cambridge brief, p. 60.

Cambridge argues that protecting the public drinking water supply "would not be adequately protected by the Appellant's alleged compliance with applicable state statutes, regulations and standards." Cambridge brief, pp. 51, 57, 61-62, 65. Cambridge also contends, citing testimony of Mr. Corda, that the intent of the state regulations addressing wastewater treatment is to "prohibit the construction, operation, and maintenance of wastewater treatment systems within the Zone A of public water supplies in order to protect such public water supplies." Cambridge brief, p. 61; Cambridge Exh. KK, ¶ 9.

C. Developer's Response

SBLLC argues that the state has exclusive jurisdiction over the disputed aspects of the project—the stormwater and wastewater management systems. SBLLC brief. pp. 1, 8. The developer further argues that the Board exceeded its authority in denying the project based on "purported concerns related to the protection of drinking water resources not even located within the town." SBLLC brief, p. 8. It goes on to argue that "the Board's power to disapprove a comprehensive permit is limited to the scope of concern of the various local boards in whose

stead the local zoning board acts," citing *Holliston, supra,* 80 Mass. App. Ct. at 417. Therefore, the developer argues, the Board should have granted the comprehensive permit conditioned upon compliance with all applicable state and federal regulations, as well as a condition requiring DEP review and oversight of the project. SBLLC brief, p. 9; SBLLC reply brief, p. 17.

SBLLC argues that neither the Board nor Cambridge has demonstrated a local requirement that affords greater protections than state and federal regulations and standards, nor that a local concern applies beyond the Weston boundaries. It notes that Mr. Corda testified that the harms asserted to occur from the project were based on state and federal, not local standards. Additionally, SBLLC challenges the credibility of Mr. Liu's testimony regarding the impacts of the effluent vapor from the WWTF. SBLLC brief, pp. 37-38. It argues that, by contrast, the project will provide an improvement over existing conditions with regard to stormwater. SBLLC reply brief, pp. 12-13; *see* SBLLC Exhs. ZZ, ¶ 12; AAA, ¶ 12, citing SBLLC Exh. B, Sheet Exh. 1.

The developer further argues that neither the Board nor the intervener has shown that the "speculative" impacts they assert are not adequately addressed by state and federal standards.[33] Finally, it notes that it has agreed to conditions proposed by Cambridge, found in SBLLC Exhibit QQ and RR, stating that it only objected to a provision that would give Cambridge first enforcement rights regarding the wastewater treatment or construction. SBLLC reply brief, p. 17; *See* Tr. XI, 83-85, 103-109.

D. Committee Analysis

"The board's power to disapprove a comprehensive permit, like its power to impose conditions in issuing a comprehensive permit, *Zoning Bd. of Appeals of Amesbury v. Housing Appeals Comm.*, 457 Mass. [748] 755-756 [(2010)], is limited to the scope of the concern of the various local boards in whose stead the local zoning board acts." *Holliston, supra,* 80 Mass. App. Ct. 406, 417-418. Therefore, it was incumbent on the Board, and Cambridge as well, to identify a local interest protected by a local requirement or regulation that is more restrictive than state

[33] SBLLC also disputes the claim that protection of drinking water is a local concern in this case because the Stony Brook and Stony Brook Reservoir do not supply water to Weston, which is supplied by the Massachusetts Water Resources Authority (MWRA). Tr. XI, 18. It also argues that protection of Cambridge's drinking water is not a local concern even though a portion of the Stony Brook is within Weston boundaries. SBLLC brief, pp. 44-45.

and federal requirements, and to demonstrate that safeguards provided by the local requirement with respect to that local interest afford greater protection of the interest against the asserted harms of the project than those afforded by state or federal regulation.[34] *See id.* at 420. *See also Scituate*, *supra,* No. 2007-15, slip op. at 25 (local regulation must apply to proposed development and specific interests in regulation are important at, or relevant to, site and proposed project).

The Board's focus here was entirely on compliance with state and federal requirements. It cannot rely on the argument that denial of a comprehensive permit is warranted because the project does not comply with state and federal requirements. *Holliston, supra,* 80 Mass. App. Ct. 406, 416, 419 (rejecting board's argument it reasonably denied comprehensive permit because plans do not comply with the WPA, where developer committed to complying with WPA and final plans are subject to state review).

Even with respect to the local bylaws and regulations the Board identified, its sole argument was that compliance with them is required by federal and state law—the MS4 Permit, the federal and state "General Permit for Stormwater Discharges from Small Municipal Separate Storm Sewer Systems," which provides "Authorization to Discharge under the National Pollutant Discharge Elimination System." Board brief, p. 14; Tr. IV, 11. The requirement of compliance with the local bylaws and regulations to meet federal and state law thereby removes these local rules from consideration as local requirements or regulations. *See* 760 CMR 56.02: *Local Requirements and Regulations.* Furthermore, the Board has not attempted an argument that the local requirements it cites are stricter than the state and federal requirements. Therefore, we rule that the Board has failed to meet its burden to demonstrate a valid local concern applicable to the project, much less a local concern that outweighs the need for affordable housing. *Holliston, supra,* 80 Mass. App. Ct. 406, 417; *Scituate, supra,* No. 2007-15 slip op. at 23-26. *See also Stoneham*, *supra,* No. 2014-10, slip op. at 31.

Furthermore, here, as in *Holliston,* where the contested matters are extensively regulated at the state and federal level, more is required than noting a particular local bylaw or regulation.

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[34] This may require a board to introduce evidence of applicable state and federal requirements for comparison with local bylaws and regulations. The comparison may involve a more detailed analysis of state and federal requirements than is necessary for the prima facie case. *See Holliston, supra,* 80 Mass. App. Ct. 406, 419-420; *Holliston, supra,* No. 2006-16, slip op. at 12. This comparison does not require us to ultimately determine whether the project will comply with state or federal requirements.

Holliston, supra, 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. The board does not argue that the DEP will be unable to provide adequate protection to current and future residents."). The Appeals Court's decision in *Holliston* made this clear, where the town had adopted a wetlands by-law that was stricter than the WPA:

> It was incumbent on the board, therefore, to identify a local interest protected by those aspects of the by-law that are stricter than the WPA and demonstrate that such interest outweighs the regional need for low and moderate income housing.
>
> The board has done nothing more than point out that the proposal violates the town's stricter by-law. It has failed to demonstrate that the safeguards the local by-law provides to wetlands interests over and above the protections afforded by the WPA outweigh the community's need for low or moderate income housing.

Id. at 419-420.

Cambridge's arguments do not address the specific Weston local requirements and regulations and compare them to state and federal requirements. Although it cites some Weston local provisions in passing, it failed to show how, in the highly regulated fields of stormwater management, wastewater management and drinking water protection, the local rules protect against specific relevant harms against which state and federal requirements fail to guard.[35] Indeed, Cambridge argues that the intent of the state regulations is to prohibit the construction, operation, and maintenance of wastewater treatment systems within the Zone A of public water supplies. Cambridge brief, p. 61; Cambridge Exh. KK, ¶ 9. No local requirement could do more than this asserted complete prohibition.

Instead, Cambridge relies on a general argument that the drinking water protection is a valid local concern under *Reynolds, supra,* 88 Mass. App Ct. 339, and then focuses on general concerns about safety of drinking water and the need to protect the residents of Cambridge. But

[35] Since Cambridge is a landowner of abutting property, and was alleging deleterious impacts to that property, it was within the presiding officer's discretion to allow the city to intervene. Because Cambridge did not actually raise any local requirement or regulation in the hearing to support its asserted local needs, it failed to demonstrate that it is "substantially and specifically affected by these proceedings," which only involve local issues.

drinking water safety is addressed by state regulations Cambridge has cited.[36] Cambridge's argument also ignores that in *Reynolds,* the Court distinguished *Holliston* because the abutter in *Reynolds* not only pointed out the proposed project would violate a local provision that was more stringent than state law, but showed it was more likely than not that harm would result from the violation of the local rule. *Id.* at 349. Reliance on *Reynolds,* without undergoing the *Holliston* analysis, is inadequate to prove a valid local concern. Additionally, any reliance on Cambridge regulations is inapposite. The Weston Board had no authority to enforce or waive Cambridge requirements. Therefore, we hold that the bylaws and regulations of Cambridge have no relevance in this proceeding.

As noted earlier, the interpretation of the various state and federal regulatory provisions at issue is highly contested by the parties. However, it is clear that significant regulation of stormwater management, wastewater treatment and protection of drinking water exists at the state and federal levels. In this highly regulated environment, DEP and the EPA ultimately will be able to determine what state and federal permits are required. Where those agencies exercise their judgment in establishing applicable requirements, and no more restrictive applicable local requirements have been shown, it is not for the Committee to determine state and federal requirements are deficient and step in to interpret those requirements or to impose additional ones on our own as part of our role to evaluate local concerns. Therefore, to the extent Cambridge argues that protection of the public drinking water supply "would not be adequately protected by the Appellant's alleged compliance with applicable state statutes, regulations and standards," *see* Cambridge brief, pp. 51, 57, 61-62, 65, any argument that limitations of state oversight give rise to a local concern is without merit.

In this matter a presumption exists that there is a substantial need for affordable housing that outweighs any asserted local concerns. 760 CMR 56.07(3)(a); *See Zoning Bd. of Appeals of Lunenburg v. Housing Appeals Comm.*, 464 Mass. 38, 42 (2013) ("there is a rebuttable

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[36] By contrast, Cambridge's assertion that the developer could not comply with the state statutes and regulations it cites suggests it believes that state requirements should address its concerns, and its concern is really with state compliance, not local requirements. *See, e.g.,* 314 CMR 3.00, Surface water discharge permit program; 314 CMR 4.00, Massachusetts surface water quality standards; 314 CMR 5.00, Ground water discharge permit program; 314 CMR 12.00, Operation, maintenance and pretreatment standards for wastewater treatment works and indirect dischargers; 310 CMR 7.00, Air pollution control; 310 CMR 10.00, Wetlands protection; 310 CMR 22.00, Drinking water; Clean Waters Act, G.L. c. 21, § 43. *See* § VI.B and C, and note 17, *supra*.

presumption that there is a substantial Housing Need which outweighs Local Concerns" if statutory minima are not met), quoting *Boothroyd v. Zoning Bd. of Appeals of Amherst,* 449 Mass. 333, 340 (2007), quoting *Hanover, supra,* 363 Mass. 339, 346, 365, 367 ("municipality's failure to meet its minimum [affordable] housing obligations defined in § 20 will provide compelling evidence that the regional need for housing does in fact outweigh the objections to the proposal"). Since we rule the Board and Cambridge have not proven a valid local concern exists to support denial of the comprehensive permit, we need not reach the question whether any purported concern would overcome that presumption. Thus, we do not reach the question whether the suggestions of the Cambridge witnesses regarding potential impacts of the WWTF are speculative or meet the "more likely than not" standard of *Reynolds, supra,* 88 Mass. App. Ct. 339, 342.[37]

Moreover, similarly to *Holliston,* to the extent the Board argues that it reasonably denied the comprehensive permit because the plans do not comply with state and federal law, the argument is unavailing. In *Holliston, supra,* Appeals Court stated:It 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. [*Hanover, supra,* 363 Mass. [339, 381] ("Since the board could have issued a permit subject to the condition of tendering a suitable disposal plan and since these plans had to comply with State standards, whatever their particular design, the [HAC's] decision that the board had unreasonably rejected the applicant's original plans was warranted"). See [*Amesbury, supra,* 457 Mass. 748, 765 & n. 21] (board does not exceed authority by imposing condition of compliance with stormwater management requirements).

See also Jepson v. Zoning Bd. of Appeals of Ipswich, 450 Mass. 81, 85 n.9 (2007) (G.L. c. 40B permits waiver only of local requirements, not state laws), citing *Hanover, supra,* 363 Mass. 339, 355; *Bowdoin v. Zoning Bd. of Appeals of Lynnfield*, 58 Mass. App. Ct. 1106 (2003) (Rule 1:28 opinion) (G.L. c. 40A, § 17, challenge to comprehensive permit on ground project will not comply with state law irrelevant and premature as developer must still obtain state approvals before implementing project).

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[37] For example, the parties have disputed whether the effluent vapor from the WWTF will represent a serious health issue. Indeed, the state standards regarding that vapor are unclear. The Board argues that it is prohibited by state regulations as a discharge to ground water and surface waters under 314 CMR 3.00 and 5.00. Ms. Zona testified, based on her ongoing meetings with DEP, that DEP has not considered atmospheric deposition to constitute such a discharge. SBLLC Exh. CCC, ¶ 30. While we do not take this as evidence of DEP's position, SBLLC's understanding of DEP's expectations underscores the importance of leaving resolution of the developer's compliance with its regulations to DEP.

Cambridge's claim that there will be no oversight if SBLLC is correct that the cited state regulations do not apply to the project is both inaccurate and inapposite. First, Cambridge and the Board argue the developer is subject to the state regulations they cite, which extensively regulate stormwater and wastewater management, as well as protection of drinking water. Indeed, they argue that the developer cannot comply with these requirements. Second, the SBLLC's expert Mr. Williams, stated that SBLLC will file a Notice of Intent with both the EPA and the DEP, which will have the authority to determine whether their statutes, regulations and requirements apply to the project. If their judgment is that the project complies with all applicable requirements, that decision will be based on their enforcement of their own statutes and regulations. If they determine the developer cannot comply, it will be unable to construct the project. Further, SBLLC states that it agrees to a condition requiring DEP oversight of this project. Therefore, here, as was the case in *Holliston,* neither the Board nor Cambridge has shown "that the DEP will be unable to provide adequate protection to current and future residents." *See Holliston, supra,* 80 Mass. App. Ct., 406, 419.

SBLLC has argued for the inclusion in the comprehensive permit of a condition requiring compliance with all applicable state and federal requirements; the developer is already communicating with DEP regarding ensuring the WWTF complies with state requirements, and it will submit a Notice of Intent to the EPA and DEP in connection with NPDES requirements. SBLLC brief, p. 23; SBLLC Exhs. ZZ (Williams), ¶ 23; DDD. Since the Board argues the MS4 Permit will require compliance with other DEP requirements, DEP can enforce its requirements. In any event, as noted above, we include in our conditions below in § VIII, a specific condition requiring that SBLLC comply with all applicable provisions pertaining to NPDES and the MS4 permit, as well as all applicable DEP requirements, that it obtain the oversight of the stormwater management system and the WWTF by DEP, and that it obtain all applicable approvals before issuance of a building permit.[38]

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[38] It has been long settled that the Committee has the power to issue permits conditioned upon compliance with state law. *Hanover, supra,* 363 Mass. 339, 373-375, 378, 381 (noting Committee included conditions providing that before commencement of construction, developers must respectively provide Town of Hanover board "satisfactory evidence that its proposed provisions for drainage and sewage disposal have received approval from the appropriate state authorities" and "secure the approval of the Commonwealth of Massachusetts, Department of Natural Resources, Division of Water Pollution Control of its connection to the Town of Concord sanitary sewer system"). *Id.* at 372 n.22. *See Woburn, supra*, 92 Mass. App. Ct. 1115 (2017) (Rule 1:28 opinion), which noted the Committee addressed state noise

Accordingly, we conclude that neither the Board nor Cambridge has demonstrated a valid local concern and have not demonstrated any valid local concern that outweighs the need for low or moderate income housing.

VIII. CONCLUSION

Based upon review of the entire record and upon the findings of fact and discussion above, the Housing Appeals Committee concludes that the decision of the Board is not consistent with local needs. The decision of the Board is vacated, and the Board is directed to issue a comprehensive permit that conforms to the application of 104 Stony Brook, LLC and as provided in the text of this decision and subject to the following conditions.

1. The comprehensive permit shall conform to the application submitted to the Board, as modified by the following conditions.

   a. The development shall be constructed as shown on the Re-designed Project Plans prepared by A&M titled "Site Development Plans for Stony Brook Weston, 104 Boston Post Road, Weston, MA" dated March 28, 2017; rev. August 11, 2017, subject to compliance with all applicable federal and state requirements. SBLLC Exh. B.

   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 104 Stony Brook Street'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 Weston town entities, staff, or officials for final comprehensive permit review and approval pursuant to 760 CMR 56.05(10)(b).

   e. The developer shall promptly submit to the Board and to the Conservation Commission copies of all formal and informal submissions by the developer to state and federal authorities with respect to formal or

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requirements by finding "'[c]onstruction of the development will not go forward unless it is in compliance' with all noise requirements, and, in fact, made the comprehensive permit subject to a condition that construction comply with all Massachusetts, Federal, and local noise and vibration regulations and requirements" and that '[l]ocal officials and residents may take whatever actions are normally taken to ensure enforcement of such requirements.'" *Id. See Cirsan Realty Trust v. Woburn,* No. 2001-22, slip op. at 20 (Mass. Housing Appeals Comm. Decision on Project Change Apr. 23, 2015).

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

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

g. Any specific reference to the submission of materials to Weston officials or offices for their review or approval shall mean submission to the appropriate municipal official with relevant expertise to determine whether the submission is consistent with the final comprehensive permit. Such official may consult with other officials or offices with relevant expertise as they deem necessary or appropriate.

h. To the extent SBLLC has not already incorporated the conditions proposed by the City of Cambridge, as identified in SBLLC Exhibits QQ and RR (with the exception of any provision that would give Cambridge first enforcement rights in connection with the wastewater treatment or construction), those conditions are incorporated by reference and made a part of this decision.

2. Should the Board fail to carry out this order within thirty days, then, pursuant to G.L. c. 40B, § 23 and 760 CMR 56.07(6)(a), this decision shall for all purposes be deemed the action of the Board.

3. Because the Housing Appeals Committee has resolved only those issues germane to G.L. c. 40B, §§ 20-23 that were placed before it by the parties, the comprehensive permit shall be further subject to the following conditions:

a. Construction in all particulars shall be in accordance with all applicable local requirements and regulations in effect on the date of 104 Stony Brook Street's submission of its comprehensive permit application to the Board, pursuant to 760 CMR 56.02: *Local Requirements and Regulations,* except those waived by this decision or in prior proceedings in this case.

b. The subsidizing agency may impose additional requirements for site and building design so long as they do not result in less protection of local concerns than provided in the original design or by conditions imposed by the Board or this decision.

c. If anything in this decision should seem to permit the construction or operation of housing in accordance with standards less safe than the applicable building and site plan requirements of the subsidizing agency, the standards of such agency shall control.

d. No construction shall commence until detailed construction plans and specifications have been reviewed and have received final approval from the subsidizing agency, until such agency has granted or approved construction financing, and until subsidy funding for the project has been committed.

e. The Board and all other Weston town staff, officials, and boards shall take whatever steps are necessary to ensure that a building permit and other permits are issued to 104 Stony Brook, LLC without undue delay, upon presentation of construction plans, pursuant to 760 CMR 56.05(10)(b), that conform to the comprehensive permit and the Massachusetts Uniform Building Code.

f. Design and construction shall be in compliance with the Massachusetts Environmental Protection Act (MEPA), G.L. 30, §§ 61-62H, and 760 CMR 56.07(5)(c). Construction shall not commence until the completion of the MEPA review process as evidenced by the issuance of a final certificate of compliance or other determination of compliance by the Secretary of Energy and Environmental Affairs. If applicable, the Committee retains authority to modify this decision based upon the findings or reports prepared in connection with MEPA.

g. Design and construction in all particulars shall be in compliance with all applicable state and federal requirements, including the state Wetland Protection Act, and Massachusetts Department of Environmental Protection requirements pertaining to stormwater management, wastewater treatment, and public drinking water. Stony Brook, LLC shall be required to obtain DEP oversight of its stormwater management design and WWTF design.

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

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

This decision may be reviewed in accordance with the provisions of G.L. c. 40B, § 22 and G.L. c. 30A by instituting an action in the Superior Court within 30 days of receipt of the decision.

HOUSING APPEALS COMMITTEE

June 22, 2023

Shelagh A. Ellman-Pearl, Chair

Lionel G. Romain

Rosemary Connelly Smedile