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

518 SOUTH AVE, LLC

v.

WESTON ZONING BOARD OF APPEALS

No. 2022-12

DECISION

January 23, 2025

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Interveners and Ten Persons Group Witnesses
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C O M M O N W E A L T H O F M A S S A C H U S E T T S

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

518 SOUTH AVE, LLC, Appellant, v. WESTON ZONING BOARD OF APPEALS, Appellee.	)	No. 2022-12

DECISION

I. INTRODUCTION

This is an appeal, pursuant to G.L. c. 40B, §§ 20-23 and 760 CMR 56.00, brought by 518 South Ave, LLC (518 South Ave or developer), from a decision of the Weston Zoning Board of Appeals (Board) denying a comprehensive permit application with respect to property located in Weston. Chapter 40B requires the Housing Appeals Committee (Committee) 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. After a lengthy hearing in this matter and reviewing the parties' evidence and briefs, we conclude that Board's decision was not reasonable or consistent with local needs. We do so, mindful of the balance between legitimate local concerns and the regional need for low or moderate income housing, and the Committee's narrow statutory focus on consideration of local concerns. The Board's and Interveners' primary focus was on compliance with state standards, which cannot be waived by Committee decisions; their failure to focus on evidence necessary to persuade the Committee that the project as proposed would result in other than speculative adverse impacts upon wetland resources and land intended to be protected by local requirements and regulations ultimately leads us to conclude

that the Board and Interveners have not met their burden of proving that a valid local concern outweighs the regional need for affordable housing.

II. PROCEDURAL BACKGROUND

On July 2, 2019, 518 South Ave submitted an application to the Board for a comprehensive permit pursuant to G.L. c. 40B, §§ 20-23, for a 200-unit rental development consisting of a single four-story building on a 9.5-acre parcel of land located at 510, 518, and 540 South Avenue, Weston, Massachusetts (the property).[1] Initial Pleading, ¶¶ 1, 2, 5. Twenty-five percent of the units will be affordable. The project will include a parking garage with 293 parking spaces. *Id.*, ¶ 19.

The Board opened the public hearing on the developer's application on August 19, 2019, and notified the developer and the Department of Housing and Community Development (DHCD)[2] that it considered that the Town of Weston had achieved the statutory safe harbor, available to a municipality that has met the general land area minimum, one of three statutory safe harbors that establishes that requirements and regulations imposed by a zoning board's decision are consistent with local needs under the Comprehensive Permit Law, G.L. c. 40B, § 20. *See* 760 CMR 56.03(1)(a). 518 South Ave filed an objection with DHCD challenging the Board's claim of a safe harbor. *Matter of Weston and 518 South Ave, LLC*, No. 2019-12 (Mass. Housing Appeals Comm. Interlocutory Decision Mar. 15, 2021); Exh. 3. DHCD thereafter issued a determination that the Board had not established it had achieved the safe harbor, and the Board filed an interlocutory appeal with the Committee. Initial Pleading, ¶¶ 9, 10. The Committee issued a summary decision determining that Weston had not achieved the 1.5 percent general land area minimum at the time of 518 South Ave's application to the Board for a comprehensive permit and remanded the matter to the Board for further proceedings. *Matter of Weston*, *supra*, No. 2019-12. *See* 760 CMR 56.03(8)(c); 760 CMR 56.05. The Board resumed the public hearing on the application, during which the developer modified the proposed project to construct 180 multifamily rental units in a single, four-story building on the property. Exhs. 3; 34, ¶ 10. On

[1] Appellant 518 South Ave owns the real property located at 510 and 518 South Avenue in Weston. Appellant 540 South Ave LLC owns the real property located at 540 South Avenue in Weston, Massachusetts. The project site is comprised of the property at 510, 518, and 540 South Avenue, Weston.

[2] As of May 30, 2023, the Department of Housing and Community Development became the Executive Office of Housing and Livable Communities (EOHLC). St. 2023, c. 7.

July 28, 2022, the Board voted to deny the application by decision filed with the town clerk on that date. Exh. 3.

On August 16, 2022, 518 South Ave filed an appeal with the Committee seeking reversal of the Board's denial decision and issuance of a comprehensive permit. The Committee held an initial conference of counsel on September 1, 2022, and the parties agreed to engage in mediation, which was unsuccessful. While mediation was pending, motions to intervene were filed by a ten persons group (Group) pursuant to G.L. c. 30A, § 10A, and by abutters Steve and Sarah Butera of 534 South Avenue, Lou and Rebecca Mercuri of 502 South Avenue, Back Lot, LLC, of 526 and 546 South Avenue, and Beechwood Stables, LLC of 412 Highland Street (Abutters) (collectively, Interveners). Intervention was granted to the Group solely on the issue of compliance with the Weston Stormwater and Erosion Control Bylaw. Intervention was granted to the Buteras solely as to the issue of the impact of the proposed retaining wall and the proposed change to the existing topography of the site related to the requested waiver of the Weston Earth Removal and Movement Bylaw, § V.I.3. The Mercuris' motion to intervene was allowed as to flooding impacts to the wetlands on their property. The motion to intervene by Back Lot, LLC was allowed as to the issues of the impact of the proposed retaining wall and the proposed change to the existing topography of the site related to the requested waiver of the Weston Earth Removal and Movement Bylaw, § V.I.3. The motion to intervene by Beechwood Stables, LLC was denied. On March 18, 2024, pursuant to 760 CMR 56.06(7)(d)(3), the presiding officer issued a pre-hearing order agreed to by the parties, which formalized matters regarding the scope of the hearing.

On May 15, 2024, the presiding officer conducted a site visit. In preparation for hearing, the parties submitted pre-filed direct and rebuttal testimony of 16 witnesses. The developer filed a motion to strike portions of the pre-filed testimony of Clifford Boehmer, Karen Sebastian, Thomas Houston, Mark Bartlett, J. Matthew Davis, and Patrick Garner, submitted on behalf of the Board, and the pre-filed testimony and pre-filed response testimony of Michael Mobile and John Chessia,[3] submitted on behalf of the Interveners.[4] At the hearing, the presiding officer

[3] The Interveners were granted leave to file a response to the developer's rebuttal testimony.

[4] The motion seeks to strike: Chessia pre-filed testimony, Exh. 45, ¶¶ 8-11, 14-23, 25-34, 39, 40, and 47, and Exhibits D and G; Chessia pre-filed rebuttal testimony, Exh. 55, ¶¶ 2-5; Garner pre-filed testimony,

denied the motion to strike except with regard to paragraphs 19, 30, 31, 32 and 47 of the Sebastian pre-filed testimony and the Boehmer pre-filed testimony paragraph 10, which was admitted *de bene*. The developer's motion to strike the paragraphs admitted *de bene* is now hereby denied.

The presiding officer held eight days of hearing on May 15-17, 20, 21, 23, 28 and 29, 2024, to permit cross-examination of witnesses and 73 exhibits were entered into evidence. At the close of evidence, the developer moved for a directed decision on the ground that neither the Board nor the Interveners introduced any testimony as to the element of their case requiring showing their local concerns outweigh the regional need for affordable housing. Following the presentation of evidence, the parties submitted post-hearing briefs and reply briefs and the developer filed a written motion for directed decision. Interveners requested the issuance of a proposed decision and oral argument before the full Committee.

Subsequent to the filing of the parties' post-hearing briefs, the Interveners and the Board filed a motion to reopen the hearing to "admit new evidence that was not available at the time of the hearing and a new witness who was not previously disclosed." The Interveners and the Board alleged that two letters from the Massachusetts Department of Environmental Protection (DEP)—one on stormwater dated August 8, 2024, and the other on wastewater dated July 24, 2024—dated after the presentation of evidence in the hearing, undermine 518 South Ave's argument that it met its *prima facie* burden to prove the project complies with "applicable rules and standards." Interveners and Board Joint Motion to Reopen Hearing, p. 7. In its opposition to the motion, the developer provided two subsequent letters from DEP, dated September 30, 2024, issuing its Superseding Order of Conditions authorizing all work required for the project within wetlands jurisdiction, and October 4, 2024, issuing a draft Groundwater Discharge Permit for the Project. For the reasons discussed below, we decline to reopen the hearing and the motion is denied.

The Committee issued a proposed decision, and the Board and Interveners filed Joint Objections and Comments thereto. The motion for oral argument before the full Committee is denied.

Exh. 41, ¶¶ 11-21; Sebastian pre-filed testimony, Exh. 39, ¶¶, 19, 20, 23-24, 30-32, 35 and 47; Mobile pre-filed testimony, Exh. 46, ¶¶ 13-21; Davis pre-filed testimony, Exh. 42, ¶¶ 9-17; Boehmer pre-filed testimony, Exh. 43, ¶ 10; and Bartlett pre-filed testimony, Exh. 44, ¶¶ 25-32 and 34.

III. FACTUAL BACKGROUND

The project consists of a single four-story building with 180 rental units, of which 45 will be affordable units. There will be an attached parking garage with 283 parking spaces. Exh. 63, sheets C-1, C-5. The project will include a courtyard with a pool for building residents, a children's playground, and separate dog parks for small and large dogs. Exh. 63. The project is to be developed on a site with frontage on South Avenue in Weston. The 9.5-acre property is in the Single-Family Residence Residence District A of the Town's zoning bylaw and there are two existing single-family homes on the property which will be demolished. Exh. 63, Existing Conditions. The project site is largely wooded and there is a bordering vegetated wetland (BVW) and an intermittent stream on the eastern side of the property. Exhs. 63; 48-A; 34, ¶ 11. The work proposed within the 100-foot buffer zone to the BVW includes the widening of an existing driveway to create a secondary emergency vehicle access, the construction of retaining walls, and the infiltration area for the treated effluent from the wastewater treatment plant, as well as part of the access road around the building, among other improvements. Exh. 63, Sheet C4. The project site is further bounded by the Pope St. John XXIII National Seminary to the south; to the north and west, there are single family residences, including those owned by the Buteras, the Mercuris and Back Lot, LLC; and to the north across South Avenue is a horse stable. Exhs. 63, Existing Conditions; 34, ¶ 11. The project proposes to treat wastewater through an onsite wastewater treatment plant which is subject to review and approval by DEP through the issuance of a Groundwater Discharge Permit. Exhs. 24, pp 46-47; 31.

IV. DIRECTED DECISION

Following the presentation of evidence, the developer filed a written motion for directed decision on the ground that the Board failed to introduce any evidence of local concerns that outweigh the regional need for affordable housing. Accordingly, the developer argues that a decision must enter in its favor. Developer Motion for Directed Decision, p. 1. The Board disputes 518 South Ave's motion, arguing that it has proven that the project will violate local concerns and that such violation outweighs any perceived need for affordable housing. Board brief, p. 31. Interveners likewise oppose the motion, arguing that the issues presented for decision should be made based on the entire record of the hearing, which requires the Presiding

Officer as factfinder to resolve disputed facts, conflicting testimony and contested exhibits. Interveners brief, p. 18. The motion is denied, as we discuss below.

V. STANDARD OF REVIEW AND BURDENS OF PROOF

When the Board has denied a comprehensive permit, the ultimate question before the Committee is whether the decision of the Board is reasonable and consistent with local needs. G.L. c. 40B, §§ 20, 22. The comprehensive permit regulations have set out the different requirements and burdens assigned to the developer and the board. 760 CMR 56.07(2)(a) and (b). Under the comprehensive permit regulations, 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 comprehensive permit regulations, 760 CMR 56.02(a)2 and (b)2, do not explicitly specify that the developer's responsibility to establish a *prima facie* case is a prerequisite for the Board's obligation to demonstrate local concerns, although Committee decisions have generally stated that if the developer sustains its burden, the burden shifts to the Board to prove a valid local concern that supports the denial. *See, e.g., Hanover R.S. Limited P'ship v. Andover*, No. 2012-04, slip op. at 5 (Mass. Housing Appeals Comm. Feb 10, 2014); *Sugarbush Meadow, LLC v. Sunderland*, No. 2008-02, slip op. at 5 (Mass. Housing Appeals Comm. June 21, 2010), *aff'd Zoning Bd. of Appeals of Sunderland v. Sugarbush Meadow, LLC*, 464 Mass. 166 (2013).

The Pre-Hearing Order set out the issues in dispute in this appeal for which 518 South Ave was required to make a prima facie case. Pre-Hearing Order, § IV.[5]

The Board's burden is to prove first, that there is a valid health, safety, environmental, or other local concern that supports the denial, and second, that the concern outweighs the regional

[5] The Pre-Hearing Order, drafted by the parties and issued by the presiding officer, identified the following as the areas for which the developer was responsible for making a prima facie case: Stormwater management; wastewater management/groundwater mounding; wetlands; construction management; architecture and density; landscape design; and traffic and related site design. Pre-Hearing Order, pp. 3-4 (Appellant/Applicant's Case).

need for housing. 760 CMR 56.07(2)(b)2. When an intervener is allowed to participate, it must also demonstrate a valid local concern that outweighs the regional need for affordable housing. "The board's power to disapprove a comprehensive permit… is limited to the scope of the concern of the various local boards in whose stead the local zoning board acts." *Holliston v. Housing Appeals Comm.*, 80 Mass. App. Ct. 406, 417-418 (2011), *F.A.R den.*, 460 Mass. 1116 (2011).

More is required than simply noting a particular local bylaw or regulation. *See Weston, supra*, No. 2017-14, slip op. at 38-39, citing *Holliston*, 80 Mass. App. Ct. 406, 419 ("where the DEP is charged with providing for the protection of health, safety, public welfare, and the environment … the board must be able to demonstrate that its local concerns will not be met by the State standards enforced by the DEP"). It is incumbent on the Board and Interveners to identify a local interest protected by a local requirement or regulation that is more restrictive than state and federal requirements, and to demonstrate that safeguards provided by the local requirement with respect to that local interest afford greater protection against the asserted harms of the project than those afforded by state or federal regulation. *See Weston, supra,* No. 2017-14, slip op. at 38, citing *Holliston,* 80 Mass. App. Ct. at 420; *Herring Brook Meadow, LLC v. Scituate,* No. 2007-15, slip op. at 25 (Mass. Housing Appeals Comm. May 26, 2010). Even if a more restrictive local requirement or regulation exists, the Board and Interveners must show that the stricter requirement is necessary to protect against specified harms that could not be protected by the state and federal schemes. *See Weston, supra,* No. 2017-14, slip op. at 17, citing *Holliston,* 80 Mass. App. Ct., 406, 417, 420; 760 CMR 56.02: *Local Requirements and Regulations*. Although the Board and Interveners argue the Town's local wetland, stormwater and wastewater bylaws and regulations establish stricter standards than state requirements, they identified little testimony or evidence establishing the potential damage relating to the wetlands and abutting properties that would result specifically from nonconformance with local requirements and regulations. *See, e.g.*, Board brief, p. 5 n.14. citing Tr. VIII, 27-31; p. 22, Interveners brief, pp. 23, 34, 35.

VI. DEVELOPER'S PRIMA FACIE CASE

A. Application of Prima Facie Case

In *104 Stony Brook, LLC v. Weston*, No. 2017-14 slip op. at 12-16 (Mass. Housing Appeals Comm. June 22, 2023), we reviewed our decisions since the inception of Chapter 40B regarding the obligations of the developer regarding submission of evidence. *Weston* discussed our consistent rulings that developers need make only a minimal showing for the prima facie case in the hearing before the Committee under the comprehensive permit regulations. *See id.,* slip op. at 12. As we noted there, we have consistently stated that "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 (prima facie case established where expert testified regarding design to fit diverse character of neighborhood) (Mass. Housing Appeals Comm. June 9, 2008), quoting *Canton Housing Auth. v. Canton,* No. 1991-12, slip op. at 8 (Mass. Housing Appeals Comm. July 28, 1993). *See Sunderland, supra*, No. 2008-02, slip op. at 5 n.4, citing *Tetiquet River Village, Inc. v. Raynham*, No. 1988-31, slip. op. 9 (Mass. Housing Appeals Comm. Mar. 20, 1991); *Eisai, Inc. v. Housing Appeals Comm.,* 89 Mass. App. Ct. 604, 610 (2016) (regulatory scheme governing applications for comprehensive permits requires only preliminary plans showing that proposal conforms to generally recognized standards) (citation omitted). For example, we have ruled that, "it may suffice for the developer to simply introduce professionally drawn plans and specifications." *Raynham, supra*, No. 1988-31, slip. op. at 9. We have also ruled that "expert 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 Oxford Housing Auth. v. Oxford*, No. 1990-12, slip op. at 5 (Mass. Housing Appeals Comm. Nov. 18, 1991) (plans must be sufficient to permit Committee to evaluate proposal with regard to aspects that are in dispute and to permit full cross-examination); *Watertown Housing Auth. v. Watertown*, No. 1983-08, slip op. at 5, 10-12 (Mass. Housing Appeals Comm. June 5, 1984) ("requirements are to be applied in a common sense, rather than an overly technical manner in context of establishing prima facie case"). And the Appeals Court has confirmed that "[i]t has long been held that it is unreasonable for a board to withhold approval of an application for a comprehensive permit when it could condition

approval on the tendering of a suitable plan that would comply with State standards." *Holliston,* 80 Mass. App. Ct. 406, 416, citing *Board of Appeals of Hanover v. Housing Appeals Comm.,* 363 Mass. 339, 381 (1973).

This prima facie rule is in place not as a "technical requirement to be fulfilled by the developer. [Rather,] [t]he prima facie requirement exists both so that this Committee will have a clear idea of the proposal before it, and so that the Board has a fair opportunity to challenge it." *Weston, supra,* No. 2017-14, slip op. at 13; *Raynham, supra,* No. 1988-31, slip op. at 11. *See also Transformations, Inc. v. Townsend,* No. 2002-12, slip op. at 10-11 (Mass. Housing Appeals Comm. Jan. 26, 2004) ("it is not necessary for an applicant to obtain permits or acquire final state or federal approval in order for an applicant to be granted a comprehensive permit or to establish its prima facie case in the case of a denial"); *Oxford, 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 *Raynham,* the only case in which the Committee ruled that a developer had failed to meet the requirement, the Committee noted that the developer had failed to meet a very low bar, stating "it may suffice for the developer to simply introduce professionally drawn plans and specifications." *Id.* at 9.

This minimum standard is important, because in proceedings before the Committee and under 760 CMR 56.07(2)(a)2, a "prima facie case" is a special term of art—it is not intended to require a developer to provide sufficient evidence in detail regarding each aspect of every potentially applicable state and federal requirement to demonstrate it could meet a burden of ultimate persuasion of compliance with all state and federal requirements, as would occur if it bore the ultimate burden of proof of the issue in this appeal. Here, the matters on which § 56.07(2)(a)2 states the developer may make the preliminary prima facie showing, general compliance with state or federal requirements or generally accepted standards, are not ones on which it has the ultimate burden of proof before the Committee, since the Committee has neither the responsibility nor the authority to finally determine such compliance. *Weston, supra,* No. 2017-14, slip op. at 13. *See also Hanover,* 363 Mass. 339, 379;[6] *Board of Appeals of North*

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

Andover v. Housing Appeals Comm., 4 Mass. App. Ct. 676, 680 (1976) (stating "…nothing in [G.L. c. 40B, §§ 20-23] or in [*Hanover,* 363 Mass. 339] … suggests that the Housing Appeals Committee has been empowered with authority to override or ignore laws passed by the Legislature or regulations validly promulgated by the Commonwealth's various boards, departments, agencies or commissions." The prima facie case is a burden of production: to introduce "evidence sufficient to form a reasonable basis for a [decision] in that party's favor*."* *Tiffany Hill, Inc. v. Norwell*, No. 2004-15, slip op. at 6 (Mass. Housing Appeals Comm. Sept. 18, 2007) (internal citations omitted). Thus, "[p]rima facie evidence, in the absence of contradictory evidence, requires a finding that the evidence is true… even in the presence of contradictory evidence, however, the prima facie evidence is sufficient to sustain the proposition to which it is applicable." *Id.*

This burden of production must be consistent with the language of the 760 CMR 56.07(2)(a)2, which describes the developer's case as proving compliance with federal *or* state standards *or* generally accepted standards. The regulation's use of the disjunctive "or," makes it clear this is not a requirement to prove compliance with every state and federal requirement that may be applicable, particularly when viewed in the context of this entire provision.[7] *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. *Raynham, supra,* No. 1988-31, slip op. at 11. "[E]ven where plans were

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noted that compliance with state requirements could be assured by including a condition in the comprehensive permit. *Id.* at 373-375, 381.

[7] 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).

incomplete, a developer that proposed to modify its plans to comply with State and Federal statutes or regulations had established a prima facie case." *Zoning Bd. of Appeals of Woburn v. Housing Appeals Comm.*, 92 Mass. App. Ct. 1115 (2017) (Rule 1:28 decision), citing *Holliston*, 80 Mass. App. Ct. 406, 416. In *Woburn*, the Appeals Court ruled that "where the developer here plans to comply with all applicable noise regulations, [the Appeals Court] similarly conclude[s] the HAC did not err in finding that the developer had established a prima facie case." *Woburn*, 92 Mass. App. Ct. 1115. *See Holliston*, 80 Mass. App. Ct., 406, 415-416 (to extent preliminary plans submitted are lacking or in fact admittedly do not comply with current State regulations or standards, developer's proposal does not end with plans when the developer proposes to make all modifications necessary to achieve compliance with state regulations).

Moreover, in cases in which a developer may not have correctly addressed every aspect of compliance with state or federal requirements, we have emphasized that "the requirement … is for a preliminary presentation [and] where it is possible to improve the presentation and satisfy 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 Raynham, 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 Norwell, supra,* No. 2004-15, slip op. at 3, 6 (presiding officer denied motion for directed decision submitted on developer's pre-filed testimony; Committee ruled that evidence at hearing did not affect that ruling). Here, both the Board and Interveners undertook to supply evidence from their witnesses regarding the developer's prima facie case, opining about both the evidence submitted by the developer and about the state and federal regulations they argue are relevant to this issue. We consider the developer's prima facie case based solely on evidence supplied by the developer. As we stated above, the Committee has no authority to determine whether a project will comply with state or

federal requirements; nor may we waive any requirement of state or federal law. Any project we approve must still comply with all applicable federal and state requirements. *See, e.g.*, *Norwell, 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, providing sufficient evidence of compliance with applicable state and federal law to meet the prima facie standard of 760 CMR 56.07(2)(a)2.

B. **Developer's Presentation**

518 South Ave argues that it made its prima facie case that the project complies with all applicable federal or state statutes or regulations or with generally recognized standards for the disputed aspects of the project, namely stormwater, wastewater, wetlands, construction management, architecture and density, landscape design, traffic and site design.[8] The developer presented plans as well as expert testimony on applicable state and federal requirements.

1. Stormwater Management

518 South Ave's civil engineer, Nate Cheal, testified that the Project complies with Massachusetts Stormwater Standards, set forth at 310 CMR 10.05(6)(k), and the Massachusetts Stormwater Handbook, and, further, that an Order of Conditions from the Conservation Commission expressly found that the State Stormwater Standards are met. Exhs. 32, ¶¶ 11, 16, 18-24; 48, ¶ 6, Exh. A. Mr. Cheal testified that the Board's consultants, Thomas Houston and Mark Bartlett (who were also the Conservation Commission's peer review consultants), confirmed that the Project demonstrated compliance with the State Stormwater Handbook Standards. Exh. 48A, pp. 10-h-10j. The developer has satisfied its prima facie case regarding stormwater management.

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[8] The Pre-Hearing Order, drafted by the parties and issued by the presiding officer, identified multiple issues of local concern asserted by the Board, which were listed as the areas for which the developer was responsible for making a prima facie case. Pre-Hearing Order, § IV.3 (Appellant/Applicant's Case). Since the Board does not dispute in its brief that the developer has made a prima facie case on the other issues, wastewater, wetlands, construction management, architecture and density, traffic and site design, it has waived any challenge to the sufficiency of the developer's case. It is the Committee's long-standing determination that issues not briefed are waived. *See Sunderland, supra*, No. 2008-02, slip op. at 3; *Hilltop Preserve Ltd. P'ship v. Walpole*, No. 2000-11, slip op. at 2 n.1 (Mass. Housing Appeals Comm. Apr. 10, 2002); *An-Co, Inc. v. Haverhill*, No. 1990-11, slip op. at 19 (Mass. Housing Appeals Comm. June 28, 1994)*; see also Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85-86 (1995), quoting *Lolos v. Berlin*, 338 Mass. 10, 13-14 (1958).

2. Wastewater Management

The developer offered the hydrogeological evaluation report prepared by its registered professional engineer, Luke Norton, and his testimony that the project complies with the DEP groundwater discharge regulations. Exhs. 36, ¶¶ 36-37; 7; 8; 24. He testified that the groundwater discharge permit issued by DEP "will be the sole approval required for" the wastewater treatment plant. Exh. 36, ¶ 22. In addition, the developer submitted a letter from DEP, dated October 19, 2023, approving the hydrogeological evaluation report and authorizing the developer to apply for an individual groundwater discharge permit. Exh. 31. Accordingly, the developer has satisfied its prima facie case with respect to wastewater management.

3. Wetlands

The developer argues it has satisfied its prima facie case related to wetlands based upon the Order of Conditions issued by the Weston Conservation Commission, expressly finding that the project complies with the Wetlands Protection Act (WPA). Exh. 48A. We agree that the developer has satisfied its prima facie case with respect to compliance with the WPA.

4. Construction Management

On behalf of the developer, Thomas J. Denney, Senior Vice President for Construction of Hanover Construction, LLC, testified that he prepared the construction management plan in compliance with industry practices. Exhs. 33, ¶¶ 4, 5; 12. Further, Mr. Cheal testified that all issues raised by the Board's peer reviewer, Mr. Thomas Houston, with respect to construction management were addressed by the Conservation Commission through specific conditions incorporated into the Order of Conditions, which the developer must satisfy during construction. Exh. 48, 48A. Mr. Denney testified that the project will comply with all construction management protocols detailed in the construction management plan and as required by the Order of Conditions. Exh. 49, ¶ 15. Accordingly, the developer has met its prima facie case with respect to construction management.

5. Architecture and Density

With respect to architecture and density, the developer offered its professionally prepared plans and the testimony of the project's architect, Brian O'Connor, AIA. Exhs. 4; 34; 51. He testified that, in his opinion, "the proposed project as designed is consistent with well-established principles for the design of quality, high-end luxury multi-family developments around the greater Boston area." Exh. 51, ¶ 3. There was no testimony or evidence presented as to any applicable federal or state standards governing architecture and density for a multifamily

residential project. The developer has met its prima facie case regarding architecture and density.

6. Landscape Design

With respect to landscape design, the developer offered its professionally prepared plans and the testimony of the project's landscape architect, Bret Montague. Exhs. 4; 35; 50; 63. He testified that the project includes a playground for children who are residents of the project, which is designed to be fully accessible, complying with all Massachusetts Architectural Access Board Standards, ensuring that residents of all abilities can get to the playground area. Exh. 35, ¶¶ 10, 11. Furthermore, the play equipment will be designed to ensure that all equipment has the required fall areas surrounding it based on industry standards that call for six feet of clear/level/soft surfacing to enter or exit each playground space. Exh. 35, ¶ 13. Based on his experience designing similar multifamily projects, he testified that "the proposed play area is appropriately scaled for the number of children we anticipate would occupy the proposed project." Exh. 35, ¶ 16. The project also includes dog parks as well as other outdoor amenities provided, such as a pool, multi-purpose exercise stations, and seating areas. Exhs. 35, ¶ 18; 50, p. 5. Mr. Montague testified that there are no state, federal or local standards for the design and slope of dog parks. Exh. 35, ¶ 20. *See 383 Washington Street, LLC v. Braintree*, No. 2020-04, slip op. at 9, 10 (Mass. Housing Appeals Comm. Mar. 15, 2022) (where developer asserted there was no general standard specifically for outdoor recreational space, evidence through expert testimony of project's compliance with applicable state requirements and generally accepted standards sufficient to meet prima facie case), *aff'd*, Nos. 2282CV00344, 2282CV00345 (Norfolk Super. Ct. May 24, 2023), *appeal pending, Braintree Zoning Board of Appeals v. 383 Washington Street, LLC, et al*, Appeals Court Nos. 23-P-1213, 23-P-1212. Accordingly, the developer has met its prima facie case related to landscape design.

7. Traffic and Site Design

Shaun Kelly, the developer's traffic engineer, testified that the project meets all recognized traffic standards. Exhs. 37, ¶¶ 18, 22, 25; 13; 14; 15. He testified that the main project site entrance driveway will meet the American Association of State Highway and Transportation Officials' (AASHTO) required minimum stopping sight distance guideline of 315 feet. Exh. 37, ¶ 22. In addition, he stated that the proposed driveway meets the minimum criteria published by the Massachusetts Department of Transportation (MassDOT) for the offset of a driveway to an

intersection based on travel speeds. Exh. 37, ¶¶ 23-25. He further testified that the project will include a secondary emergency access drive which will be gated and will serve only emergency vehicle access. Exh. 35, ¶ 26. Based on Mr. Kelly's testimony and the evidence presented by the developer, the developer has met its prima facie case on traffic and site design.

C. Board's and Interveners' Motion to Reopen Hearing

The evidence presented by 518 South Ave is sufficient to meet the prima facie standard of 760 CMR 56.07(2)(a)2. In seeking to reopen the hearing, the Board and Interveners sought to introduce additional evidence that the developer could not establish its prima facie case regarding stormwater and wastewater. With respect to wastewater, the Board, having failed to challenge the developer's prima facie case on this issue, may not raise it after the hearing concluded. The Board also sought to reopen the hearing with regard to compliance with state stormwater requirements, seeking to add documents that relate exclusively to matters regulated by state standards. We decline to reopen the hearing for two reasons: First, as shown above, the developer has submitted evidence in the hearing that it has complied with the state requirements and that it will comply with all applicable state requirements. The prima facie case does not require proof of, or even explicit testimony showing compliance with, every applicable federal and state statute, regulation, and guideline. *See Weston, supra,* No. 2017-14, slip op. at 13 and cases cited. Thus, there is no reason to reopen the hearing, which is focused on local, not state concerns, to consider a matter that is addressed by conditions we impose as part of this decision. The developer has agreed to comply with all applicable state and federal requirements, as it is required to do. Second, even if we were to reopen the hearing to include the proffered documents, the documents provided by the developer in its opposition to the motion to reopen the hearing show that DEP has issued its Superseding Order of Conditions authorizing all work required for the project within wetlands jurisdiction, and a draft Groundwater Discharge Permit for the Project. Accordingly, the developer's evidence demonstrates to us further support that it has satisfactorily addressed state and federal requirements, and it has included evidence that it will comply with state and federal law, as well as generally accepted standards, as shown in its plans, reports and testimony. No more is required to meet the requirements of 760 CMR

56.07(2)(a)2.[9] If the project is subject to additional state requirements, it will be obligated to comply with them. *See* § IX, *infra*, which includes a condition mandating such compliance.

Additionally, the Board's (and Interveners')[10] legal challenges (and evidence) to the developer's experts' testimony regarding the nuances and details of the applicable state and federal requirements go beyond the purpose of the prima facie case, since we do not ultimately determine whether a project will comply with state or federal requirements. *See* § V.A., *supra.*

Accordingly, we conclude that 518 South Ave has satisfied the requirements of 760 CMR 56.07(2)(a)2.

VII. LOCAL CONCERNS

We note at the outset that a great deal of testimony was introduced in this case, the majority addressing highly technical groundwater and wastewater issues. Pre-filed testimony, pre-filed rebuttal testimony, and pre-filed response testimony was filed by 16 expert witnesses (10 of whom addressed water issues). Cross examination of these witnesses consumed eight days. In the course of this testimony a number of issues were discussed in passing[11] that ultimately were not pursued by the parties.[12] Issues not briefed by the parties are considered

[9] The developer's experts testified that the plans comply with state and federal requirements and the plans provide sufficient information to demonstrate that compliance, subject to further required permitting review. For the developer to invest time and resources in a proposal that is likely to fail for lack of compliance with these requirements would not make sense. *River Marsh, LLC v. Pembroke*, No. 2019-04, slip op. at 16, n.9 (Mass. Housing Appeals Comm. Apr. 11, 2024).

[10] The ruling on the Interveners' motions to intervene made clear that "[t]he Committee's grant of intervener status does not constitute a finding that the intervener[s] ha[ve] proved aggrievement; rather it simply allows the [Interveners] to participate and demonstrate in proceedings before the Committee their substantial and specific aggrievement by the relief requested by the developer." Ruling on Motion to Intervene, Aug. 17, 2023, slip op. at 5, n.9. That ruling did not allow Interveners to participate on the issue of the developer's prima facie case and we do not consider their arguments on this issue. Nevertheless, their argument that the developer's prima facie case fails because it has not shown present, rather than future, compliance with state or federal requirements is incorrect, as we discussed in *Weston, supra,* No. 2017-14, slip op. at 16.

[11] For instance, there was mention that there might be "odor impacts to abutters" from the wastewater treatment facility. Exh. 40, ¶ 15.

[12] In the Pre-Hearing Order, the Board identified landscape design, including amenities such as dog parks and playgrounds, as a local concern it intended to prove as part of its case, based upon the Zoning Bylaw, standards from the National Recreation Association, American Public Health Association, and American

waived. *Falmouth Hospitality, LLC v. Falmouth*, No. 2017-11, slip op. at 38 (Mass. Housing Appeals Comm. May 15, 2020), and cases cited; *Okoli v. Okoli*, 81 Mass. App. Ct. 371, 378 (2010), *citing Lolos v. Berlin*, 338 Mass. 10, 14 (1958).

A. **Standard of Review**

When a developer appeals the denial of a comprehensive permit, the ultimate question before the Committee is whether the decision of the Board is consistent with local needs. 760 CMR 56.07(1). Since we have found that the developer has established a prima face case that the project complies with state or federal law or generally recognized standards, the burden shifts to the Board to prove a valid local concern that supports the denial, and then that the local concern outweighs the regional need for affordable housing. 760 CMR 56.07(2)(b)2. The local concern must be one protected by a provision of a town's bylaws or regulations that is stricter than state or federal law and the Board must prove that the safeguard provided by the local requirement outweighs the regional affordable housing need. *Holliston*, 80 Mass. App. Ct. 406, 417, 420; *see also* 760 CMR 56.02: *Local Requirements and Regulations*. The burden on the Board is significant: the fact that Weston does not meet the statutory minima regarding affordable housing establishes a rebuttable presumption that a substantial regional housing need outweighs the local concerns in this instance. 760 CMR 56.07(3)(a); *see Zoning Bd. of Appeals of Lunenburg v. Housing Appeals Comm.*, 464 Mass. 38, 42 (2013) ("there is a rebuttable presumption that there is a substantial Housing Need which outweighs Local Concerns" if statutory minima are not met), *quoting Boothroyd v. Zoning Bd. of Appeals of Amherst*, 449 Mass. 333, 340 (2007), *quoting Board of Appeals of Hanover v. Housing Appeals Comm.*, 363 Mass. 339, 346, 365, 367

Planning Association, the Weston Tree Removal Policy (which is addressed in § VI.D, *infra*, and the Weston Scenic Road Bylaw (which was also identified by the Interveners). Pre-Hearing Order, § IV.5(f). Other than the Zoning Bylaw, the cited provisions are not local requirements or regulations. The Board raised them in its argument regarding local concerns, in testimony from Ms. Sebastian and Mr. Boehmer regarding the size and locations of playgrounds and other amenities at the project as well as the general scale and design of the building. Mr. Boehmer's testimony on behalf of the Board that the proposed outdoor amenities are deficient and inconsistent with design industry standards was based upon the American Society of Planning Officials' January 1965 Standards for Outdoor Recreational Areas, which is not a local by-law or regulation, and which has not been updated for almost 60 years. Exh. 72. Furthermore, on cross-examination, Mr. Boehmer acknowledged that the 1965 Standards for Outdoor Recreational Areas was developed for the design of city parks and not apartment buildings. Tr. VII, 36. Moreover, neither the Board nor the Interveners presented any arguments in their briefs on this issue, nor was there any testimony or argument related to the Weston Scenic Road Bylaw. Accordingly, the Board and Interveners have waived any dispute of local concerns on these issues not briefed. *See* n.8, *supra*.

(1973) ("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"). If the Board has not articulated a local concern, shown its relationship to a specific local bylaw or regulation, and demonstrated the harm from the proposed development, then it has failed to demonstrate a valid local concern applicable to the project, much less that such a concern outweighs the need for affordable housing. *Id.* As discussed below, with regard to each of the issues specified in the Pre-Hearing Order, [13] the Board and the Interveners have either failed to reach the threshold to establish a local concern or failed to prove a local concern that outweighs the regional need for affordable housing.

B. Stormwater Management

The Board argues that the developer's proposed stormwater management system does not meet local stormwater management requirements and will fail, causing damage to wetlands and abutting properties.

1. Weston Stormwater Regulations

The developer's civil engineer, Mr. Cheal, said in pre-filed testimony:

> The Weston Stormwater Regulations require additional analysis and compliance above and beyond the Massachusetts Stormwater Standards in two specific ways. First, the Weston Stormwater Regulations require analysis of a 1-inch and 25-year storm event. Second, the Weston Stormwater By-law further requires that the volume of stormwater discharges be maintained at or below predevelopment levels for each storm event analyzed.

Exh. 32, ¶ 12; *see* Exh. 48, ¶ 28 ("The Town's By-Law only differs from State Stormwater Standards and the Handbook in that it requires volume control…."); [14] Tr. II, 89; Tr. III, 21; Tr. VI, 43; *see also* Exh. 21, §§ 6.0(A)(1)(iii), 6.0(A)(2)(i)(a), 6.0(A)(2)(i)(d) (Weston Stormwater

[13] The interveners raise substantially the same issues as the Board. *See* Exh. 1, §§ IV-7, IV-8. The six issues addressed in this decision appear as they were listed in the Pre-Hearing Order; a seventh issue, "traffic and related site design," was not briefed by the parties, and was therefore waived. *See* Exh 1, § IV-5; *Sunderland*, *supra*, No. 2008-02, slip op. at 3; *see also Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85-86 (1995), *quoting Lolos v. Berlin*, 338 Mass. 10, 13-14 (1958). *See* n.8, *supra.*

[14] The Board questions Mr. Cheal's credibility since earlier in this testimony he stated that Board's witnesses "purport to make the case that the Weston Stormwater and Erosion Control By-Law and Regulations are 'more restrictive'…. [but] they are wrong." Exh. 48, ¶ 21.

and Erosion Control Regulations). We agree that the two aspects of the local stormwater regulations described above are stricter than state requirements.[15]

The stormwater regulations also provide that "the design … shall, to the maximum extent feasible, employ environmentally sensitive site design as outlined in the DEP handbook…," and "Consideration of Low Impact Development practices is required, and implementation… is encouraged… to the maximum extent practicable…. Guidance… is provided …in Appendix B of these Regulations and the MA Stormwater Management Handbook." Exh. 21, §§ 6.0(A)(1)(i), 6.0(A)(1)(ii). Because the local regulations incorporate requirements in the state handbook and regulations, using the terms "maximum extent feasible," "consideration," "encouraged," and "maximum extent practicable," these provisions do not establish requirements stricter that state law. [16]

In this decision we are concerned only with the specific provisions of the Weston stormwater management bylaw and regulations that are stricter than the state requirements. In some circumstances, it is the Weston Stormwater Permitting Authority which issues a Stormwater Management Permit (SMP) under the Weston Stormwater Management and Erosion Control Bylaw. *See* Exh. 20, § VI (Administration). If that were the case, the Board and this Committee would have the authority under the Comprehensive Permit Law to act in place of the local permitting authority and grant an SMP overriding local requirements. The bylaw and regulations are detailed and lengthy, and mostly incorporate the state standards. *See, e.g.*, Exh. 20, § VI-D; Exh. 21, § 6.0(A)(1) ("At a minimum all projects… shall comply with

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[15] Arguably, the analysis of the "1-inch and 25-year storm event" is not a substantive requirement. Requirements that are purely procedural need not be followed since the comprehensive permit process before the Board, and ultimately this Committee, take the place of procedures before other local boards. *See SLV School Street, LLC v. Manchester-by-the-Sea*, No. 2022-14, slip op. at 36 (Mass. Housing Appeals Comm. Dec. 3, 2024) ("the stringent procedural requirements of [an alternatives analysis] bear on the importance of the issue to the town. They do not establish the burden of proof in this Chapter 40B proceeding…."), citing *Scituate, supra*, No. 2007-15, slip op. at 24-26. It might be argued that the effects of a particular level of storm are sufficiently different from those of other storms that addressing that storm during design of the stormwater system constitutes an independent local concern. We need not address this issue since the developer's analysis included consideration of the 1-inch and 25-year storm.

[16] Mr. Cheal testified that "[t]he project implements two significant Low Impact Development techniques (porous pavement and a green roof) …." Exh 48, ¶ 26. This does not belie the fact that the stormwater system design is—as the Board's civil and environmental engineer pointed out in some detail—in most respects a very traditional, conventional design. *See* Exh. 44, ¶¶ 25-27. But the state's and the Town's encouragement to consider state-of-the-art, environmentally friendly design elements does not mean that such elements are required.

the…Massachusetts Stormwater Standards and accompanying Stormwater Management Handbook…."). In the case before us, as is common, all of the state Stormwater Management Standards (310 CMR 10.05(6)(k)-(q)) are interpreted and enforced by the Weston Conservation Commission and DEP pursuant to 310 CMR 10.05(6)(b) ("The Order of Conditions shall impose such conditions as are necessary to meet the performance standards set forth in… Stormwater Management Standards provided in 310 CMR 10.05(6)(k) through (q).").[17] Thus, we need not address the state standards that are incorporated into the local bylaw, but rather only local requirements that are stricter than state requirements. For instance, during our hearing considerable evidence was introduced concerning porous pavement and the project's emergency access roadway; related to this is the question of whether this project is a "redevelopment" project as defined in the state standards. *See, e.g.*, Exhs. 40, ¶¶ 17-19; 44, ¶ 34; 45, ¶ 25; 48, ¶¶ 10-12, 31. Although it is theoretically possible that proof of a defect in the design of the particular porous pavement here could be relevant to compliance with the local requirement that limits total volume of discharged stormwater, compliance with any state standard concerning porous pavement *per se* is not within our jurisdiction, and there is no allegation that there are local requirements in this regard that are stricter than the state requirements or that they would address a deficiency in the state standard in a way that establishes a valid local concern. *See Holliston,* 80 Mass. App. Ct. 406, 420 (Where "[t]he board has done nothing more than point out that the proposal violates the town's stricter by-law … [i]t 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"); *SLV School Street, LLC v. Manchester-by-the-Sea,* No. 2022-14, slip op. at 43 (Mass. Housing Appeals Comm. Dec. 3, 2024) ("Consideration of … state standards is outside the purview of our local concerns analysis, except to the extent [they] show [that] local requirements are stricter than state requirements.").

[17] *See also*, for example, testimony of Mr. Cheal, the engineer who designed the stormwater system, that the Conservation Commission, as the "reviewing authority to find compliance with the [WPA]," issued an Order of Conditions approving the location of the porous pavement element of the stormwater system. Tr. III, 129.

2. **Hydrologic Analysis**

The Board argues that the developer "refused" to prepare a hydrologic analysis as required by the Massachusetts Stormwater Management Standards. Board brief, p. 2. It notes that the Weston regulations require a "hydrologic analysis using TR-55/TR-20 or other acceptable analysis…." Exh. 21, § 6.0(A)(2)(i). It argues that although the developer used a computer model called HydroCAD, it used incorrect assumptions and in other ways compromised the analysis. Board brief, pp. 12-25. This argument is not an argument that no analysis was performed, but rather that the analysis was flawed. Throughout their testimony, Messrs. Cheal and Gemma maintained that they had conducted the proper analysis. *See, e.g.*, Exhs. 11; 32, ¶¶ 13-15; 64, § 2.1; Tr. II, 89-90; Tr. V, 17-24, 33; *see also* Tr. VI, 39-40. The Board has not argued that the local requirement for a hydrologic analysis is any stricter than that under the state standards. Moreover, we find the developer did conduct the required analysis. The questions before us are the interrelated ones of whether that analysis correctly found the stormwater system will function as designed within the applicable local requirements, or if not, whether any local concerns are significant enough to outweigh the regional affordable housing need.

3. Will the stormwater system function as designed either raising no local concerns or only concerns not significant enough to outweigh the housing need?

a) Design of Stormwater System

The developer's civil engineer, Mr. Cheal, presented evidence that the project's stormwater management system has been designed in accordance with DEP Stormwater Management Standards and with the additional local requirements in Weston's Stormwater Management and Erosion Control By-Law and regulations. *See* Exh. 32, ¶¶ 13, 16-24. The underground storage and infiltration features of the system are located near the underground leaching field for the project's wastewater system. The design and approval of the stormwater and wastewater systems are separate technical processes. The stormwater system was designed by Mr. Cheal, using the HydroCAD computer software. Tr. II, 70, 83, 89. The project's wastewater treatment facility must be permitted under state regulations by DEP, and in preparation for applying to DEP for an individual groundwater discharge permit for the wastewater system, the developer was required to prepare a hydrogeologic evaluation report. The developer hired a second civil engineer specializing in geotechnical design and hydrogeological design and permitting, Mr. Norton, both to support the overall design of the project and

specifically to analyze groundwater mounding under the wastewater leaching field. Exh. 36, ¶¶ 4, 23-24, 27. Groundwater mounding occurs as stormwater infiltrates through the soil to the existing ground water level and the groundwater surface is temporarily distorted to a higher elevation—creating a mound. Since mounding can interfere with the leaching field of the wastewater system, it was the most significant of several issues that DEP reviewed in detail.[18] *See* Exh. 45, ¶¶ 9-11. Mr. Norton's Hydrogeologic Evaluation Report used MODFLOW software, and was based on 62 test pits, 21 test borings, eight monitoring wells, eight hand-driven well points, and 42 infiltration tests, observed over a two-and-a-half-year period.[19] Exh. 36, ¶¶ 25, 26, 29, 32, 35; Tr. II, 110.

The crux of the Board's and Interveners' argument is based on the testimony of several consultants. The Board's consultant, Dr. Davis, a professor with master's and doctoral degrees in hydrology and formal training and expertise in hydrogeology, reviewed the developer's various reports, focused on the MODFLOW simulation, rather than concerns about the details of Mr. Cheal's HydroCAD analysis. He stated, "the inadequate hydraulic capacity of the geologic materials at the site to absorb stormwater runoff from the proposed project is evidenced by [the] MODFLOW simulation of the groundwater mound for the 10-year storm event." Exh. 42, ¶ 10; *see* Tr. VIII, 21-28; Tr. VI, 47-49.[20] He concluded that the MODFLOW simulation shows that during a ten-year storm, excessive groundwater mounding will occur beneath the subsurface recharge areas (SRAs) of the stormwater system. Exh. 42, ¶¶ 10, 13-17. He testified that, under the simulated conditions, the mound would rise high enough to enter the SRAs, and said,

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[18] In reviewing Mr. Norton's report, DEP raised questions in two "Technical Deficiency Letters," and then approved the third iteration of the report with conditions. *See* Exhs. 7; 23; 24; 28; 29; 31; 36, ¶¶ 10-21.

[19] Forty of the infiltration tests were Guelph permeameter infiltration test (tests slightly more sophisticated than standard percolation tests); many of these were witnessed by representatives of DEP, the consultants, and representatives of the Weston Board of Health. Exh. 36, ¶ 25.

[20] Because the focus of the Board's and Interveners' arguments regarding stormwater are based on this MODFLOW simulation, additional context of that simulation is necessary. The "Model-Calculated Mound Height – Primary Leach Field" figure depicting a 13-foot groundwater mound provides that "mound heights [are] calculated by the groundwater flow model after 90-days of water being discharged to the primary leach field at a rate of 26,400 gallons per day (80% of the design flow rate of 33,000 gallons per day) and a 10-year storm event (91 days into model simulation)." Exh. 29, p. 33, fig. 11. It also states, "[t]he mounding in the vicinity of the residential area … is unrelated to the stormwater and wastewater infiltration that is occurring as a result of site development and would occur regardless of the development condition on the property; it is simply the result of a large rain event." *Id.*

"[n]aturally, groundwater that exceeds the top of the SRAs due to groundwater mounding conditions will need to flow somewhere," and posited that it will ultimately "breakout" or flood to the surface. Exh. 42, ¶¶ 11, 16; *see* Tr. I, 95.

One of the developer's MODFLOW simulations calculates groundwater mounding as high as 13 feet. Exhs. 7, p. 20; 29, p. 33; 42, ¶ 13; *see* Tr. I, 93. Dr. Davis suggested that this "indicates a catastrophic failure of the stormwater design." Exh. 42, ¶ 14. In addition, he stated that the developer has not properly modeled the mounding, and it also has "failed to simulate the impacts of that groundwater mounding… on the wetlands" and therefore the stormwater management system has not been designed "to mitigate those impacts." Exh. 42, ¶ 16. He concluded that the mounding will "very likely result in operational failures of its proposed stormwater system…." Exh. 42, ¶ 17.

The Board's civil engineer, Mr. Barrett, reached the same conclusions as Dr. Davis concerning mounding. Exh. 44, ¶¶ 27-33. He added that the developer's predictions concerning the amount of runoff leaving the site are "false." Exh. 44, ¶ 28. The Interveners' civil engineer, Mr. Chessia, agreed that the mounding would cause flooding. Exh. 45, ¶¶ 11, 16-19. He also ran the computer simulation himself using Mr. Cheal's data but encountered error messages that he stated Mr. Cheal should have reported and should have corrected. Exh. 45, ¶ 15. Further, he contended that the system does not comply with state Stormwater Management Standard 2 (peak rate attenuation), and, more important for our purposes, with the stricter Weston standard that total volume of runoff does not exceed existing conditions.[21] Exh. 45, ¶¶ 20, 21.

The Interveners retained Dr. Michael A. Mobile, a groundwater hydrologist and Certified Groundwater Professional, with nearly 20 years of experience in groundwater hydrology and modeling. Exh. 46, ¶¶ 1-2, 4. He agreed with the Board's experts, asserting that the developer's consultant "selectively used information," rendering his results invalid. Exh. 46, ¶ 14. He raised a number of highly technical objections. Exh. 46, ¶¶ 15-25; *see* Exh. 54. More specifically, he explained most clearly that the HydroCAD model generates simulated infiltration rates from the constructed underground SRAs, and that data is then entered into the MODFLOW model, which in turn predicts the degree of groundwater mounding. But, Dr. Mobile testified, the mounding

[21] He also disagreed that the development can be considered a redevelopment project subject to more lenient treatment under state law, particularly with regard to the project emergency access roadway. We need not reach this issue, since it is a question of state law. *See* Exh. 45, ¶¶ 22-23.

"predictions" are not fed back into the HydroCAD model in any way to assess the mounding's impact on infiltration from the SRAs.[22] Tr. VIII, 25-28. He agreed with Mr. Bartlett and Dr. Davis that this was an inconsistency between the two models that would need to be resolved to provide realistic predictions of peak flows and volumes of stormwater into the wetlands, and that the system will be compromised by reduced infiltration. Exh. 46, ¶¶ 19-22. He also performed his own simulations, working in part from data provided by Mr. Chessia. Exh. 46, ¶¶ 23, 27. He concluded that in a 100-year storm, the amount of excess "rejected infiltration would be converted to additional outflow," which when added to the amount modeled by the developer's consultant, Mr. Cheal, would result in a total exceeding the pre-development volume estimate by 0.31 acre-feet, in violation of the Weston stormwater bylaw and regulation. Exh. 46, ¶ 25. He testified, without specifics, that there would be "likely adverse effects to the wetlands and neighboring properties." Exh. 46, ¶ 23. He also predicted that there would be significant areas in which water would "break out" above the surface of the ground before flowing into the wetlands. Exh. 46, ¶ 28-30.

In his pre-filed rebuttal testimony, Mr. Cheal noted that in April 2024, the Conservation Commission approved the project under the WPA, relying on two of the Board's experts—Mr. Garner and Mr. Bartlett—as peer reviewers. *See* Exh. 48, ¶ 1; *see also* Tr. VI, 11. This decision with regard to state wetlands requirements, however, is not dispositive with regard to the local stormwater bylaw, although it does generally provide support for the methodology used by the developer in that it is an indication of compliance with state stormwater standards. He further also responded to technical issues with regard to the HydroCAD modeling. *See, e.g.*, Exh. 48, ¶ 9. And, under cross-examination, he repeatedly maintained that his analysis was proper and that the stormwater design complied with the local stormwater bylaw. *See, e.g.*, Tr. III, 13, 21-23.

More specifically, Mr. Cheal stated that although a mounding analysis was done as part of the wastewater permitting process, none was required since there was greater than four feet of vertical separation between the stormwater system and the estimated seasonal high groundwater

[22] While the Board and Dr. Davis refer to the MODFLOW simulations or models as "predictions," there is no evidence regarding the likelihood of such an event happening. *See* Exh. 42, ¶ 16; Board brief, pp. 4, 16-17, 19-20, 23. The Board notes that the occurrence of one of the conditions calculated in the model, the 10-year storm event, has a probability of "10% in any year." Board brief, p. 16, n.34. It offers no argument or evidence regarding the probability of a 10-year storm event occurring immediately following 90 days of water being discharged to the primary leach field at a rate of 26,400 gallons per day (80% of the design flow rate of 33,000 gallons per day), as was modeled. *See* n.20, *supra*.

level. Tr. II, 73, 100. He noted that his design was conservative in a number of ways, including "not taking credit" for the fact that infiltration goes out through the sides of the SRAs. Tr. II, 78. He frequently stated that there were hypothetical questions that he could not answer because he had not done a mounding analysis as part of the stormwater system design. *See, e.g.*, Tr. II, 76. He testified consistently that the MODFLOW analysis showing a 13-foot groundwater mound did not indicate a defect in his stormwater system design. Tr. III, 19; *see* Tr. III, 68, 73. He noted that he could not opine on the effect of the groundwater mound on the operation and functionality of SRAs, because the MODFLOW model is intended to model the effects under the wastewater disposal area, not to analyze conditions under the stormwater recharge areas. Tr. III, 7-8; *see* Tr. III, 68, 73.

Mr. Cheal stated that he was not surprised when he saw the 13-foot mounding nor was he concerned about the functioning of the SRAs. He also testified that "there was no reason to conduct any additional analysis as the design conforms with standard of practice, [and] conforms with the requirements in the Stormwater Handbook, which is to site your system with a minimum of 4 feet of separation to estimated seasonal high groundwater." Tr. II, 131. *See* Tr. II, 130,131-133, 138. Finally, he testified that when the detention and infiltration capacity of the system is exceeded, it is designed so that excess runoff will flow out to the nearby wetlands through a level spreader, which prevents erosion by spreading the water into sheet flow. Tr. II, 82.

Mr. Norton also filed rebuttal testimony disagreeing with the Board's and Interveners' experts.[23] He said, "[t]he mounding in the vicinity of the proposed stormwater basins (SRA #1 through SRA #3) represents an acceptable conservative impact (no reductions taken for dispersal in the open chambers or potential changes in hydraulic conductivity) from transient stormwater recharge on the wastewater discharge site. This is demonstrated by Mass DEP's review and approval of the latest Groundwater Model Report and Supplemental Hydrogeologic Model Summary." Exh. 47, ¶ 3. The details, however, are more complicated. In reviewing the last iteration of the developer's evaluation, DEP commented that the groundwater mounding analysis

[23] In his written response to DEP concerning his hydrogeological evaluation, although he noted that compliance with stormwater requirements would be assessed separately from wastewater permitting, Mr. Norton was also unequivocal, stating, "the project's stormwater design does in fact meet the stormwater mounding requirements in the Stormwater Standards…." Exh. 29, p. 3 (Response 1).

showed that the system would "elevate the water surface elevation of a wetland, which does not comply with…. the Massachusetts Stormwater Handbook, Volume 3, Chapter 1, pages 28-29." However, the Stormwater Handbook only requires a mounding analysis, when separation between the bottom of an infiltration system and groundwater is less than four feet, which is not the case here.[24] Exh. 29, § II, Comment 1. Mr. Norton conceded that there would be a slight elevation under unusual circumstances, but in addition to technical arguments, he pointed out that nothing in the groundwater discharge regulations under which DEP was reviewing the report incorporates the Stormwater Management Standards. Exh. 29, § II, Response 1. Thus, DEP's approval of the report may be indicative of compliance with the state methodology; it is not definitive with regard to stormwater requirements. *See* Exh. 31. In any event, the developer will be required to comply with all state requirements. *See* § VIII, *infra*.

Mr. Norton also made a technical argument in rebuttal that the state stormwater requirements do not prohibit the rise of mounded groundwater into the stormwater chambers. Exh. 47, ¶ 6. But this disagreement between the experts is a very technical one that casts only a limited amount of light on the central substantive question before us, which is not compliance with state Stormwater Standards, but rather whether the Weston bylaw's and regulations' limit on the volume of discharge will likely be exceeded to an extent that causes harm to wetlands and abutting properties, and if so, what measures the developer should take to prevent that result.

Mr. Norton also stated that the design is more conservative than it appears using MODFLOW in a number of ways. For instance, he testified that MODFLOW does not "see" the "cavernous" subsurface recharge areas, and that the mounding prediction is "very conservative," and "standard practice throughout the Commonwealth." Exh. 47, ¶ 8. He made more conservative assumptions in response to DEP. Exh. 47, ¶ 9. He also defended his seasonal high groundwater level assumptions. Exh. 47, ¶¶ 10-12. He also addressed "breakout" or seepage of water from the surface into the wetlands and concluded that additional modeling "indicated no material difference between pre- and post-development; with projected seepage at the wetland boundary being the same pre- and post-development." Exh. 47, ¶ 16.

Mr. Norton was cross-examined at length. He reiterated that he is a hydrogeologist and was not the stormwater system designer, and that his hydrogeological evaluation was to

[24] This concern by DEP was later resolved by its subsequent approval of the developer's hydrogeologic report. Exh. 31.

demonstrate the mounded recharge below the wastewater system for approval by DEP. He stated unequivocally that it cannot be used to evaluate the stormwater system's performance. Tr. II, 59; *see* Tr. VIII, 7.[25] More specifically, he testified that, pursuant to state regulations, since there was more than four feet of vertical separation between the stormwater system and groundwater, he did not evaluate the effect of mounding; he did not evaluate any aspect of the functioning of the stormwater system—such as a change in infiltration rate if groundwater rises into an SRA. Tr. I, 97-105, 109. But he did acknowledge that, "there were peer reviewers who wanted to look at the interaction between stormwater and wastewater in a different manner than presented in the reports." Tr. I, 110. And when cross-examined on a supplemental report that he had prepared, he agreed that a graphic figure portraying one scenario showed a 13-foot groundwater mound above the top of SRA-3 and agreed in that scenario that it would reach the surface of the ground. Tr. II, 14-24; *see* Exh. 29, attach., figs. 11, 12. He also reluctantly acknowledged that if the mound were above the SRA and the surface, that would constitute flooding and that "flooding is not good." Tr. II, 26-27. He qualified those responses, however, by stating that in the MODFLOW modeling that he did "there is no SRA-3 [or other] structure," and he was reluctant to acknowledge that the stormwater system would not operate as designed under circumstances where the SRA-3 was flooded. Tr. II, 26, 28. He elaborated that because he did not model SRA structures in the soil, he could not speak to any impact on the groundwater mound and other aspects of the design there would have been if they had been included. Tr. II, 35-36.

The developer also filed pre-filed rebuttal testimony concerning groundwater modeling and stormwater system design by a second professor, Thomas Ballestero, who has master's and doctoral degrees in civil engineering specializing in hydrology and water resources. Dr. Ballestero discussed the interaction between the HydroCAD and MODFLOW models, and described the design, like typical system designs based upon regulatory standards, as inherently conservative. Exh. 52, ¶ 14. He focused particularly on the testimony by the Interveners' experts, making several technical points concerning the two models, *e.g.,* that the MODFLOW model does not take into account that the infiltration chambers are surrounded by stone rather than soil; that it assumes that water will flow out of the bottom of the chambers only, and not the

[25] Dr. Davis and other witnesses agreed that the purpose of the MODFLOW model and the evaluation was to show that the wastewater leach field was not impacted by the groundwater mound, but they clearly also believed that it had value in assessing the functionality of the stormwater system. Exh. 44, ¶ 31.

sidewalls; and that it does not model water flowing through the soil, but rather only when it becomes part of the groundwater. *See* Exh. 52, ¶¶ 17(a)-17(j). He acknowledged that "for a certain period of time, groundwater flows into the bottom of the buried stormwater chambers." Exh. 52, ¶ 16. But his conclusion was that the Interveners' experts are wrong, and "the HydroCAD model demonstrates that the design rainfall event is appropriately managed in compliance with the Massachusetts Stormwater Standards." Exh. 52, ¶ 16. The Intervener's expert, Dr. Mobile, filed a lengthy response specifically challenging the points made by Dr. Ballestero. *See* Exh. 54.

As discussed below, the Board and Interveners have not demonstrated a valid local concern regarding the stormwater system's compliance with the Town bylaw and regulations.

b) Will the stormwater system have adverse impacts to the wetlands if volumes do not remain at or below those of pre-development conditions?

If the Board or Interveners had proven a local concern, in order to prevail they would still have needed to prove that that concern outweighs the regional need for affordable housing. 760 CMR 56.07(2)(b)2. They have not.

In the record before us, there are occasional general assertions by the Board's or the Interveners' experts that failure of the stormwater system and damage to the adjacent wetlands are likely. The most forceful statement was from Dr. Davis, who testified that the simulated groundwater mound height, in relation to the stormwater system, "indicates a catastrophic failure of the stormwater design." Exh. 42, ¶ 14. Presumably since his expertise is limited to hydrology, he provided no testimony of the possible impact on the wetlands. *Id.* And on cross-examination, when asked what he meant by catastrophic failure, he simply said there would be "significant damage," without specifying what sort, and also said, as noted above, "[w]e don't know what's going to happen." Tr. VIII, 15. The Board's witness who was most likely to have expertise with regard to wetlands impact was Mr. Garner, who in addition to being a hydrologist and land surveyor is a wetlands scientist hired specifically to evaluate wetlands impacts of the project. Exh. 41, ¶¶ 1-5, 8. As noted above, the Conservation Commission approved the project based in part on his opinion that there would be no damage to the wetlands. His direct pre-filed testimony exclusively addressed possible impacts caused by the proximity of the emergency access roadway and retaining wall to the No Disturb Zone. Exh. 41, ¶¶ 14-21. His pre-filed response

testimony addressed only the location of the wastewater leaching field, not stormwater issues.[26] Exh. 53, ¶¶ 4-9. His testimony on cross examination briefly addressed wastewater issues and the retaining wall but was primarily related to impacts on the wetlands of work in the No Disturb Zone. Tr. VII, ¶¶ 12-28.

On the other hand, testimony by the expert hired by the developer to assess the potential hydrologic impacts of stormwater on the wetlands— Mr. Gemma, an engineer rather than a wetlands scientist—was more specific.[27] *See* Tr. V, 5. Although the developer did not submit pre-filed testimony by him, Mr. Gemma was called to testify by the Board. He testified that he was very familiar with this watershed, having worked for over 30 years as a peer reviewer in Weston—for the Conservation Commission, the Planning Board, the Historic Commission, and the Building Inspector, as well as the Board. Tr. V, 71. He began his analysis by noting that "the applicant's civil engineer … reported that no increase in runoff rates or volumes into the on-site wetland will occur…," while "[c]onsultants engaged by abutting parties contend that [the HydroCAD] model inaccurately portrays the infiltration capacity of the various systems…. In my analysis, I have not taken a position either way. Rather, I review the hydrologic condition of the wetland under varying assumptions as to the performance of the proposed stormwater management system…." Exh. 10, pp. 1-2. While we do not doubt the veracity of any of the witnesses, Mr. Gemma, although hired by the developer, seemed uniquely positioned to assess the situation in an objective manner, and testified in a very straightforward manner on cross-examination.

Mr. Gemma's Hydrologic Impact Assessment and Sensitivity Analysis addresses the impact on the wetlands under conditions in which the on-site capacity of the project's stormwater system is exceeded, and excess stormwater, by design, is released into the wetlands over the level spreader. It concludes:

> Even in the case of a total failure of the stormwater management system…, no increase in wetland water levels will occur for all storm events through the 10-year, 24-hour design storm. What limited impacts will occur are restricted to larger storm

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[26] With regard to wastewater, he concluded that "state standards in the [WPA] do not… adequately protect the site," and, without elaboration, that wastewater "impacts to the wetland that *may* arise… *may* include alteration and/or loss of BVW (Bordering Vegetated Wetlands), loss of habitat and... continuing long-term impacts…." (emphasis added). Exh. 53, ¶ 21.

[27] Mr. Gemma's analysis was prepared in response to an inquiry from the Town's consultants. Tr. V, 19, 71-72; Exh. 10.

> events…. Even in the most extreme case, the maximum rise in water surfaces will not exceed one inch in height and the surcharge duration will be no more than 6 hours. As noted earlier in this report, wetland hydrology supporting the wetland plant community is dictated by smaller storm events that establish and sustain the water level in the wetland, both at the surface and below the surface. The … project will have zero impact on the smaller storm events which deliver most of the annual water budget to the resource area. Moreover, zero impact will occur from even larger, episodic storm events including the 2- and 10-year events. Where potential impacts in water surface elevations are possible, … the rise in water levels are [sic] so diminutive and of such short duration, no impact to the wetland hydrology or ecosystem[28] will occur.

Exh. 29, attachment, p. 9. On cross-examination, Mr. Gemma defended his written analysis and added that he uses the Weston Stormwater Regulations every week during the course of his work, and that all of his analysis was "performed within the context of what the regulations were trying to achieve." Tr. V, 17; *see* Tr. V, 14, 17-29, 33, 37.

Finally, although it addressed WPA compliance, and not local stormwater requirements, the Conservation Commission's April 17, 2024, Order of Conditions includes comments that Mr. Garner made to the Commission concerning possible impact on wetland:

> Patrick Garner's comments[29] on the Applicant's final revised plans and documents are included here…:
>
> Potential Wetland and Stream Impacts
> …Based on the most recent plans – and with the exception of impacts from the retaining wall (discussed immediately above) my opinion is that the project will not alter any protected wetland resources. My opinion relies upon both Hydrogeologic Impact Analysis (conducted by Rob Gemma-MetroWest Engineering…) and the separate mounding analysis conducted by others. Gemma, following MassDEP-approved methodology, analyzes potential impacts to the overall watershed (which totals 228 acres). His conclusion, with which I concur, is that the project has no impacts on wetland water levels—even under complete stormwater system failure—through a 10-year storm. For larger storms, (through a 100-year event), his modeling indicates that stream water levels overtop stream banks and rise (in comparison to pre-development conditions) by a maximum height of 0.1 feet. This rise in height is projected to last for a period of approximately six hours before levels return to normal. I consider water level changes as projected in the Gemma analysis to have a *de minimus* [sic] impact. …

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[28] The conclusion to Mr. Gemma's final, September 22, 2022, analysis modified the original September 1, 2022, version by adding two words at the end: "or ecosystem." *Cf.* Exh. 10, p. 9; *see* Tr. V, 6.

[29] Mr. Garner's comments "focus[ed] solely on WPA-related issues, and [were] not a review of stormwater, associated mounding issues, if any, and/or sewage design." Exh. 48A, p. 10-d.

> Such a rise in stream levels would have a negligible impact to the wetland ecosystem—wetland plants can endure long periods of standing water.

Exh. 48 (Exh. A, pp. 10-c - 10-d).

Even if the stormwater management system were to fail to operate, as alleged by the Board and Interveners, causing stormwater volumes to increase above pre-development levels, they have not demonstrated that there would be damage to the adjacent wetlands, and certainly not damage great enough to outweigh the regional need for affordable housing.

4. Committee Analysis

Dr. Ballestero noted that "…I believe that all experts agree with a time-honored quote, 'All models are wrong; some are useful.'" He went on to say that "it is nearly impossible to exactly reproduce all the detail, nuances, and variability of natural systems in our models…," even though models can be created whose results are a reasonable description of the systems being modeled. Exh. 52, ¶ 17.

We find a similar problem of imprecision in the record on the stormwater management system in this case. We do not doubt the veracity or conscientiousness of the testimony the experts have provided, but neither do we find a clear basis for concluding that one expert is wrong and another right. We note that Mr. Norton's acknowledgement of possible flooding might appear significant, but it was based upon hypothetical questions, particularly regarding more extreme possibilities, not his understanding of the stormwater system designed by Mr. Cheal, which Mr. Cheal defended unambiguously. Dr. Davis, when asked his opinion about what would happen if the system failed, said, "there's such a disconnect between the HydroCAD model and the groundwater model that they're both only helpful in showing that *we don't know what's going to happen*." (emphasis added) Tr. VIII, 15.

Specifically, the Board claims the developer's hydrologic analysis must be flawed because the developer's separate groundwater mounding analysis included a simulation that calculated a maximum groundwater mound of 9 to 13 feet, which would rise into SRA-2 and or SRA-3 under the extreme conditions of a 10-year storm event immediately following 90 days of the primary wastewater leaching area operating at 80% of design flow. It argues that because the hydrologic analysis assumes four feet of separation between groundwater and the SRAs, the mounding analysis proved that assumption to be false, and therefore the developer must adjust the hydrologic analysis' stormwater infiltration rates from the SRAs to account for the SRA

failure "predicted" by the groundwater model. It also argues that since the stormwater system was not designed to manage that simulated event, it must be defective.

We are not convinced that developer's stormwater system must be equipped to handle every possible scenario that can be modeled, particularly the more extreme scenarios. The groundwater mounding analysis also simulated groundwater mounding under "normal conditions," based on average water table conditions with 67% of the design flow rate (22,110 gallons per day) to the primary wastewater leaching area. That calculation factored in precipitation-based recharge set at 22 inches per year and the volume of precipitation that would fall on impermeable areas of the site, which was added to the three stormwater infiltration systems (46 inches per year). Exh. 7, fig. 15. Under "normal conditions," the groundwater post-development is depicted as equal to or less than the average groundwater pre-development, and the minimum four feet of separation between groundwater and the SRAs is maintained. *Id.*

In any event, even if the stormwater management system were to cause stormwater volumes to increase above pre-development levels, as alleged by the Board and Interveners, they have not demonstrated that there would be damage to the adjacent wetlands, and certainly not damage great enough to outweigh the regional need for affordable housing. Therefore, they have not demonstrated a local concern with regard to stormwater management that is protected by a local bylaw or regulations that outweighs the need for affordable housing. *See* 760 CMR 56.07(2)(b)2; Exh. 1 (Pre-Hearing Order), §§ IV-5, IV-7, IV-8. Under these circumstances, subject to compliance with applicable state requirements, the stormwater management system proposed by the developer is acceptable even should it result in an increase in the volume of stormwater discharge.

C. **Wastewater Management: Board of Health Regulations**

The developer proposes to construct, in addition to stormwater infiltration systems, a small private subsurface wastewater treatment plan to treat up to 33,000 gallons per day (gpd) of treated sanitary wastewater, to be permitted through a Groundwater Discharge Permit issued by DEP. Exhs. 4, 31.

The Board argues that Chapter VI, § 2.5 of the Town's Board of Health regulations (BOH regulations) applies to this project. Section 2.5 states: "No part of the structural components of a leaching facility shall be located within 100 feet of a wetland as defined in M.G.L. chapter 131 section 40 (Wetland Protection Act)." Exh. 56, p. 6. Section 2.5 appears

under Section 2 – Requirements for Designing Sewage Disposal Systems. The Board argues that, although the proposed wastewater system for the project is not a septic system regulated under 310 CMR 15.00 (also known as Title 5), nevertheless, the project's soil absorption system should be considered a "treatment system" within the meaning of Title 5 and, therefore, the wastewater system should be subject to the setback requirements in § 2.5 of the BOH regulations. Board brief, p. 28. Even though the project's wastewater system is not a Title 5 system, the Board's witness, Mr. Garner, who is a wetland scientist, rather than a registered professional engineer, testified that the "harm sought to be protected by the BOH regulation not only exists with respect to the wastewater disposal system proposed here, but due to that system's larger size as compared to a smaller Title 5 septic system, the potential harm posed by such system is arguably greater with such a system than with a septic system." Exh. 53, ¶ 5. On cross-examination, he stated that his concern is limited to the failure of the treatment plant. Tr. VII, 13. He testified further that there is "no assurance that any treatment plant is going to function a hundred percent of the time" and that there are safety measures that alert monitoring individuals in the event of a failure. *Id.*

The Board argues[30] that, because DEP, in its July 21, 2023, Technical Deficiency letter, stated that it "considers the setback requirements for a Title 5 System to apply to all wastewater soil absorption systems given that all soil absorption systems would contribute to groundwater mounding," then it follows that the local setback provisions of § 2.5, which mirror Title 5's requirements, must apply to the wastewater treatment system for the project. Board brief, p. 28. However, the setback required by DEP is a state standard imposed by DEP on wastewater systems pursuant to Stormwater Handbook Volume 1, Table RR. Exh. 28.

The developer disputes the application of § 2.5 to the project, relying on testimony of Mr. Norton, its professional engineer. Developer brief, p. 12. He testified that "the design and siting of small private wastewater treatment plants is regulated by MassDEP's regulations at 314 CMR 5.0, which govern groundwater discharge permits." Exh. 36, ¶ 7. He stated that a wastewater treatment plant is not a Title 5 sewage disposal system and is not subject to regulation under 310 CMR 15.000, which governs septic systems. Exh. 36, ¶ 8. The difference, he stated is that "a wastewater treatment plant discharges treated effluent, in contrast to a standard septic system, which does not treat effluent prior to discharge." *Id.* Therefore, he stated that the BOH

[30] The Interveners' argument on this issue is substantially the same as the Board's.

regulations do not apply and that there are no local regulations governing the design and siting of wastewater treatment plants. Exh. 36, ¶ 9. On cross-examination, Mr. Norton elaborated that wastewater in a septic system goes through a primary treatment, while wastewater from a treatment plant goes through an additional secondary treatment, and in both situations, wastewater is eventually discharged into a leach field and filtered through the soil. Tr. II, 31-33. He further testified that there are additional differences between a Title 5 system and a wastewater treatment system other than that they both discharge to a leach field. Tr. II, 34.

Regulatory interpretation relies on "principles of construction that are well established by the courts." *Matter of Dighton and Stoney Ridge Estates, LLC*, No. 2010-01, slip op. at 5 (Mass. Housing Appeals Comm. Decision on Interlocutory Appeal, June 21, 2010) (stating assertion of HPP certification safe harbor rests on relevant provisions of 760 CMR 56.00 using well-established principles of construction). A regulation should be "read in the same manner as a statute" with words given "their plain and ordinary meaning." *Id*., citing *Ingalls v. Board of Reg. in Medicine*, 445 Mass. 291, 294 (2005). "Regulations may not be interpreted in a way that produces a result which 'is contrary to the plain language of the statute and its underlying purpose.'" *TBI, Inc. v. Board of Health of North Andover*, 431 Mass. 9, 13 (2000), quoting *Protective Life Ins. Co. v. Sullivan*, 425 Mass. 615, 618 (1997).

The Board and Interveners' argument that § 2.5 of the BOH Regulations is intended to apply to wastewater treatment plants not governed by Title 5 is unpersuasive. Reading the BOH Regulations as a whole, comprehensive document, it is clear that it is intended to apply only to the construction of subsurface sewage disposal systems pursuant to Title 5. Exhs. 56; 47, ¶ 15; 36, ¶ 9. The fact that both Title 5 and wastewater treatment systems both employ a form of leach field—a factor that the Board spent considerable time emphasizing—does not automatically subject the project to a specific setback provision within the BOH Regulations. Moreover, the Board presented no evidence that § 2.5 has been applied to wastewater treatment plants in the way it suggests. Even if we did find the Board's argument persuasive (which we do not), the Board has not shown that the harm from not conforming to § 2.5 is more likely to occur than not. *See Weston Dev. Group v. Hopkinton*, No. 2000-05, slip op. at 20 (Mass. Housing Appeals Comm. May 26, 2004) (conjecture does not provide measure of evidence necessary to prove project as proposed would result in adverse impact on resource intended to be protected by bylaw). Mr. Garner's testimony that it is "the better science to have more, rather than less,

distance, between a wastewater leach field and wetlands," neither establishes a local concern nor specific adverse impacts to the wetlands if the BOH Regulation is not applied to the project. Exh. 53, ¶ 6. Accordingly, the Board did not meet its burden of proof by establishing a local concern that outweighs the regional need for affordable housing.

D. **No Disturb Zone and Tree Removal Policies**

The Board argues that the project also violates two policies of the Conservation Commission: a 25-foot No Disturb Zone (NDZ) Policy and a Tree Removal Policy.[31] Exhs. 41, ¶ 15; 41B; 39, ¶¶ 23, 24; 39B, 39C. Ms. Sebastian testified that the NDZ, "prohibits work from being conducted within 25 feet of the edge of a Resource Subject to Protection under the [WPA]." Exh. 39, ¶ 35. Mr. Garner testified that more than 260 feet of the proposed emergency access drive lies within the NDZ. Exh. 41, ¶ 14. He further described important functions of NDZs in general and concluded that "impacts to the wetlands… may arise… includ[ing] loss of BVW, loss of habitat and buffer, and… continuing long-term impacts to this resource… as a result to [sic] the proposed construction." Exh. 41, ¶ 21. The NDZ was first approved by the Conservation Commission on October 28, 2015; there is no factual dispute that the NDZ is a written policy of the Conservation Commission but was not promulgated as a bylaw or regulation until Weston adopted its Wetland Bylaw in 2023, after the date of 518 South Ave's application for the project. *See* 760 CMR 56.02: *Local Requirements and Regulations.* Developer brief, p. 15; Board brief, p. 26, n.42; Interveners reply, p. 6.

The Tree Removal Policy prohibits any trees subject to the policy from being cut down within jurisdictional areas, i.e., wetlands, unless permission has been granted by the Commission. Exh. 39B. Again, there is no dispute that the Tree Removal Policy is just that—a policy—and is not a regulation or bylaw. Ms. Sebastian referred to it as a "directive" of the

[31] In their briefs, the Board and Interveners make a conclusory assertion about the Town's floodplain protection district in the context of their respective local concerns cases, with no argument on its application to their cases on local concerns. The Board also states that a significant portion of the emergency access road falls within the NDZ and that that the asserted defect in the overall project design (too large a project in too small a site) touches every aspect of design and construction [including], "the undersized children's playlot." Board brief, p. 26; Board reply, p. 10. Since these statements do not constitute argument, these issues are deemed waived. *See* n.8, *supra.* The Interveners' assertion in their brief that that the Board did not waive the Wetlands and Floodplain Protection District A does not alter our conclusion.

Conservation Commission. Tr. V, 87. It was approved by the Conservation Commission on October 28, 2015, and revised July 21, 2020, but no evidence was presented to establish it as a bylaw or regulation of the Conservation Commission.

The Board and Interveners nevertheless argue that both the NDZ and the Tree Removal Policy must be considered local requirements and regulations within the meaning of 760 CMR 56.02 and are applicable to the project. Board brief, p. 27; Interveners reply, p. 6. They argue that they both are written policies that were adopted and published years ago by vote of the Conservation Commission. Exhs. 39B; 39C. The Interveners point to the language of 760 CMR 56.02, in which the term "Local Requirements and Regulations" is defined to include "other actions" which are more restrictive than state requirements. Interveners brief, p. 7. Such "other actions," they argue, indicate a legislative intent not to limit the term to only laws or regulations. *Id.*

The developer disagrees with the Board's and Interveners' interpretation of 760 CMR 56.02 and argues that neither policy constitutes a local requirement or regulation existing as of the date of the comprehensive permit application, and as such, they may not be enforced against the project. Developer brief, p. 14. The policies here, the developer contends, were not adopted by the Conservation Commission pursuant to a duly enacted Wetlands Bylaw, which was not adopted by Weston Town Meeting until May of 2023.

There is no dispute that neither policy was codified as a bylaw or regulation at the time the application for the project was filed, nor is there any dispute that both policies existed in writing at that time. However, a municipality has no authority to regulate wetlands in the absence of a bylaw passed by Town Meeting. *Haskins Way, LLC v. Middleborough*, No. 2009-08, slip op. at 19 (Mass. Housing Appeals Comm. Mar. 28, 2011) (informal wetlands policy cannot be basis for condition in permit). Furthermore, a no-build "policy" not lawfully adopted as a regulation, and containing no requirement of uniform application, has been rejected as a basis for a conservation commission's authority to deny an application to perform work within a 100 foot buffer. *Fieldstone Meadows Dev. Corp. v. Conservation Comm'n of Andover*, 62 Mass. App. Ct. 265, 268 (2004).

The Committee has held that "any regulation not in effect at the time of the filing of the application [for a comprehensive permit] will not be applied to [the] project." *Hopkinton, supra*, No. 2000-05, slip op. at 8-11; *see also Hollis Hills, LLC v. Lunenburg*, No. 2007-13, slip op. at

8-14 (Mass. Housing Appeals Comm. Post Decision Ruling … Mar. 25, 2013); *Lever Development, LLC v. West Boylston*, No. 2004-10, slip op. at 15 (Mass. Housing Appeals Comm. Dec. 10, 2007).. We determine that neither the NDZ nor the Tree Removal Policy are local requirements or regulations within the meaning of 760 CMR 56.02, existing prior to the date of the developer's comprehensive permit application and therefore they do not apply to the project.

E. Earth Removal, Fill, and Retaining Walls

The Board argues that the project is too large for the site, and therefore, the height, bulk, placement, and physical characteristics of the project are incompatible with the site and surrounding land. This, it argues, will result in severe impacts regarding matters of health, safety, the environment and other local concerns. Board brief, p. 8. Because the project requires importation of soil onto the site and retaining walls to build up the site, the developer requires the following waivers, which the Board denied. Exhs. 3; 5. First, the Weston Zoning Bylaw requires a 45-foot minimum setback from a lot line for structures in the Residence A district.[32] Exh. 19, § VI.B. The developer sought a waiver of that setback to 1 foot for retaining walls over 36 inches high and guard rails and fences over six feet high. Exh. 5. Second, the developer sought a waiver from Zoning Bylaw § V.I.3 concerning Earth Removal and Movement to allow the importation of approximately 22,000 cubic yards of fill to raise the grade of the site. Exhs. 5; 19, § V.I.3. Third, the developer sought a waiver from the Material Removal Bylaw, Art. IX of the Weston General Bylaws,[33] for removal of soil, loam, sand or gravel from the site. Exh. 5.

The Board focuses its argument mainly on these issues in the context of the stormwater management and soil capacity, discussed in more detail in § VI.B, *supra*. While the Board did not make an argument regarding the Earth Removal and Movement Bylaw in its brief, Mr. Bartlett testified that compliance with the bylaw is "critically important to allow for monitoring

[32] The Zoning Bylaw defines retaining walls as a structure if they are 36 inches or more above existing natural grade. Exh. 19.

[33] The Weston General Bylaws were not submitted as an exhibit at the hearing. Realizing this oversight, Interveners attached a copy of the Material Removal Bylaw as Exhibit A to their post-hearing brief. Because the Bylaw was not properly admitted as an exhibit, we refer to only those provisions of the Material Removal Bylaw as they are referenced in testimony or other admitted exhibits. Like the courts, the Committee will not consider information that is not part of the evidentiary record. *See, e.g.*, *Adoption of Helen*, 429 Mass. 856, 863 (1999) (judge may not rely on facts that are not properly admitted in evidence); *Care & Protection of Benjamin*, 403 Mass. 24, 27 ("the judge could not properly consider facts not in evidence").

and controlling impacts to the community and abutting property owners from the truck trips that will be required to import fill to raise the proposed site, and for general construction of the buildings and associated site work." Exh. 44, ¶ 36. He estimated that, based on the amount of cut and fill indicated on the developer's preliminary plans, there could be an additional 520 truck trips that could generate pollutants and sediment which could infiltrate groundwater and nearby wetlands and properties. *Id.*

The Interveners focus is on the alleged visual and physical encroachment of the retaining walls on their respective properties. Interveners brief, p. 5. Mr. Houston testified:

> The site plans show a retaining wall extending along the west and south property lines of the abutting residence at 534 South Avenue and along the south and east property lines of 526 South Avenue. The wall is approximately 940-ft. in length (scaled) and extends to 11-ft. in height with the taller segments having a fence and guardrail on top for a total height of approximately 15-ft.

Exh. 40, ¶ 14. Ms. Sebastian testified the significance of the setback provision is that there is not "significant" room to plant buffering and screening to provide a visual buffer from the retaining walls. Tr. V, 92. She testified generally, without describing any specific impacts, that the use of retaining walls is not "environmentally sensitive design." Exh. 39, ¶ 27. The Interveners' engineer, Mr. Chessia, testified on cross-examination that the Board was correct in denying these waivers because, in his opinion, "this is an excessive amount" of fill due to the length, height and extent of the retaining walls. Tr. VI, 83. He further testified that there is nothing in the Earth Removal and Movement bylaw that specifically regulates the amount of cut and fill allowed on the property and that approval of the amount allowed is subject to the permitting authority's determination. Tr. VI, 83-84.

The Interveners further argue that the developer has failed to establish compliance with § V.I.3.b—the Earth Movement Bylaw—which prohibits more than 1,000 cubic yards of earth from being moved (with certain inapplicable exceptions), unless the following requirements are met: (1) movement "will not impair the usability of the area for the purposes permitted in this Zoning By-law"; (2) "grades to be established within the area will permit vehicular access to the area and the continuation of streets from the abutting properties;" and (3) "the area may ultimately be developed compatibly with the neighboring land." Exh. 19, § V.I.3.b. Accordingly, Interveners contend that denial of the waivers of these requirements should be upheld. As we stated in *Manchester*, the Interveners' arguments that the developer bears the

burden to justify its requested waivers by demonstrating compliance with the requirements it seeks to waive is misconceived. *See Manchester, supra*, No. 2022-14, slip op. at 36.

The developer's landscape architect, Mr. Montague, who has over 20 years of experience designing landscapes for multifamily projects, testified that there is an approximately four-foot area between the retaining wall and the western property line which "will accommodate larger plant material to be installed. It will also allow for the material to thrive and reach mature and vigorous root masses, yielding healthier screening for longer duration." He also testified that "[m]oving the retaining wall towards the main entry drive also allowed for screening plants to be installed on the low side of the site, further camouflaging the wall block." Exh. 35, ¶ 9. Mr. Montague testified that the retaining walls were part of the Order of Conditions approved by the Conservation Commission, countering Ms. Sebastian's claim that they are not "environmentally sensitive design." Exhs. 50, ¶ 5; 48A, B. Mr. Cheal disputed Ms. Sebastian's testimony that the retaining walls will encroach on abutting properties. He testified that "[t]he project plans (Exhibit 4) do not show the retaining walls encroaching on any abutting properties." Exh. 48, ¶¶ 14, 15. Mr. Denney testified that, pursuant to the construction management plan, other activity on the site will be limited during the importation and exportation of soil from the site, in order to reduce traffic accessing the site. In addition, he testified that there will be a flagman present to assist truck traffic, and to monitor tracking pads and dust control compliance throughout the process. Exh. 33, ¶ 7. Finally, on cross-examination, Mr. Denney testified that the project will comply with all relevant construction management requirements as well as the Order of Conditions, which Mr. Cheal testified incorporates compliance with Mr. Houston's recommendations as conditions with respect to erosion and sediment control during construction. Tr. IV, 86; Exh. 48, ¶ 39.

The Board and Interveners have not met their burden of proof to establish a local concern with respect to the aesthetic or environmental impact or safety of the retaining wall on the abutting properties that outweighs the need for affordable housing. *See Holliston,* 80 Mass. App. Ct. 405, 417, 420; *Norwell, supra, No.* 2004-15, slip op. at 24. Nor have they demonstrated valid local concerns related to waivers of the setback provisions, the Earth Removal and Movement Bylaw or the Material Removal Bylaw necessary for the retaining wall, that outweigh the regional need for affordable housing.

VIII. CONSULTANT FEES

In its initial pleading, the developer challenges the peer review fees imposed by the Board as unreasonable and extraordinary and argues it is entitled to a refund of certain charges to bring the fees more "in line with what Hanover Company has been charged on similar projects and would be similar to the peer review costs charged" for a similarly sized project in Weston. Developer brief, pp. 26-27. David Hall, Regional Development Planner for Hanover Company, testified that:

> At the outset of the hearings, the Board and the Applicant agreed that each hearing session would have a dedicated topic so that the Applicant would not need to have its entire hearing team attend each session and so that the Board's peer reviewers would not all need to attend every hearing session.

Exh. 38, ¶ 5. Mr. Hall provided the agreed-upon hearing schedule and topic to be discussed, as well as a chart listing peer review fees, with the accompanying invoices, for which the developer alleges it was improperly charged for duplicate attendance by peer reviewers from the same firm, review of abutters' and other peer reviewers' materials, attendance at hearings outside of the peer reviewer's scope and other excessive review time. Exhs. 38, ¶ 15; 22.

The Board charged the developer a total of $131,335.50 in peer review fees for its review of the proposed 180-unit multifamily housing development. Exh. 38, ¶ 14. Mr. Hall testified that in the 13 projects of similar type permitted under G.L. c. 40B, in which he has been involved, peer review fees have ranged between an estimated $20,000 and $80,000. Exh. 38, ¶ 13. The developer seeks a refund in the amount of $49,533.25. Exh. 38, ¶ 26; Developer brief, p. 26. Its challenges to the fees imposed fall into the following categories.

Matters Regulated by State Law. The developer argues that the Board undertook an extensive peer review process, with extraordinarily expensive peer review fees, on matters of state law over which the Board and Committee have no jurisdiction, when it could have "simply conditioned the Project on receiving the required state approvals." Developer brief, p. 25. As to the peer review fees specifically attributed to experts hired by the Board to evaluate the groundwater mounding model, the developer urges the refund of $15,690.00. Developer brief, p. 26.

Duplicative attendance by Professional Services Corporation, PC (PSC). Mr. Bartlett testified that he "personally participated in all of the above noted PSC peer reviews" which included "no less than twenty peer review memoranda." Exh. 44, ¶¶ 10, 14. Invoices for PSC

show simultaneous attendance by Mr. Bartlett and Mr. Houston at several Board meetings, duplicative entries for multiple conferences with and review of Interveners' experts and reports, and review of its own peer review memoranda. Exh. 22. For PSC's duplicative attendance at Board hearings, conferences and reviews by Mr. Houston and Mr. Bartlett, the developer was charged $9,395.00. Exhs. 38, ¶ 17; 22.

Review of Construction Management Plan. Mr. Hall testified that PSC billed a total of 24 hours (6 hours billed on May 31, 2022, plus 16 more hours of time billed on June 30, 2022) for review of the project construction management plan, which is "11 pages long, including a cover page, a page devoted to contact information and project description, and graphics…." Exh. 38, ¶ 9. He testified that, in his experience, "it is excessive to charge 24 [sic] hours of billable time to review an 11-page document and to produce a 7-page memorandum on a matter that was relatively straightforward and not particularly controversial." *Id.* Based upon a review of the invoices, the developer was billed $3,790.00 for 22 hours of construction management plan review. Exh. 22.

Sebastian Attendance Outside Scope. According to the meeting schedule, landscaping was to be discussed at the February 17, 2022, and June 7, 2022, hearings. Exh. 38, ¶ 6. A review of Ms. Sebastian's invoices reflect attendance at several additional hearings, including a hearing held on June 29, 2022, for "closing arguments by counsel" and on May 2, 2022, for "groundwater modeling and stormwater." Exh. 38, ¶ 6. The total billed by Ms. Sebastian for attendance at hearings at which landscaping was not anticipated as a topic is $2,100.00.

Review of Abutter and Other Peer Review Reports. For PSC, J. Matthew Davis & Associates, and Karen Sebastian Landscape Architecture's time spent reviewing materials prepared by abutters or by other peer reviewers, the developer was charged $4,380.00. Exh. 22. Dr. Davis testified that he reviewed and provided comments on reports produced by the experts on behalf of the abutters on the issue of stormwater and groundwater mounding. Exh. 42, ¶¶ 8, 11. The invoices from MDM and from Patrick Garner also reflect time spent reviewing materials prepared by abutters but are not broken out by time entry and so the amounts associated with their excessive time cannot be identified. Exhs. 38, ¶ 19; 22.

Other invoices Mr. Hall challenged in his testimony include charges related to review of wetlands issues, although he asserted there are no local wetlands by-laws and compliance with the WPA will be reviewed solely by the Conservation Commission; groundwater mounding and

wastewater, although he stated that the Town has no ordinance regulating groundwater mounding or wastewater treatment; sanitary sewers, although he stated that there is no sewer system proposed as part of the project; attendance at a board of health meeting, although he stated the project was never before the BOH for review; and review of school bus stop and site circulation, which was being reviewed by Board's traffic peer reviewer. Exh. 38, ¶¶ 21-25.

The Board contests the developer's request for a refund of the disputed consultant fees, placing the blame on the developer for the costs incurred in pursuing this permit. It alleges that the "major design changes" during the hearing process resulted in significant additional review time and that the developer did not previously dispute the peer review consultants retained by the Board. Board brief, p. 34. The size and complexity of the project, the Board argues, is a central consideration in the review of the reasonableness of the fees charged. Board reply, p. 10. The Board, however, does not respond to Mr. Hall's specific challenges to the fees enumerated in his testimony.

Pursuant to 760 CMR 56.05(5)(b), a review fee may be imposed only if:

1. the work of the consultant consists of review of studies prepared on behalf of the Applicant, and not of independent studies on behalf of the Board;
2. the work is in connection with the Applicant's specific Project;
3. all written results and reports are made part of the record before the Board; and
4. a review fee may only be imposed in compliance with applicable law and the Board's rules.

Furthermore, 760 CMR 56.05(5)(c) addresses the assessment of consultant review fees, requiring them to be "reasonable in light of" the following factors:

1. the complexity of the proposed project as a whole;
2. the complexity of the particular technical issues;
3. the number of housing units proposed;
4. the size and character of the site;
5. the project construction costs; and
6. fees charged by similar consultants and scopes of work in the area. As a general rule, the Board may not assess any fee greater than the amount which might be appropriated from town or city funds to review a project of similar type and scale in the town or city.

Pursuant to 760 CMR 56.05(5), the Committee has jurisdiction to review the reasonableness of consultant fees imposed by the Board. The Committee has often ruled on whether consultant and peer review fees imposed by a board have been reasonable and consistent with the comprehensive permit regulations. *See Weiss Farm Apartments, LLC v. Stoneham*, No.

2014-10, slip op. at 88 (Mass. Housing Appeals Comm. Mar. 15, 2021) (discussing when fees may be imposed, in accordance with 760 CMR 56.05(5), *aff'd*, No. 2181CV00818 (Middlesex Super. Ct. July 21, 2022); *Pyburn Realty Trust v. Lynnfield*, No. 2002-23, slip op. at 21-24 (Mass. Housing Appeals Comm. Mar. 22, 2004). The intent of Chapter 40B could be frustrated by imposing excessive fees to render the proposed project uneconomic and thwart the construction of affordable housing if a developer is unable to challenge those fees. *Page Place Apartments, LLC v. Stoughton*, No. 2004-08, slip op. at 17-20 (Mass. Housing Appeals Comm. Feb. 1, 2005).

A fee may only be imposed in compliance with applicable law and the Board's rules and, pursuant to 760 CMR 56.05(5)(a), the Board "should not impose unreasonable or unnecessary time or cost burdens on an Applicant." *See Stoneham, supra*, No. 2014-10, slip op. at 78 (discussing when fees may be imposed, in accordance with 760 CMR 56.05(5)). In its past decisions, consistent with 760 CMR 56.05(5)(b), the Committee has made clear that such costs must be consistent with requirements established by local requirements or regulations. *Id.* (and cases cited).

In her ruling denying the Board's motion for summary decision on the issue of consultant fees, the presiding officer determined that an evidentiary hearing was necessary for the assessment of the reasonableness of specific categories of the disputed fees in light of the factors enumerated in 760 CMR 56.05(5)(c).[34] The itemized invoices provided by the developer show duplicative efforts by the Board's experts, as well as a substantial amount of time spent reviewing third party reports, reviewing other consultants' reports, and unreasonably lengthy conferences and correspondence with and regarding third parties. Exh. 22. While there are other invoices indicating duplicate attendance, improper review of abutter materials, attendance at hearings outside of the peer reviewer's scope and other excessive review time, these invoices are not itemized, and specific dollar amounts for specific entries cannot be determined.

We find that the developer has proven that the following fees do not comply with § 56.05(5)(b) and are unreasonable pursuant to 760 CMR § 56.05(5)(c):

1. Duplicative attendance by PSC at Board hearings: $4,455.00:

[34] *See* Ruling on Motion for Partial Summary Decision, Mar. 15, 2023, in which the jurisdictional issues raised by the Board in its post-hearing briefs were also addressed and denied.

6/7/2022	3 @ 165/hr	$ 495.00	Bartlett
6/21/2022	2.5 @ 165/hr	$ 412.50	Bartlett
6/28/2022	1.75 @ 165/hr	$ 288.75	Bartlett
5/10/2022	3 @ 165/hr	$ 495.00	Bartlett
5/19/2022	1.25 @ 165/hr	$ 206.25	Bartlett
3/8/2022	3.5 @ 165/hr	$ 577.50	Bartlett
1/12/2022	1.5 @ 165/hr	$ 247.50	Bartlett
1/18/2022	3 @ 165/hr	$ 495.00	Bartlett
1/31/2022	3 @ 165/hr	$ 495.00	Bartlett
6/8/2021	3 @ 165/hr	$ 495.00	Bartlett
6/30/2021	1.5 @ 165/hr	$ 247.50	Bartlett
		$ 4,455.00	

2. Excessive review time for construction management plan review: $2,800.00 (16 hours):

6/2/2022	8 @ 175/hr	$ 1,400.00	Houston
6/3/2022	8 @ 175/hr	$ 1,400.00	Houston
		$ 2,800.00	

3. Ms. Sebastian's attendance at hearings outside the scope of her expertise: $2,100.00:

6/29/2022	1.75 @ 150	$ 262.50	Sebastian
5/19/2022	1.5 @ 150	$ 225.00	Sebastian
5/2/2022	2.25 @ 150	$ 337.50	Sebastian
5/10/2022	2.75 @ 150	$ 412.50	Sebastian
5/24/2022	2.75 @ 150	$ 412.50	Sebastian
1/31/2022	3 @ 150	$ 450.00	Sebastian
		$2,100.00	

4. Review of materials prepared by abutters or by other peer reviewers: $3,630.00:

6/21/2022	1.5 @ 175	$ 262.50	PSC - Houston
4/26/2022	2 @ 165	$ 330.00	PSC – Barlett
5/23/2022	1.75 @ 165	$ 288.75	PSC – Bartlett
4/24/2022	1.75 @ 165	$ 288.75	PSC – Bartlett
4/25/2022	.5 @ 165	$ 82.50	PSC – Bartlett
12/18/2021	1 @ 165	$ 165.00	PSC – Bartlett
4/26/2022	2.5 @ 150	$ 375.00	Davis
5/22/2022	2.5 @ 150	$ 375.00	Davis
9/3/2021	1.5 @ 150	$ 225.00	Davis
6/7/2022	1 @ 150	$ 150.00	Sebastian

3/7/2022	5.5 @ 150	$ 825.00	Sebastian
1/13/2022	1.75 @ 150	$ 262.50	Sebastian
		$ 3,630.00	

Exh. 22. Accordingly, the Board is ordered to repay the developer the total of the amounts above, which is $12,985.

IX. CONCLUSION

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

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

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

   a. The Development shall be constructed as shown on the Site Development and Architectural Plans dated June 29, 2022, revised October 23, 2023, and February 2, 2024, set out in and prepared by Tetra Tech and Metrowest Engineering, Inc. Exhs. 4; 63.

   b. The developer shall comply with all applicable non-waived local requirements and regulations in effect on the date of 518 South Ave's submission of its comprehensive permit application to the Board, consistent with this decision pursuant to 760 CMR 56.02: *Local Requirements and Regulations*.

   c. 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).

d. 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.

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

4. Because the Housing Appeals Committee has resolved only those issues placed before it by the parties, the comprehensive permit shall be subject to the following further conditions:

a) Construction in all particulars shall be in accordance with all applicable local zoning and other bylaws, regulations and other local requirements in effect on the date of 518 South Ave's submission of its comprehensive permit application to the Board, 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 518 South Ave, 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 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 and wastewater management.

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

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

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

January 23, 2025

Shelagh A. Ellman-Pearl, Chair

Lionel G. Romain

James G. Stockard, Jr.

Lisa V. Whelan, Presiding Officer