COMMONWEALTH OF MASSACHUSETTS

HOUSING APPEALS COMMITTEE

TIFFANY HILL, INC.

v.

NORWELL BOARD OF APPEALS

No. 04-15

DECISION

September 18, 2007

TABLE OF CONTENTS

COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

TIFFANY HILL, INC.	)	
Appellant	)	
v.	)	No. 04-15
NORWELL BOARD OF APPEALS	)	
Appellee	)	

DECISION

This is an appeal pursuant to G.L. c. 40B, §§ 20-23, and 760 CMR §§ 30.00 and 31.00, brought by Tiffany Hill, Inc. (THI), from a decision of the Norwell Zoning Board of Appeals (Board) with respect to an application for a comprehensive permit for property located in Norwell, Massachusetts. The Board's decision granted a comprehensive permit but imposed conditions that were determined in this appeal to effectively constitute a denial of the comprehensive permit. See *Tiffany Hill, Inc. v. Norwell,* No. 04-15, slip op. at 2-5 (Mass. Housing Appeals Committee June 24, 2005 Rulings on Preliminary Motions) ("Preliminary Rulings").

I. PROCEDURAL HISTORY

On or about June 20, 2003, THI submitted an application to the Board for a comprehensive permit for the construction of 66 condominium homes to be built on approximately 18 acres of land off Tiffany Road in Norwell. The project was to be financed by the Housing Starts Program of the Massachusetts Housing Finance Agency (MassHousing) and/or the New England Fund program (NEF) of the Federal Home Loan Bank of Boston. Exh. A. The decision indicates that the public hearing opened on July 16,

2003 and continued on September 10, October 22, November 5, and December 10, 2003, and April 14, May 12 and June 9, 2004.[1] The Board also held site walks of the proposed site on September 25 and October 23, 2003 and of Tiffany Road on June 12, 2004. During the hearing before the Board, THI offered plans regarding a 44-unit project. The parties disagree whether this constituted a formal change in the application, although the Board's decision states that THI submitted a revised pro forma and plans for a 44-unit project. Exh. A.

On June 21, 2004, the Board closed the hearing, deliberated and adopted its decision. The Board's decision evaluated the 44-unit plan, rather than the original 66-unit proposal. The decision was written as a grant of the comprehensive permit with conditions, including the limit of the number of units to 24 and the number of bedrooms to 38, as well as a number of other conditions, and grants and denials of various requested waivers of local provisions.

On July 9, 2004, THI filed its appeal with the Housing Appeals Committee. The Board filed an Answer. Ms. Ellen Sullivan, who resides across the street from the proposed site, sought leave to intervene in this matter. The Committee held a Conference of Counsel on August 6, 2004.[2] THI thereafter filed a motion pursuant to 760 CMR 30.07(2)(d) seeking a determination that the Board's decision was *de facto* a denial of the comprehensive permit.[3] On November 19, 2004, THI filed a Notice of Project Change. In response, the Board filed a Motion to Remand/Notice of Determination of Substantial Change. The presiding officer granted the motion to intervene, specifically limiting Ms. Sullivan's participation to "her allegations of potential threats to her health and safety from flooding, stormwater runoff and effluent breakout from the proposed retaining wall system and leach fields for the wastewater system and from the proposed storm water detention basin for the storm water management

---

1. The Board's decision indicates that the hearings scheduled for January 21 and March 10, 2004 were postponed and that THI chose not to appear at the June 9, 2004 hearing. Exh. A.

2. The Chairman of the Housing Appeals Committee presided over the initial Conference of Counsel. He thereafter recused himself from this proceeding.

3. The Board filed, and then withdrew, a motion seeking to limit THI's appeal to its revised development.

system." *Tiffany Hill,* slip op. at 9-10 (Preliminary Rulings).[4] She denied the motion to remand and granted the motion to deem the decision a denial. *Id.* at 5, 7.[5]

The presiding officer conducted a Pre-Hearing Conference on August 9, 2005. Thereafter THI filed a motion in limine to exclude evidence regarding the financial feasibility of the project, which the presiding officer granted. The parties then executed a Pre-Hearing Order which the presiding officer issued on November 16, 2005. The parties thereafter submitted pre-filed direct testimony and THI filed pre-filed rebuttal testimony. Before the commencement of the evidentiary hearing, THI submitted a motion for directed decision. The Board opposed this motion and requested a directed decision in its favor. The presiding officer denied both motions. The Presiding Officer's Preliminary Rulings and Directed Decision Ruling have been reviewed by the Committee and are incorporated into this decision as rulings of the full Committee.

The Committee's *de novo* evidentiary hearing commenced on June 26, 2006 in Norwell and continued on June 27, 28 and 30, 2006 in Boston, consisting of sworn witness testimony for the purpose of cross-examination. The presiding officer also conducted a site visit. At the close of the evidence, both THI and the Board renewed their motions for directed decision. Following the close of the hearing, the Board, THI and Ms. Sullivan filed post-hearing memoranda. In its brief, the Board requested reconsideration of the ruling that the Board's decision was a *de facto* denial of the project and asked for rehearing based on

---

4. In her post-hearing brief, Ms. Sullivan argues that stormwater runoff from the site into the drainpipe and through the Town's easement across her property, as well as the flow of surface stormwater and wastewater onto her property constitute actionable common law trespass and common law nuisance. These claims are outside the scope of her participation as an intervener. Moreover, they fall outside the Committee's jurisdiction.

5. In her ruling, the presiding officer noted that the Board's decision's focus on Title 5 and state DEP stormwater management requirements "obscures the extent to which the reduction in bedrooms and units was based on local concerns or standards, rather than state-regulated issues." She noted that "[t]o the extent a board's bases its reduction in project size upon statewide concerns that would be addressed in another forum, rather than local concerns it has not demonstrated a reasonable basis for the reduction. Cf. *Dexter Street, LLC v. N. Attleborough*, No. 00-01, slip op. at 6 n.7 (Mass. Housing Appeals Committee July 12, 2000); *Hamlet Development Corp. v. Hopedale*, No. 90-03, slip op. at 15 (Mass. Housing Appeals Committee Jan. 23, 1992)" Nor did it draw a logical connection between the reduction and the stated local concerns. *Tiffany Hill*, slip op. at 3 (Preliminary Rulings).

different burdens of proof. The Intervener requested a proposed decision in accordance with 760 CMR 30.09(5)(h) and G.L. c. 30A, § 11(7), which the presiding officer issued on August 17, 2007. The renewed motions for directed decision are denied for the reasons set out in Section IV.A. The Board's motion for reconsideration is also denied for the reasons set out in Footnote 5. The Intervener's request for oral argument to the full Committee is denied.

II. FACTUAL OVERVIEW

The Appellant proposes to construct 36 units of condominium housing, with 72 bedrooms on approximately 18 acres off Tiffany Road in Norwell. The site of the proposed development slopes upward toward Route 3 from Tiffany Road, a designated scenic road in Norwell, and slopes along Route 3 toward the Southeast. According to the proposal, a single entrance driveway from Tiffany Road divides at about 550 feet into the site to loop around the upper portion of the site where the housing is to be located. The developer proposes a septic system serving the entire project to be located near Tiffany Road behind a series of retaining walls and landscaping. THI also proposes to construct a detention basin below the buildings and parking areas and above the septic system and leach field to collect stormwater from the upper portions of the site. Stormwater below the detention basin is intended to be collected at storm drains on Tiffany Road.

The Intervener, Ms. Sullivan, resides across the street from the proposed project on the southern side of Tiffany Road. The Town holds an easement on her property to construct a 15-inch pipe drain, end wall and ditch to drain eight catch basins on Tiffany Road to carry water away from the road. Exh. 51. Additional facts specific to the disputed issues are addressed below in the discussions of these issues.

III. PRELIMINARY ISSUES

To be eligible to proceed on a comprehensive permit application before a zoning board, or to bring an appeal before the Housing Appeals Committee, an applicant must fulfill three requirements. The parties have stipulated that THI meets the limited dividend status requirement of 760 CMR 31.01(1)(a), the fundability requirement of 760 CMR 31.01(1)(b), and the site control requirement of 760 CMR 31.01(1)(c). Pre-Hearing Order, § II.

The parties have also stipulated that Norwell has not satisfied any of the statutory minima defined in sentence two of the definition of "consistent with local needs" in G.L. c. 40B, § 20. Pre-Hearing Order, § II. See 760 CMR 31.04; 31.06(5); 31.07(1)(e). As case law and Committee precedents establish, the fact that Norwell does not meet the statutory minima establishes a rebuttable presumption of a substantial regional housing need that outweighs local concerns. 760 CMR 31.07(1) and 31.07(1)(e). See *Board of Appeals of Hanover v. Housing Appeals Committee*, 363 Mass. 339, 367, 294 N.E. 2d 393, 413 (1973) (failure to meet statutory minimum housing obligations "will provide compelling evidence that the regional need for housing does in fact outweigh the objections to the proposal"); *Woburn Board of Appeals v. Housing Appeals Committee,* 66 Mass. App. Ct. 1109, 2006 WL 1493052 (2006), further appellate review denied, *Board of Appeals of Woburn v. Housing Appeals Committee,* 447 Mass. 1107, 853 N.E. 2d 1059 (2006).

IV. BURDENS OF PROOF

A. Appellant's Burden of Proof

When the Board has denied a comprehensive permit, the ultimate question before the Committee is whether the decision of the Board is consistent with local needs. Under the Committee's regulations, a developer "may establish a *prima facie* case by proving, with respect to only those aspects of the project which are in dispute, that its proposal complies with federal or state statutes or regulations, or with generally recognized standards as to matters of health, safety, the environment, design, open space, or other matters of local concern." 760 CMR 31.06(2).[6]

The Board contends that THI has failed to make a *prima facie* showing that the proposal complies with state or federal requirements or other generally recognized standards

6. Alternatively a developer may prove that "local requirements or regulations have not been applied as equally as possible to subsidized and unsubsidized housing." 760 CMR 31.06(4); G.L. c. 40B, § 20. In the Pre-Hearing Order, THI raised the issue of unequal treatment regarding the "high groundwater elevation determination pursuant to Part II (3) of the Town of Norwell Board of Health Rules and Regulations." Pre-Hearing Order, § IV, ¶ 4. THI did not submit evidence on this issue, and has not raised it in its brief. The issue is therefore waived. See *Washington Green Development,*

with respect to the issues in dispute. In support, it points to its own evidence, and the cross-examination testimony of THI's witnesses. Ms. Sullivan joins the Board in this argument. However, the Board and the Intervener mistake the nature of THI's burden. Unlike an ultimate burden of persuasion, an appellant's burden to present a *prima facie* case is one of production: to introduce "evidence sufficient to form a reasonable basis for a [decision] in that party's favor." M. S. Brodin, *et al., Handbook of Massachusetts Evidence* § 3.2.1 at 61 (8th ed. 2007) and cases cited. "Prima facie evidence, in the absence of contradictory evidence, requires a finding that the evidence is true; the prima facie evidence may be met and overcome by evidence sufficient to warrant a contrary conclusion; even in the presence of contradictory evidence, however, the prima facie evidence is sufficient to sustain the proposition to which it is applicable." *Id.*, § 3.5.3 at 84 and cases quoted. A party's burden of production may be tested with a motion for directed decision, as did both THI and the Board in this proceeding. See *Tiffany Hill, Inc. v. Norwell,* No. 04-15 (Mass. Housing Appeals Committee May 3, 2006 Ruling on Motion for Directed Decision) ("Directed Decision Ruling"). In denying the Board's motion, the presiding officer ruled that THI had met its burden with respect to the issues in contention. *Id.* at 2. The evidence introduced at the hearing did not alter this result.

B. Board's Burden of Proof

Once the Appellant has demonstrated that its proposal complies with state or federal requirements or other generally recognized standards with respect to the aspects of the project in dispute, the burden then shifts to the Board to prove first, that there is a valid health, safety, environmental, design, open space or other local concern that supports the denial of a comprehensive permit, and second, that such concern outweighs the regional need for low or moderate income housing. G.L. c. 40B, §§ 20, 23; 760 CMR 31.06(6). See *Hanover, supra,* 363 Mass. 339, 365; *Hilltop Preserve LTD Partnership v. Walpole*, No. 00-11, slip op. at 4 (Mass. Housing Appeals Committee Apr. 10, 2002).

LLC v. Groton, No. 04-09, slip op. at 3 n.2 (Mass. Housing Appeals Committee Sept. 20, 2005), citing *Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85, 653 N.E. 2d 595, 598 (1995).

In denying THI's motion for directed decision against the Board, the presiding officer stated:

> The Board's issues concerning the health and safety impacts of the stormwater and wastewater systems are serious enough to warrant consideration in the context of a full hearing, at which the credibility and weight of witness testimony may be evaluated. The Board has submitted sufficient evidence to require that these issues be examined to determine whether valid local concerns exist. See *Litchfield Heights,* No. 04-20, slip op. at 13, citing *Lexington Woods v. Waltham,* No. 02-36, slip op. at 7, 19-20 (Mass. Housing Appeals Committee Feb. 1, 2005). THI's argument that consideration of issues with the proposed wastewater and stormwater management systems should be left to the subsidizing agency overlooks the responsibility of the Committee to consider whether the issues raised constitute valid local concerns. See *CMA, Inc. v. Westborough,* No. 89-25, slip op. at 6 (Mass. Housing Appeals Committee June 25, 1992).
>
> With regard to the proposed water main and the traffic issues, the Board has raised sufficient concerns to require oral testimony, at a minimum to permit the assessment of the credibility and weight of the witnesses' testimony. With regard to the access roadway issues, the issue of whether potential safety hazards outweigh the need for affordable housing is more properly evaluated after an opportunity for the assessment of the credibility and weight of witness testimony at the hearing. See *Litchfield Heights,* No. 04-20, slip op. at 13, *Lexington Woods,* No. 02-36, slip op. at 7, 19-20.

Tiffany Hill, slip op. at 4 (Directed Decision Ruling) (footnote omitted).

If one of the local concerns put forth by the Board to justify its *de facto* denial is based on the inadequacy of existing municipal services or infrastructure, it not only has the burden of proving that inadequacy of services or infrastructure is a valid local concern that outweighs the regional need for housing, but it also must prove that the installation of adequate services is not technically or financially feasible. See 760 CMR 31.06(8). In that instance, THI may rebut the Board's case by proving "that preventive or corrective measures have been proposed which will mitigate the local concern...." 760 CMR 31.06(9).[7]

---

7. Ms. Sullivan seeks to prove that the project poses a threat to her health and safety from flooding, storm water runoff and or effluent breakout from the proposed retaining wall system and leaching fields for the wastewater system and from the proposed storm water detention basin for the storm water management system. Pre-Hearing Order § IV, ¶ 11.

V. LOCAL CONCERNS

A. Wastewater Management

1. THI's *Prima Facie* Case

THI proposes to build a septic system to serve all the units in the development. In denying the Board's request for a directed decision, the presiding officer ruled that THI's prefiled testimony and exhibits provided evidence that its proposal complies with federal or state requirements or other generally recognized design standards with respect to the wastewater system. *Tiffany Hill,* slip op. at 2 (Directed Decision Ruling).

The Board has renewed its motion for a directed decision on the ground that evidence, including testimony by the developer's witnesses, demonstrates that THI does not have plans that comply with the applicable state and local standards. The Board also argues that it is inadequate for THI to rely on preliminary plans for its *prima facie* case. Its expert stated that it is not possible to construct a Title 5 compliant septic system for the number of units and bedrooms THI desires.

THI met its initial burden by presenting, in its direct case, *prima facie* evidence that the wastewater management system generally complied with state requirements with respect to the aspects of the septic system put into issue by the Board, including Title 5 requirements for separation to groundwater, breakout control and reserve areas.[8] See Exhs. 40, 10-12, 21-24. THI's expert acknowledged on cross-examination that although the current plans don't comply in all respects with Title 5, he believed that because they are preliminary they comply sufficiently, and the final design would be "a fully complied plan," even if it was necessary to modify the design to bring it into conformance. Tr. I, 69. He stated that "[t]here are a lot of other details that need to be included in the plans and calculations and so on that had not yet been fully done but if we were to submit a plan to the Board of Health for approval, then there would be a lot more additional details...." Tr. I, 68.

---

8. The Board also argues that the retaining wall will constitute "blight" on Tiffany Road, which is designated as a scenic road. See G.L. c. 40, § 15C; Exh. 26. As discussed below, the Board has not demonstrated that the retaining wall will have a serious adverse impact on Tiffany Road as a scenic road to constitute a valid local concern that outweighs the need for affordable housing.

As we noted above, testimony or evidence in the hearing contradicting THI's *prima facie* evidence does not negate the sufficiency of the developer's evidence to meet its burden, nor does it eliminate the evidentiary value of THI's evidence. See *Handbook of Massachusetts Evidence, supra,* § 3.5.3 at 84. Thus, the Board's evidence that aspects of the system may not currently comply with Title 5 does not invalidate THI's *prima facie* case. The Committee has made clear, since its earliest cases that "plans submitted for comprehensive permit approval are preliminary and need not be as detailed as final construction drawings. The rationale for this rule is that the comprehensive permit itself is preliminary in the sense that no construction can proceed until a building permit has been issued. The building permit is not issued until the appropriate officials have reviewed final construction drawings and insured that the project will comply with various state codes and all local requirements not waived by the comprehensive permit." *Oxford Housing Authority v. Oxford*, No. 90-12, slip op. at 4 (Mass. Housing Appeals Committee Nov. 18, 1991) and cases cited. On appeal before the Committee, to establish a *prima facie* case, the plans must be sufficient to both permit the Committee to evaluate the proposal with regard to aspects that are in dispute, and to permit full cross-examination by the Board. Finally, the requirements of 760 CMR 31.02(2) are to be applied in a common sense, rather than an overly technical manner. *Id.* at 5, and cases cited. In any event, as the testimony and evidence showed, Title 5 has undergone changes during the course of this comprehensive permit process. The Committee's review of preliminary plans would not be determinative because the septic system must ultimately comply with the state requirements in effect at the time of certification.

We also note, that for the most part, the issues raised by the Board and the Intervener concerning the septic system raise primarily state-regulated, rather than local, concerns. By denying THI's motion for directed decision, the presiding officer was able to consider the evidence and evaluate whether local concerns exist with respect to the septic system.

2. Title 5 Compliance does not raise Local Concerns

The question before us is whether the issues raised by the Board and Ms. Sullivan concerning the health and safety impacts of the wastewater system constitute valid local

concerns. Because the system will discharge less than 10,000 gpd (gallons per day), the Board and the Intervener argue that DEP will not be reviewing the system and therefore the Committee should evaluate it. The parties submitted extensive evidence regarding the proposed structure and layout of the septic system, the nature of the soils on the site and in the vicinity, as well as the interaction with stormwater and groundwater. They spent considerable time debating whether the design will comply with Title 5 (310 CMR 15.000) requirements. They focused little attention on two local requirements relating to septic systems which THI has requested to be waived.[9]

In its renewed motion for a directed decision, THI argues that compliance with Title 5, a state requirement, is beyond the scope of this proceeding and the Committee should direct the Board to issue a comprehensive permit requiring it to comply with Title 5. As a state regulation, Title 5 must be met in all developments with septic systems built under Chapter 40B. The Committee has ruled that, where no local requirement forms the basis for the Board's dispute with the proposal, the matter may be resolved by the imposition of a condition mandating compliance with state requirements. See *Canton Property Holding, LLC v. Canton*, No. 03-17, slip op. at 23-24 (Mass. Housing Appeals Committee Sept. 20, 2005), citing *9 North Walker Street Development, Inc. v. Rehoboth*, No. 99-03, slip op. at 6-7 (Mass. Housing Appeals Committee June 28, 2005); *Rising Tide Development, LLC v. Lexington*, No. 03-05, slip op. at 27 (Mass. Housing Appeals Committee, June 14, 2005); *Washington Green Development, LLC v. Groton*, No. 04-09, slip op. at 21 (Mass. Housing Appeals Committee, Sept. 20, 2005).

While under certain circumstances it may be appropriate for the Committee to review important health and safety issues that are not specifically governed by local regulation, those situations arise when exceptional circumstances exist that could not have been anticipated by the Town, and when review of the issue may not take place outside the context of this appeal. See *Hamlet Development Corp. v. Hopedale*, No. 90-03, slip op. at 8-15 (Mass. Housing

9. Those two requirements were waived by the Board in its decision granting a comprehensive permit for a 38-bedroom project. Exh. A, p. 33. The requirements are: Board of Health Regulation § 2.8 (requiring design that assumes property is in nitrogen sensitive area) and § 2.12 (specifying setback and drainage requirements for mounded septic systems). Exh. 37.

Appeals Committee Jan. 23, 1992); *Walega v. Acushnet,* No. 89-17, slip op. at 5-7 (Mass. Housing Appeals Committee Nov. 14, 1990).

The Board argues that this project fits within the exception because the septic system is not large enough to trigger DEP review, and no wetland issues bring the project under conservation commission jurisdiction. It also argues that the design of the proposed wastewater system raises significant concerns that a failure of the system could lead to an extended inability to discharge wastewater and the proposed project is so different from housing permitted under existing zoning that it raises wastewater (and stormwater) concerns that were not anticipated by the Town. However, the Board has not indicated what specific regulatory provisions it would have instituted to address this project. Two local requirements exist that would apply to this project unless they are waived. Moreover, the Board and Ms. Sullivan focus on arguing that the project will be unable to comply with Title 5. If THI is unable to show the Board of Health that its project meets Title 5, it will be unable to obtain the certification to proceed with construction.

The specific issues the Board and the Intervener raise concerning the septic system involve the separation to groundwater, the construction of the retaining wall system, the adequacy of the reserve area, the mixing of effluent from the septic system with subsurface storm flow and groundwater, and the likelihood of "breakout," or contaminated groundwater or subsurface storm flow breaking out onto the ground surface. Even though these issues are not subject to direct DEP review, in order to proceed with the development, THI must obtain certification that the system complies with Title 5 from the Norwell Board of Health, the Local Approving Authority under that regulation. Therefore, adequate Title 5 review will take place elsewhere, and the Committee should not determine whether the system would comply with Title 5.

The Board and the Intervener argue that THI's proposed system provides for a four-foot, rather than a five-foot separation to groundwater, including a separation to high groundwater, which they argue is required under 310 CMR 15.212. With regard to separation to groundwater, the issue is whether a five-foot separation is required throughout the system. While the evidence suggests that 5 feet may well be the required separation to

use, and THI has indicated it will comply if this is the requirement, the determination should be made by the Board of Health, with consultation with the DEP if necessary, concerning the effect of the subsurface storm flow and the nature of the soils on the calculations.[10]

THI designed a mounded three-part septic system with a 3-tiered retaining wall in order to maintain a four-foot separation to the higher groundwater elevation that resulted from the addition of potential groundwater mounding to the mean annual high groundwater level. Exh. 28. The Board and Ms. Sullivan argue that the proposed retaining wall fails to comply with Title 5, in part because the wall will not be composed of impervious material. Questions regarding whether the wall itself must be impervious or may be installed in connection with a separate impervious liner, as well as other disputed aspects of the wall's construction, should be resolved by the Board of Health. Since Title 5 was revised after the issuance of the Guidelines for Design and Installation of Impervious Barriers and Slope Stabilization for Title 5 Systems (Exh. 50), the DEP can offer guidance regarding the effect of language in 310 CMR 15.255(2)(f) regarding a project "where a retaining wall to stabilize the slope is required and also is proposed as an impervious barrier...." See Tr. II, 18-19.[11] In any event, the Board and Ms. Sullivan have not demonstrated that a retaining wall system will violate Title 5.

The Board and the Intervener also argue that the reserve areas do not comply with Title 5. With regard to the adequacy of the reserve area, the Board has largely focused on the possibility that the retaining wall system will fail necessitating a major repair of the leaching field. The testimony presented about the possibility of failure of the retaining wall and the septic system is speculative and does not constitute a valid local concern that outweighs the

---

10. THI contends it calculated the four-foot separation to high groundwater as required under 310 CMR 15.212 only after adding the effect of groundwater mounding to the mean annual high groundwater elevation. The parties disagreed whether underground flow of water constituted "subsurface storm flow" as suggested by THI's expert or "recharge water" as suggested by the Board's expert. See Tr. II, 136-137; IV, 21. To what extent this subterranean water should be considered in determining the appropriate separation should be decided by the Board of Health.

11. Testimony of the Board's engineer on whether recent revisions to Title 5 supersede language in the guidelines for construction of retaining walls, constitutes a legal interpretation of DEP regulations and guideline and is not probative.

regional need for affordable housing. See *Washington Green,* No. 04-09, slip op. at 20. Nor has the Board demonstrated that the tiered wall system will present a safety issue. Whether the reserve area meets Title 5 requirements will be decided by the Board of Health.

Groundwater flows from upper portion of the site generally toward Tiffany Road. Tr. II, 84. The Board and Ms. Sullivan argues that wastewater or "effluent" would break out onto the surface of the neighboring Taylor property, the easterly end of the subject property and on the downgradient properties as a result of the subsurface storm flow called "interflow." Tr. II, 83; Tr. III, 184-185, 195, 202-203; Exh. 44, ¶ 6.2. The effluent plume was expected to extend in an elliptical direction from the leaching field. See Tr. IV, 61; II, 190.

THI's and the Board's experts disagreed regarding the inferences to be drawn about the conductivity of the soils under and across Tiffany Road. In his prefiled testimony, THI's witness stated there was nothing to suggest in either the soil borings or in the topography of the land downgradient of the development that premature breakout would occur. Exh. 48, ¶ 4. However, on cross-examination, he acknowledged that he "couldn't state for certain" that breakout would not occur under the currently proposed configuration. Tr. II, 129.

Both the Board and Ms. Sullivan argue that effluent breakout poses a health and safety threat. Title 5 regulates these issues and has requirements regarding the treatment of sewage in septic systems. No witness has testified that a Title 5 compliant system would present a health hazard. Rather, the Board's witness stated that the concerns about a mixture of effluent and groundwater breaking out off site led to the Board's decision to grant a permit for a smaller, 24-unit development. In acknowledging that the project's plans for the septic system remain preliminary, the developer's expert testified that, while he believed it would not be necessary, a reduction in the number of permitted units may be necessary to construct a Title 5-compliant system. Tr. I, 69-70. Whether a reduction in the number of units is necessary for the construction of a Title 5 compliant septic system will be resolved by the Board of Health.

None of these issues with Title 5 raises a local concern that the Committee must resolve. If the Board is correct that only a smaller project will meet Title 5, the Board of

Health's review will ensure that this constraint is followed. However, consideration of state requirements under Title 5 does not completely address the Board's and Ms. Sullivan's concerns. They argue that the proposed project would not comply with the Board of Health septic system regulations, citing in particular two local regulations which are appropriately brought to our consideration.

3. Local Norwell Board of Health Regulations

The Board argues that the proposed project would not comply with two provisions of the Board of Health Rules and Regulations, and that the concerns underlying these provisions are the reason for the Board's decision to approve 24 units for the project as opposed to the 44 units previously under consideration. See Tr. IV, 71-73; Exh. 37, §§ 2.8, 2.12. The Board argues that § 2.8 requires that every septic system should be designed as if it were in a nitrogen-sensitive area, thus requiring additional treatment to remove nutrients and make wastewater cleaner:

> Nitrogen Sensitive District
> Due to the number of on-site private water supplies both in and outside the aquifer protection district and other areas designated as nitrogen sensitive and based on the fact that a large portion of the town lies within the watershed to the North River:
>
> For the purposes of septic system design, the entire town will be considered nitrogen sensitive for new construction as defined and described in 310 CMR 15.214 through 15.217.

Exh. 37, § 2.8, p. 62. The Board's expert stated that "[i]f this system were designed as if it were in a nitrogen-sensitive area, there would be additional treatment facilities provided to remove nutrients from the wastewater to make it cleaner, to provide additional levels of protection for both the residents and the aquifers." Tr. IV, 72.

The Board also argues that the project does not meet the setback regulation requiring a five-foot horizontal setback from a property line for every foot of height of a mounded septic system. Tr. IV, 71-73; Exh. 37, § 2.12. Section 2.12 provides in pertinent part:

> Mounded Septic Systems
> Septic systems that must be mounded because of high groundwater conditions will be designed so that the toe of slope or the outside edge of a retaining wall is a minimum of five (5) feet from the property line for each one (1) foot in height required above the existing grade. The additional setback for these

> mounded systems will be used to control storm water drainage so that pre and post discharge are equal and in the same direction.
>
> Variance from the above regulation is not required if the applicant can show by clear and convincing evidence to the Board of Health that post stormwater flows will not adversely impact abutters.

Exh. 37, § 2.12, p. 63. The Board's expert stated that this "very significant" provision "would go a long way to addressing the issues of blight and the issues of impact on neighbors," Tr. IV, 72, and "would address so many of the community and neighborhood concerns." Tr. IV, 73. When asked if there was any way to resolve these concerns without reducing the density of the project, he stated "[t]hese concerns are what led the Board of Appeals ... to reach twenty-four units." Tr. IV, 73.

In its decision on THI's application for a comprehensive permit, the Board waived both of these provisions, provided the total bedrooms in the project do not exceed 38. Exh. A, p. 33. THI requests that the Committee order waivers from both of these requirements. The evidence presented by the Board is insufficient to demonstrate a valid local concern outweighing the need for affordable housing to warrant denial of these waivers. The Board has not presented sufficient evidence that the nitrogen levels generated by a Title 5 compliant septic system on this site would present a local health and safety concern. Similarly, the evidence concerning the setback requirement for the retaining wall is speculative regarding the effect upon the health and safety.[12] As discussed below, with regard to aesthetic concerns related to the retaining wall, we find that the Board has not demonstrated a local concern that outweighs the need for affordable housing and therefore it does not support denying these waivers.

We have noted that state requirements will not be waived. The Board and Ms. Sullivan have not demonstrated that a system that complies with Title 5 will be unsafe. As indicated by the developer's witness at the hearing, should the Board of Health determine

---

12. This provision provides no detailed requirements although it expresses a local interest in balancing pre- and post- discharge and in protecting abutters from post-stormwater flows. See discussion in Section V.C.

that a Title 5 system cannot be built to support the number of units THI desires, the developer will have to proceed with fewer units.[13]

B. Aesthetic Concerns Regarding Retaining Wall

The Board argues that the erection of a retaining wall of the height and dimensions of THI's proposed wall would constitute blight on the neighborhood in general and along a statutorily recognized scenic roadway, Tiffany Road. See G.L. c. 40, § 15C; Exh. 26. With respect to the retaining wall, we find that THI, through its prefiled testimony and exhibits, has provided evidence that its proposal complies with federal or state requirements or other generally recognized standards. Exhs. 40, ¶ 20. The wall is intended to be tiered, with landscaping. It is likely to blend into the wooded area along Tiffany Road, and to the extent it is visible, will not be unattractive. The developer's witness stated that landscaping as well as the retention of existing trees would provide adequate screening of the tiered retaining wall system. Tr. II, 13-14, 95-96; Exh. 40, ¶ 20; see Exh. 26. Also, because the system is composed of three walls with landscaping interposed between the walls, it represents a less monolithic appearance. We cannot conclude that this would damage the scenic road character of Tiffany Road. We find that the Board has not established a local concern with respect to the aesthetic impact of the retaining wall on a scenic road or the neighborhood that outweighs the need for affordable housing.

C. Stormwater Management

1. Role of the Committee

Typically with Chapter 40B projects, factual questions with regard to whether the final design or construction of a stormwater management system actually complies with state law are resolved in the first instance by the local conservation commission, with further review available before the DEP. The case before us, however, is unusual. Since there are no wetland resource areas on or near the property, the Board has acknowledged that DEP approval is not required for THI's stormwater management system. The Board and Ms. Sullivan argue that because review of this system will not take place through DEP or the

13. Of course, the developer could appeal the Board of Health determination to the DEP.

Conservation Commission, the Committee must evaluate the proposal's compliance with the DEP Stormwater Management Policy (SMP).[14]

Although THI has stated it intends to comply with the SMP in the construction of this development, it argues that no local concern is involved in this case and the Committee should not review its compliance with state law requirements.[15] See, e.g., Tr. I, 102; Tr. III, 49-50, 99, 103; Exh. 29. See *OIB Corp. v. Braintree,* No. 03-15, slip op. at 6-7 n.8 (Mass. Housing Appeals Committee Mar. 27, 2006); *Baywatch Realty Trust v. Marion,* No. 02-28, slip op. at 24 (Mass. Housing Appeals Committee Dec. 5, 2005) (stormwater management not local concern in absence of local bylaw). Neither the Board nor Ms. Sullivan argues that THI has failed to comply with local requirements regarding stormwater management.

The Board ordinarily should not be permitted to inquire into an issue or place restrictions on affordable housing if the Town has not previously regulated the matter in question. See *9 North Walker Street Development, Inc. v. Rehoboth,* No. 99-03, slip op. at 4-5 (Mass. Housing Appeals Committee Nov. 6, 2006 Decision of the Committee on Remand), citing *Walega*, No. 89-17, slip op. at 6, n. 4; *Sheridan Development Co. v. Tewksbury*, No. 89-46, slip op. 4, n. 3 (Mass. Housing Appeals Committee Jan. 16, 1991). In that circumstance, a developer's obligations are determined by state requirements. Evidence in the record relating to local stormwater management regulation is confusing, and the parties did not raise any such provisions in their briefs. We note, however, that Section 2.12, of the Board of Health Regulations, which the Board asked the Committee to enforce in the context of septic system design, states that "[t]he additional setback for these mounded [septic] systems will be used to control storm water drainage so that pre and post discharge are equal and in the same direction. Variance from the above regulation is not required if the applicant can show by clear and convincing evidence to the Board of Health that post stormwater flows

---

14. The SMP and its standards are "designed for use under multiple statutory and regulatory authorities of the [DEP], including the Wetlands Protection Act, as amended by the Rivers Protection Act, and the Clean Water Act." Exh. 29. The SMP standards apply during routine project review by issuing authorities under the Wetlands Protection Act. *Id.*

15. THI renews its motion for directed decision on this basis. That motion is denied.

will not adversely impact abutters." Exh. 37, § 2.12, p. 63.[16] To the extent this provision expresses a local concern in balancing stormwater discharge and in protecting abutters from stormwater flows, it is relevant to our discussion, particularly in light of evidence of breakout of groundwater and "subsurface storm flow" or "recharged groundwater." Tr. II, 136-137; Tr. IV, 20-21. However, given the longevity of Chapter 40B, arguments that proposed multifamily development of this sort raises stormwater concerns that were not previously anticipated by the Town are unpersuasive. See *Dexter Street, LLC v. N. Attleborough*, No. 00-01, slip op. at 6 (Mass. Housing Appeals Committee July 12, 1990); *Hamlet,* No. 90-03, slip op. at 15. For this reason, our decision addresses the general concerns expressed by Board of Health Regulation § 2.12.

Some of the confusion with regard to this issue arises since the developer is permitted to proceed under the Comprehensive Permit Law with preliminary designs. Therefore it is not significant that THI's plans do not yet demonstrate compliance with the SMP in every detail. 760 CMR 31.02(2). See Tr. I, 77-78. Typically, if we are satisfied that the preliminary plans generally complied with the requirements contained in the SMP, we would impose our own condition requiring compliance in final detailed plans to be enforced by the Town, following its normal procedures in evaluating final construction plans and monitoring construction. That is usually done by the building inspector, the town engineer, the conservation agent, or another appropriate town official, and any disputes that might arise would be reviewable first by the Board, then by this Committee, and ultimately by the courts.

---

16. Also see Norwell Planning Board Subdivision Rules and Regulations § 7C, requiring all drainage systems to meet performance standards of DEP stormwater management policy and applicants for subdivision approval to submit information to Planning Board's engineer and Permanent Drainage Committee to evaluate stormwater runoff designs). Exh. 36, § 7C, pp. 41-45. Since none of the parties has argued that these provisions apply in this case, and the cover page of the Planning Board Subdivision Rules and Regulations is dated after the date of THI's application for a comprehensive permit, we infer that these stormwater management provisions were not in effect at the time of the application and do not control. Also see Tr. I, 117 (testimony of THI's witness suggesting that local Planning Board "currently" has a provision allowing a judgment call regarding characterization of soil type). The Committee has long 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." *Weston Development Group v. Hopkinton,* No. 00-05, slip op. at 8-11 (Mass. Housing Appeals Committee May 26, 2004).

In any event, THI is committed to preparing a final design that meets the SMP. With § 2.12 in mind, the Committee will address certain major concerns raised by the Board and the Intervener concerning THI's preliminary stormwater management design to guide in the development of detailed plans to conform to the SMP. Cf. *Canton Property Holding,* No. 03-17, slip op. at 23 (noting review of state stormwater management rules by conservation commission); *OIB Corp.,* No. 03-15, slip op. at 6-7. The exact design of the stormwater management system must be addressed in detail before and during construction. This will be assured by the developer's commitment to comply with the SMP, as conditioned in our decision. See Section VIII.[17]

2. THI's Stormwater Management Design

To address stormwater management for the project site, THI proposes to construct a large detention basin in a central location on the site to collect stormwater from the higher elevations on the site away from Tiffany Road and control the outflow, wicking the water through a piping system designed to control and diminish the rate of runoff into the existing street drain piping in Tiffany Road. The detention basin will be lined on three sides with a waterproof lining and cut into the existing topography. It will also collect groundwater and discharge it with the stormwater. Exh. 40; Exh. 26. According to THI's expert, the detention basin is proposed to be constructed upgradient of the septic system and will not cause runoff from the lower portion of the site to flow onto Tiffany Road and worsen existing localized flooding and ponding problems. Exh. 40, ¶ 15; Exh. 10.

Stormwater draining from impervious surfaces below the detention basin is to be captured in a storm drain proposed at the driveway entrance and connected to existing street drains on Tiffany Road. Those existing street drains connect to an outlet pipe located at the

---

17. To ensure conformity with the septic system design to be reviewed by the Board of Health, THI will submit its detailed stormwater management plans to that board, which may consult with the Norwell Planning Board's Engineer and Permanent Drainage Committee. The engineer and committee, by virtue of the Planning Board Subdivision Rules and Regulations, have the expertise to evaluate stormwater management plans for compliance with the SMP and standards, and can advise the Board of Health with respect to these issues. Exh. 36, § 7C, pp. 41-45. This is particularly important as the septic system review may result in THI's modification of the proposed project size, as discussed above, affecting the final design of the septic system and stormwater management system as well.

northwestern corner of Ms. Sullivan's property in accordance with an easement for street drainage from Tiffany Road. Exhs. 26, 51. The existing street drains are undersized and do not have the capacity to handle a ten-year storm event. Exh. 40, ¶ 15. Both Tiffany Road and abutting properties regularly experience ponding and flooding during and after storm events under present circumstances. Exh. 39A-39R; Tr. III, 6-9.

THI's engineer testified that the design of the system conforms generally to the SMP and that when the project reaches the final design and construction phase, the developer is committed to making any modifications that might be necessary to bring the system into full compliance. Exh. 40, ¶¶ 11-16; Exhs. 10-12; See Tr. I, 105-109; III, 129-133. THI argues that its proposed stormwater management system meets the SMP because groundwater recharge is not required (although its engineering expert testified it would be feasible to do so if desired); the drainage calculations generally comply with generally accepted methods of measuring pre- and post-development stormwater and groundwater impact and show a reduction in post-development runoff rates at the design point (where the drain pipe empties toward the wetlands beyond the Sullivan property); field examination of *in situ* soil properties is proper to establish the Hydrologic Soils Grouping (HSG) soil group found on site; the location of the detention basin will not contribute to flooding on Tiffany Road; and any dewatering of the site is minimal, seasonal, and does not preclude compliance with the SMP.

The Board and the Intervener argue that the developer has not met its burden of establishing compliance with DEP requirements with regard to 1) balancing pre- and post-development groundwater recharge rates; 2) drainage calculations for methods of measuring pre- and post-development stormwater and ground water impact and post-development runoff rates following construction; 3) characterization of *in-situ* soils on the site with regard to the HSG established by the National Resources Conservation Service (NRCS); 4) the location and sizing of detention basin upgradient of the septic system and the effect on runoff onto Tiffany Road; and 5) the effect of dewatering of the site.

With respect to stormwater management, we find that THI, through its prefiled testimony and exhibits, has provided *prima facie* evidence that its proposal complies with

federal or state requirements or other generally recognized standards. Exh. 40, ¶ 7. See Tr. I, 77-78. The Board's and Ms. Sullivan's evidence introduced to rebut THI's evidence does not eliminate the evidentiary value of THI's evidence. *Handbook of Massachusetts Evidence* § 3.5.3 at 84 and cases cited. Also see *Standerwick v. Zoning Board of Appeals,* 447 Mass. 20, 324, 849 N.E. 2d 197, 209 (2006). The question now turns to whether the Board has demonstrated the existence of a valid local concern that outweighs the need for affordable housing.

3. Balance of Pre- and Post-Development Groundwater Recharge Rates

The Board's engineer testified that the system as currently designed does not meet the SMP. Exh. 43, ¶ 19. The Board argues Standard 3 of the SMP requires the stormwater system to be designed through the use of infiltration measures so that there is no net loss of annual recharge to groundwater and that annual recharge in the post-development site should approximate the annual recharge from the pre-development site conditions. Tr. IV, 46-47; Exh. 43, ¶¶ 19-20. While THI does not disagree that this is a requirement, it relies on its characterization of the soils on the property to place the project within an exception to Standard 3.

Evidence in the record indicates that the soils were designated as HSG-C soils under the NRCS soils classification. Exhs. 10, 13, 16-19, 22-24, 26-28. THI's expert stated he recharacterized the soils as D soils, to be conservative in predictions of storm runoff in order to maximize the size the detention basin. THI's expert indicated the purpose of the conservative recharacterization of the soils to maximize runoff calculations would protect against runoff onto Tiffany Road. Under Standard 3, however, the development would not be required to recharge D soils.

The Board's expert testified that the soil conditions in the three different horizons of all sixteen test pits studied on the site state "sandy loam" which is a highly permeable HSG A soil, not an impermeable HSG D soil, as stated by THI's expert. Tr. IV, 67-69; Exh. 3. The Board argues that THI has not justified its recharacterization of the *in-situ* soil properties and did so to bypass the requirement of on-site recharge requirements, thus permitting all stormwater to be disposed of or infiltrated off-site. It argues that DEP was not consulted on

this project and has not given an opinion on the propriety of the information used to support the soil recharacterization, and that THI must make a clear showing sufficient to support such a recharacterization as set forth in the exception to the SMP Standard 3. Exh. 29.

As additional factors influencing the need for recharge of stormwater, the Board points out that the developer's soils expert confirmed that 20 inches of rain are recharged annually on site. Exh. 13. It argues that this pre-development condition must be preserved post-development. The Board also points out that the location of the bottom of the detention basin below the groundwater table results in dewatering, occurring at the upgradient part of site where groundwater enters the detention basin and flows ultimately through the stormwater drain system. Tr. III, 50. Based on the testimony of the Board's and the developer's engineers, approximately 128,600 to 136,000 gpd of groundwater would be removed from the site. Tr. III, 134-135; IV, 69. The Board's expert testified that failure to recharge would cause a "permanent and irrevocable" loss of value and groundwater resources adversely affecting wetlands because groundwater replenishes water in wetlands and affects stream flow, well water and ecological systems. Tr. IV, 69-70.

Although THI did not include a recharge system in its preliminary plans, its witness indicated it could recharge the water in the upgradient area through roof drains. Tr. III, 46. Although we see value in THI's conservative use of soil characteristics to size the detention basin, on this record, the HSG C characterization may be more appropriate to use for the purposes of determining recharge, in conjunction with calculations of anticipated dewatering through the detention basin. We anticipate that the Board of Health will address whether to require a recharge system in its review of THI's detailed plans under the SMP. See Tr. IV, 18.

4. Runoff from Lower portion of Site and Flooding on Neighboring Properties

Stormwater from impervious surfaces below the detention basin would be captured in existing street drains connecting to an outlet pipe on Ms. Sullivan's property. At present, Tiffany Road experiences significant flooding during and after storm events, including 10-year storms. The developer's hydrologist stated that the pooled water on Tiffany Road results from "subsurface storm flow," subterranean water flow through permeable soils above

less permeable soils. Tr. II, 136-137. The flood waters on occasion sheet across the top of Tiffany Road onto properties on the southern side of the road across from the project site. Exh. 39A-39R; Tr. III, 6-9. Although the Town has an easement for a 15-inch drain pipe that transports stormwater from Tiffany Road through Ms. Sullivan's property and discharges it toward wetlands south of her property, both the Board and Ms. Sullivan argue that the Board has no authority under the terms of the easement to increase the size of the drainage pipe on Ms. Sullivan's property. Ms. Sullivan stated that although she has experienced overland flooding on her property after storm events, there has been no flooding in her basement, and she does not have a sump pump in her basement. Tr. III, 8-9.

The Board's engineering expert stated that the Tiffany Road storm drain system is inadequate to accommodate runoff under existing conditions. The Board argues that the location of the detention basin upgradient of the septic system will cause runoff from the lower portion of the driveway and site to flow onto Tiffany Road, resulting in substantial ponding and localized flooding. The Board's engineer stated that the proposed project will increase the peak rate and total volume of stormwater runoff discharged to the Tiffany Road system, worsening existing ponding problems. Exh. 43, ¶ 19(f). He also stated that because the proposed development is more densely developed, it would generate a greater quantity of runoff than that generated by development of the site under applicable zoning. Exh. 43, ¶ 19(h). Ms. Sullivan shared that position. She also argues that flooding of storm water runoff, mixed with effluent breakout threaten her health and safety.

The Board and Ms. Sullivan argue that discrepancies in the drainage calculations offered by THI to measure pre-and post-development stormwater and ground water impact fail to account for all stormwater flow. The Board's engineer stated that excess flows "disappear" on the drainage calculations. Tr. IV, 56; Exh. 10, 6, 7. He testified that THI's drainage calculations show that the proposed design will fail under all storm events, and that in a two-year event the project would be 16 percent over capacity, and in a hundred-year event, it would be 81 percent over capacity, causing even more stormwater to flow over Ms. Sullivan's property. Exh. 26; Tr. IV, 54-56.

THI's engineer stated that "although the volume of post-development runoff is slightly increased under certain circumstances, the rate at which water exits the site is dramatically reduced by the construction of a detention basin, thereby reducing the rate at which water flows from the site into the Tiffany Road drainage system." Exh. 46, ¶ 4.

Given the existing condition of the stormwater drainage system on Tiffany Road in the vicinity of the site, the Tiffany Road storm-drain system clearly is currently inadequate to meet local needs. That inadequacy is a valid local concern. In such a circumstance, the burden is on the Board to show that improvement of the drainage system is not technically or financially feasible. 760 CMR 31.06(8). The Board has not argued that THI may not access the street drains, although it questions THI's right to add flow to the drain pipe through Ms. Sullivan's property. Existing runoff from the project site currently uses the street drains and flows through the easement drain pipe. The question of whether additional flow is excluded under the easement, even if the rate remains the same or less than at present, is not before us.[18] The interpretation of the easement is more appropriately directed to the courts. In any event, the Board has not shown that the installation of adequate services to meet stormwater needs at this location is not technically or financially feasible. Exh. 43, ¶¶ 19-20. While the Board and Ms. Sullivan argue that neither THI nor the Town has demonstrated a right to replace and increase the size of the Sullivan property drain line, that burden does not rest with THI. Nor has the Board shown a technical or financial inability to address drainage inadequacies on Tiffany Road through means other than the easement. Moreover, THI has expressed willingness to work with the Town to improve the conditions in the Tiffany Road drainage system by possibly replacing pipes and structures under Tiffany Road, if the Town is amenable. Exh. 40, ¶ 15. We do not find a local concern with respect to stormwater management that outweighs the need for affordable housing.

---

18. Ms. Sullivan contends THI is not entitled to tie its drainage system into the street drains on Tiffany Road. Neither the Board nor Ms. Sullivan submitted expert legal testimony on the construction of language granting easements. Nor was evidence submitted regarding whether Ms. Sullivan would permit the Town to enlarge the drain pipe through her property, even if it would alleviate her flooding situation.

The Board argues that the only meaningful way to comply with the SMP is to reduce the size of the project as originally determined by the Board so that THI can site properly sized detention basins on the property, infiltrate stormwater to the maximum extent feasible and not increase the rates and volumes of runoff which are already breaking out on the property as subsurface storm flow and flooding the street and abutting properties. We will require that THI's final detailed plans demonstrate compliance with the SMP including the requirement that the post-development rate of runoff from the site onto Tiffany Road and/or abutting properties is no greater than that under existing conditions. See Section VIII.

D. Traffic Safety

1. Access Driveway

THI has requested that the Committee grant certain waivers from the Norwell Planning Board Rules and Regulations limiting the length of a single access driveway to 500 feet. See Exh. 36. The proposed driveway extends for the first 550 feet into the site and thereafter provides an interior loop connecting the building groupings through their respective parking lots. Exh. 31A; Tr. II, 67-68. With respect to concerns related to the design of the proposed driveway, we find that THI, through its prefiled testimony and exhibits, has provided evidence that its proposal complies with federal or state requirements or other generally recognized standards with regard to the driveway's design regarding emergency access, egress and safe on-site circulation. Exhs. 4, 41, 47. Also see Tr. II, 53-69.

The Board's engineer stated that the design does not comply with good engineering practice, or design and safety standards intended to promote good traffic circulation and to limit the number of persons potentially isolated in the event of blockage of a dead end street. He also states that at 1,100 feet long, the driveway is in excess of the Planning Board rule limiting the length of streets to 500 feet or 12 dwellings. Exh. 43, ¶ 22; Exh. 36; Tr. IV, 37.

The developer's traffic expert testified that while it is generally accepted by industry professionals that shorter dead end streets are safer, there is no generally accepted length above which a roadway is considered unsafe. He testified that the design of this project provides compensating features to offset the fact that it has only one access, including that the main driveway is virtually straight with good sight lines and without friction points, such

as driveways, that would create hazards. He also stated that the steepest grade of 8 percent is not excessive under the circumstances. The development's single access roadway is fairly level for the first 75-100 feet from Tiffany Road. Thereafter, the looped portion of the driveway rises at an 8 percent grade except for the intersection near the building parking areas. The length of the driveway is approximately 1000 to 1100 feet. Exh. 47, ¶¶ 2- 3; Tr. II, 54-56. In evaluating the safety of the single access driveway, the developer's witness stated several factors should be considered, including length, grade, number of units, amount of traffic and potential for blockages. He stated that the volume of traffic along the drive will be small with the number of times that vehicles will be passing each other in opposite directions along this segment even smaller, and that these drivers are likely to be almost exclusively repeat users who are familiar with the driveway. Therefore the chance of an accident blocking the driveway is very small. He also indicated that THI could address the potential for blockages by appropriately clearing and grading the driveway shoulders. He ultimately gave the opinion that the design of the driveway was safe. Exh. 47, ¶¶ 2-9; see Exh. 40, ¶ 20; Tr. II, 67-68.

Each such roadway must be considered on its own merits based upon "an analysis of all the characteristics of the roadway taken together." *Lexington Woods, LLC v. Waltham*, No. 02-36, slip op. at 19 (Mass. Housing Appeals Committee Feb. 1, 2005) (upholding denial of comprehensive permit for a steep, winding, 1,000-foot roadway serving 36 townhouse condominium units). In this case, the driveway presents no insurmountable design problems. Cf. *OIB Corp.*, No. 03-15, slip op. at 8-11 (approximately 100 units located on two cul-de-sacs well beyond standard established by town). The Board, in its comprehensive permit decision, waived the distance requirement for a 24-unit development; here THI seeks approval of a 36-unit project. On the evidence in this record, particularly in light of the developer's testimony that grading of shoulders could address the potential for blockages, which we will require by condition, the Board has not demonstrated that the safety risks associated with the driveway design constitute a valid local concern that outweighs the need for affordable housing.

2. Traffic Flow and Sight Distances

Relying on testimony of its engineer, the Board argues that the design of the project will adversely impact the flow of traffic on Tiffany Road and will afford inadequate visibility or "corner" and intersection sight distance, bringing it out of compliance with applicable American Association of State Highway and Transportation Officials (AASHTO) and MassHighway guidelines and regulations. See Exh. 43, ¶ 24.

With respect to these concerns, we find that THI, through its witnesses and proposed exhibits, has provided evidence that its proposal complies with federal or state requirements or other generally recognized standards. Exh. 4; Exh. 41, ¶¶ 2-8. The developer's traffic expert stated that the visibility and sight distances provided at the proposed site driveway were greater than required to provide safe operating conditions for documented speeds, i.e., speeds significantly above the posted speed limit, and therefore met AASHTO standards for stopping and intersection sight distances. Exh. 41, ¶ 6. The Board's witness stated that residents and the general public would be exposed to conflicts arising from the disruption of orderly and safe traffic flow, causing vehicles in the traffic stream on Tiffany Road having to stop or maneuver to avoid crashes. Exh. 43, ¶ 24.

As the developer's traffic expert pointed out, the only purported insufficiency regarding site distance relates to the "desired" distance standards designed to minimize the inconvenience to through traffic caused by drivers exiting a side street or driveway safely but under conditions that require the oncoming driver to slow down from his initial speed. He pointed out that AASHTO explicitly states that this is an issue of convenience. The witness stated that that convenience would be to accommodate drivers traveling more than 11 mph above the posted speed limit of 25 mph from the north. Exhs. 41, ¶ 6, 47, ¶ 10. As a convenience, rather than safety issue, this does not represent a valid local concern that outweighs the need for affordable housing. Exhs. 4; 41, ¶¶ 2-8; 47, ¶¶ 10-11; Tr. II, 57-65. Accordingly, the Board has not demonstrated a valid local concern that outweighs the need for affordable housing with respect to sight distance.

E. Water Main Design

With respect to concerns about the design of the proposed water main, we find that THI, through its witnesses and proposed exhibits, has provided evidence that its proposal complies with federal or state requirements or other generally recognized standards with regard to the adequacy of water pressure for the water main system to support a residential sprinkler system. Exhs. 25; 42, ¶ 4; 40 ¶ 20. Also see Tr. III, 142-149.

Relying on its expert engineer's testimony, the Board argues that the project should have a looped redundant water distribution system. Its engineering expert recommended a looped system based on the number of anticipated residents in the development to ensure a reliable water supply for domestic and fire protection purposes. Exh. 43, ¶ 21; Tr. IV, 35-37. THI's witness, a professional sprinkler contractor, testifying about sprinkler safety, did not expressly give an opinion on the advisability of a looped main. During the hearing, however, he stated that based on his evaluation, the impact on the flow for the sprinkler system in the event of hydrant flow would leave a substantial cushion of water pressure. Tr. III, 147-149. THI argues that its expert stated the water pressure is sufficient to support a residential sprinkler system for even the larger project it originally proposed according to generally recognized design standards. Exhs. 25; 42, ¶ 4; Tr. III, 142-149. It argues that testing demonstrates that the proposed water main is more than capable of providing fire protection for the three buildings proposed.

THI has requested a waiver from Section 4.21.4 of the Norwell Planning Board Rules and Regulations, "Dead-End Water Mains." That provision was not mandatory in any event, but only provides that "[d]ead-end water mains shall be avoided and all water mains shall be looped to eliminate standing water, except upon the express written recommendation of the Board of Water Commissioners." Exh. 36, § 7D.4; Exh. 46, ¶ 7. In its decision on THI's application for a comprehensive permit, the Board permitted THI to review the issue of the elimination of a looped water main with the water commissioners and fire department.

The Board argues that THI has offered no measures to mitigate local concerns as required by 760 CMR 31.06(9). However, this rebuttal only becomes necessary if the Board has demonstrated a valid local concern. On this sparse record, the Board has not adequately

demonstrated a legitimate local concern with regard to the need for a redundant water main system for the project that outweighs the need for affordable housing. See *Groton Housing Authority v. Groton,* No. 91-07, slip op. at 10 (Mass. Housing Appeals Committee Sept. 19, 1991) (Board failed to sustain its burden of proving that an unlooped water supply system will cause a health, safety, environmental, or other hazard). Cf. *Lexington Woods*, No. 02-36, slip op at 19. The provision for a looped water main will be waived.

VI. WAIVERS AND CONDITIONS

In its decision, the Board specified which waivers of local requirements would be granted as part of the comprehensive permission. Exh. A, pp. 31-36. Except for waivers addressed above, THI has not requested any alteration of the decision of the Board on waivers of local rules. Therefore, the Committee adopts the determination of the Board with regard to all other requested waivers specified in the Board's decision.

In its decision, the Board requested that "any order to the Board to remove or modify any condition in this Decision be limited to a particular condition or specific conditions and that all other conditions and requirements of this Decision be affirmed." Exh. A, p. 13. To the extent that conditions represent local concerns properly raised in this proceeding they could be considered. However, in failing to submit evidence or argument in support of these conditions, the Board has not justified their retention. See, e.g., *Rising Tide Development, LLC v. Sherborn,* No. 03-24, slip op. at 7, 19-20 n.23 (Mass. Housing Appeals Committee Mar. 27, 2006); *Washington Green,* No. 04-09, slip op. at 3 n.2, citing *Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85, 653 N.E. 2d 595, 598 (1995). They will not be included in the permit.[19]

We note that some of the conditions in the Board's decision would constitute a requirement of the developer to appear in the future before the Board or otherwise seek from

---

19. In particular, THI argues that the following conditions require it to return to the Board for subsequent review and approval: Conditions 8, 10, 14, 18, 21-27, 29-31, 33, 40, 42, 45, 48, 51, 53, 56, 60, 68, 70-73, 75, 79, 80, 85, 86, 93-96. See Exhs. A; C, § 26(i). It also argues that the permanent monitoring conditions imposed on the septic system and stormwater management system are unreasonable. Exh. A, Conditions 55-59, 60-70. As THI points out, the Board has not submitted any evidence to support the inclusion of these conditions, and they shall be excluded from the permit.

it further review and approval. In most instances, such a "condition subsequent" undermines the entire purpose of a single, expeditious comprehensive permit and is improper. *Peppercorn Village Realty Trust v. Hopkinton,* No. 02-02, slip op. at 22 (Mass. Housing Appeals Committee Jan. 26, 2004). Also see *Hastings Village, Inc. v. Wellesley,* No. 95-05, No. 95-05, slip op. at 33-34 (Mass. Housing Appeals Committee Jan. 8 1998), *aff'd,* No. 00-P-245 (Mass. App. Ct. Apr. 25, 2002); *Owens v. Belmont,* No. 89-21, slip op. at 13-15 (Mass. Housing Appeals Committee June 25, 1992); 760 CMR 31.09(3). Other conditions include an unlawful requirement in the comprehensive permit that would be in excess of a board's authority. *Peppercorn Village,* No. 02-02, slip op. at 16-17; *Archstone Communities Trust v. Woburn,* No. 01-07, slip op. at 19-21 (Mass. Housing Appeals Committee June 11, 2003). To the extent that certain conditions merely relate to issues that were not addressed in the preliminary plans submitted with the comprehensive permit application, and seek a review to determine consistency with applicable local regulation, those requirements, so long as they do not require further hearing and approval by the Board, but rather entail only approval by the town official who customarily reviews such plans, are appropriate. *Peppercorn Village,* No. 02-02, slip op. at 22; *Owens,* No. 89-21, slip op. at 13-15. However, since this decision provides for construction to be in accordance with all presently applicable local zoning and other by-laws, and all other local requirements, except those waived by this decision, as well as all applicable state and federal requirements, such concerns should be protected.

VII. FEES

THI objects to the payment of the Board's legal fees and fees incurred for financial review of the project and requests an order from the Committee prohibiting the Board from charging certain fees for these services. See Exh. 33. In *Pyburn Realty Trust v. Lynnfield,* No. 02-23, slip op. at 21-24 (Mass. Housing Appeals Committee Mar. 22, 2004), this Committee determined that requiring an applicant to pay the town's attorney costs could deter some developers from applying for a comprehensive permit, particularly for projects involving a small number of units. *Id.* at 23. In *Hanover, supra,* 363 Mass. 339, the Court determined that by enacting G.L. c. 40B, the Legislature intended to provide a mechanism for relief from exclusionary zoning practices, defined as any local requirements or regulations

that prevent the construction of affordable housing. *Id.* at 354. The Court held that the Committee has the authority to override, when necessary, local requirements and regulations, including zoning bylaws and ordinances, in order to promote the construction of low and moderate income housing in cities and towns. See *id.* at 355-356, 363. Also see *Page Place Apartments, LLC v. Stoughton,* No. 04-08, slip op. at 17-20 (Mass. Housing Appeals Committee Feb. 1, 2005).

The Board contends that there is no evidence of the unreasonableness of the legal and financial fees. Under G.L. c. 40B, § 21, boards "shall have the authority to use the testimony of consultants." The Board's argument ignores the distinction between the payment of counsel fees for the litigation of a board proceeding and the payment of consultant fees for a legal expert consultant or witness. See *Pyburn,* No. 02-24, slip op. at 22-24 and n.15 ("consultant" as used in statute is to provide "testimony" or "explanation" on technical aspects of proposed project to assist board in determining if project is consistent with local needs). Nothing in G.L. c. 40B, § 21, suggests that the payment of attorney fees is considered part of such "consultant" fees. THI may not be charged for the fees of legal counsel.

THI also objects to the payment of fees incurred for what it alleges was financial review of the project to determine how many units could be eliminated before the project would be deemed uneconomic. Exh. A, § FF. It argues it should not be required to pay for the Board's fees for financial analysis used to redesign the project, citing *Pyburn,* slip op. at 21-24. The Board argues that THI has submitted no evidence of the unreasonableness of the outstanding peer review fees, or that they render the project uneconomic. It asks the Committee to direct THI to pay the fees.

As discussed above, in contrast to legal fees, peer review fees are permitted to be assessed. See *Pyburn,* No. 02-24, slip op. at 22-24 and n.15 ("consultant" as used in statute is to provide "testimony" or "explanation" on technical aspects of proposed project to assist board in determining if project is consistent with local needs). However, the Board states in its decision that the financial consultant determined that the design criteria in its decision would not render the revised project uneconomic. See Exh. A, § FF, p. 13. The Board also

argues that the fees were incurred to determine whether the development was meeting profitability thresholds to ensure the Town would receive any excess profits due. These considerations are not properly part of the Board's analysis of whether its local concerns outweigh the regional need for affordable housing, *CMA, Inc., v. Westborough,* No. 89-25, slip op. at 24 (Mass. Housing Appeals Committee, June 25, 1992). Therefore, requiring the developer to pay for fees solely for this purpose would be outside the scope of using a consultant to provide "testimony" or "explanation" on technical aspects of proposed project to assist the Board in determining if a project is consistent with local needs. *Pyburn*, No. 02-24, slip op. at 22-24 and n.15. THI may not be charged for these fees.

VIII. CONCLUSION

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

1. The comprehensive permit shall conform to the application submitted to the Board as modified by the Notice of Change submitted to the Housing Appeals Committee except as provided in this decision.

2. The comprehensive permit shall be subject to the following conditions:

(a) Subject to the provisions of Paragraph 2(b) and 2(c), the development shall be constructed as shown on drawings by Outback Engineering, Inc., signed and stamped May 12, 2004, except as modified by drawings by Outback Engineering, Inc., dated June 19, 2006. See Exhs. 11, 12, 21, 26-28.

(b) Design and construction shall be in compliance with all requirements of 310 CMR 15.000, *et seq.*, Title 5, as determined by the Norwell Board of Health, and all other applicable state and federal requirements.

(c) Design and construction shall be in compliance with the state Department of Environmental Protection Stormwater Management Policy. Prior to the commencement of

construction, the applicant shall submit to the Norwell Board of Health for review and approval, a stormwater management report prepared by the project engineer that demonstrates that the final plans meet the DEP Stormwater Management Policy.

3. Should the Board fail to carry out this order within thirty days, then, pursuant to G.L. c. 40B, § 23 and 760 CMR 31.09(1), 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 presently applicable local zoning and other by-laws, and all other local requirements, except those waived by this decision, as well as all applicable state and federal requirements.

(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 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 shall take whatever steps are necessary to ensure that a building permit is issued to the Appellant, without undue delay, upon presentation of construction plans that conform to the comprehensive permit and the Massachusetts Uniform Building Code.

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

Housing Appeals Committee

Dated: September 18, 2007

Joseph P. Henefield

Marion V. McEttrick

Christine Snow Samuelson

James G. Stockard, Jr.

Shelagh A. Ellman-Pearl, Presiding Officer