COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

GREEN VIEW REALTY, LLC

v.

HOLLISTON ZONING BOARD OF APPEALS

No. 06-16

DECISION

January 12, 2009

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COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

GREEN VIEW REALTY LLC Appellant	)	
v.	)	No. 06-16
ZONING BOARD OF APPEALS OF HOLLISTON Appellee	)	

DECISION

I. PROCEDURAL HISTORY

On January 19, 2005, Green View Realty, LLC submitted an application to the Holliston Zoning Board of Appeals for a comprehensive permit pursuant to G.L. c. 40B, §§ 20-23 to build 200 affordable, mixed-income, condominium housing units known as Cedar Ridge Estates on a nearly 53-acre site at the southwest corner of Marshall and Prentice Streets in Holliston. The housing is to be financed either under the Housing Starts Program of the Massachusetts Housing Finance Agency (MassHousing) or the New England Fund of the Federal Home Loan Bank of Boston. Exh. 4, fifth section, p. 1.

On September 11, 2006, the Board denied the comprehensive permit. Exh. 1. On September 29, the developer appealed to this Committee. Thereafter, in order to structure the Committee's *de novo* hearing and narrow the issues presented, the parties negotiated a Pre-Hearing Order, which was issued by the presiding officer pursuant to the Committee's regulations.[1] Prefiled testimony was received from fifteen witnesses, a site visit and three

1. Preliminary hearing procedures are described in 760 CMR 30.09(4) and 760 CMR 56.06(7)(d). That is, our regulations, which originally appeared at 760 CMR 30.00 and 31.00, have been amended and recodified effective February 22, 2008 as 760 CMR 56.00. Our hearing

days of hearings to permit cross-examination of witnesses were conducted, and post-hearing briefs were filed.

II. FACTUAL OVERVIEW

This case involves a large, 52.55-acre, irregularly shaped site in an area of Holliston zoned "Agricultural-Residential A," which permits residences on 80,000 square foot lots. Exh. 1, ¶ 1; 7; 8; 32, § IV-B. The immediate vicinity is sparsely developed, though residential housing subdivisions are scattered through the general area of town in which the site is located. Exh. 7, 8. The 200 units of condominium housing are primarily in quadraplex buildings, with a few triplex and duplex buildings. The proposal includes two entrance roadways from Marshall Street, and an additional emergency access roadway from Marshall Street. Exh. 10.

The site is currently wooded, rising to a small hill at its center. Exh. 48, p. 9. In the northeastern corner, near where the site abuts the intersection of Prentice and Marshall Streets, there is a manmade pond with bordering wetlands. Exh. 7; 48, ¶ 24. The western third of the site consists of a much larger, forested wetlands area. Exh. 7; 48, p. 9. The total of wetlands area on the site is 16 acres. Exh. 71, ¶ 102.

The site is what is commonly known as a "brownfields" site. That is, a previous owner, beginning in the 1960s, allowed illegal, unsupervised dumping on the site. In the mid-1980s, both the U.S. Environmental Protection Agency (EPA) and the Massachusetts Department of Environmental Protection (DEP) investigated and assessed the site. Exh. 45, p. 1; 71, ¶¶ 63, 65. As a result, more than three hundred drums containing tar and other

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technically began under the old regulations with the initial Conference of Counsel in 2006, and did not terminate until briefs were filed September 22, 2008. Under longstanding practice, however, we consider the date of our hearing to be the date on which the Pre-Hearing Order was issued, in this case, April 7, 2008, which is after the effective date of the new regulations. Further, the new regulations themselves indicate that they are generally to be applied to matters pending before us. 760 CMR 56.08(3). In addition, since many provisions of the new regulations are identical to those in the previous version, few issues of fairness with regard to retroactive application are raised in any case. Therefore, we will generally apply the new regulations, and rely on the old regulations when principles of basic fairness so require. See *Cozy Heath Community Corp. v. Edgartown*, No. 06-09, slip op. at 3-4 (Mass. Housing Appeals Committee Apr. 14, 2008), *appeal docketed* No. 08-00021 (Dukes Super. Ct. May 19, 2008).

contaminants, two hundred thousand tires, construction debris, other solid waste, and seventy tons of contaminated soil have been removed from the site. Exh. 71, ¶¶ 61-64. In conjunction with construction of the housing, the developer will complete remediation of the site by transporting hazardous and recyclable materials off site, monitoring and treating groundwater as necessary, and consolidating non-hazardous waste and existing fill into a smaller sealed and capped disposal area on the western portion of the site where no housing will be built. Exh. 71, ¶¶ 85-87; also see Exh. 12 (Supplemental Investigation & Revised Conceptual Remedial Plan with Associated Cost Estimates).

III. PRELIMINARY ISSUES

Prior to the evidentiary portion of the hearing, the Board moved twice to dismiss the appeal, and also filed a motion to clarify which environmental issues were local issues properly before the Committee under the Comprehensive Permit Law and which were state and federal issues beyond its jurisdiction. The presiding officers[2] denied the motions to dismiss, and clarified the treatment of the environmental issues. We will revisit those issues briefly.[3]

A. Title Issues and Site Control

The arguments initially raised by the Board were addressed fully in the presiding officer's February 20, 2007 Ruling on Board's Motion to Dismiss. That is, consistent with a number of our past precedents, when the number of housing units changes during the local hearing process, and the Board has the opportunity to review those changes, the developer is not required to obtain a new project eligibility determination from the subsidizing agency in order to maintain fundability. Second, as also explained in detail in the February 20, 2007 ruling, the record shows colorable title to the 2.55-acre parcel

2. A little more than half way through the two-year hearing process Committee Chairman Werner Lohe replaced Hearing Officer Shelagh A. Ellman-Pearl as the presiding officer.

3. As is common, the presiding officer's rulings were interlocutory and were not published on the Committee's website. They are, of course, part of the record in this case, and are hereby ratified by the full Committee. But to the extent that there are inconsistencies between them and this decision, this decision controls. Further, unpublished rulings, as preliminary statements of the law by the presiding officer alone, though they may occasionally provide useful guidance, generally should not be considered precedent in other cases.

challenged by the Board[4] and also sufficient rights with regard to an easement over a bridle path to establish site control. Also see Exh. 71, ¶¶ 24-28; 72, ¶¶ ; 6-15; 89, ¶ 36; cf. Exh. 77, ¶ 57; 78, ¶ 8(a).

B. The DEP Liens and Site Control

In the second, February 20, 2008 ruling, the presiding officer addressed a new argument concerning site control. The Board asserted that because of Massachusetts Department of Environmental Protection (DEP) liens, the developer did not have control of the proposed site as required by 760 CMR 31.01. Specifically, between 1984 and 1989, when the owners of the development site allegedly failed to respond to Notices of Response Action from DEP under G.L. c. 21E (Mass. Oil and Hazardous Material Release Prevention and Response Act), state and local authorities took action on their own, and incurred response action costs. Exh. 71, ¶¶ 63-64, 71; 78, ¶ 8(k). Ultimately, DEP perfected liens on the property to secure payment of the response action costs in the amount of $1.75 million. Exh. 70, third "whereas" clause and ¶ 6. In 2002, DEP and the town issued a request for proposals to attract a developer to purchase and develop the site and pay off the indebtedness. Exh 71, ¶ 73.

On January 3, 2005, the current developer, Green View Realty, LLC, entered into a purchase and sale agreement for the site with the owners, the C&R and R&C Trusts. In addition to the standard recitations, the agreement states that the sellers will convey marketable title to the property, free from all encumbrances, "subject, however, to the following: ... (v) ... the lien ... by the Massachusetts Department of Environmental Protection attached hereto as Exhibit H...." Exh. 14, ¶ XI-A(v). It goes on to provide that the seller is obligated to convey title "subject to the following conditions precedent on the closing date:... (iii) the DEP lien on the Property shall be paid and discharged or subject to written agreement with DEP...." Exh. 14, ¶ XII-B(iii). Thus, the purchase and sale agreement clearly contemplates the DEP liens, and is not invalidated by their existence. There is no question that a valid purchase and sale agreement is sufficient to

4. The site includes three parcels. The first two are adjacent parcels which total 50 acres and are located at 708 Prentice Street; the third parcel is a 2.55-acre tract of land located southeast of a parcel referred to as "Parcel 7319."

establish site control. 760 CMR 56.04(4)(g), 31.01(3). "The statute does not explicitly state the requisite property interest necessary to qualify as an applicant for a comprehensive permit.... [But it] does not require the applicant... to establish... a present title in the proposed site." See *Hanover v. Housing Appeals Committee*, 363 Mass. 339, 377-78 (1973); also see *Autumnwood, LLC v. Sandwich*, No. 05-06, slip op. at 3 (Mass. Housing Appeals Committee Nov. 4, 2005 Ruling on Motion to Dismiss); *Paragon Residential Properties v. Brookline*, No. 04-16, slip op. at 6 (Mass. Appeals Committee Dec. 1, 2004 Ruling on Pre-hearing Motions). Thus, the presiding officer's ruling in February 2008 was correct. Further, three months after the ruling on this question, the developer entered into an agreement with DEP, which established that in return for a payment of $1,750,000, DEP will issue a recordable release of the liens at the time of the closing on the sale of the site by the trusts to the developer. Exh. 70, ¶¶ 6, 9. Thus, it is clear that the liens will not stand in the way of the developer's ability to control the site in order to proceed with the development.

C. Fundability

Finally, the Board argued that the amount of the liens was sufficiently large to render the proposed project no longer fundable. The Board has renewed this argument in its post-hearing brief, specifically claiming that because of "an uncharacteristically low profit margin," the development is not financially feasible, and therefore not fundable under our regulations. We conclude that the Board has not rebutted the presumption of fundability established under our regulations.

Financial feasibility is an essential part of fundability, which, in turn, is a component of the determination of project eligibility that is made by a subsidizing agency to initiate the entire permitting process under the Comprehensive Permit Law.[5] The determination of project eligibility was made with regard to this development pursuant to 760 CMR 31.01(1)(b) and 31.01(2)(b)(4), the regulations in effect at that time. That is,

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5. The Board refers to fundability as a "jurisdictional requirement." Board's Brief, pp. 5-6. In fact it is more properly viewed as a substantive aspect of the developer's *prima facie* case for entitlement for a comprehensive permit, or as it is referred to in our new regulations, a "project eligibility requirement." *Town of Middleborough v. Housing Appeals Committee*, 449 Mass. 514, 521 (2007); 760 CMR 56.04(1).

on August 24, 2004, MassHousing issued a project eligibility determination. Exh. 4, fifth section. On July 19, 2006 and July 31, 2006, MassHousing reviewed that determination, and concluded that "there is no need to modify our original project eligibility letter. ...we will review all changes in this project when an application for Final Approval is submitted when and if a comprehensive permit is granted." Exh. 2; Exh. 3, third para. These letters established a presumption of fundability. 760 CMR 31.01(2)(f), 31.07(1)(a). To reemphasize the nature of the presumption, the regulations in effect at that time provided that this Committee generally was not to hear evidence concerning financial feasibility or fundability other than evidence "as to the status of the project before the subsidizing agency." 760 CMR 31.07(4)(a), 31.07(4)(d). That is, as elaborated in several of our decisions, although it would be appropriate for us to hear evidence that the subsidizing agency had withdrawn its determination, because fundability is a technical administrative matter within the expertise of the subsidizing agency, it is inappropriate for us to go further and look behind the subsidizing agency's determination and make our own determination. See *Farmview Affordable Homes, LLC v. Sandwich,* No. 02-32, slip op. at 4-5 (Mass. Housing Appeals Committee May 21, 2004 Ruling on Motion... to Quash Subpoenas...); *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 7-9 (Mass. Housing Appeals Committee Jun. 25, 1992). Similarly, we might have considered a finding that the fundability requirement had not been met if there had been evidence that the subsidizing agency had conducted its review improperly.[6] See *Bay Watch Realty Tr. v. Marion*, No. 02-28, slip op. at 2-3 (Mass. Housing Appeals Committee Order Concerning Jurisdiction Nov. 22, 2004)(site plans not reviewed in making project eligibility determination), *aff'd sub nom. Board of Appeals of Marion v. Housing Appeals Committee*, No. 07-P-1372 (Mass. App. Ct. Oct. 7, 2008). These regulations and precedents are consistent with the ruling of the Appeals Court that the appropriate avenue for challenging the validity of a project eligibility determination is during an appeal to

6. It appears that the subsidizing agency did not specifically consider the liens when it issued its project eligibility determination in 2004 since they had not yet been perfected. But it was well aware of the need for and possible costs of remediation on the site since it included a condition that required the developer to obtain "cost-cap and third-party liability protection insurance...

this Committee, with subsequent review by the courts pursuant to G. L. c. 30A. *Town of Marion v. Mass. Housing Finance Agency*, 68 Mass.App.Ct. 208, 211 (2007). That is, the court did not indicate that this Committee is to substitute its judgment for that of the subsidizing agency, but rather noted that it must be borne in mind that "the funding eligibility determination is merely an interim step in the administrative process." *Id.* at 211, 471; also see *Town of Amesbury Zoning Board of Appeals v. Housing Appeals Committee*, Misc. No. 07-PS-351321, slip op. at 19, 16 L.C.R. 332, 337 (Mass. Land Court May 16, 2008) ("...there is no requirement that a project eligibility letter must be *maintained* while an appeal is pending. Clearly this is a matter which will be overseen by the Project Administrator as the project proceeds."), *appeal docketed*, No. 2008-P-1240 (Mass. App. Ct. Jul. 24, 2008).

The Board's argument here asks us to engage in a financial analysis that would allegedly show that because of the size of the DEP liens and changing development costs the proposal is no longer financially feasible. Board's Brief, p. 4. But this is the sort of technical analysis of fundability that should be reserved for MassHousing, and not this Committee. Thus, we conclude that the Board has not rebutted the presumption of fundability.

Finally, if fundability were to be reviewed under our new regulations, there would be even less basis for us to reconsider financial feasibility and fundability. The regulations now provide that the subsidizing agency's determination is "conclusive," and any subsequent allegation of failure to fulfill one of the requirements may only be made on the grounds that the proposal itself has changed, and in that case the question of continuing fundability is to be determined by the subsidizing agency. 760 CMR 56.04(1), 56.04(4)(d), and 56.04(6).

D. Clarification of the Scope of Environmental Issues

As discussed in detail in the presiding officer's ruling of February 20, 2008, the Board argued that "as a matter of law, there is no limitation of the scope of environmental issues that may be considered in a ZBA or Committee proceeding." Appellee's Motion to

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providing as much as $3,000,000 in insurance coverage to protect the Town of Holliston, MassHousing, and other parties...." Exh. 4, fifth section, p. 3, ¶ 6; also see Exh. 3.

Clarify Scope of Environmental Matters..., p. 3, n.1 (filed Aug. 17, 2007). We disagree. But often there is not a bright line between matters that are local concerns that we must consider and those that are state or federal questions beyond our jurisdiction. For that reason, prior to the actual presentation of evidence in this case, the presiding officer issued a ruling attempting to clarify the scope of the issues to be considered. This, in turn was followed in the normal course by a Pre-Hearing Order prepared with the participation of the parties. The overall case was organized into six occasionally overlapping issues: wetlands protection, stormwater management, groundwater protection, landfill consolidation/creation and design, open space, and traffic. Pre-Hearing Order, § IV-5. Two of these issues—groundwater protection and landfill consolidation—were particularly problematic, and the presiding officer did not rule definitively in the February 2008 ruling as to whether they were proper issues for the Committee to consider. With regard to those issues, he ruled that the Board should identify any portions of the Holliston Zoning Bylaws which contain standards more stringent than state law and that the Board "is advised to present evidence" on those issues. Ruling on...Motion to Clarify..., pp. 10-11 (Feb. 20, 2008). That is, a final determination as to whether the Committee has jurisdiction on those matters was left for this final decision. They are addressed in section III-D(1), immediately below. The other four issues are more straightforward, and are addressed in section III-D(2), below.[7]

1. Consolidation of the Onsite Landfill, Remediation, and Related Issues of Groundwater Protection Are Not Regulated Under the Holliston Zoning Bylaw and Therefore Are Not Properly Before the Committee.

Prime real estate is rarely available for affordable housing, and therefore over the years, we have reviewed a number of plans for developments on the sites of abandoned

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7. At the time of the presiding officer's February ruling, it appeared that the issues of open space and traffic had been waived. The presiding officer, however, permitted them to be raised again in the Pre-Hearing Order, and in that sense the later order supersedes the ruling.

We note that both the ruling and the order are merely attempts to frame the issues in this case in a preliminary manner. The presiding officer cannot bind the full Committee with regard to what issues are properly before it, and therefore to the extent that parts of the ruling or order may be inconsistent with this decision, this decision controls. Also see n. 3, above.

landfills.[8] The case before us is unusual, however, since the town has asserted that it has regulated remediation of such sites under its zoning bylaw, and that its zoning requirements prohibit the construction of this affordable housing development. Because both the remediation process and its relationship to the Comprehensive Permit Law are complex, the questions of what facts must be proved in a case like this and how the law should be applied are similarly complicated. We have considered them particularly carefully since public policy supports the development of affordable housing on brownfields sites,[9] and it is therefore important both in this case and in future cases that the law not be applied in such a way as to create unnecessary barriers to the permitting of affordable housing.

The fundamental structure of the Comprehensive Permit Law as applied in our hearings is that the developer must establish a *prima facie* case that its proposal complies with generally recognized design standards, which may include state and federal standards, and if it does so, the burden then shifts to the Board to prove that there are local concerns which support the denial of the comprehensive permit and that those local concerns outweigh the regional need for housing. 760 CMR 56.07(2)(a)(2), 56.07(2)(b)(2); see *Board of Appeals of Woburn v. Housing Appeals Committee*, 451 Mass. 581, 583-584 (2008). But our focus is on local concerns, and nothing in Chapter

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8. In 1974, we considered a site that had "in the past been used for refuse dumping purposes. ...[T]here was concern... [about] the ... release of subterranean gas...." We found that the danger was minimal, and noted that "to assure the best approach"... the Board and the developer had agreed to work cooperatively. *Planning Office for Urban Affairs, Inc. v. Beverly*, No. 73-04, slip op. at 9 (Mass. Housing Appeals Committee May 10, 1974).

In later cases, housing was also approved with relatively little conflict with regard to hazardous waste issues. See *Shorebrook Trust v. Yarmouth*, No. 88-11, slip op. at 2 (Mass. Housing Appeals Committee May 3, 1989)(site found acceptable despite "the presence of environmentally undesirable material due to its previous use as the Town Dump"); *Woodland Heights Partnership v. Bourne*, No. 91-06, slip op. at 14, (Mass Housing Appeals Committee, Jun. 14, 1993)("the town... will actually benefit" because "[t]he developer's proposal is that all hazardous materials and solid waste be removed from the site"); *Northern Middlesex Housing Associates v. Billerica*, No 89-48, slip op. at 4 (Mass. Housing Appeals Committee Memorandum on Remand, Oct. 12, 1993)(condition requiring Board oversight of remediation stricken because "ensuring that remediation is performed 'in accordance with applicable federal and state hazardous waste regulations' is not within [the] jurisdiction [of the local Board or the Housing Appeals Committee]").

9. See, e.g., G.L. c. 21E, § 3A(j)(3)(a)(i)(b).

40B suggests that we should consider environmental issues raised under state and federal law. On the contrary, the Committee has no the authority to hear a dispute as to whether a developer is adhering to state or federal law. See *O.I.B. Corporation v. Braintree*, No. 03-15, slip op. at 6-7 (Mass. Housing Appeals Committee Mar. 27, 2006)(holding that it is not "the role of either the Board or this Committee to adjudicate compliance with state standards"), *aff'd* No. 2006-1704 (Suffolk Super. Ct. Jul. 16, 2007. Further, as we have noted recently,

> 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) (Remand Decision), citing *Walega v. Acushnet*, No. 89-17, slip op. at 6, n.4 (Mass. Housing Appeals Committee Nov. 14, 1990); *Sheridan Development Co. v. Tewksbury*, No. 89-46, slip op. 4, n.3 (Mass. Housing Appeals Committee Jan. 16, 1991). 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 [under state or federal law] 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 Appeals Committee Jan. 23, 1992); *Walega, supra* at 5-7.

Lever Dev., LLC v. West Boylston, No. 04-10, slip op. at 10 (Mass Housing Appeals Committee Dec. 10, 2007). Also see *Meadowbrook Estates Ventures, LLC v. Amesbury*, No. 02-21, slip op. at 14 (Mass. Housing Appeals Committee Dec. 12, 2006)(holding review of innovative wastewater technology is inappropriate when there is no local regulation and a state DEP permit is required), *appeal docketed*, No. 2008-P-1240 (Mass. App. Ct. Jul. 24, 2008); *Attitash Views, LLC v. Amesbury*, No. 06-17, slip op. at 12, n.7 (Mass. Housing Appeals Committee summary decision Oct. 15, 2007)(attempt to enforce uncodified requirements with regard to outdoor design "may well also run afoul of the statutory provision that all requirements be applied 'as equally as possible to subsidized and unsubsidized housing.' G.L. c. 40B, § 20"). *aff'd*, No. 2007-5046 (Suffolk Super. Ct. Jan. 7, 2009). If, however, the municipality has distinct regulations that are more strict than the parallel state law, issues raised under the local requirements are considered local

concerns under the Comprehensive Permit Law. *LeBlanc v. Amesbury*, No 06-08, slip op. at 9 (Mass. Housing Appeals Committee, May 12, 2008), *appeal docketed*, No. 2008-2631D (Suffolk Super. Ct. Jun. 12, 2008); *Princeton Development, Inc. v. Bedford*, No. 01-19, slip op. at 11 (Mass. Housing Appeals Committee Sep. 20, 2005); *Oxford Housing Auth. v. Oxford*, No. 90-12, slip op. at 12 (Mass. Housing Appeals Committee, Nov. 18, 1991).

In this case, both the developer and the Board introduced extensive expert testimony concerning consolidation of the on-site landfill, remediation, and groundwater protection. The evidence describes the past, present, and future of the site in great detail. Thorough assessments of the site itself and of the hazardous materials on the site have been done in the past. Exh. 73, ¶ 7; 74, ¶¶ 7, 11. Further assessments have been done fairly recently (Phase I and II Environmental Site Assessments), and a conceptual remedial plan (Supplemental Investigation & Revised Conceptual Remedial Plan with Associated Cost Estimates) has been prepared by a licensed site professional (LSP). Exh. 74, ¶¶ 13-15; Exh. 12; Exh. 44. Still further assessment and remediation can and will be done in order to achieve a "permanent solution" which presents no significant risk to the public.[10] Exh. 74, ¶¶ 13-14, 22, 24, 32-63, 156; Exh. 41, pp. 6, 12. This specifically includes remediation of groundwater prior to development of the site. Exh. 74, ¶ 64, 65-87.

The Board argues that because considerable further assessment and design remains to be done, the developer has not established a *prima facie* case. Board's Brief, pp. 19-21. More specifically, it argues that the proposal has not been described in sufficient detail to enable the Board to have "a fair opportunity to challenge it." Board's Brief, p. 21; also see *Tetiquet River Village, Inc. v. Raynham*, No. 88-31, slip op. at 11 (Mass. Housing Appeals Committee Mar. 20, 1991). But our review of the evidence concerning the detailed work already done concerning this site, particularly the conceptual remedial plan, leads us toward the opposite conclusion—that the plans and the

10. See 310 CMR 40.1000, *et seq*. "Permanent Solution means a measure or combination of measures which will, when implemented, ensure attainment of a level of control of each identified substance of concern at a disposal site or in the surrounding environment such that no substance of concern will present a significant risk of damage to health, safety, public welfare, or the environment during any foreseeable period of time." 310 CMR 40.0006.

evidence of future compliance with state law would be sufficient to establish a *prima facie* case. See *Canton Property Holding, LLC v. Canton*, No. 03-17, slip op. at 22 (Mass Housing Appeals Committee Sep. 20, 2005 (expert testimony that design will comply with state stormwater management standards is sufficient to establish *prima facie* case); also see Exh. 12. In fact, however, despite all of the evidence introduced, we need not consider the substance of these issues—either whether the developer proved its *prima facie* case or whether the Board has established counterbalancing local concerns in response—because, as discussed below, we conclude that the Holliston Zoning Bylaws do not regulate the remedial activity proposed here.

To consider what the Holliston Zoning Bylaws regulate and do not regulate, we must examine in more detail how the issues have been framed in this case, and what bylaw provisions might be applied to them. In the Pre-Hearing Order, the question of whether consolidation of the landfill creates a dangerous situation is raised in two places. First, under "Groundwater Protection," the Board's position is stated as "[c]onsolidation/creation of a landfill will pollute the groundwater." Pre-Hearing Order, § IV-5(c)(ii). The Holliston requirements cited in the Pre-Hearing Order to show that groundwater is protected are two very general sections of the bylaw:

> In any district, no use will be permitted which will produce a nuisance or hazard.... Neither shall there be permitted any use which discharges into the air, soil, or water any industrial, commercial, or other kinds of wastes... unless the same are... treated....

Exh. 32, § I-D(1).

> No discharge... into... the ground, of any materials... as can contaminate... water supply... shall be permitted except in accordance with applicable federal, state, and local ... laws and regulations.

Exh. 32, § V-N(2).[11]

Second, under "Landfill Consolidation/Creation and Design," the Board's position is stated as "[c]onsolidation/creation of a landfill will endanger the public safety." Pre-Hearing Order, § IV-5(d)(i). The Holliston requirement cited to show that the consolidation of waste on the site is regulated locally is the "Basic Requirements" section

11. Bylaw section V-I (Wetlands and Flood Plain Protection Zone) is also referred to in the Pre-Hearing Order, but is not relied on by the Board.

of the Holliston Zoning Bylaws, which states that "[a]ny use not specifically enumerated in a district herein shall be deemed prohibited." Exh. 32, § I-B.[12] In its brief, the Board cites, in addition, the two very general bylaw sections above. Exh. 32, §§ I-D(1), V-N(2); also see Board's Brief, pp. 14, 23.

With regard to both of these issues, there is an additional provision in the bylaw which might have been cited by the Board except that under the specific facts presented here, it does not apply. That is, the "prohibited uses" section of the Groundwater Protection District special regulation prohibits landfills in Zone II groundwater protection areas. Exh. 32, § V-L(4)(B)(2)(c). In this case, however, the area of landfill consolidation is not in the Zone II.[13] That is, only a small area at the eastern edge of the northern part of the site, near the intersection of Marshall and Prentice Streets, is within the Zone II delineated by the section V-L of the Holliston Zoning Bylaw. Exh. 73, ¶ 47; Exh. 48, p. 12; Exh. 57, p.1 and fig. 2. The landfill consolidation area is a two-acre area in a west-central portion of the site, outside of the Zone II. Exh. 48, pp. 11-13; Exh. 74, ¶ 43.

On the most fundamental level, the attempt by the Board to interpret these bylaw provisions as prohibiting the landfill consolidation is belied by the fact that at least one other landfill *has* been permitted in Holliston—a town-owned landfill on the opposite side of Marshall Street just south of the site, which was closed and capped in 1983.[14] Exh. Exh 57, pp. 1-2, fig. 2.

But more significantly, we find that none of the above bylaw provisions can fairly be read to regulate the landfill consolidation here. If a new landfill were proposed, that might be a use regulated under Holliston Zoning Bylaw. But here there is an existing hazardous waste site. There is no indication in any of the bylaw provisions that they are intended to regulate remediation; instead, the language, particularly the references to

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12. A typographical error in the Pre-Hearing Order mistakenly refers to this section as section V-B. See Pre-Hearing Order, § IV-5(d). Exhibit 32 is the "Town of Holliston Zoning Bylaws, adopted October 1962... with amendments through October 2006."

13. Further, there is a question as to whether this consolidation of landfill materials under DEP supervision, as opposed to an operating landfill, falls within the definition in the bylaw. See Exh. 32, § V-L(4)(B)(2)(c) and 310 CMR 19.006.

14. A small part of this town-owned landfill appears to actually be within the Zone II groundwater protection area. Exh. 57, fig. 2.

"discharges," clearly refers to active uses that pollute the environment rather than to remediation efforts on existing hazardous waste sites.[15]

Further support for this position is found in the fact that landfills *are* mentioned specifically with regard to Zone II areas in the Groundwater Protection District section of the bylaw, but only there. This supports our conclusion that the other, very general language in the bylaw—where landfills are not specifically mentioned—does not, under the Comprehensive Permit Law, constitute local regulation of the placement and design of landfills, much less of activities to remediate an existing problem. Since these matters

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15. Since we find that Holliston has not in fact regulated the remediation of hazardous waste sites, we need not reach the difficult question of whether such local regulation is preempted under home rule principles articulated by the Supreme Judicial Court. That is, "municipalities can pass zoning ordinances or bylaws as an exercise of their independent police powers, but these powers cannot be exercised in a manner which frustrates the purposes or implementation of a general or special law enacted by the Legislature...." *Board of Appeals of Hanover v. Housing Appeals Committee*, 363 Mass. 339, 360 (1973). We have found no ruling from the courts that indicates whether the Legislature, in adopting Chapter 21E, may in fact have intended to preempt local regulation of hazardous waste site remediation. But we do note that "in some circumstances we can infer that the Legislature intended to preempt the field because legislation on the subject is so comprehensive that any local enactment would frustrate the statute's purpose." *Boston Gas Co. v. Somerville*, 420 Mass. 702, 704 (1995), cited with approval in *Boston Edison Co. v. Bedford*, 444 Mass. 775, 781 (2005). On the other hand, invalidation of local requirements may well require a "sharp conflict" between them and the state legislation, which "appears when either the legislative intent to preclude local action is clear, or, absent plain expression of such intent, the purpose of the statute cannot be achieved in the face of the local by-law." *School Comm. of Boston v. Boston*, 383 Mass. 693, 701 (1981), quoting *Grace v. Brookline*, 379 Mass. 43, 54 (1979). Thus, for example, local wetlands protection bylaws containing more stringent controls than the state Wetlands Protection Act have been upheld. See *Lovequist v. Conservation Commission of Dennis*, 379 Mass. 7 (1979). Cf. *Fafard v. Conservation Commission of Barnstable*, 432 Mass. 194, 204 (2000)(local wetlands bylaw upheld under the rationale that "the Legislature provided only general principles to be used in regulating construction [of piers] on Commonwealth tidelands.").

It is not clear how remediation of a hazardous waste site should be viewed under these precedents. We note, however, that remediation is governed by a very comprehensive state statutory scheme, the Massachusetts Oil and Hazardous Material Release Prevention Act, G. L. c. 21E. "Simply put, G. L. c. 21E was drafted in a comprehensive fashion to compel the prompt and efficient cleanup of hazardous material and to ensure that costs and damages are borne by the appropriate responsible parties. To that end, the department has promulgated extensive regulations, known collectively as the Massachusetts Contingency Plan (MCP), for purposes of implementing, administering, and enforcing G. L. c. 21E. See G. L. c. 21E, § 3; 310 Code Mass. Regs. §§ 40.0000 (1999)." *Taygeta Corp. v. Varian Assoc. Inc.*, 436 Mass. 217, 223, (2002). Similarly, the operation and management of active sold waste facilities are also extensively and strictly regulated under state law. See 310 CMR 19.000.

have not been regulated locally, they are not local concerns that this Committee will consider.

Finally, in addition to the allegations related to landfill consolidation, the Board asserts a similar claim with regard to groundwater protection and the proposed wastewater treatment facility. It contends that the proposed on-site wastewater treatment facility may affect a town well that is about two miles downgradient. Exh. 73, ¶ 62. Though the facility (which will require approval and permitting by DEP) has not yet been fully designed, it is clear that it will discharge 65,000 gallons per day into the groundwater.[16] Exh. 71, ¶108-113; Exh. 73, ¶¶ 45, 48. The Board argues that "[i]t is entirely possible that some of the proposed wastewater discharge will pass through the [existing town-owned] landfill [which is across Marshall Street from the site]..., generating additional contaminants to groundwater from [that] landfill." Board's Brief, p. 36. This, in turn, could "degrade the water quality at [Town Well #4]."[17] Board's Brief, p. 37; also see Pre-Hearing Order, § IV-5(c)(i). The developer points out that detailed hydrogeological and other studies will be prepared before the facility is permitted by the state DEP, and argues that in any case there will be no adverse effect on the town landfill or well. See Exh. 73, ¶¶ 47, 50, 53, 54, 58. The Holliston requirements cited in the Pre-Hearing Order to show that this issue is regulated are the general sections referred to above. See Exh. 32, §§ I-D(1), V-N(2), and V-I (Wetlands and Flood Plain Protection Zone). But, as indicated above, § I-D(1) prohibits discharges "unless [they]are... treated," which the effluent will be in this case, and § V-N(2) permits discharges "in accordance with the applicable federal, state, and local health and water pollution control laws and regulations," which will also be true. Section V-I protects features on the surface of the earth—wetlands and flood plains—rather than the groundwater, and the Board has pointed to no specific part of the section that it alleges will be violated. See Board's Brief, pp. 39-41. Thus, as with the previous issues, we find that these bylaw

16. The effluent will have been treated, and thus its discharge directly into groundwater does not violate the law. Exh. 73, ¶¶ 75-77.

17. The developer's position is that detailed hydrogeological and other studies will be prepared before the facility is permitted by the state DEP, and that there will be no adverse effect on the town landfill or well. See Exh. 73, ¶¶ 47, 50, 53, 54, 58.

provisions cannot fairly be read to regulate or prohibit the wastewater discharge here. There is no indication in any of the bylaw provisions that they are intended to regulate discharges from a large wastewater treatment facility that is fully subject to state law.

Consolidation of the onsite landfill, remediation, and the related issues of groundwater protection are not regulated under the Holliston Zoning Bylaw, and therefore are not properly before this Committee. Further, since these issues will be fully reviewed by state environmental authorities, there is no need for us to consider making an exception to our general rule of not considering unregulated matters. Cf. *Walega v. Acushnet*, No. 89-17, slip op. at 6 n.4 (Mass. Housing Appeals Committee Nov. 14, 1990).

2. Issues Properly Before the Committee

Four additional environmental and planning matters were put into issue by the Pre-Hearing Order in this case. With regard to some of these, the developer continues to challenge the presiding officer's ruling that they are legitimate matters of local concern. As mentioned above, there is not always a bright line between local concerns and matters regulated by the state. It is a line that must be drawn on a case by case basis after considering not only the design feature being challenged by the Board, but, equally important, the unique circumstances of the municipality—that is, its specific, written regulations and requirements and past regulatory practices. In this case, we find that each of the four other matters enumerated in the Pre-Hearing Order have been regulated sufficiently so that we will consider them on the merits. They are summarized as follows.

Issues concerning **wetlands protection** are regulated by the Holliston Wetlands Bylaw § 3, and Holliston Wetlands Regulations, § 6. See Exh. 33; 34.

Issues concerning **stormwater management** are regulated by the Holliston Board of Health Stormwater and Runoff Regulations and the Holliston Site Plan Review Regulations. See Exh. 35; 36.

Issues concerning **open space** have been regulated by Holliston under various provisions in its zoning bylaw. For instance, in section V-H, Special Permit for Cluster Development, the town has expressed a policy of permitting increased density when increased open space is provided. Similarly, under section V-G, open space is regulated

in apartment districts. Thus, by analogy, it is legitimate for the Board to raise open space concerns with regard to the proposed development. Stated in other terms, we will address open space on the merits since we find that the issue has been regulated under sections V-H(2)(a)(4), V-H(2)(h-j), V-G(2)(c)(4), V-G(4)(r), V-G(5)(a)(6)(d), and V-G(5)(d)(3) of the bylaw. See Exh. 32.

Issues concerning **traffic** have also been regulated by Holliston both explicitly and under longstanding land use approval practices. See, e.g., Site Plan Review and Special Permit Regulations, Exh. 35, § 7.3.4.[18] Therefore, we will also address the local traffic concerns raised in this case—adequacy of sight distance at the entrances and of emergency access.

IV. LOCAL CONCERNS

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, the developer may establish a *prima facie* case by showing that its proposal complies with state or federal requirements or other generally recognized design standards.[19] 760 CMR 31.06(2), 760 CMR 56.07(2)(a)(2). The burden then shifts to the Board 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 need for housing. 760 CMR 31.06(6); 760 CMR 56.07(2)(b)(2); also see *Hanover v. Housing Appeals Committee*, 363 Mass. 339, 365 (1973); *Hamilton Housing Authority v. Hamilton*, No. 86-21, slip op. at 11 (Mass. Housing Appeals Committee Dec. 15, 1988).

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18. Roadway design is in all likelihood regulated by subdivision regulations as well, but they were not introduced into evidence.

19. "[A] *prima facie* case may be established with a minimum of evidence." *100 Burrill Street, LLC v. Swampscott*, No. 05-21, slip op. at 7 (Mass. Housing Appeals Committee Jun. 9, 2008), quoting *Canton Housing Authority v. Canton*, No. 91-12, slip op. at 8 (Mass. Housing Appeals Committee Jul. 28, 1993). For example, "it may suffice for the developer to simply introduce professionally drawn plans and specifications." *Tetiquet River Village, Inc. v. Raynham*, No. 88-31, slip. op. 9 (Mass. Housing Appeals Committee Mar. 20, 1991).

A. Wetlands Protection

With regard to wetlands, the developer introduced testimony from two experts, a specialist in wetlands and wetland delineation and a professional civil engineer. Exh. 76, ¶ 1; 87, ¶ 2; 73, ¶ 1. The Board presented testimony from an expert who is both a professional civil engineer and a professional planner. Exh. 77, ¶ 1; 77-A.

There are five wetlands areas on the site. They were identified in a single Abbreviated Notice of Resource Area Delineation (ANRAD) that the developer filed with the Holliston Conservation Commission in June 2003 under both the Holliston Wetlands Bylaw and the state Wetlands Protections Act (WPA), G.L. c. 131, § 40. Exh. 53.[20] These wetlands are regulated locally by the Holliston Wetlands Bylaw § 3, and Holliston Wetlands Regulations, § 6. See Exh. 33; 34. The Board has focused on two particular provisions of the bylaw and regulations that are stricter than state law: first, the provisions that define the 100-foot buffer zones around each wetland area as actual resource areas and largely prohibit disturbance of the land in such zones, and second, a provision that

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20. Only excerpts from the ANRAD (Exhibit 53) were admitted in to evidence; the exhibit does not include the maps or plans that show the actual delineation. Subsequent to the filing of this document with the Conservation Commission in 2003, a site visit was conducted which included the town conservation agent, a member of the Commission, a consultant employed by the Commission, and the developer's expert. Exh. 76, ¶¶ 27-28; also see 87, ¶¶ 5-10. With regard to one area—the pond (Area E)—"minor adjustments" were made in the field to the wetlands delineation. Exh. 54, p. 2; 76, ¶ 31; also see 87, ¶¶ 5-10. In addition, the consultant suggested that the wetlands boundary be moved up (away from the pond) by one two-foot contour. Exh. 54, p. 2; 76 ¶ 31. In the other four areas, no changes were suggested other than the addition of one "intermediate flag." Exh. 54, pp. 2-3; 76, ¶¶ 32-34; also see 87, ¶¶ 5-10. The consultant recommended that these slightly modified delineations be approved by the Conservation Commission. Exh. 54, p. 3. The Commission apparently never acted upon that recommendation, and in 2004, as a technical matter, the developer withdrew the notice. Exh. 55. The Board now argues that in the context of the comprehensive permit application, the wetlands have not been delineated sufficiently to permit the wetlands issues to be fully addressed. See, e.g., Exh. 77, ¶ 16. We disagree. Under the Comprehensive Permit Law, either the Board or, on appeal, this Committee has "the same power to issue permits or approvals" as the Conservation Commission, that is, to determine the proper wetlands delineation under the local wetlands bylaw. G.L. c. 40B, § 21. We find, based upon the documentary evidence before us, particularly Exhibit 54, and the testimony of the witnesses, that with regard to the local bylaw, the 2003 wetlands delineation made by the developer's expert, as modified by the suggestions of the Conservation Commission's consultant, is accurate. Exh. 87, ¶ 10. An approximate depiction of this delineation appears on the overall site plans. See Exh. 6, sheets 7 and 13 ("Existing Conditions Plan, Plan 5" and "Grading and Drainage Plan, Sheet 5").

specifically classifies the first 50 feet of the buffer zone as a "no disturbance area." Board's Brief, pp. 44, 49; Exh. 34, §§ 3.4, 6.3.1.

As will be seen below, the developer's wetlands expert described, with reasonable specificity, the design elements that may affect the five wetlands areas. See Exh. 76, ¶¶ 45-64, 68-78; 87, ¶¶ 11-27. That description, the clear intention to comply with the state Wetlands Protections Act, and the expert's testimony that the development "will result in no significant adverse impacts to wetland resource areas both under the WPA and the Town of Holliston Bylaw" are sufficient to establish a *prima facie* case pursuant to 760 CMR 56.07(2)(a)(2). Exh. 78, ¶ 78. To determine whether the Board has met its burden in response, we will address the wetlands areas individually, examining the design proposed by the developer and the local concerns raised by the Board. Neither party, however, introduced a great deal of scientific evidence with regard to impacts on these resource areas.[21] Nevertheless, there is sufficient information so that by comparing the evidence presented by each side we are able to identify legitimate local concerns, and we conclude that the Board has not met its burden of establishing that those concerns outweigh the regional need for affordable housing so as to justify denial of the comprehensive permit. In one instance, however, a significant enough concern has been raised so that we will impose a condition to ensure that local concerns are protected when the development is constructed.

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21. For instance, the Board's expert testified that there will be "extensive construction of dwelling units and stormwater management facilities within 25 to 35 feet" of wetlands, and yet his more detailed testimony focused on stormwater management facilities and not the location of buildings. Exh. 77, ¶ 15. For that reason, we can only address the stormwater facilities, and any local concerns about building locations, roadway locations, or the like are deemed waived.

We should note that the Board's failing in this regard is a common one in the cases presented to us. Frequently, Boards' witnesses fail to develop their testimony beyond how a proposed development falls short of local requirements. This is not sufficient. The Board must also demonstrate why the stricter local requirement must be applied to protect a local concern. A board should provide evidence of how the proposed development would have a more detrimental impact if certain local requirements are waived than if it is built to state standards, and show that that impact is sufficiently great to outweigh the regional need for housing. Ordinarily, this would require the Board to work closely with the Conservation Commission and to hire a wetlands scientist to evaluate the physical characteristics of the site in great detail. Not only should the expert be familiar with the site, but ideally, he or she should also be sufficiently familiar with the bylaw and the overall characteristics of the town so that he or she understands the scientific basis for specifying particular bylaw provisions that are stricter than state law.

The Pond (Area E) – At the northeastern end of the site is a triangular, man-made pond, with a narrow peripheral wetlands area along its banks (labeled Area E). See Exh. 6, sheet 9; Exh. 10. Because it is slightly larger than a quarter of an acre, it is protected under both state and local law. Exh. 76, ¶¶ 24-25. Much of the area surrounding the pond was disturbed in the past; gravel mining operations led to topsoil removal, soil compaction, and piles of spoil. Exh. 76, ¶¶ 57, 59; 87, ¶¶ 14, 16. Its buffer zone, including the 50-foot no-disturbance area, although degraded, is a wetlands resource area under the local bylaw. The developer proposes to re-grade all of this area in order to construct a large stormwater detention basin—Basin 4P—which will surround the pond on two of its three sides. Exh. 76, ¶¶ 57, 59; 6, sheet 9. The existing wetlands at the edge of the pond will not be disturbed, and the bottom of the basin, which will be at an elevation similar to that of the pond, will consist of hydric soils and "will be revegetated with indigenous hydric species, ...increas[ing] the overall wetland area of the site, and enhanc[ing]... surface water management and wildlife habitat." Exh. 76, ¶ 60; 87, ¶¶ 17, 18. That is, a considerable portion of this area, when completed, will not just be a buffer zone, but will itself become an actual wetland, with improved stormwater management capabilities and increased "functionality... in terms of shade, hiding cover, and forage opportunities" for wildlife. See Exh. 87, ¶ 18; 89, ¶ 49. Nearby buildings are well clear of the no-disturbance area and impinge on the 100-foot buffer by at most about ten feet. Exh. 6, sheet 9; Exh. 77, ¶ 63.

The Board's expert raised a number of concerns. First, he asserted that the pond is a vernal pool. Exh. 77, ¶¶ 18, 19. It clearly is not. A vernal pool, which rarely resembles a pond, is a "confined basin or depression..., which, at least in most years, holds water for a minimum of one month during the spring... [and] is free of adult predatory fish populations, [thus] providing essential breeding and rearing habitat functions for amphibian... species...." Exh. 34, p. 5 (Holliston wetlands regulations). On-site observations have shown that there *is* a vernal pool in the small body of open water in the large wetlands area (Area A/D) on the western portion of the site. Exh. 76, ¶ 37-39; Exh 54, p.3. But in the pond at the northeastern part of the site, the developer's wetlands specialist observed three different species of predatory fish and various

unidentified minnows, which led him to the conclusion, with which we agree, that the pond is not a vernal pool. Exh. 76, ¶¶ 24, 40; 87, ¶ 12.

A more legitimate concern raised by the Board's expert is that the bottom of the stormwater basin will be a foot below the existing wetlands surrounding the pond, "which is likely to lower groundwater and dewater the wetland...." Exh. 77, ¶ 18. The developer's expert did not respond, which adds credibility to this assertion. See Exh. 87. This, however, is easily addressed by a condition requiring that the floor of the basin be raised at least one foot, unless a hydrogeologic or other study shows that there is no risk of dewatering nearby wetlands or that the risk can be addressed by other means.[22] See § VI-2(c), below.

Beyond this, the Board's expert testified in general terms that the no-disturbance zone will be altered, and that the developer "has not demonstrated... that it can address these [unspecified] issues without adversely impacting this resource area...." Exh. 77, ¶ 20. But the burden of proof is on the Board, and we find it has not proven specific damage within the no-disturbance area in order to meet that burden.

We conclude that although the nature and quantity of the work proposed here is unusual, when viewed in the context of the remediation of an extensively disturbed site, the Board has proven no local concern that outweighs the regional need for housing.

The Large Wetlands Areas (Areas A/D) – At the opposite end of the site are the two largest wetlands areas (labeled Areas A and D), which are part of an extensive forested swamp that extends well beyond the site itself; they adjoin one another, separated by an existing roadway. Exh. 76, ¶¶ 14-16, 20; also see Exh. 4, sheet 13; 48, p. 9. These areas constitute roughly the western third of the site, and as noted above, one of them contains within it a vernal pool. See Exh. 48, p. 9; Exh. 76, ¶ 37-39; Exh 54, p.3. They are protected under both state and local wetlands regulations. The 100-foot buffer zone currently "is largely a denuded former landfill slope transitioning to an old disturbed field

22. Raising the floor is not in itself a significant change in the design of the development. If, however, as is likely, this change requires other changes in design, whether or not they are substantial can be determined pursuant to 760 CMR 56.05(11). The developer's engineer also suggested the possibility of placing an impervious barrier between the pond and the basin to

and shrub habitat." Exh. 76, ¶ 22. The forested wetland areas themselves will remain undisturbed, but a very large stormwater detention basin—Basin 7P—will be constructed close to them. Exh. 76, ¶ 46-47. A portion of it will be located within both the 100-foot buffer zone and the 50-foot no-disturbance area. Exh. 6, sheet 13; 76, ¶ 48. In a manner similar to Area E, the developer proposes to completely re-engineer and re-grade the area in which the stormwater basin will be located. Construction debris will be removed, and the area will be excavated to increase flood storage capacity. Exh. 76, ¶ 49. The entire basin will "be re-vegetated with indigenous [plant] species," and become a wetland. Exh. 76, ¶¶ 51, 74; 89, ¶ 49. And, a "significant area of the buffer zone along the eastern edge of the Wetland A/D... will also be fully restored. Exh. 87, ¶ 22. The developer's expert's opinion is that the stormwater basin "will revitalize this degraded area.... It will enhance this area through soil stability and shade.... It may provide habitat for a variety of wildlife species, including amphibians such as spotted salamanders that may breed in the... vernal pool located in this area...." Exh. 87, ¶ 23-24.

The Board's expert provided no testimony that specifically addressed the possible impact of Basin 7P on Areas A/D. See Exh. 77, ¶¶ 13-23. General comments that the on-site stormwater management system will negatively affect wetlands and buffer zones are insufficient to satisfy the Board's burden of proof. See Exh. 77, ¶ 17.

The Small Isolated Wetlands Areas (Area B and C) – Near Areas A/D are two much smaller depressions, labeled Areas B and C. They are separated from the larger areas by the existing roadway in one case, and by an earthen berm in the other. Exh. 76, ¶ 19-20. These are isolated wetlands protected under local regulations, but not under the WPA. Exh. 73, ¶ 21. The first small isolated wetlands area, Area C, is also described as "degraded" due to historic gravel mining practices and dumping. Exh. 76, ¶¶ 47, 68, 73. It "was a dump site for old stumps, as evidenced by the rotting remains of the root systems." Exh. 76, ¶ 20. This area is within proposed stormwater Basin 7P, and thus, as described above, the developer proposes to completely re-engineer and re-grade the area, including this entire small wetlands area. Exh. 76, ¶ 47; Exh. 6, sheet 13. As noted,

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"prevent groundwater migration to the ... basin." Exh. 89, ¶ 50. Depending on what the ramifications of such a barrier are, this, too, could possibly be a substantial change.

construction debris will be removed, and the area will be excavated to increase flood storage capacity. Exh. 76, ¶ 49. The entire basin will "be re-vegetated with indigenous [plant] species, " which will "restore the function of the degraded [wetland] both in terms of surface water management and as wildlife habitat." Exh. 76, ¶¶ 51, 74; 87, ¶ 23; 89, ¶ 49. The developer's expert's opinion is that the stormwater basin "will be an enhancement of the small pocket wetland...." Exh. 87, ¶ 26.

The Board's expert provided little in the way of concrete objections to these design plans. In a single paragraph, he simply described the work, characterized it as "complete destruction" of the wetland, and stated, "It is imperative that the standards that apply to these locally and state regulated areas be thoroughly evaluated [to determine] whether the stormwater system can be constructed without adversely affecting the interests protected under the local bylaw." Exh. 77, ¶ 22. We find that this, too, is insufficient to prove the existence of a local concern that outweighs the regional need for housing.

The second isolated area, Area B, is across the existing road to the west of Area C. It is outside of the area in which Basin 7P will be constructed, and will not be disturbed. Exh. 6, sheet 13; also see Exh. 76, ¶ 47. The Board's expert expressed no concerns with regard to it. See Exh. 76, ¶¶ 13-23.

Review of Final Plans - Lastly, we note that while the broad outlines of the developer's proposal for wetlands restoration are clear, the Board's expert is correct that detailed specifications have yet to be provided. See, e.g., Exh. 77, ¶¶ 19, 20. In some cases such as this—where the wetlands issues are fairly complex—developers might have chosen to present more detailed plans, even though only preliminary plans are required. See 760 CMR 56.05(2)(a), (2)(f). Since that was not the case here, lest there be any confusion, the parties should be aware that while we hereby approve the overall preliminary wetlands plan under the local bylaw, specific designs must be reviewed by the Holliston conservation agent under the wetlands bylaw prior to construction, and the developer must appear before the Conservation Commission under the state WPA. See 760 CMR 56.05(10)(b).

B. Stormwater Management

Stormwater management is regulated by the Holliston Board of Health Stormwater and Runoff Regulations and the Holliston Site Plan Review Regulations. See Exh. 35; 36. The town uses these regulations in its "discretionary permit process" that applies in both wetlands and upland areas. Exh. 78, ¶ 9; 36, § 7.3.3(a), (d). The most significant way in which the local requirements exceed state requirements appears to be that not only must post-development peak discharge rates not exceed pre-development rates, but in addition, post-development discharge volume must be held constant or reduced. Exh. 78, ¶ 9; Exh. 35. Also, slopes in stormwater basins are not permitted to be steeper than four to one, as compared to the state limit of three to one. Exh. 35. There may also be enhanced water quality standards, though these were not specified by the Board. See Exh. 78, ¶ 9.

The parties focused largely on the proposal's primary stormwater management features: the detention basins, described above, which are "constructed wetland areas." See Exh. 89, ¶ 49. The developer's expert civil engineer testified that the plans admitted into evidence are preliminary plans that comply with the 1997 state Stormwater Management Guidelines, and will be redesigned to comply with 2008 revisions in state requirements. Exh. 73, ¶¶ 90-93; 111(b); 89, ¶ 46. He testified about various specific aspects of the design, and indicated that in several respects the preliminary plans will need modification.[23] Exh. 73, ¶¶ 94-106.

All of the Board's arguments are based on the testimony of its expert professional engineer and planner, Thomas Houston.[24] See Board's Brief, pp. 50-63. This testimony and the arguments articulated by the Board in its brief focus almost entirely on whether

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23. The preliminary nature of the plans created some confusion. For instance, the Board's expert was concerned that a fence was not provided around the stormwater basin and that drywells had not been designed to capture roof water. Exh. 77, ¶28, 29. But developer's expert testified on rebuttal that fences, though not required, "could be provided if needed," and that "[l]ocalized infiltration of roof top runoff will be provided at each of the proposed buildings." Exh. 89, ¶¶ 45, 48. Similarly, though further field work will be required, the preliminary design calculations are based not only on USGS Soil Survey information, but also "preliminary onsite test pit data." Exh. 89, ¶ 44; cf. Exh. 77, ¶ 26.

24. The town planner testified only as to the applicability of town requirements, not as an expert on stormwater. Exh. 78, ¶ 9.

the stormwater system will function as designed. See, e.g., Board's Brief, p. 51, ¶ 21; p. 53, ¶ 25; Exh. 77, ¶¶ 25-42. The testimony attempts to show either that the design does not comply with state standards or that compliance with state standards is not feasible. See, e.g., Exh. 77, ¶¶ 31, 33, 35. It provides considerable detail, particularly with regard to the elevation of various design features and the separation of those features and the basins themselves from groundwater. See, e.g., Exh. 77, ¶¶ 25, 26, 31-35, 38-40. In contrast, the developer's expert, James Hall, by and large chose not to respond to the specific allegations, but simply elaborated briefly on the developer's commitment to complying with state standards. Exh. 87, ¶¶ 43-52.

The testimony does not provide an explicit and unambiguous explanation of the difference of opinion between these two qualified experts, but the reason for the disagreement is clear by implication. The Board's expert based his testimony on the assumption that the basins are upland basins requiring two feet of separation between their bottoms and groundwater. See Exh. 77, ¶ 25. But the basins will not be in an upland area since the developer's expert designed them as "constructed wetland areas," which will be at or near groundwater, and in his opinion are approvable under state standards. Exh. 89, ¶ 49. A more explicit indication of the misunderstanding appears in the testimony concerning wetlands protection, discussed above. Alteration of a small, isolated wetland would not be permissible if it were to be replaced by an upland detention basin, but here the existing wetland is being incorporated into a much large constructed wetland. And, as the developer's wetlands expert pointed out, the Board's expert "fail[ed] to understand that no wetlands will be destroyed...." Exh. 87, ¶ 26.

Having reviewed the testimony of both stormwater experts, we find that the developer has proven that the proposed development will comply with state stormwater standards.[25] This proof of compliance with state standards is sufficient to establish the developer's *prima facie* case. 760 CMR 56.07(2)(a)(2); *Canton Property Holding, LLC v. Canton*, No. 03-17, slip op. at 21-24 (Mass. Housing Appeals Committee Sep. 20,

25. Although the final design must comply with state law is required in any case, so that there will be no confusion, we include a condition to that effect, and this will ensure that if the Board's expert is correct in any of his specific critiques, those problems will be rectified. See § VI-2(d), below.

2005) (*prima facie* case established even though "depth, sizing, location and configuration of the detention basins might require revision").

As noted above, little if any of the Board's testimony attempted to meet its burden of proof by establishing damage to local concerns that might outweigh the regional need for affordable housing. For instance, even though there was no clear testimony with regard to the volume of stormwater runoff, we can infer that the design will not meet the strict local requirement that the volume as well as rate of runoff be limited. That is, the developer's expert testified only that the design will ensure that "post-development peak discharge rates do not exceed pre-development peak discharge rates." Exh. 73, ¶ 95. But, assuming that the volume of runoff does not meet the local standard, there is no indication that this will do any harm. In fact, any significant harm appears unlikely since the site is immediately adjacent to a very large existing wetland.

The only area in which there was any testimony about non-compliance with local requirements was with regard to the slope of the sides of the stormwater basins and their depth. But the Board's expert testified only that the design calls for a three-to-one slope (which is permissible under state standards), that they are deeper than the local standard of three feet, and that therefore they "do not comply" with local reculations. Exh. 77, ¶¶ 36, 41. There is no evidence of harm which might outweigh the regional need for affordable housing.

We conclude that the Board has not met its burden of proof with regard to the design of the development's stormwater management system.

C. Open Space

At least 15 acres of the site, or nearly 30% of it, will be open and undeveloped. Exh. 71, ¶ 15; cf. Exh. 73, ¶ 43. Much of this will be wooded wetlands, although there are some upland wooded areas and a two-and-one-half-acre open area suitable for playing fields which is located in the southeast corner of the site above the wastewater leaching field. Exh. 6; 10; 71, ¶ 15; 89, ¶¶ 19-20. There will also be recreation facilities, including two tennis courts,[26] at least two playgrounds, two gazebos, and paths for

26. The developer originally proposed either tennis courts or a putting green.

walking and bicycling.[27] Exh. 10; 71, ¶ 15; 73, ¶¶ 36-43. The developer's civil engineer testified not only that this open space meets generally recognized standards, but also that it meets the requirements of the Holliston Zoning Bylaw. Exh. 89, ¶ 3. We find that it is unnecessary to determine definitively whether the design complies with the bylaw, but in any case, rule that this expert's testimony in full is sufficient to establish a *prima facie* case pursuant to 760 CMR 56.07(2)(a)(2).

First, we have previously noted that "[t]hough the purpose of the Comprehensive Permit law is to permit waiver of unnecessarily restrictive local requirements, it is nevertheless instructive to consider the requirements" that the town has put in place for other developments similar to the one proposed. See *L.A. Associates, Inc. v. Tewksbury*, No. 03-01, slip op. at 13-14, (Mass. Housing Appeals Committee Feb. 1, 2005). The Holliston Zoning Bylaw suggests that the total open space in a cluster development should in no case be "less than 15% of the total land area of the tract...."[28] Exh. 32, § V-H(2)(j). The Holliston town planner argued that this 15% figure is not a fair benchmark since the bylaw provides an alternate way of calculating required open space. That alternative, however, is entirely unrealistic for affordable housing. It assumes individual homes built on nearly one-acre lots. That is, as the town planner acknowledged, it would require that each housing unit be placed on a 40,000 square foot lot and "to achieve 200 [housing] units... with the minimum required open space, over 210 acres would be required." Exh. 78, ¶ 8(l). In summary, since nearly 30% of this development is open space, the bylaw itself suggests that the amount of open space is adequate.

More important is the testimony introduced by the Board from a well qualified professional planner. See Exh. 79, ¶¶ 15-17; Tr. III, 58-82. Based upon an estimate of between 567 and 612 residents living in the development, she prepared a chart of

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27. The latest plans, prepared May 22, 2006, (Exhibit 10), show tennis courts rather than a putting green, one playground, two gazebos, and paths. The remaining playground(s) will be added to the plans as per the testimony of the developer's principal.

28. We have little doubt that this is intended to include wetlands. The Apartment District section of the bylaw refers to "open space *including* wooded and wetland areas." Exh. 32, § V-G(2)(c)(4) (emphasis added).

recommended recreational facilities. See Exh. 79, ¶ 16. As seen in Table 1, it is remarkably similar to what is being proposed:

Table 1

Proposed	Recommended by the Board's Expert
2 playgrounds	1 tot lot & 1 playground
open area (2½ a.)	common space with amenities (3-5 a.)
2 gazebos	—
2 tennis courts	1 or 2 tennis courts
—	basketball court
walking trails (> ½ mile)	walking trails (minimum: ½ mile)

As seen in the table, both parties suggested two play areas. The developer's plans show only one such area, and therefore need to be revised to add a playground for elementary school children to conform to the actual proposal. See Exh. 10 In addition, the play area that *is* shown on the plans, which appears to be a small tot lot, is poorly located. The developer, in consultation with the Holliston town planner, should give serious consideration to enlarging the tot lot and placing it in a safer location—one in which children playing are visible from the rear windows of homes. (A triangular open space located 400 feet due west of the current location would appear to be ideal.)

The large open area proposed by the developer is slightly smaller than that suggested by the Board's expert, but that is more than compensated for by the two gazebos proposed for other parts of the site.

The proposal lacks a basketball court, but that can easily be added in the vicinity of the open area or, better, in some other location on the site. We will so require by condition. See § VI-2(e), below.

We conclude that the proposal provides adequate open space.

D. Traffic

The Board raised two issues with regard to traffic—that vehicular sight distance at the entrances will be inadequate, and that the configuration of the internal roadways is inadequate for emergency access.[29] Pre-Hearing Order, § IV-5(f). The developer's

29. There was testimony on broader questions concerning the volume of traffic and levels of service on local roads and intersections and concerning the existing conditions with regard to

engineering design firm conducted a traffic study, and two of its expert witnesses—its civil engineer and its traffic engineer—testified that under standards issued by the American Association of State Highway and Transportation Officials (AASHTO) the sight distances at the entrances will be adequate and that emergency vehicles will have access throughout the site. Exh. 46, pp. 18, 28; Exh. 73, ¶ 25-27; 75, ¶ 145. This is sufficient to establish the developer's *prima facie* case. 760 CMR 56.07(2)(a)(2).

Sight Distance – The Board argues that under AASHTO standards the recommended intersection sight distances are not met at either of the two entrances to the development. Exh. 77, ¶¶ 47-49. Specifically, the Board's expert notes that at the northern entrance, looking north, the intersection sight distance should be 467 feet, but that only 410 feet of sight distance is available. Exh. 77, ¶ 47. At the southern entrance, looking south, the intersection stopping distance should be 467 feet, but only 400 feet of sight distance is available. Exh. 77, ¶ 48.

The developer's expert was in substantial agreement with the Board's expert with regard to the measured conditions, finding that sight distance at both entrances was 400 feet.[30] Exh. 75, ¶¶ 69,70; Exh. 46, p. 16. But he delved into the question of sight distance in considerably more detail. See Exh. 75, ¶¶ 57-87. He noted that two separate sight distance criteria are used to evaluate intersections—intersection sight distance and stopping sight distance. Exh. 75, ¶ 58. Specifically, AASTHO *recommended intersection* sight distances "are based upon not inconveniencing traffic," while *minimum stopping* sight distances provide for safe stopping by vehicles on Marshall Street. Exh. 75, ¶¶ 130-131; 86, ¶¶ 19, 22. He agrees that the recommended intersection sight distance is 467 feet. Exh. 46, p. 18; 75, ¶ 80; 86, ¶¶ 19, 22. But he concludes that because the sight distances exceed the minimum stopping standard of 327 feet, they "are

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sight distance at the intersection of Prentice and Marshall Streets. See, e.g., Exh. 77, ¶¶ 43-46, 50-52. We will not consider these, however, since they were not raised in the Pre-Hearing Order. See Pre-Hearing Order, § IV-2 (issues raised in the Pre-Hearing Order "are the sole issues in dispute...").

30. At a later point, the witness testified that the sight distance at the northern entrance was 410 feet. Exh. 75, ¶ 81. We assume that the lower figure is correct.

adequate to provide safe intersections." Exh. 46, p. 18; 75, ¶¶ 83, 131; 86, ¶¶ 20, 23; also see Exh. 47, p. 4, ¶ 10.

We credit the testimony of the developer's witnesses, and conclude that because stopping sight distances will be adequate, the entrances to the development will be safe.

Emergency Access – The Board and its experts argue that there is not adequate emergency access to all parts of the development because of dead-end streets that "exceed the local safety standard of 500 feet and 12 dwelling units per dead-end road." Board's Brief, pp. 64, 69-70; Exh 77, ¶ 53.

The development roadways are a combination of loops and dead ends. There are three access points on Marshall Street—two entrances and an emergency access roadway. Exh. 73, ¶ 20-21; Exh. 10. Although the majority of housing units are not on dead-end streets, two fairly long roadway segments do have dead ends. Each of these—one near the center of the site serving 30 housing units and the other at the northern end of the site with 32 units—is between 600 and 700 feet long.[31] Exh. 10 (by scaling). There is little evidence with regard to topography or other features of these roadways.

We agree with the Holliston fire chief that "[a]s a general rule,... long, single-access roadways should be avoided due to the potential for blockages" due to fallen trees, automobile crashes, or other unusual circumstances which may results in delays in emergency personnel reaching homes isolated at the end of the street." See Exh. 80, ¶¶ 4-6. Among the three leading cases of this sort that we have considered, we have twice found the dead-end roadways to be sufficiently hazardous to justify denial of a comprehensive permit. See *O.I.B. Corp. v. Braintree*, No. 03-15, slip op. at 8-11 (Mass. Housing Appeals Committee Mar. 27, 2006) (1500-foot single-access roadway to 100 units of housing found inadequate); *Lexington Woods, LLC v. Waltham*, No. 02-36, slip op. at 8-20 (Mass. Housing Appeals Committee Feb. 1, 2005) (steep, winding, 1000-foot single-access roadway to 36-unit development found inadequate); cf. *Capital Site Management Associates Ltd. Partnership v. Wellesley*, No. 89-15, slip op. at 28-35 (Mass. Housing

31. Exhibit 10, a site plan prepared by the developer's engineer, has a notation that says. "Length of Dead End = 1,613'." This is incorrect.

Appeals Committee Sep. 24, 1992) (steep, 200-foot roadway to 33-unit development approved).

But the dead-end streets in this case are difficult to evaluate. In general terms, neither is the length of the streets and the number of houses located on them so great as to unquestionably create a hazardous situation, nor are they so short and sparsely developed so as to be of no concern. Further, we have little specific information to rely on. Few details concerning topography or other design criteria were explored in the testimony, nor did either party present evidence concerning the scientific or statistical aspects of the risk involved. Thus, in our judgment, the Board has not presented sufficient evidence to meet its burden of proving that the risk presented by these dead-end streets outweighs the regional need for affordable housing.[32]

The Board and the fire chief also argue that school-bus stops are inconveniently located, and that as a result parents may drive their children to the bus stops and block emergency vehicles with their parked cars. Board's Brief, pp. 68, 70; Exh. 80, ¶ 8. Though this argument appears unconvincing on its face, we need not analyze it since the developer has agreed to locate bus stops in more central locations. Exh. 89, ¶42; also see § VI-2(f), below.[33]

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32. It would be a simple matter to reconfigure the dead-end streets to create safer, looped roadways. See Exh. 10. That is, the turn-around loop at the end of the dead-end street in the center of the site is near the turn-around loop at the end of a similar, but much shorter street. By eliminating the turn-around loops and adding a new segment of roadway about 500 feet long, these two streets could be joined, creating a large continuous loop. At the northernmost part of the site, the turn-around loop at the end of the second long dead end could simply be replaced by an additional emergency access road intersecting with Marshall Street, which is only about 100 feet away. Further, it appears that the long emergency access road at the southern end serves no purpose; if it were eliminated, the only housing units that would not still be accessible by two alternate routes are the six units that are actually located on it. Overall, the site design shows little creativity, and though it meets minimum standards, there are a number of ways in which the configuration of roadways and housing units could be improved. Any such changes that the developer may propose are subject to the procedures in 760 CMR 56.05(11).

33. A similar argument—that vehicles maneuvering out of tandem parking spaces might block emergency vehicles—was made by the Board's expert. Exh. 77, ¶ 54. It was not briefed, and therefore is waived. See *An-Co, Inc. v. Haverhill*, No. 90-11, slip op. at 19 (Mass. Housing Appeals Committee Jun. 28, 1994), citing *Lolos v. Berlin*, 338 Mass. 10, 13-14 (1958).

V. ATTORNEYS FEES

The developer has filed a motion for reimbursement of attorney's fees. The Board's rules provide that "[t]he Board may hire outside consultants for review and analysis of any application when the board determines it appropriate," and the cost is to be borne by the developer.[34] At the first hearing before the Board, in March 2005, counsel for the Board informed the developer that an escrow account would need to be established to pay consultant fees. Exh. 71, ¶ 118. Norton Affidavit, Attach. 2 (filed Jul. 17, 2007). The developer agreed to pay between $10,000 and $15,000 into an escrow account to pay consultants, including the Board's counsel. Exh. 71, ¶¶ 121, 122. The developer alleges that at that time expenses to be paid to counsel were "presumed to be limited to approximately $5,000 based upon [counsel's] representation." Exh. 71, ¶¶ 123. The minutes of the meeting indicate only that "[the developer] agreed to fund attorney's fees." Members of the Board and town officials who were present state that the Board did not "make any representation to the applicant that the initial escrow account would be sufficient to cover expenses associated with technical assistance, including legal assistance. In fact, the account was established 'subject to replenishment.'" Affidavits of Carey, Dellicker, Donovan, and Sherman, ¶¶ 6-9 (Board's Opposition to Motion for Reimbursement, Attach. B, C, D, E (filed Jul. 27, 2007)). Although it is unlikely that the Board could have required payment of most of the attorney's fees, the Comprehensive Permit Law does not prohibit the developer from voluntarily agreeing to pay such fees. See *Attitash Views, LLC v. Amesbury*, No. 06-17, slip op. at 14 (Mass. Housing Appeals Committee Summary Decision Oct. 15, 2007), *aff'd*, No. 2007-5046 (Suffolk Super. Ct. Jan. 7, 2009), and cases cited. Based upon the minutes, and supporting affidavits, we find that there was no explicit limitation placed upon the amount of those fees that the developer agreed could be reimbursed. The motion for reimbursement is therefore denied.

34. The rules are entitled "Rules for the Issuance of a Comprehensive permit, G.L. c. 40B," and "are authorized by G.L. c. 40B, sec. 21; G.L. c. 44, sec. 53G; and 760 CMR 31.02(3)."

VI. 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 Holliston 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 except as provided in this decision.

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

(a) The development, consisting of 200 total units, shall be constructed substantially as shown on site plans by Coler & Colantonio, Inc. (Cedar Ridge Estates, January 19, 2005, rev'd May 22, 2006)(Exhibit 6, as revised by Exhibit 10), landscape plans by Coler & Colantonio, Inc. (8/2/06)(Exhibit 13), architectural plans by Egnatz Associates, Inc. (Exhibit 13), and as described in this decision.

(b) Prior to beginning construction, the developer shall, as described more fully in the February 20, 2007 Ruling on Board's Motion to Dismiss in this matter, establish ownership of the 2.55-acre parcel within the site and that easement rights to a bridle path are consistent with the development plans.

(c) The floor of stormwater Basin 4P shall be raised at least one foot, unless a hydrogeologic or other study shows that there is no risk of dewatering nearby wetlands or that the risk can be addressed by other means.

(d) All design features shall comply with the state Wetlands Protection Act, including all DEP Stormwater Management Guidelines, subject to review by the Holliston Conservation Commission and the Massachusetts Department of Environmental Protection.

(e) Recreational facilities shall be provided as proposed and further described or modified in section IV-C, above.

(f) Unless notified by the Board that the current locations of the two proposed bus stops are acceptable, the bus stops shall be relocated to central

locations on looped roadways.

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 presently applicable local zoning and other by-laws except those waived by this decision or in prior proceedings in this case.

(b) The subsidizing agency or project administrator may impose additional requirements for site and building design so long as they do not result in less protection of local concerns than provided in the original design or by conditions imposed by 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) Construction and marketing in all particulars shall be in accordance with all presently applicable state and federal requirements, including, without limitation, fair housing requirements.

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

(f) 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.

(g) The Board shall take whatever steps are necessary to insure that a building permit is issued to the applicant, without undue delay, upon presentation of construction plans, which 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

Date: January 12, 2009

Werner Lohe, Chairman

Marion V. McEttrick

James G. Stockard, Jr.

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