(SEAL)

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
LAND COURT DEPARTMENT

MIDDLESEX, ss. 09 PERMIT SESSION CASE NO. 393326 (KCL)

ZONING BOARD OF APPEALS OF HOLLISTON,

Plaintiff,

v.

HOUSING APPEALS COMMITTEE and GREEN VIEW REALTY, LLC,

Defendants.

MEMORANDUM AND ORDER ON THE PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS ON COUNTS I AND II OF THE COMPLAINT

Introduction and Facts

On January 19, 2005, defendant Green View Realty, LLC ("GVR") submitted a comprehensive permit application to the plaintiff Zoning Board of Appeals of Holliston (the "board") for the construction of a 200-unit affordable housing condominium development (the "project") in Holliston. The project site is located on approximately fifty-three acres off of Marshall Street and is in the Agricultural-Residence A Zoning District. It is currently wooded and contains approximately sixteen acres of wetlands.

The site has had a long history of environmental problems that the town, the Massachusetts Department of Environmental Protection ("DEP"), and the United States Environmental Protection Agency ("EPA") have attempted, and continue, to address. Between 1987 and 2002, the EPA and DEP performed environmental investigations and preliminary cleanup of the site, which removed more than 340 drums of tar and other contaminants, 210,000

tires, construction debris, solid waste, and over seventy tons of contaminated soil. To date, however, the site still contains construction debris and landfill materials and a presently undefined area of the property remains affected by organic and inorganic contaminates. In addition, some of the groundwater is impacted by trichloroethylene ("TCE"), a known carcinogen. GVR has proposed to clean up the hazardous materials pursuant to G.L. c. 21E (the Massachusetts Oil and Hazardous Material Release Prevention and Response Act) and the Massachusetts Contingency Plan ("MCP"). After this remediation is complete, GVR proposes to construct an affordable housing development with 200 mixed income condominium units on the site.

On September 11, 2006, after a hearing on GVR's application for a comprehensive permit pursuant to G.L. c. 40B, §§ 20-23, the board denied the application. GVR subsequently appealed to the defendant Housing Appeals Committee ("HAC"). The board filed two motions to dismiss that appeal, asserting that GVR did not have site control and the project was not financially feasible. The HAC denied both motions, the parties submitted pre-filed testimony, and a four day evidentiary hearing was held before a hearing officer (the Chairman) at the HAC. In a decision dated January 12, 2009, the HAC vacated the decision of the board and ordered a comprehensive permit to be issued, subject to various conditions. The board now appeals from the HAC's decision pursuant to G.L. c. 30A, § 14 (Count I) and seeks declaratory judgments pursuant to G.L. c. 231A regarding title to the property and the financial feasibility of the project (Count II) and the lawfulness of certain practices and procedures of the HAC (Count III).

The board has moved for a judgment on the pleadings for Counts I and II of the complaint. The administrative record on which that motion is based contains four volumes of pleadings/correspondence (containing 1,923 pages), five volumes of exhibits (containing 2,880

pages), three volumes of transcripts of the hearing before the HAC (containing 491 pages), and a supplemental volume (containing an additional 313 pages), all of which has been reviewed by the court. The parties submitted briefs and a hearing was held. For the reasons more fully set forth below, there is substantial evidence in the record to support the HAC's decision and, accordingly, the HAC's decision must be upheld. Also for the reasons more fully set forth below, it is hereby declared that GVR has demonstrated colorable title to the site sufficient to demonstrate site control and there is substantial evidence that the project will be financially feasible.

Additional material facts are contained in the analysis section below.

Standard of Review of the HAC's Decision

When the board has denied an application for a comprehensive permit and that denial has been appealed to the HAC, "the ultimate question before the [HAC] is whether the decision of the Board is consistent with local needs." *Transformations, Inc. v. Townsend Zoning Board of Appeals*, Decision No. 02-14, at *9 (HAC Jan. 26, 2004); *see also* 760 CMR 56.05(4)(a), (c); 760 CMR 56.07(1)(a), (b); *Board of Appeals of Hanover v. Housing Appeals Comm.*, 363 Mass. 339, 346 (1973). To determine that question, the HAC conducts a *de novo* review that covers the following issues. First, as outlined in greater detail in the analysis section below, the developer has "the burden of proving that it has met the project eligibility requirements of 760 CMR 56.04(1)." 760 CMR 56.07(2)(a)(1); *see also, e.g., 100 Burrill Street, LLC v. Swampscott Zoning Board of Appeals*, Decision No. 05-21, at *3-4 (HAC June 9, 2008) (regarding the former 760 CMR 31.01(1) and noting that the new regulations are "virtually identical").[1] Second, if the

[1] While this case was before the HAC, 760 CMR 31.00, *et seq.* was superceded by 760 CMR 56.00, *et seq.* The board's motions to dismiss GVR's appeal were decided by the HAC under the earlier regulations and the HAC's ruling on those motions will be reviewed by this court under the earlier version. However, the hearing and the final decision were conducted and decided pursuant to the newer regulations and will be reviewed under those

developer meets that burden, it then "may establish a prima facie case by proving, with respect to only those aspects of the Project which are in dispute (which shall be limited, in the case of a Pre-Hearing Order, to contested issues identified therein), that its proposal complies with federal or state statutes or regulations, or with generally recognized standards as to matters of health, safety, the environment, design, open space, or other matters of Local Concern." 760 CMR 56.07(2)(a)(2); *see also, e.g.*, *100 Burrill Street*, Decision No. 05-21, at *4, 6-8; *Transformations*, Decision No. 02-14, at *9.

If the developer meets these initial hurdles, 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 which supports [the board's] denial [of the comprehensive permit], and then, that such Local Concern outweighs the Housing Need."[2] 760 CMR 56.07(2)(b)(2); *see also, e.g.*, *Board of Appeals of Woburn v. Housing Appeals Comm.*, 451 Mass. 581, 583-84 (2008); *Hanover*, 363 Mass. at 365. As is the case here, however, since "the town has not achieved the ten percent minimum by the prescribed date, there shall be a rebuttable presumption that there is a substantial regional need which outweighs local concerns." *Zoning Bd. of Appeals of Canton v.*

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provisions (with the exceptions outlined in 760 CMR 56.08(3)(c)). In any event, the jurisdictional and project eligibility requirements in both versions are nearly identical. The old regulations, 760 CMR 31.01(1) and (2), provided the following:

> (1) To be eligible to submit an application for a comprehensive permit or to file or maintain an appeal before the Committee, the applicant and the project shall fulfill the following jurisdictional requirements:
> (a) The applicant shall be a public agency, a non-profit organization, or a limited dividend organization.
> (b) The project shall be fundable by a subsidizing agency under a low and moderate income housing subsidy program.
> (c) The applicant shall control the site.
> (2) Fundability shall be established by submission of a written determination of Project Eligibility (Site Approval) by a subsidizing agency . . . .

The new regulations, 760 CMR 56.00, *et seq.*, are set forth in the text immediately following.

[2] Not relevant to this case, the board may "show conclusively that its decision was Consistent with Local Needs by proving that one or more of the grounds described in 760 CMR 56.03(1) has been satisfied [the affordable housing requirements], in accordance with the procedure set forth in 760 CMR 56.03(8)." 760 CMR 56.07(2)(b)(1).

Housing Appeals Comm., 76 Mass. App. Ct. 467, 469-70 (2010). After reviewing all of the evidence, if the HAC "finds, in the case of a denial, that the decision of the board of appeals was unreasonable and not consistent with local needs, it shall vacate such decision and shall direct the board to issue a comprehensive permit or approval to the applicant." *Hanover*, 363 Mass. at 346 (quoting G.L. c. 40B, § 23).

This court's review of the HAC's decision (Count I) is governed by G.L. c. 30A. G.L. c. 40B, § 22. Such review is "confined to the record" and this court must "give due weight to the experience, technical competence, and specialized knowledge of the [HAC], as well as to the discretionary authority conferred upon it." G.L. c. 30A, § 14; *see also Hanover*, 363 Mass. at 376; *Canton*, 76 Mass. App. Ct. at 473. Further, "[t]he board, as the appealing party, has the 'heavy' burden of showing that the agency decision of the HAC is not supported by substantial evidence." *Canton*, 76 Mass. App. Ct. at 472 (citation omitted). If the HAC's decision is supported by substantial evidence, it must be upheld. *Middleborough v. Housing Appeals Comm.*, 449 Mass. 514, 516-17 (2007); *Zoning Board of Appeals of Wellesley v. Housing Appeals Comm.*, 385 Mass. 651, 657 (1982). Substantial evidence is defined as "such evidence as a reasonable mind might accept as adequate to support a conclusion." G.L. c. 30A, § 1(6); *Hanover*, 363 Mass. at 376 (citing G.L. c. 30A, §§ 1(6) and 14(8)(e) (superceded by G.L. c. 30A, § 14(7)(e)). Ultimately, "[a] court may not displace an administrative board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." *Middleborough*, 449 Mass. at 529 (citations omitted); *see also Canton*, 76 Mass. App. Ct. at 473.

Analysis

Count I: Review of the HAC's Decision

The board's challenges to the HAC decision fall into two categories. First, it alleges generally that the HAC's denial of its motions to dismiss and the HAC's decision itself were "in excess of its jurisdiction, based on errors of law and illegal procedures, unsupported by substantial evidence, unwarranted by facts found on the record, arbitrary and capricious, an abuse of discretion and not otherwise in accordance with law." Memorandum in Support of Plaintiff's Motion for Judgment on the Pleadings on Count I of the Complaint at 1-2 (June 16, 2009). More specifically, the board cites to numerous substantive issues that it believes the HAC erroneously decided: (1) project eligibility (the fundability of the project and whether the project met the jurisdictional requirements to be before the HAC); (2) environmental issues (most notably, the presence of TCE and the remediation of the property); (3) groundwater discharge; (4) open space and recreation needs; (5) wetlands and stormwater management; and (6) traffic. Second, the board also contends that the HAC made a procedural error in limiting its scope of review to those bylaws that are more stringent than state laws. I discuss each of these arguments in turn.

Project Eligibility

As noted above, the HAC's regulations require GVR to prove the following as part of its *prima facie* case in order to submit a comprehensive permit application to the board and, should the board deny that application in whole or in part, to have the board's decision reviewed by the HAC:

> [T]he Applicant and the Project shall fulfill, at a minimum, the following project eligibility requirements:

(a) The Applicant shall be a public agency, a non profit organization, or a Limited Dividend Organization;

(b) The Project shall be fundable by a Subsidizing Agency under a Low or Moderate Income Housing subsidy program; and

(c) The Applicant shall control the site.

Compliance with these project eligibility requirements shall be established by issuance of a written determination of Project Eligibility by the Subsidizing Agency that contains all the findings required under 760 CMR 56.04(4), based upon its initial review of the Project and the Applicant's qualifications in accordance with 760 CMR 56.04.

760 CMR 56.04(1).[3]

To meet these requirements, GVR sought and obtained a Project Eligibility Letter ("PEL") from the Massachusetts Housing Finance Agency ("MassHousing") in which MassHousing found that GVR "would be eligible to apply as a limited dividend organization in connection with an application for financing under the Programs." Administrative Record, Exhibits, Volume I at 53; Administrative Record, Pleadings/Correspondence, Vol. I at 72. MassHousing also found that the "Project appears financially feasible," the pro forma reviewed suggests that "the Project appears financially feasible on the basis of estimated development costs," "the proposed financing is reasonable and profit is properly limited," "the developer is financially responsible and meets the general eligibility standards of the Programs," and the project meets the requirements of the financial programs, "subject to final review of eligibility and to final approval." *Id.*

The board has not challenged MassHousing's finding that GVR is eligible to apply as a limited dividend organization and, accordingly, there is substantial evidence in the record to

[3] As noted above, 760 CMR 56.04(1) came into effect after the board's motions to dismiss GVR's appeal to the HAC were filed and prior to the time the hearings at the HAC took place. As also noted above, however, 760 CMR 56.04(1) is substantially similar to the previous version, 760 CMR 31.01. Therefore, case law governing the former version is applicable to the new version.

show that GVR has demonstrated that it meets requirement (a). 760 CMR 56.04(1); *Hanover*, 363 Mass. at 380. The board, however, contends that the project is not financially feasible (requirement (b)) and that GVR has failed to show it has site control (requirement (c)). It also generally contends that MassHousing's PEL is insufficient evidence to support the HAC's finding that GVR met the project eligibility requirements.[4] These arguments, however, are all incorrect. Under the regulations in effect at the time of the decision, the PEL in and of itself is sufficient to establish that GVR has met the project eligibility requirements.[5] 760 CMR 56.04(1); *see also Middleborough*, 449 Mass. at 517, n.8, 520-21 (noting that a PEL results in a rebuttable presumption the project is fundable and site control exists and further finding that "[i]t is an evidentiary issue that the party opposing the comprehensive permit must rebut.");[6] *Hanover*, 363 Mass. at 378-80 (tying the project eligibility requirements to the requirements of the funding agency and indicating that the PEL was sufficient evidence for the HAC to conclude the project met such requirements). In sum, I find that the HAC was not unreasonable in relying on the expertise of MassHousing in determining the financial feasibility of the project. *See*

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[4] The board also argues that the PEL expired after two years and the extension was invalid due to a "substantial" change in the project (the number of bedrooms increased), citing to 760 CMR 31.03. However, that section applies to substantial changes while the project is on appeal before the HAC. 760 CMR 31.03(1). Here, the changes to the proposal occurred while the project while still being reviewed by the board. Considering that the remedy available under this regulation is a remand to the board for a decision on the changes in the proposal, the board's argument is of no consequence. In addition, the board notified MassHousing of the change and MassHousing ultimately concluded that the PEL was still valid. Although section 31.03(2)(b) states that a change in the number of bedrooms by less than ten percent will not *ordinarily* be considered a substantial change, that section does not suggest that a change over ten percent will *always* be considered a substantial change. Indeed, if that were the case, this scenario likely would have been included in the list of examples of substantial changes under subsection (a). Accordingly, it would be within HAC's discretion to determine whether a change in units over ten percent was a substantial change warranting a remand to the board. 760 CMR 31.03(1). As a result, it was not unreasonable for MassHousing and the HAC to find that the PEL was still valid. Finally, it should be noted that MassHousing will review the project (including the increase in number of bedrooms) again in order to issue its final approval prior to construction.

[5] In Count III of its complaint, the board challenges the HAC's "failure to allow challenges to the decision of a subsidizing agency" as contrary to the laws of the Commonwealth or other rules and regulations, which would presumably challenge the validity of 760 CMR 56.04. Count III, however, is not yet before the court.

[6] Again, this case was decided under 760 CMR 31.01 and 31.07, the earlier version of the regulations, and therefore the PEL was not conclusive evidence at that time.

Middleborough, 449 Mass. at 520-21; *Indian Brook Cranberry Bogs, Inc. v. Board of Appeals of Plymouth*, 17 LCR 646, 649 (2009) (Piper, J.).

Moreover, beyond just the PEL, substantial evidence in the administrative record supports the HAC's finding that each of the project eligibility requirements was met. To give just one example (relative to the question of financial feasibility), J. Michael Norton, the principal owner of GVR, testified that based upon the pro forma, "an estimated total profit margin of approximately 5.3% was calculated." Administrative Record, Exhibits, Volume IV at 2264. The pro forma (dated August 15, 2006) indicates that the 200-unit development will result in an estimated net profit of $3,720,000 (a 5.34% profit). Mr. Norton further indicated that Michael Jacobs, a consultant hired by the board, estimated the profit could be between 12.6 and 15 percent if the environmental remediation expenses were at the low end of the estimate. This (and other evidence in the record) therefore provides substantial evidence of financial feasibility and, accordingly, the HAC's decision must be upheld. *Farmview Affordable Homes, LLC v. Sandwich Board of Appeals*, Decision No. 02-32, at *4 (HAC Feb. 1, 2005) ("fundability is a technical, administrative matter that is solely within the province of the subsidizing agency. Even if there is some uncertainty about fundability, the Board or the Committee does not supplant the subsidizing agency and conduct a full review of these issues."); *100 Burrill Street*, Decision No. 05-21, at *3-4 (concerns about the developer's principal being in bankruptcy not enough to impair demonstration of site control).

The evidence cited by the board does not suggest a contrary result. Admittedly, the pro forma includes only $900,000 to satisfy the DEP lien, which since that time has increased pursuant to a Settlement Agreement to resolve DEP's claims for remedial costs. As a result, GVR must pay, at a minimum, $1,250,000 when it acquires title to the property. Depending on

certain factors, this figure could be as high as $1,750,000. But, even taking this into account, the project will still result in a net profit and, as Mr. Norton testified, since construction will not begin until the environmental remediation is completed, other estimates in the pro forma may change (*e.g.*, the sales price of condominiums, labor and materials expenses, etc.).[7] Indeed, at the time of the HAC hearing, testimony indicated that comparable market-rate units were being sold for more than $500,000 each, well in excess of the estimated sales price in the pro forma.

There also is substantial evidence in the record to demonstrate that GVR has sufficient site control. G.L. c. 40B "does not require the applicant for a comprehensive permit to establish before the board or committee a present title in the proposed site." *Hanover*, 363 Mass. at 378; *see also Princeton Development, Inc. v. Bedford Bd. of Appeals*, Decision No. 01-19, at *4 (Sept. 20, 2005). Further, "the statute's use of standards set by State or Federal funding agencies to define 'low or moderate income housing' indicates that the Legislature intended to define the requisite property interest for a permit in terms of the selected financing agency's property interest requirements." *Hanover*, 363 Mass. at 378. Accordingly, the HAC's position that the PEL establishes sufficient site control for purposes of the comprehensive permit process is reasonable.

Moreover, in addition to the PEL, the administrative record contains substantial evidence demonstrating that GVR has colorable title to the property. GVR entered into a Purchase and Sale Agreement with the site's current owners, R&C and C&R Realty Trusts, and the board does not dispute GVR's demonstration of title to approximately fifty acres of the property located at

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[7] As the defendants have pointed out, this is one reasonable explanation for MassHousing's practice to not revisit the PEL during the application process and, instead, to defer final review of the project until just prior to construction. *See Middleborough*, 449 Mass. at 521 ("the intent of the act – to streamline and accelerate the permitting process for developers of low or moderate income housing in order to meet the pressing need for affordable housing – would be severely hampered if the issue of fundability could be raised collaterally at any point to attack the validity of a comprehensive permit" (citations omitted)).

708 Prentice Street (corresponding to Holliston Assessor Plan, Parcels 7319 and 7322).[8] The board's sole dispute concerns GVR's site control of the 2.55-acre parcel and an easement across a bridle path. However, the record contains substantial evidence that GVR has colorable title to both. For example, as outlined in the supplemental administrative record, title examinations were completed which demonstrate sufficient site control to both the 2.55-acre parcel and the easement through a chain of title going back to the 1800s. *See, e.g.*, Supp. Administrative Record at 2935-3173 (title documents can be found in multiple sections of the record). While the board argues that ambiguity remains, merely asserting ambiguity is not sufficient to detract from GVR's demonstration of colorable title or to overturn the HAC's decision.[9] *See Princeton Development*, Decision No. 01-19, at *4 ("any 'lingering questions' about access would be laid to rest before any construction were to begin"); *Dexter Street, LLC v. North Attleborough Board of Appeals*, Decision No. 00-01, at *15 (July 12, 2000) ("Mere speculation about possible problems . . . is certainly not sufficient to establish the board's case and therefore the board failed to meet its burden").

For all of these reasons, there is substantial evidence in the record showing that GVR met its burden of demonstrating that it meets the project eligibility requirements. Accordingly, the HAC's decision finding the same must be upheld.

For the same reasons, the HAC's denial of the board's motions to dismiss must be upheld. Although the motions to dismiss must be reviewed under the old regulation, which

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[8] The project site includes three parcels: two adjacent parcels consisting of fifty acres located at 708 Prentice Street (Holliston Assessor Plan, Parcels 7319 and 7322) and a third parcel consisting of approximately 2.55 acres located southeast of Parcel 7319. The evidentiary record also includes Purchase and Sale Agreements for two other properties at 95 and 123 Marshall Street that are not part of the project site.

[9] Further, since the board did not submit any independent evidence to support such an argument, the issue may properly be deemed waived. *See Transformations*, Decision No. 02-14, at *5, n. 3 (citing *Tobin v Commissioner of Banks*, 377 Mass. 909 (1979)) ("To do no more than to provide unsubstantiated assertions . . . may result in the issue being deemed waived.").

states that "[f]undability shall be established by submission of a written determination of Project Eligibility (Site Approval) by a subsidizing agency," 760 CMR 31.01(2), as noted above, there is substantial evidence in the record beyond the PEL to demonstrate that GVR has both site control and the project is fundable. Further, the PEL would, by itself, be sufficient evidence to defeat the board's motions to dismiss. *See Flomenbaum v. Commonwealth*, 451 Mass. 740, 751, n.12 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 127 S. Ct. at 1965) ("to survive a motion to dismiss, a complaint must contain factual allegations 'enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true.'"). Accordingly, the HAC's decisions denying the motions to dismiss are upheld.

GVR's *Prima Facie* Case

GVR must next demonstrate that it met its *prima facie* case. As noted above, GVR may do so "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 56.07(2)(a)(2); *see also, e.g.*, *Transformations*, Decision No. 02-14, at *9. "As we have noted before, a prima facie case may be established with a minimum of evidence." *Transformations, Inc.*, Decision No. 02-14 at *11 (citing *Canton Housing Authority v. Canton Zoning Bd. of Appeals*, No. 90-12, slip op. at 8 (HAC July 28, 1993)). Contrary to the board's arguments, GVR need not demonstrate complete compliance at this stage. *Hanover*, 363 Mass. at 375, 381 (permit can be conditioned on "completion of proposed work in accordance with identified plans or other certain standards" or subject to submitting *new* plans that comply with state standards); *Canton Property Holding, LLC v. Canton*, Decision No. 03-17, at *21-22 (HAC Sept. 20, 2005) (testimony that it will meet state requirements is enough to demonstrate a

prima facie case). Here, GVR presented both expert testimony and documentary evidence to demonstrate its *prima facie* case. This record thus establishes that GVR met its *prima facie* case (either the proposal currently complies or GVR has indicated it will comply and the proposal can be amended to do so).[10]

Accordingly, the burden then shifts to the board to demonstrate that there are valid local concerns that outweigh the regional need for housing. 760 CMR 56.07(2)(b). The board has focused on the issues that follow.

Regional Need for Affordable Housing[11]

The town stipulated that it does not meet any of the statutory minimum requirements for low and moderate income housing set forth in G.L. c. 40B, § 20. Indeed, the town had only 3.15% low or moderate income housing at the relevant time.[12] The board does not contest this, but instead argues that the Housing Productions Plans approved by the Department of Housing and Community Development ("DHCD") for Holliston and the surrounding communities and DHCD's Five-Year Consolidated Plan "generally point to needs for affordable housing for seniors, people with very low incomes, and people with disabilities" and that there is a more

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[10] The board asserts that it is improper for the HAC (and this court) to rely on GVR's testimony that the project will comply with all relevant state regulations and such local regulations that have not been waived. However, numerous cases suggest that such reliance is both proper and reasonable, especially given the fact that acquiring the comprehensive permit is merely one step in the long process prior to a building permit being issued for the project. *See, e.g., Hanover*, 363 Mass. at 375, 381. It is reasonable for the HAC to rely on other agencies and boards with greater expertise to review the proposal for strict compliance, particularly for issues traditionally of state concern (*e.g.*, superfund sites, brownfield remediation, and Wetlands Protection Act ("WPA") issues). *Princeton Street*, Decision No. 01-19, at *11-13 ("We need not address these since they will be subject to review under the [WPA]."); *Dexter Street*, Decision No. 00-01, at *6, n.7 (discussing *MP Corp. v. Planning Board of Leominster*, 27 Mass. App. Ct. 812 (1989), and stating that *MP Corp* "supports the argument that a zoning board of appeals has no power to act in the absence of local regulations, at least in an area that is primarily of state concern. But when there is an issue of major public health or safety concern that is not likely to be dealt with in another forum, and particularly where the issue arises primarily because of the unanticipated nature of the subsidized housing development, we will address it.").

[11] Typically, the regional need for housing is evaluated last in case law. However, since each issue of local concern must be balanced against the need for housing, I address this question first.

[12] The record reflects that in 2005 and 2006, the town approved two projects. It is unclear whether these projects are reflected in the 3.15% figure. Regardless, it is undisputed that the town has not met the minimum requirements under G.L. c. 40B.

pressing need for rental housing. Administrative Record, Exhibits, Vol. IV at 2431-32. Although it may be true that the town has a need for additional rental housing, this does not obviate its responsibilities under the statute, which requires a minima of affordable housing for people of low and moderate incomes to purchase. In addition, the board may not differentiate among various types of affordable housing (senior versus very low income, etc.) in determining the regional need under G.L. c. 40B, § 20. Accordingly, the record demonstrates that there is "compelling evidence that the regional need for housing does in fact outweigh the objections to the proposal." *Hanover*, 363 Mass. at 367. The board therefore has the "heavy burden" to rebut this presumption by showing that the local concerns outlined in the Pre-hearing Order outweigh the regional need.[13] *Canton*, 76 Mass. App. Ct. at 471, 473. "[T]hat burden requires proof of a specific health or safety concern of sufficient gravity to outweigh the regional housing need." *Id.*

Issues of Local Concern

In addition to whether the project met the jurisdictional prerequisites (site control and fundability), the parties identified the following as issues in dispute in their Pre-Hearing Order: (1) open space and recreational opportunities; (2) traffic and internal roadway design; (3) environmental remediation (including landfill consolidation); (4) wetlands and stormwater issues; (5) and groundwater discharge impacts.[14]

The board initially argues that the HAC erred in limiting its review to those environmental issues that were covered by local bylaws that are more stringent that state

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[13] As outlined above, the board must first demonstrate that there are valid issues of local concern and, for those issues deemed valid, it must then prove that those issues of local concern outweigh the regional need for housing. Here, for some of the following issues identified by the board as valid issues of local concern, the HAC determined that the board did not sustain its initial burden and the HAC therefore did not reach the balancing test. Assuming for argument's sake that all of the following issues are valid, there is sufficient evidence in the record to apply the balancing test so that a remand (which the board sought in the alternative) is unnecessary (and, given the HAC's decision, would be futile anyway).

[14] Housing design and layout was also identified in the Pre-Hearing Order, but the parties have not raised that as an issue before this court. Accordingly, this issue has been waived.

regulation. In response to the board's motion to clarify the scope of the environmental matters to be addressed in the HAC proceedings, the HAC ruled that it "does not have the authority to hear a dispute as to whether a developer is adhering to state or federal standards." Administrative Record, Pleadings/Correspondence, Vol. IV, at 1814 (citing *O.I.B. Corp. v. Braintree Board of Appeals*, Decision No. 03-15, at *7 (HAC Mar. 27, 2006); *Canton*, Decision No. 03-17, at *7)). Consistent with its decisions in the past, the HAC noted that, "absent exceptional circumstances," "where there are no local regulations relevant to a zoning board's concern, the Committee rarely allows a zoning board to place additional restrictions beyond state standards." *Id.* at 1815 (citing *O.I.B.*, at *7; *Walega v. Acushnet*, Decision No. 89-17, at *9, n.6 (HAC Nov. 14, 1990)). Having outlined this standard, however, the HAC ruled on the board's motion as follows. It determined that the town's wetlands bylaw was more stringent than state law and, accordingly, the HAC would hear evidence related to wetlands issues. It also ruled that the board could present evidence on stormwater and groundwater protection issues, deferring a ruling on whether local regulations are stricter. With regards to hazardous waste issues, the HAC noted that the board no longer asserted they were local concerns[15] and thus the HAC ruled that they would not be addressed in the hearing. Finally, the HAC noted that the issues of traffic, open space, and smart growth were raised late, were not asserted by the board in its motion to clarify, and thus were waived.

The HAC's rulings are reasonable, especially given the fact that GVR must first establish a *prima facie* case (that the project complies *generally* with *state* standards) and that it is then the *board's* burden (once GVR has made its *prima facie* case) to identify valid issues of *local concern* in order to reach the balancing test of whether those issues outweigh the regional need for affordable housing. Accordingly, where there are environmental concerns that will be

[15] This position appears to be contrary to some of the board's arguments before this court.

reviewed for complete compliance with *state* standards by other agencies, it is reasonable and consistent with the regulatory framework for the HAC to rely on the expertise of those agencies for a comprehensive review of the project.[16] *See Taylor v. Housing Appeals Comm.*, 451 Mass. 149, 157 (2008) (G.L. c. 40B "prevents municipalities from obstructing the building of a minimum level of housing affordable to persons of low income while leaving to local authorities their well-recognized autonomy generally to establish *local zoning requirements*" (emphasis added)); *Hanover*, 363 Mass. at 372, n. 22, 381 (noting that the board's demand for new plans for drainage and sewer was unreasonable since it could condition the permit on submitting sufficient plans and those plans must comply with *state* standards); *O.I.B.*, Decision No. 03-15, at *7; *Transformations*, Decision No. 02-14, at *16, n.22; *Dexter Street*, Decision No. 00-01, at *6, n.7. Accordingly, the HAC did not err in purportedly limiting the scope of its review.[17] *Middleborough*, 449 Mass. at 524 ("A reviewing court must apply all rational presumptions in favor of the validity of the administrative action and not declare it void unless its provisions cannot by any reasonable construction be interpreted in harmony with the legislative mandate.").

Open Space and Recreational Opportunities

The board contends that the open space and recreational opportunities provided in the project do not meet generally accepted standards. However, the evidence shows that the project proposal meets many of the local bylaw requirements for a cluster development.[18] For example,

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[16] As the HAC noted, *Jepson v. Zoning Board of Ipswich*, 450 Mass. 81 (2007), does not suggest a contrary result. In considering abutters' standing, the court in *Jepson* noted that flooding is an interest protected by G.L. c. 40B. *Jepson*, 450 Mass. at 90. It further noted that such issues will be considered by the conservation commission and DEP during the process, but it does *not* suggest (or require) that the board and the HAC review the project for compliance with state standards. *Id.* Here, the conservation commission and DEP will review the project for compliance and, accordingly, the HAC's ruling is not contrary to *Jepson*.

[17] I also note that despite the order limiting review, substantial evidence was admitted on these issues and reviewed by the HAC to the degree it deemed appropriate.

[18] Although the project would not necessarily fall within the cluster development provisions of the bylaw, they are somewhat illustrative of what the town deems necessary for open space. Admittedly, the proposal would

the project sets aside thirty percent of the property as open space and recreational facilities, well in excess of the fifteen percent requirement in the bylaw. Bylaw § V-H(2)(j). The project will include a playground(s), tennis courts, walking trails, gazebos, open space, and recreational fields. In addition, each unit will have either a patio or a porch and an open, grassy area that will be maintained by the association. All of the open space will be owned by an owner's association and a conservation restriction will be in place to protect it in perpetuity.

The town's expert, Judi Barrett, contends that the project should provide a tot lot or playground for pre-school children (covering 0.25 to 0.45 acres), a playground for elementary school children (0.5 acres), park and open space with fields and walkways (3.0 to 5.0 acres), tennis courts (1 or 2), a basketball court (1), and walking trails (0.5 miles).[19] However, during cross-examination, Ms. Barrett acknowledged that the current plan shows that the fields, trails, and tennis courts met these so-called requirements. In addition, the HAC required GVR to include a basketball court and relocate and add/expand the playgrounds based upon the town's concerns.[20]

More importantly, however, the board has not cited to any provisions in the town's bylaws or state or federal regulations to support its argument that these recreational amenities are truly requirements. It therefore cannot impose them or deny the comprehensive permit on the basis that the proposal lacks some of them. *Princeton Development*, Decision No. 01-19, at *16, n.22 ("in the absence of exceptional circumstances, we are reluctant to consider local concerns

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not meet certain requirements of the cluster development provisions, such as the requirement that buildings only be single-family, detached dwellings. Bylaw § V-H.

[19] Ms. Barrett also argued that the location of the proposed playground was not safe since children would have to cross a street to access it. However, the street is an internal development road (not a public thoroughfare) and there will be crosswalks installed throughout the project (including at the playground) that should sufficiently address this concern. Further, Ms. Barrett's requirements to locate playgrounds in a manner that children would not have to cross *any* streets would be unreasonable and nearly impossible under most scenarios. Accordingly, this is not a valid local concern that outweighs the regional need for housing. *Capital Site Management Associates Limited Partnership v. Wellesley Zoning Board of Appeals*, Decision No. 89-15, at *45-47 (HAC Sept. 24, 1992).

[20] GVR testified that a second playground would be added.

that the town has not previously chosen to regulate"); *O.I.B.*, Decision No. 03-15, at *7. Accordingly, open space and recreational opportunities are not *valid* local concerns regarding this project.

Even if they were (and the board could require them), as noted above, the record demonstrates that the proposal (with the HAC's additional requirements) contains nearly all of these amenities. Accordingly, there was substantial evidence in the record to demonstrate that the local concern for open space and recreational opportunities does not outweigh the regional need for housing. The HAC's decision on this issue was thus reasonable and must be upheld.

Traffic

There is substantial evidence in the record that indicates that the project will not significantly worsen traffic or create unsafe conditions on the neighborhood and internal roadways. For example, the traffic study indicated that the intersections at Marshall Street and the proposed driveways and at Marshall/Prentice Streets met the minimum requirements (or could meet such requirements with the clearing of sight lines) of the American Association of State Highway and Transportation Officials ("AASHTO").[21] For many categories, the project

[21] For the Marshall/Prentice Streets intersection, the traffic study concluded that the AASHTO recommended stopping sight distance for the 85th percentile speed (40 mph) is 305 feet. The existing sight distances at that intersection are 315 feet from the west and 570 feet from the east. On Marshall Street, the recommended distance for the 85th percentile (42 mph) is 327 feet. The existing stopping sight distance at Driveway 1 is 400 feet from the north and 500 feet from the south. At Driveway 2, the existing distance is 800 feet from the north and 400 feet from the south. Accordingly, the recommended stopping sight distance was met for all intersections.

For intersection sight distance, the minimum sight distance is 305 feet at the Marshall and Prentice Streets intersection; the recommended sight distance is 445 feet. Existing intersection sight distance looking west is 155 feet (from 14.5 feet back) and 260 feet (from 10 feet back) and 570 feet looking east. On Marshall Street, the minimum intersection sight distance is 260 to the north and 327 to the south; recommended is 401 to the north and 467 to the south. The existing intersection sight distance at Driveway 1 looking north is 410 feet and 500 to the south. At Driveway 2, the existing distance is 800 feet to the north and 400 feet to the south. Based on these figures, all minimum (and many recommended) distances are met except for the Marshall and Prentice Streets intersection, looking west.

It should be noted that Mr. Houston contends that for intersection sight distance to the north of Driveway 1, the recommended distance is 467 feet. Such discrepancy is not material since, as noted throughout this decision, the HAC's decision cannot be overturned on the basis on conflicting testimony. *Middleborough*, 449 Mass. at 529 (citations omitted); *Canton*, 76 Mass. App. Ct. at 473.

met the stricter recommended distances. John Morgan, GVR's traffic expert, testified that the traffic study was conducted in accordance with standard engineering practice,[22] all sight distances are adequate for safety purposes, the added traffic due to the development would be minor,[23] and there would be no significant changes in Level of Service ("LOS").[24] Further, any traffic issues with the existing intersection at Marshall/Prentice Streets are preexisting conditions.

The board's expert, Professional Services Corporation ("PSC") (Thomas Houston, PSC's president, provided testimony), did not contradict this evidence. The main focus of the board's and PSC's concerns are regarding the sight lines that are currently below AASHTO *recommended* distances and the necessity to clear and maintain the sight line at the

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22 The town's consultant, Professional Services Corporation, PC indicated the same.

23 Based upon a conservative estimate, Mr. Morgan testified (and the traffic study reported) that the project will generate an average of 1,158 vehicle trips per weekday. The traffic study also reflected an average trip generation of 1,152 vehicles on Saturday. More specifically, there will be 90 trips during the weekday morning peak (15 entering the development, 75 exiting); 106 trips during the weekday evening peak hour (71 entering, 35 exiting), and 101 during the weekend mid-day peak (55 entering, 46 exiting).

24 The Marshall/Prentice Streets intersection currently operates at LOS A or B for all approaches. In addition, the town police data revealed that there have been no reported accidents at this intersection. MassHighway data indicated only 2 accidents, which is well below the average for unsignalized intersections (0.33 versus 0.80 accidents per million vehicles in the study district and 0.6 for the state). Based on this data, the town's consultant concluded that "it does not appear that significant safety problems exist at this intersection." Administrative Record, Exhibits, Vol. II at 831. Under future no-build conditions, the intersection will have a slight reduction in LOS, but will still maintain LOS A or B for all approaches. Under future build conditions, the intersection will experience almost no change in LOS except for the northbound traffic on Marshall Street during the weekday evening peak hour (LOS changes from B to C), but the traffic study concluded that such a "delay will not be noticeable." Administrative Record, Exhibits, Vol. IV, at 1907. The town's consultant agreed that the analysis suggested no significant changes in LOS due to the project (without soccer conditions).

Under *assumed* conditions for peak soccer field use, Prentice Street will still operate at LOS A, but Marshall Street would approach LOS F. Traffic counts were subsequently conducted, which revealed that the initial assumptions were overestimated. As a result, the Marshall Street approach would operate at LOS C during peak soccer conditions, which is an acceptable level. In addition, the traffic study concluded that such traffic delays would not impact the project driveways. Mr. Morgan testified that the queue might reach as many as fifteen vehicles during the worst five percent of the peak soccer hour, but that it would not reach the project driveways. Finally, even if it would operate near LOS F, such conditions do not necessarily result in safety concerns. Rather, the traffic study described LOS F conditions as involving "traffic backup and traffic jam conditions." *Id.* at 1891. Further, it should be noted that the traffic problem is largely due to *soccer* traffic and not traffic from the *development* (as evidenced by comparing this data to the future build traffic without soccer) and is therefore not an appropriate basis for the denial of the permit. *Princeton Development*, Decision No. 01-19, at *17 ("the Board must show that the traffic impact specifically attributable to the proposed . . . development is sufficiently great to outweigh the need for affordable housing").

Marshall/Prentice Streets intersection. The board also argues the GVR does not control a certain portion of the frontage along Prentice Street necessary to maintain clear sight lines. However, as noted above, AASHTO *minimum* distances are met (or will be with clearing) and, indeed, most *recommended* distances are met. GVR has agreed that it will clear sight lines and, if necessary, it will even consider granting the town a permanent easement to ensure such clearing.

The board also professed two other concerns regarding traffic and the neighborhood roads. First, the board contends that a traffic study should have been conducted for additional intersections, such as the Prentice/Mill Streets and Prentice Street/Pine Crest Golf Club intersections.[25] However, Mr. Morgan testified that traffic study areas are typically selected where fifty or more vehicle trips from the project are added to the intersection during the peak hour and only the Marshall/Prentice Streets intersection meets that threshold. Second, the board contends that improvements must be made to Marshall Street (*e.g.*, widening the road) and the Marshall/Prentice Streets intersection. However, GVR's traffic study concluded that no major improvements were necessary (including widening Marshall Street) and simply recommended minor improvements (*e.g.*, clearing sight lines and installing warning signs and speed limit signs).[26]

Based upon the substantial evidence in the record, the HAC reasonably determined that the additional traffic from the project would not cause significant traffic or safety issues on the external roadways. *Canton*, 76 Mass. App. Ct. at 474 ("HAC could permissibly find that the evidence regarding increased traffic and longer traffic queues at the intersection constituted evidence of inconvenience, but not of any significant safety concern. . . . Moreover, based on its

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[25] Mr. Houston testified that MEPA requires such studies if there is a five percent or greater increase in traffic. However, Mr. Morgan testified that there will be less than a three percent increase to the other intersections, so no additional studies are needed.

[26] Despite this conclusion, GVR indicated a willingness to explore improvements to Marshall Street.

expertise in deciding similar cases, HAC was entitled to find that even if there is increased congestion, that condition here would not rise to the level of a significant local safety concern."); *Lexington Woods, LLC v. Waltham Zoning Board of Appeals*, Decision No. 02-36, at *23-24 (Feb. 1, 2005). Not only was there significant evidence to support that decision, but it should also be noted that the AASHTO standards and other state standards for *new* roads are not applicable to existing roads and, "however helpful [they are] for generally considering roadway safety, [they] should not be treated as requirements to be applied rigidly in this context." *Canton*, Decision No. 03-17, at *9. Further, as testimony indicated, failure to meet such standards does not mean that the intersections are unsafe. As a result, although there may be some traffic issues to some degree with the existing roadways (particularly during soccer games), "[t]he Board cannot rely on the bad traffic situation in the vicinity of the site as a basis for denying the comprehensive permit." *Lexington Woods*, Decision No. 02-36, at *24; *see also Dexter Street*, Decision No. 00-01, at *17. This is particularly so where, as here, "it is technically and financially feasible to improve [the roads]." *Canton*, Decision No. 03-17, at *16. In sum, since traffic "will not be exacerbated in any significant way by the proposed project . . . [it] is not a legitimate local concern upon which the denial of a comprehensive permit may be based" and, accordingly, the HAC's decision regarding external traffic and safety was reasonable. *Dexter Street*, Decision No. 00-01, at *16-17; *see also Canton*, 76 Mass. App. Ct. at 474; *Princeton Development*, Decision No. 01-19, at *17. Accordingly, the HAC's decision on this issue must be upheld.

The board also argues that the internal roadways are unsafe, primarily due to the length of the dead-end roadways that exceed the town's length and density requirements (no more than twelve houses on a single-access roadway, which cannot be longer than 500 feet). Although the

majority of the homes will not be on dead-end roads, approximately sixty units will be located on two dead-end roads that are between 600 and 700 feet long, which the fire chief was concerned would impair emergency access due to potential blockages of the roadway. There were also suggestions in the record that parking in the development is inadequate and that the location of bus stops could cause blockages on the roadways.

However, there was also testimony and evidence showing that the roadways will be twenty-four-feet wide, on-street parking will be prohibited, turnarounds will be installed at the end of the road, and thus emergency access will not be materially impaired. Further, GVR has included curbing, signage, crosswalks, emergency access spaces, two off-street parking spaces per unit, and sixty-two off-street guest parking spaces dispersed throughout the project. The HAC has also required that the bus stops be relocated to more central locations on the looped (non-dead-end) roads. There also was no suggestion that the dead-end roads were particularly steep or contained sharp curves or that there would be problems with access if the roads remain unblocked (as should be the case given the parking prohibition).[27] Even if such conditions existed, there was no *specific* demonstration of safety hazards sufficient to outweigh the regional need for housing. *G.P. Affordable Homes Corp. v. Falmouth Board of Appeals*, Decision No. 89-24, at *6 (HAC Nov. 12, 1991). Accordingly, the board's assertions that blockages *may* occur and there *may* be insufficient parking are speculative. Finally, GVR's expert, Kelly Killeen, also testified that additional revisions to the internal circulation plan could be made to address the town's concerns (and the HAC suggested that revisions could be made to shorten or

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[27] The HAC recognized that it has, in the past, upheld a board's denial due to long, dead-end roads. *See, e.g., O.I.B.*, Decision No. 03-15, at *8-11; *Lexington Woods*, Decision No. 02-36, at *8-20. However, in those cases, the dead-end roads were significantly longer (over 1,000 feet), had steep grades and sharp curves, and there was no secondary access. In any event, as noted throughout this decision, this court cannot overturn the HAC's decision on the basis of conflicting testimony even were I to decide otherwise during a *de novo* review (such would not necessarily be the case here anyway). *See, e.g., Middleborough*, 449 Mass. at 529.

eliminate the dead-end roads). There is therefore sufficient evidence in the record to support the HAC's decision with respect to both internal roadways and traffic. *See Dexter Street*, Decision No. 00-01, at *15 ("Mere speculation about possible problems . . . is certainly not sufficient to establish the board's case."). Accordingly, the HAC's decision on this issue must be upheld.

Environmental Remediation

There are significant remaining environmental issues on the property. This is a fact that GVR does not contest. As noted above, the property was previously a disposal site for tires, construction debris, and hazardous materials. Local, state, and federal agencies have attempted to address the environmental contamination over the past several decades, but a degree of contamination is still present.[28] Such contamination includes tricholoroethylene (TCE) and other organic compounds, which have entered the groundwater. To date, DEP and other entities that have conducted investigations on the property have not been able to identify the source of the TCE with certainty.[29] However, GVR's consultant, William Hoyerman, identified several Areas of Concern and has acknowledged that TCE has entered into bedrock aquifers and traveled to abutting parcels. Clearly, the environmental issues are of great local concern. But, for the reasons set forth below, it was reasonable for the HAC to conclude that these issues will adequately be addressed by the state regulatory authorities and, in light of that, the board's concerns do not outweigh the regional need for affordable housing.

Before any development can occur, the property must be remediated in compliance with G.L. c. 21E (the Massachusetts Oil and Hazardous Material Release Prevention and Response

[28] GVR, EPA, and DEP have spent over $1,500,000 to investigate and remove solid and hazardous waste from the property.

[29] Testimony indicated that DEP's consultant concluded that the likely source was the drums that were disposed of at the property, which have since been removed.

Act), the Massachusetts Contingency Plan ("MCP"), and other applicable laws and regulations.[30] As noted above, GVR has entered into a Settlement Agreement with DEP and will enter into an Administrative Consent Order with DEP, which will also require compliance with G.L. c. 21E and the MCP and will set deadlines for completion of the remediation work. As part of this entire process, GVR must notify and involve the public (including the board) throughout all stages.

Over the years, numerous studies of the property and its contamination have been conducted, including recent Phase I and Phase II Environmental Site Assessments. Based on information from those studies, the current proposal (which may be adjusted based on new information from pilot tests) is to use a combination of pump and treat and bioremediation to eliminate the TCE from the groundwater, which are proven technologies.[31] GVR will also

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[30] G.L. c. 21E is the Commonwealth's Superfund Law. It was enacted to carry out both state and federal laws and regulations to prevent, respond to, contain, and remove hazardous materials from properties. *See, e.g.*, G.L. c. 21E, §§ 3, 4, 6. The MCP can be found at 310 CMR 40.0000, *et seq*. "The MCP applies to any person required by M.G.L. c. 21E to notify the [DEP] of a release or threat of release of oil and/or hazardous material and/or to perform one or more response actions at any site in Massachusetts without regard to the level of [DEP] oversight, if any, of response actions at the site." 310 CMR 40.0003. Among other things, the MCP provides for the evaluation and remediation of releases of hazardous materials and the recovery of costs incurred by the Commonwealth. 310 CMR 40.0002.

DEP classified the property as a Public Involvement Site (Tier 1A), which is a property with serious contamination and a priority project that will receive additional DEP oversight.

[31] There was a significant amount of testimony regarding bioremediation. The proposal calls for the use of Hydrogen Release Compound (HRC) to enhance anaerobic bioremediation. It is undisputed that if there is not sufficient oxygen present, the process may result in breakdown products such as vinyl chloride, which is more toxic than TCE. However, there was also testimony that TCE does not *always* break down into vinyl chloride, there are methods to prevent such breakdown products (*e.g.*, adding oxygen to the area), and alternative compounds could be used instead of HRC, if necessary, based upon the pilot testing.

The board contends that the use of HRC violates the local zoning bylaws. However, the general provisions cited by the board are not applicable. Specifically, the board asserts that Bylaw §§ I-D(1) and V-N(2) set forth stricter requirements than the MCP. Section I-D(1) states the following:

> "In any district no use will be permitted which will produce a nuisance or hazard from fire or explosion, toxic or corrosive fume, gas, smoke, odors, obnoxious dust or vapor, harmful radioactivity, offensive noise or vibration, flashes, objectionable effluent or electrical interference which may affect or impair the normal use and peaceful enjoyment of any property, structure, or dwelling in any neighborhood. Neither shall there be permitted any use which discharges into the air, soil, or water any industrial, commercial or other kinds of wastes, petroleum products, chemicals or pollutants unless the same are so treated before discharge as to render them harmless to life or vegetation of any kind."

Section V-N(2) provides the following:

remediate any remaining solid waste at the property through a combination of off-site disposal and consolidation onsite pursuant to DEP regulations. Although the overall remediation plan was developed to meet DEP's previous standards, GVR testified that it will be adjusted to meet the new, more stringent standards. Under such standards, the property must meet a Condition of No Significant Risk *prior* to development.[32] Finally, should any issues remain after the project has achieved the required standards (*e.g.*, potential impacts to indoor air), the proposal calls for engineering controls such as vapor barriers and ventilation systems.

The board asserts that GVR must demonstrate a final remediation plan *now* that does not include any data gaps, that demonstrates compliance with the MCP, and that will not change based upon new information gathered in the field during the process. This level of certainty for such a complex issue is unreasonable at this stage. The Administrative Consent Order and the MCP contemplate (and require) additional assessments. Such assessments may reveal new information and suggest that different methods of remediation are more appropriate. DEP will

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> "No discharge at any point into any public sewer, private sewerage disposal system, stream, water body, or into the ground, of any materials of such nature or temperature as can contaminate such water body or water supply, or cause emission of dangerous or offensive elements in reaction thereto, shall be permitted except in accordance with the applicable federal, state and local health and water pollution control laws and regulations."

Even if these provisions were stricter than the MCP (an argument that lacks merit), there is no indication that the remediation efforts would violate these provisions. There was significant testimony that HRC is not a hazardous material and has been approved for use on properties throughout Massachusetts by the DEP. There was even testimony that it has been used on another property in Holliston. GVR's expert, William Hoyerman also testified that "[t]he DEP and the Town's prior consultant, Joel Mooney . . . have confirmed the Remedial Plan and technologies selected are reliable and appropriate." Administrative Record, Exhibits, Vol. V., at 2837. Although Mr. Mooney testified that additional testing and information is needed, he conceded that the overall approach was reasonable and the property could be brought into compliance. Further, if additional testing reveals that HRC is not proper and may result in toxic byproducts, GVR testified that alternative methods will be used.

[32] Mr. Hoyerman testified that "No Significant Risk means a level of control of each identified substance at a site or in the surrounding environment such that no such substance of concern shall present a significant risk of harm, safety, public welfare or the environment during any foreseeable period of time." Administrative Record, Exhibits, Vol. IV, at 2315 (quoting from 310 CMR 40.0006).

oversee this process and will ensure continual compliance with all applicable environmental statutes and regulations.[33]

Many of the town's remaining concerns (in addition to whether GVR's proposal will adequately clean up the property) relate to the *potential* impact of the TCE plume (and other materials) on the town's drinking water supply wells and potential negative indoor air quality. Much of these concerns stem from the assertion that the groundwater discharge of wastewater from the property (approximately 65,000 gallons per day) *may* change flow patterns, *may* result in wastewater traveling through the town landfill, *may* exacerbate high iron and manganese concentrations at the town's well, and *may* result in the TCE plume traveling to that well.[34] The board also is concerned that air quality issues may result from gas emanating from areas such as the capped landfill portion of the property.[35] However, as noted above, prior to obtaining approvals for construction of the development (including the wastewater treatment facility), the property must be remediated in compliance with G.L. c. 21E and the MCP. Indeed, even the board's brief cites to and emphasizes DEP standards in evaluating the project, which I take as an admission – and certainly a recognition – that reliance on the DEP to ensure such standards are met is reasonable. Based on those standards, construction will begin only when the TCE and other contaminants have been sufficiently removed from the property (or reduced to safe levels)

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33 As further discussed below, the Conservation Commission and DEP also will oversee and regulate any remedial work that may be necessary in and around the wetlands on the property.

34 The wastewater treatment system will be addressed in greater detail below. It should be noted, however, that the facility will be located on a different portion of the property than the contaminated groundwater area. In addition, the record demonstrates that the town's well receives less than five percent of its water from the portion of the aquifer impacted by the property or the town's landfill.

35 The record demonstrates that prior sampling did not detect any elevated levels of gases and that the only development in these areas will be open air structures such as the recreational fields and tennis courts. If necessary, GVR has recommended a vapor barrier and ventilation systems to prevent problems and acknowledges that an Activity Use Limitation (AUL) may be put in place (if necessary) to notify and protect residents from potential problems.

and indoor air conditions will be safe for residents. Finally, long-term testing will be conducted to monitor soil, gas, and groundwater to ensure continuous compliance.

Accordingly, although additional information may prove necessary, there is substantial evidence in the record to support the HAC's determination that the environmental issues will be adequately addressed by DEP and, accordingly, that the local concerns do not outweigh the regional need for housing. *Farmview Affordable Homes*, Decision No. 2-32, at *7; *see also Indian Brook*, 17 LCR at 653-54 (the board did not impermissibly defer deciding substantive issues by requiring the project to comply with state standards and acquire DEP permits). Indeed, the remediation of this property should not only alleviate the local concerns, but also will be a benefit to the local community by reducing or eliminating the currently existing health and safety risks. Furthermore, as the HAC noted in its decision, public policy supports the remediation and development of brownfields sites. Administrative Record, Pleadings/Correspondence, Vol. IV, at 1896 (citing G.L. c. 21E, § 3A(j)(3)(a)(i)(b)). The HAC's decision must therefore be upheld. *Canton*, 76 Mass. App. Ct. at 473 (requiring the board to meet its "heavy burden" and stressing that the reviewing court cannot "displace an administrative [agency's] choice between two fairly conflicting views").

Wetlands and Stormwater Issues

It is undisputed that the town has enacted local wetlands bylaws that are stricter than the state's Wetlands Protection Act (G.L. c. 131, § 40, *et seq.*) ("WPA") by protecting a greater area of buffer zone around wetlands and also protecting isolated wetlands. GVR requested a waiver of the local wetlands bylaws and regulations. GVR must, however, comply with the WPA and has agreed to do so. As part of the process, GVR must file a Notice of Intent under the WPA to obtain an Order of Conditions from the Holliston Conservation Commission or, if necessary, a

Superseding Order of Conditions from DEP. This process will ensure that both the Conservation Commission and (potentially) DEP will thoroughly review the project to ensure compliance with the WPA and other relevant state regulations. The board, therefore, must demonstrate that the alleged failure to comply with the *additional* protections from the local wetlands bylaws will result in "a specific health or safety concern of sufficient gravity to outweigh the regional housing need." *Canton*, 76 Mass. App. Ct. at 473 (citing *Hanover*, 363 Mass. at 367, 376).

There was extensive testimony regarding the wetlands throughout the property. An Abbreviated Notice of Resource Area Delineation (ANORAD) depicts a Bordering Vegetated Wetland ("BVW") (protected under the WPA) in the western portion of the property, consisting of two wetlands (Wetland A and Wetland D).[36] The BVW is protected by a local, fifty-foot "No Disturbance Area" and a state, 100-foot buffer zone. Wetlands B and C are in close proximity to the BVW, but these two wetlands are small and isolated and are not protected under the WPA (they are only protected under the local bylaw). In the eastern portion of the site, there is another isolated wetland (Wetland E) that includes a man-made pond. The pond and associated vegetated wetland are protected under both the local bylaw (again, the fifty-foot "No Disturbance Area") and the WPA (the 100-foot buffer).

The majority of the development (including buildings) will be constructed in uplands that do not impact these identified wetlands. However, construction of some of the stormwater detention basins is proposed within either the wetlands or their buffer zones. For example, basin

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[36] This delineation was reviewed by Applied Ecological Services ("AES") (hired by the Conservation Commission). AES made a minor adjustment to the delineation of Wetland B, added an intermediate flag to Wetland C, and concluded no further adjustments were necessary. AES recommended that (with those changes) the delineation be approved and recommended that additional evaluations be conducted to determine if Wetland B was a vernal pool habitat and determine the buffer zone around Wetland D. Although approval was recommended, GVR withdrew the ANORAD. Even though the delineation was withdrawn, it is sufficient for reviewing the preliminary plans under G.L. c. 40B. *See Canton*, Decision No. 03-17, at *24; *Transformations*, Decision No. 02-14, at *10. The record also reveals a dispute over whether the pond is a vernal pool habitat, but James Hall testified that it was not. Regardless, the pond and its wetlands are protected under local regulations and the WPA.

7P is proposed to be constructed adjacent to Wetlands A, B, and D and involves work within Wetland C. Wetland C is only protected under the local bylaw. Basin 4P is proposed to be constructed adjacent to the pond/Wetland E. But the majority of these disturbances will be in buffer zones and not within the wetlands (except Wetland C). In addition, construction of the stormwater basins will improve the wetlands resources (which have been historically degraded areas due to sand and gravel removal and environmental contamination) by revegetating the area with indigenous plant species, increasing flood storage capacity, and removing construction debris. GVR's expert, James Hall, testified that the proposed work will overall enhance the wetland systems on the property and provide wildlife habitat.[37]

The board is concerned about both the disturbance to the wetland resources on the property (during construction and permanently with the location of the stormwater basins) and, more specifically, is concerned that some of the wetlands will be destroyed during construction and dewatered due to the location of the basins and the high groundwater level. For example, the plans for Basin 4P call for excavation down to elevation 260.0, which would result in the basin floor being one foot lower than the surface of the existing wetland. Tom Houston, the board's expert, believed that this excavation would lower groundwater levels and the wetland would therefore be dewatered. The board also is concerned (particularly with the pond) that construction of the stormwater systems will disrupt wildlife (though it provided no specific evidence on this issue). Finally, other concerns with the stormwater systems cited by the board include permeability tests not being provided, lack of adequate vehicular access, lack of a security fence, an alleged inability to achieve the state's requirement of a two-foot separation between groundwater and basin floors for Basins 4P and 5P, an alleged inability to comply with

[37] In addition to installing stormwater systems that comply with DEP requirements, GVR has committed to including Low Impact Development techniques to further address stormwater runoff, including pervious pavement, rainwater gardens, bio-swales, and localized infiltration of roof runoff.

local slope and depth requirements, an alleged inability to meet local runoff requirements, and other technical issues with regards to the construction and operation of the systems.

Many of these concerns were addressed by GVR during the hearings at the HAC. For example, Mr. Killeen testified that additional testing will be conducted, the basins meet DEP's slope and depth requirements, fences could be provided, and the systems will incorporate the new DEP standards. More importantly, however, and ultimately decisive, is that the board failed to meet its burden of demonstrating that any harm would result from these issues, even assuming (for argument's sake) that the board is correct and the plan cannot meet the stricter *local* requirements.

There is thus substantial evidence in the record to demonstrate that the HAC's decision was reasonable and should be upheld. Such evidence sufficiently demonstrates that once the project is complete, the wetland resources on the property will be enhanced and that *all* state requirements will be met. GVR submitted preliminary plans, which are sufficient for purposes of a c. 40B review.[38] *Canton*, Decision No. 03-17, at *24; *Transformations*, Decision No. 02-14, at *10. Again, contrary to the board's argument, GVR need not demonstrate complete compliance at this stage. *Canton*, Decision No. 03-17, at *23-24; *O.I.B.*, Decision No. 03-15, at *6-7; *Transformations*, Decision No. 02-14, at *10; *see also Hanover*, 363 Mass. at 372, n.2, 381 (noting that the board's demand for new plans for drainage and sewer was unreasonable since it can condition the permit on submitting sufficient plans and those plans must comply with *state* standards). The preliminary plans for the stormwater systems were designed to comply with the

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[38] The preliminary designs were based upon USGS Soil Survey information and preliminary test pit data. This is sufficient for the preliminary plans and, accordingly, the board's challenge to the lack of extensive permeability tests fails.

Likewise, as noted above, relying on the wetlands delineation was reasonable even though it will be necessary to update the delineation prior to obtaining approval by the Conservation Commission. The delineation provided an accurate mapping of the wetlands as of 2004. Although some changes might be necessary (and, accordingly, some changes in the stormwater system might be necessary), this was sufficient for a preliminary plan.

1997 Stormwater Management Guidelines, which were the standards in effect during the public hearings before the board. In 2008, DEP implemented new standards, which GVR has committed to complying with in designing the final stormwater system.

The Conservation Commission and other agencies will thoroughly review the final plans to ensure that compliance is obtained for the project and all *state* standards are met. *Canton*, Decision No. 03-17, at *23-24. To the extent that the HAC's decision is inconsistent with the state requirements (*e.g.*, the state requirement for a two-foot separation between the groundwater and the stormwater basin floor),[39] the HAC is not authorized to waive state requirements and, accordingly, those aspects of the decision are stricken. *Jepson v. Zoning Board of Appeals of Ipswich*, 450 Mass. 81, 85, n.9 (2007). To the extent that the plans do not (and will not) meet the stricter *local* requirements, substantial evidence demonstrates that the HAC appropriately considered these issues, *Jepson*, 450 Mass. at 90, and the board did not show that failure to meet the stricter local requirements would have specific long-term, negative impacts (versus generalized, *potential* impacts) to the wetland resources or the stormwater system in general. The board thus did not meet its heavy burden of demonstrating that the *local* additional protections were necessary and outweighed the regional need for affordable housing and, therefore, "the strictly local interests of the town must yield." *Hanover*, 363 Mass. at 381, 384; *Transformations*, Decision No. 02-14, at *14 ("It is not enough to argue that the site is environmentally sensitive and contains unique wetland features as the Board has done here. It was the *Board's burden* to produce evidence to establish what unique features are present within the project area and to show that the project would have a definable negative impact on those

[39] It is unclear whether all of the stormwater basins must meet this two-foot requirement. As GVR has indicated, portions of the proposed stormwater system consist of constructed wetlands and *not* dry basins. There was testimony to indicate that constructed wetlands are permissible (in certain circumstances) under the DEP guidelines and the two-foot requirement may not apply to the constructed wetlands. In any event, the project must meet DEP requirements and these issues will be resolved before the Conservation Commission and DEP.

features."). Accordingly, the HAC's decision must be upheld. *Hanover*, 363 Mass. at 381, 384; *Princeton Development*, Decision No. 01-19, at *12-15.

Groundwater Discharge

The project proposal indicates that a wastewater treatment plant will be installed that will discharge approximately 65,000 gallons per day of treated wastewater. The proposed location of the plant is approximately two miles from the town's drinking water wells. In order for such plant to be installed, GVR must obtain a Groundwater Discharge Permit from DEP. As part of the permitting process, GVR must conduct additional studies of the potential impact of the discharged waters on the property, the town's landfill, and the potential of the water to migrate to the town wells.

The board argues that the treated wastewater *may* flow through the town's landfill, *may* mobilize iron, manganese, and other contaminants, and *may* cause additional impacts to water quality at the wells.[40] Such speculative impacts are not sufficient to meet the board's burden of demonstrating valid local concerns exist. Even if they were valid concerns, Mr. Killeen testified that initial testing revealed the area was suitable for wastewater discharge and there was no TCE contamination at the wells. The board's concerns also will be addressed in the permitting

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[40] The board also argues that its local bylaws are stricter and that the development will violate those provisions because the wastewater plume would constitute a prohibited contaminant (citing Bylaw § V-N(2)). While I disagree that the local bylaw is stricter, even if it was (and a waiver was deemed inappropriate), if GVR obtains a Groundwater Discharge Permit, it would not violate V-N(2). That section states the following:

> No discharge at any point into any public sewer, private sewerage disposal system, stream, water body, or into the ground, of any materials of such nature or temperature as can contaminate such water body or water supply, or cause emission of dangerous offensive elements in reaction thereto, shall be permitted except in accordance with applicable federal, state, and local health and water pollution control laws and regulations."

Here, GVR must obtain a permit in order to construct and operate the wastewater treatment facility and, therefore, would be operating in accordance with applicable state laws. The board has not cited to any federal laws that would apply (or would be violated by the project). Besides V-N(2), the board also does not cite to any other local laws or regulations that the facility would independently violate and, therefore, there presumably are none. Accordingly, any concerns with regards to the wastewater treatment facility will be reviewed and resolved in the state permitting process.

process. Substantial evidence was thus submitted to demonstrate that the local concerns do not outweigh the regional need for housing and, accordingly, the HAC's decision on this issue must be upheld. *Hanover*, 363 Mass. at 381-84.

Count II: Prayer for Declaratory Relief Pursuant to G.L. c. 231A, § 1

Count II of the Complaint seeks declaratory relief pursuant to G.L. c. 231A, s. 1, seeking a judgment that "GVR does not have clear title to portions of the Property sufficient to constitute site control [and] [t]he DEP lien constitutes an impediment to GVR's site control." Complaint at 12 (Feb. 11, 2009). In effect, the board's brief makes clear that this count simply reargues the issues from Count I. For example, the board notes that the HAC's decision "was based on errors of law, unwarranted by facts found on the record, arbitrary and capricious, an abuse of discretion and not otherwise in accordance with law. G.L. c. 30A, § 14." Memorandum in Support of Plaintiff's Motion for Judgment on the Pleadings as to Count II of the Complaint at 2 (July 20, 2009). The board likewise sets forth the same set of facts and standard of review for Count II regarding site control, which is a component of GVR's initial *prima facie* case before the HAC.[41] Accordingly, for the reasons set forth above, I find and rule that GVR has sufficiently demonstrated site control.

Conclusion

For the foregoing reasons, the board has not met its "heavy burden of showing that the agency decision of the HAC is not supported by substantial evidence." *Canton*, 76 Mass. App. Ct. at 472. Accordingly, the HAC's decision is upheld (with the possible exception noted above) and the board shall issue the comprehensive permit accordingly. Also for the foregoing reasons,

[41] Although the Complaint asserts that "[t]he DEP lien constitutes an impediment to GVR's site control," Complaint at 2, such argument was not addressed in the board's Memorandum in Support of Plaintiff's Motion for Judgment on the pleadings as to Count II of the Complaint and is therefore deemed waived. To the extent that this issue relates to the profitability and fundability of the project, this is addressed in the analysis above and does not detract from GVR's evidence demonstrating site control.

I find and rule that GVR demonstrated site control and financial feasibility of the project sufficient for purposes under G.L. c. 40B, § 20. The parties shall contact the court to schedule further events to address and resolve Count III of the Complaint so that final judgment may enter.

SO ORDERED.

By the Court (Long, J.)

Attest:

Deborah J. Patterson, Recorder

Dated: 24 June 2010

A TRUE COPY
ATTEST:
Deborah J. Patterson
RECORDER