COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss. Superior Court Department
Civil Action No. _____

MANCHESTER ESSEX CONSERVATION TRUST, INC. and a TEN PERSONS GROUP,

Plaintiffs,

v.

HOUSING APPEALS COMMITTEE, and SLV SCHOOL STREET, LLC

Defendants.

**COMPLAINT**

1. Plaintiffs file this Complaint under G.L. c. 30A, § 14 and c. 40B, § 22, for judicial review of administrative proceedings before Defendant Housing Appeals Committee ("HAC") related to a comprehensive permit issued to Defendant SLV School Street, LLC ("Developer") for a residential housing project located in Manchester, Massachusetts.

2. A copy of the HAC's final decision dated December 3, 2024 ("Decision") is attached as Exhibit A.

**Parties**

3. Plaintiff Manchester Essex Conservation Trust ("MECT") is a 501(c)(3) non-profit land trust corporation whose mission is to preserve natural resources, wildlife habitat, and open spaces. MECT accomplishes this mission through land acquisition, scientific research, public education and community engagement on environmental issues in our communities. Founded six decades ago, MECT has preserved some 1800 acres of land, most of which it owns and the rest under conservation restrictions.

4. MECT holds conservation restrictions for the Manchester-Essex Wilderness Conservation Area ("WCA"), a 1600 acre natural wilderness preserve that abuts the project site. As the steward of that conservation land, MECT monitors encroachments, maintains trails, conducts research and educational programs, all to protect the natural resources and wildlife habitat that abound throughout the WCA.

5. MECT sought to intervene in the HAC proceedings unsuccessfully, participated to the extent allowed as an Interested Person, and is aggrieved by the Decision.

6. MECT is a Massachusetts nonprofit corporation whose principal place of business is located at 65 Eastern Avenue, Unit B1A, Essex, MA 01929.

7. Plaintiff Ten Persons Group intervened in the HAC proceedings pursuant to G.L. c. 30A, § 10A, but intervention was granted "solely with regard to evidence and argument relating to alleged potential environmental damage caused by the project's impacts upon the vernal pools and the cold water fishery stream." (Ex. A, p. 2)

8. Plaintiff Ten Persons Group, whose names and addresses are attached as Exhibit B, is aggrieved by the Decision curtailing the scope of intervention and by the outcome of the Decision.

9. Defendant SLV School Street LLC is a Massachusetts limited liability company whose manager is Strategic Land Ventures, LLC, whose managers are Geoffrey Engler and KIG LJK MA Real Estate Investors LLC, whose managers are Justin D. Krebs and LJK Realty Advisors LLC, whose managers are Laura Jester Krebs and Patrick Cleary. Developer's principal place of business is located at 257 Hillside Avenue, Needham, MA 02494.

10. Defendant Housing Appeals Committee ("HAC") is a statutorily created state agency within the Executive Office of Housing and Livable Communities. HAC's principal

place of business is located at 100 Cambridge St, Suite 300, Boston, MA 02114. Under its enabling act, G.L. c. 23B, § 5A, HAC hears petitions for review of comprehensive permits under G.L. c. 40B, § 22 and conducts hearings in accordance with 760 CMR 56.

**Jurisdiction and Venue**

11. This Court has exclusive subject matter jurisdiction over this action by virtue of G.L. c. 30A, § 14.

12. Venue is proper in Essex County where the Plaintiffs reside and where the Property is located. Id.; G.L. c. 223, § 1.

**Site**

13. The site of the proposed project is a wooded 23 acre lot on School Street in Manchester, Massachusetts ("Site").

14. The proposed building would sit atop a hill that contains areas of rock ledge 75 feet above School Street.

15. The Site is surrounded by wetlands, including six certified vernal pools and a perennial stream called Sawmill Brook, which is a certified Coldwater Fish Resource.

16. The Site is located in the Limited Commercial District ("LCD") of Manchester where residential use is not permitted under the zoning bylaw.

17. The LCD accounts for less than eight percent of the land area in Manchester, just 238 acres where commercial development is allowed in the Town.

18. The Site accounts for nearly ten percent of all commercially available land in the Town of Manchester (23/238 acres).

**Project**

19. The proposed project would clear cut over seven acres of the Site for the

development of 136 units in a three-story building with underground parking ("Project").

20. The Project as proposed would require blasting of rock ledge, estimated at 3,850 truckloads, to construct the roadway, underground garage and building for the Project.

21. The Project as proposed would be accessed by a single driveway some 1800 feet long as steep as an eight percent grade.

22. Nearly half of the vernal pool watershed would be rendered impervious (60,056 sq. ft. / 127,968 sq. ft. = 47%), with 50% of the proposed sidewalk, 40% of the driveway and nearly 20% of the building itself constructed within the buffer zone of vernal pools.

23. Nineteen waivers would be required from the Manchester wetlands bylaw and regulations to construct the project as proposed.

24. No alternatives analysis, water budget or drift fence survey were submitted to support the requests for waivers granted by HAC to Developer.

**HAC Regulations**

25. HAC regulations state: "Any decision of the Committee may be reviewed in the superior court in accordance with the provisions of M.G.L. c. 30A." 760 CMR 56.07(5)(e).

26. HAC regulations state: "any person shall be allowed to intervene to the extent that he or she would have standing as a person aggrieved to appeal the grant of a special permit in accordance with M.G.L. c. 40A, § 17." 760 CMR 56.06(2)(b).

27. As a direct abutters, Plaintiffs are presumed by statute to have "standing as a person aggrieved" under c. 40A, § 17. Id.

28. HAC regulations impose the initial burden on Appellant to "establish a *prima facie* case by proving. . . 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).

**HAC Proceedings**

29. In 2021, Developer filed an application for a comprehensive permit with the Manchester Zoning Board of Appeals ("ZBA").

30. After sixteen public hearing sessions, in 2022 the ZBA denied the comprehensive permit for the Project, and Developer appealed to the HAC.

31. In March 2024, HAC conducted a three-day evidentiary hearing at which sixteen witnesses testified and 76 exhibits were entered into evidence.

32. Six months later, HAC issued a proposed decision that vacated the ZBA's decision to deny a comprehensive permit and "directed [the ZBA] to issue a comprehensive permit that conforms to the application".

33. Plaintiffs and the ZBA objected to HAC's proposed decision in a Joint Objection dated October 24, 2024. (Ex. A, p. 2)

34. HAC issued the final Decision on December 3, 2024.

**Errors of Law and Unlawful Procedure**

35. As outlined above, the HAC proceedings exceeded the statutory authority or jurisdiction of the agency, based upon errors of law and unlawful procedure, unsupported by substantial evidence and was arbitrary, capricious and an abuse of discretion, all in violation of G. L. c. 30A, § 14(7)(b)(c)(d)(e) and (g).

36. Among other errors, HAC improperly denied MECT's motion to intervene, and limited the intervention of the Ten Persons Group, both of whom qualified for full intervention under the statutory and regulatory standards, G.L. c. 30, § 10A; 760 CMR 56.06(2)(b). HAC curtailed Plaintiffs' role to certain limited issues as stated in the ruling. A proper application of

the Chapter 40B regulations would have allowed Plaintiffs to show Manchester's local bylaws and regulations would protect vulnerable adjacent conservation land from adverse effects caused by the Project. Because Plaintiffs qualified for full intervention in the HAC proceedings, they should have been admitted as full parties and their positions fully considered in the Decision.

37. Among other errors, HAC improperly disregarded record evidence from Plaintiffs in determining whether Developer met its burden to establish its *prima facie* case: "Their testimony is not relevant. We consider the developer's prima facie case for the purposes of this appeal based solely on evidence supplied by the developer." (Ex. A, p. 9) Chapter 30A and the regulation that sets out the Appellant's burden, required HAC to consider "all evidence", G.L. c. 30A, § 11(4), including evidence from other parties, not just the Developer.

38. Among other errors, HAC improperly applied a new agency rule retroactively. The ZBA permit decision was issued in August 2022, yet HAC vacated that decision based on a case it decided ten months later in June 2023. (Ex. A, pp. 4, 5, 6, 10, 11, 34, 40, 41, citing *104 Stony Brook, LLC v. Weston* (HAC June 22, 2023)). Absent clear legislative authority, new agency rules cannot be applied retroactively without violating equitable principles. Under the statutory rulemaking process under Chapter 30A, a new rule cannot be applied before the date of publication and after a public hearing, unless it qualifies as an "emergency regulation". G.L. c. 30A, § 6. The HAC's ruling that post-dates the ZBA's permit decision was not an "emergency regulation" and should not have been applied retroactively.

39. Among other errors, HAC misconstrued the Appellant's burden as a "minimum standard" "established with a minimum of evidence" (Ex. A, pp. 5 & 6) to prove 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). That regulation puts the burden on Appellant to demonstrate compliance, but HAC did not hold Appellant to that standard. Instead of considering all the evidence to adjudicate whether the project complies, HAC excused Appellant of its obligation to prove the project complies with applicable regulatory standards by mischaracterizing the burden as minimal.

40. Among other errors, HAC improperly interpreted Developer's prima facie burden as "not a requirement to prove compliance with every state and federal requirement that may be applicable". (Ex. A, p. 7 & n. 3) Chapter 40B and its regulations require Developer to prove that the project complies with all applicable state and federal laws, regulations and standards, not just some of them. HAC misconstrued the language of the regulation and did not make findings that the project complies with all applicable laws, regulations and standards.

41. Among other errors, HAC erred by crediting the testimony of Jason Cleary, a former fire chief, who was laboring under a conflict of interest when he testified against the Town, in violation of the Massachusetts Conflict of Interest law, G.L. c. 268A. HAC improperly credited Mr. Cleary's testimony: "Cleary was the Authority Having Jurisdiction (AHJ) under the state fire code." (Ex. A, pp. 10, 22 n. 11) But the "AHJ" as defined under the Massachusetts Comprehensive Fire Safety Code cannot be a former fire chief: "Authority Having Jurisdiction shall be the Head of the Fire Department or the State Fire Marshal and their designees, as defined in M.G.L. c.148." 527 CMR 1.00:3.2.2. Mr. Cleary was not employed by the Weston Fire Department when he testified, and resides in Maine beyond the subpoena power of the HAC or any Court of law. Mr. Cleary's improper testimony was relied on by HAC on a dozen pages throughout the Decision, including on the critical need for a second means of access and egress to the Site. (Ex. A, pp. 3, 5, 13, 14, 22-29)

42. Among other errors, HAC failed to properly consider Manchester's local bylaws and regulations, notably regarding stormwater and wetlands. The ZBA declined to waive those local protections, but the HAC compelled them to be waived in the Decision. The Manchester stormwater and wetland protection bylaws, enacted under the Town's Home Rule authority, are independent of and stricter than state standards. In order to even consider any waiver, the local wetlands bylaw requires an alternatives analysis that was never submitted to the ZBA or HAC. Without an evaluation of the consequences of waiving Manchester's local bylaws, HAC acted unreasonably in waiving Manchester's stormwater and wetlands bylaws and regulations.

43. Among other errors, HAC refused to consider state laws and regulations enacted to protect the environment, such as the Wetlands Protection Act, 310 CMR 5, Surface Water Quality Standards, 314 CMR 15.00, and Coldwater Fish Resources: "None of these arguments pertaining to alleged noncompliance with the state WPA, 310 CMR 5, the Massachusetts Stormwater Handbook and state Surface Water Quality Standards (314 CMR 15.00) demonstrate the existence of local concerns here." "Consideration of those state standards is outside the purview of our local concerns analysis". (Ex. A pp. 40, 43 n. 32) HAC erred by ignoring the performance standards of these state laws and regulations on the proposed Project merely because Manchester has not adopted similar local protections.

44. Among other errors, HAC effectively issued a use variance for residential use on a lot in the LCD zoned exclusively for commercial use. Use variance are forbidden by state law: "Except where local ordinances or by-laws shall expressly permit variances for use, no variance may authorize a use or activity not otherwise permitted in the district in which the land or structure is located". G.L. c. 40A, § 10. HAC lacks the authority to command a use variance in violation of state law.

45. Among other errors, HAC improperly directed the ZBA to issue a comprehensive permit unconditionally without remanding the matter to the ZBA. HAC is not the permit granting authority under Chapter 40B, only a ZBA has that authority. Instead of compelling the issuance of its own permit, HAC should have vacated the ZBA's permit decision, remanded the matter, so the ZBA would have the opportunity to issue a comprehensive permit consistent with the HAC Decision.

46. These errors of law and unlawful procedure were called to the attention of HAC in written Objections to the proposed decision dated October 24, 2024, but not corrected in the final Decision.

**Count I – G.L. c. 30A, § 14**

47. Plaintiffs restate the allegations of Paragraphs 1- 46, above.

48. Among other errors, the Defendants exceeded the statutory authority and jurisdiction of the agency, based on errors of law and unlawful procedure, unsupported by substantial evidence, and constitutes an arbitrary, capricious abuse of discretion that is not in accordance with law.

49. The HAC's Decision constitutes a final decision of the agency, and no other administrative remedy remains to be exhausted.

WHEREFORE, Plaintiffs request that this Court:

1. Annul the HAC Decision;

2. Determine that the HAC proceedings exceeded its authority and jurisdiction, were based upon errors of law, unlawful procedure, and unsupported by substantial evidence, were arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;

3. Determine that MECT and the Ten Persons Group were entitled to intervene in the HAC proceedings as full parties;

4. Determine that the unlawful HAC proceedings render the comprehensive permit approved and adopted during those proceedings to be a legal nullity and void;

5. Determine that irregularities in procedure before the agency require testimony thereon to be taken in the Court;

6. Award Plaintiffs costs and fees in this action; and

7. Grant such other relief as it deems just and proper.

Respectfully submitted for Plaintiffs
By their attorneys,

*/s/ Dennis A. Murphy*

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Dated: January 2, 2025

# Exhibit A

# C O M M O N W E A L T H  O F  M A S S A C H U S E T T S

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

**SLV SCHOOL STREET, LLC**

v.

**MANCHESTER BY-THE-SEA ZONING BOARD OF APPEALS**

No. 2022-14

## DECISION

December 3, 2024

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Geoffrey Engler
David C. Formato, P.E.
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Kenneth Milender
Carlton Quinn, P.E.
Daniel Riggs

**Board's Witnesses**
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John Chessia, P.E.
Patrick C. Garner
Scott Horsley
Sean P. Reardon, P.E.

**Ten Persons Group Witnesses**
Garlan Morse
Lynn Atkinson

**C O M M O N W E A L T H  O F  M A S S A C H U S E T T S**

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

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|---|---|---|
| SLV SCHOOL STREET, LLC,<br><br>Appellant,<br><br>v.<br><br>MANCHESTER-BY-THE-SEA ZONING BOARD OF APPEALS,<br><br>Appellee. | ) | No. 2022-14 |

**DECISION**

## I. INTRODUCTION AND PROCEDURAL BACKGROUND

This is an appeal, pursuant to G.L. c. 40B, §§ 20-23 and 760 CMR 56.00, *et seq*, brought by SLV School Street, LLC (SLV), from a decision of the Manchester-By-The-Sea (Manchester) Zoning Board of Appeals (Board) denying a comprehensive permit application with respect to property located in Manchester.

On September 27, 2021, SLV submitted an application to the Board for a comprehensive permit pursuant to G.L. c. 40B, §§ 20-23, for a 136-unit rental development on an undeveloped, 23-acre parcel located at 0 School Street, Manchester, Massachusetts. Twenty-five percent of the units (34 units) would be reserved for lease to low or moderate income households. Initial Pleading, ¶¶ 3, 9, 23.

On October 26, 2021, the Board opened a public hearing on SLV's application. The hearing continued for 15 additional sessions and was closed on July 28, 2022. The Board voted to deny the comprehensive permit on August 16, 2022, and filed its decision dated August 25, 2022, with the Town clerk on August 30, 2022. Exh. 1; Initial Pleading, ¶ 23; Superseding Pre-

Hearing Order, § II, ¶ 6.

On September 15, 2022, SLV filed an appeal with the Housing Appeals Committee seeking reversal of the Board's denial decision and issuance of a comprehensive permit. The Committee held an initial conference of counsel on October 4, 2022, after which motions to intervene were filed. The Committee granted intervention to a ten persons group (Group) that moved to intervene pursuant to G.L. c. 30A, § 10A; however, intervention was granted "solely with regard to evidence and argument relating to alleged potential environmental damage caused by the project's impacts upon the vernal pools and the cold water fishery stream." Ruling on Motion to Intervene, p. 11. The Committee also denied the motion to intervene of the Manchester Essex Community Trust (MECT) but granted it leave to participate as an interested person pursuant to 760 CMR 56.06(2)(c). Thereafter, pursuant to 760 CMR 56.06(7)(d)3, the presiding officer issued a pre-hearing order on October 6, 2023, and a superseding pre-hearing order on October 13, 2023, which formalized matters agreed to by the parties.

On November 8, 2023, the presiding officer conducted a site visit. In preparation for hearing, the parties submitted pre-filed direct and rebuttal testimony of 16 witnesses. The Group filed a motion to strike the pre-filed testimony of Jason Cleary, former fire chief of the Town, joined by the Board, on the ground that the Board and Group were not notified that the developer would contact an identified adverse witness directly. The presiding officer denied the motion. The Group also moved in the alternative to strike the testimony of SLV's witness, Orestes Brown, or to amend the pre-hearing order to add witnesses. The presiding officer granted the request to add witnesses and denied the motion to strike.

The presiding officer held three days of hearing on March 3-5, 2024, to permit cross-examination of witnesses. Seventy-six (76) exhibits were entered into evidence. Following the presentation of evidence, the parties submitted post-hearing briefs and reply briefs. The Group requested the issuance of a proposed decision. The Group also requested oral argument before the full Committee. A proposed decision was issued on October 10, 2024. The Board and the Group filed a Joint Objection to the Proposed Decision on October 24, 2024. We deny the Group's request for oral argument before the full Committee.

## II. FACTUAL BACKGROUND

SLV proposes to construct multifamily rental housing to be located on a wooded, 23-acre

lot including a hill, rock ledge and wetlands, that slopes upward off the west side of School Street, the adjacent existing road. The development will be at the top of a knoll at an elevation of 75 feet higher than School Street. Exhs. 56, ¶¶ 6, 7, 16; 68, ¶ 3; SLV brief, p. 9; Board brief, p. 3. The project consists of a single building with 136 rental units, of which 34 will be affordable units. The units will be in three stories above ground with a parking garage below ground. Exhs. 1, p. 3; 5A; 7. The property is in the Limited Commercial District (LCD) pursuant to the Town's zoning bylaw and within the Ground and Surface Water Resource Overlay Protection Districts. Exhs. 1, p. 3; 2, pp. 82-83, 132; 5A; 6. The site's topography has a "significant slope that requires substantial regrading in order to accommodate the building construction and access driveway." Exh. 56, ¶ 16. According to SLV, six state-certified vernal pools lie within or abutting the property, which also sits abutting the Sawmill Brook, a certified cold water fishery. Exhs. 55, ¶ 7; 69, ¶ 16; 71, ¶ 15; *see* SLV brief, p. 4; Board brief, p. 3.

## III. STANDARD OF REVIEW AND BURDENS OF PROOF

When the Board has denied a comprehensive permit, the ultimate question before the Committee is whether the decision of the Board is consistent with local needs. G.L. c. 40B, §§ 20, 22. The comprehensive permit regulations have set out the different requirements and burdens assigned to the developer and the board. 760 CMR 56.07(2) and (3). Under the comprehensive permit regulations, the developer:

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

760 CMR 56.07(2)(a)2.[1] The comprehensive permit regulations, 760 CMR 56.07(2)(a)2 and (b)2, do not explicitly specify that the developer's burden to establish a *prima facie* case is a

[1] Alternatively, a developer may prove that local requirements and regulations have not been applied as equally as possible to subsidized and unsubsidized housing. 760 CMR 56.07(2)(a)4; G.L. c. 40B, § 20. General Laws Chapter 40B, § 20, provides that local rules and regulations cannot be deemed "consistent with local needs" unless they are "applied as equally as possible to both subsidized and unsubsidized housing." *See* 760 CMR 56.07(2)(a)4. SLV carries the burden of proving such unequal treatment. *Id.* SLV did not raise unequal treatment in its brief or reply brief. Therefore, it has waived this issue. The Board, on the other hand, correctly notes that any comparison to the commercial biolab building in the

prerequisite for the Board's obligation to demonstrate local concerns, although Committee decisions have generally stated that if the developer sustains its burden, the burden shifts to the Board to prove a valid local concern that supports the denial. *See, e.g., Hanover R.S. Ltd. P'ship v. Andover*, No. 2012-04, slip op. at 5 (Mass. Housing Appeals Comm. Feb 10, 2014); *Sugarbush Meadow, LLC v. Sunderland*, No. 2008-02, slip op. at 5 (Mass. Housing Appeals Comm. June 21, 2010), *aff'd Zoning Bd. of Appeals of Sunderland v. Sugarbush Meadow, LLC*, 464 Mass. 166 (2013).

The Board's burden is to prove first, that there is a valid health, safety, environmental, or other local concern that supports the denial, and second, that the concern outweighs the regional need for housing. 760 CMR 56.07(2)(b)2. When an intervener is allowed to participate, it must also demonstrate a valid local concern that outweighs the regional need for affordable housing. "The board's power to disapprove a comprehensive permit… is limited to the scope of the concern of the various local boards in whose stead the local zoning board acts." *Holliston v. Housing Appeals Comm.*, 80 Mass. App. Ct. 406, 417-418 (2011), *F.A.R den.,* 460 Mass. 1116 (2011). It is therefore incumbent on the Board and Interveners to identify a local interest protected by a local requirement or regulation that is more restrictive than state and federal requirements, and to demonstrate that safeguards provided by the local requirement with respect to that local interest afford greater protect against the asserted harms of the project than those afforded by state or federal regulation. *See id.* at 420; *104 Stony Brook, LLC v. Weston*, No. 2017-14, slip op. at 38 (Mass. Housing Appeals Comm. June 22, 2023), citing *Holliston, supra,* 80 Mass. App. Ct. 406, 420; *Herring Brook Meadow, LLC v. Scituate*, No. 2007-15, slip op at 25 (Mass. Housing Appeals Comm. May 26, 2010), *aff'd* No. 2012-P-1681 (Mass. App. Ct. Jan. 31, 2014). Even if a more restrictive local requirement or regulation exists, the Board and Interveners must show that the stricter requirement is necessary to protect against specified harms that could not be protected by the state and federal schemes. *See Weston, supra*, No. 2017-14, slip op. at 17, citing *Holliston*, *supra*, 80 Mass. App. Ct., 405, 417, 420; 760 CMR 56.02: *Local Requirements and Regulations*. Although the Board and Interveners argue the Town's

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LCD, the only comparison made in the developer's case, is not a proper consideration under this standard, since it is not a comparison between subsidized and unsubsidized housing. Board brief, p. 28. Accordingly, we find SLV has not demonstrated unequal treatment between subsidized and unsubsidized housing in this matter.

local wetland bylaw and regulations establish stricter standards than state requirements, as discussed below, they failed to prove harm specifically relating to requested waivers of local requirements that protect the asserted local concerns. More is required than simply noting a particular local bylaw or regulation. *See Weston*, *supra*, slip op. at 38-39, citing *Holliston*, *supra*, 80 Mass. App. Ct. 406, 419 ("where the DEP is charged with providing for the protection of health, safety, public welfare, and the environment … the board must be able to demonstrate that its local concerns will not be met by the State standards enforced by the DEP"). Moreover, this burden of proof remains on the Board despite language in local bylaws or regulations imposing a burden of proof upon a developer. *See* discussion *infra,* in §§ V.B.2 and 3.

## IV. DEVELOPER'S PRIMA FACIE CASE

### A. Application of Prima Facie Case

We have recently discussed in depth how we apply the rule concerning the developer's establishment of a prima facie case under 760 CMR 56.07(2)(a)2. *Weston*, *supra*, No. 2017-14, slip op. at 12-16. In *Weston,* we reviewed our past decisions and discussed our consistent rulings that developers need make only a minimal showing for the prima facie case in the hearing before the Committee under the comprehensive permit regulations. *See id.,* slip op at 12: "[A] *prima facie* case may be established with a minimum of evidence." *100 Burrill Street, LLC v. Swampscott*, No. 2005-21, slip op. at 7 (Mass. Housing Appeals Comm. June 9, 2008) (prima facie case established where expert testified regarding design to fit diverse character of neighborhood), quoting *Canton Housing Auth. v. Canton*, No. 1991-12, slip op. at 8 (Mass. Housing Appeals Comm. July 28, 1993). "For example, 'it may suffice for the developer to simply introduce professionally drawn plans and specifications.'" *Sunderland, supra,* No. 2008-02, slip op. at 5 n.4, quoting *Tetiquet River Village, Inc. v. Raynham*, No. 1988-31, slip. op. 9 (Mass. Housing Appeals Comm. Mar. 20, 1991). *See Eisai, Inc. v. Housing Appeals Comm.,* 89 Mass. App. Ct. 604, 610 (2016) (regulatory scheme governing applications for comprehensive permits requires only preliminary plans showing that proposal conforms to generally recognized standards) (citation omitted). "[E]xpert testimony directly addressing the matter in issue is more than sufficient to establish the developer's *prima facie* case." *Sunderland, supra,* No. 2008-02, slip op. at 9; *Canton Property Holding, LLC v. Canton*, No. 2003-17, slip op. at 22 (Mass Housing Appeals Comm. Sept. 20, 2005) (expert testimony that design will comply with state

stormwater management standards is sufficient to establish prima facie case). *See also Oxford Housing Auth. v. Oxford*, No. 1990-12, slip op. at 5 (Mass. Housing Appeals Comm. Nov. 18, 1991) (plans must be sufficient to permit Committee to evaluate proposal with regard to aspects that are in dispute and to permit full cross-examination); *Watertown Housing Auth. v. Watertown*, No. 1983-08, slip op. at 5, 10-12 (Mass. Housing Appeals Comm. June 5, 1984) ("requirements are to be applied in a common sense, rather than an overly technical manner in context of establishing prima facie case"). And the Appeals Court has confirmed that "[i]t has long been held that it is unreasonable for a board to withhold approval of an application for a comprehensive permit when it could condition approval on the tendering of a suitable plan that would comply with State standards." *Holliston,* 80 Mass. App. Ct. 406, 416, citing *Board of Appeals of Hanover v. Housing Appeals Comm.,* 363 Mass. 339, 381 (1973). *Accord River Marsh, LLC v. Pembroke,* No. 2019-04, slip op. at 6-7 (Mass. Housing Appeals Comm. Apr. 11, 2024).

This prima facie rule is in place not as a "technical requirement to be fulfilled by the developer. [Rather,] [t]he prima facie requirement exists both so that this Committee will have a clear idea of the proposal before it, and so that the Board has a fair opportunity to challenge it." *Weston, supra,* No. 2017-14, slip op. at 13; *Tetiquet River, supra,* No. 1988-31, slip op. at 11. *See also Transformations, Inc. v. Townsend*, No. 2002-12, slip op. at 10-11 (Mass. Housing Appeals Comm. Jan. 26, 2004) ("it is not necessary for an applicant to obtain permits or acquire final state or federal approval in order for an applicant to be granted a comprehensive permit or to establish its prima facie case in the case of a denial"); *Oxford Housing Auth. v. Oxford*, *supra,* No. 1990-12, slip op. at 4-5 ("since design work involves substantial costs for the developer, it is unreasonable to require completed plans before the comprehensive permit is issued"). In *Tetiquet,* the only case in which the Committee has ruled that a developer had failed to meet the requirement, the Committee noted that the developer had failed to meet a very low bar, stating "it may suffice for the developer to simply introduce professionally drawn plans and specifications." *Id.* at 9.

This minimum standard is important, because in proceedings before the Committee and under 760 CMR 56.07(2)(a)2, a "prima facie case" is a special term of art—it is not intended to require a developer to provide sufficient evidence in detail regarding each aspect of every potentially applicable state and federal requirement to demonstrate it could meet a burden of

ultimate persuasion of compliance with all state and federal requirements, as would occur if it bore the ultimate burden of proof of the issue in this appeal. Here, the matters on which § 56.07(2)(a)2 states the developer may make the preliminary prima facie showing, general compliance with state or federal requirements or generally accepted standards, are not ones on which it has the ultimate burden of proof before the Committee, since the Committee has neither the responsibility nor the authority to finally determine such compliance. *Weston, supra,* No. 2017-14, slip op. at 13. *See also Hanover,* 363 Mass. 339, 379;[2] *Board of Appeals of North Andover v. Housing Appeals Comm.,* 4 Mass. App. Ct. 676, 680 (1976) (stating "…nothing in [G.L. c. 40B, §§ 20-23] or in [*Hanover,* 363 Mass. 339] … suggests that the Housing Appeals Committee has been empowered with authority to override or ignore laws passed by the Legislature or regulations validly promulgated by the Commonwealth's various boards, departments, agencies or commissions." The prima facie case is a burden of production: to introduce "evidence sufficient to form a reasonable basis for a [decision] in that party's favor." *Tiffany Hill, Inc. v. Norwell*, No. 2004-15, slip op. at 6 (Mass. Housing Appeals Comm. Sept. 18, 2007) (internal citations omitted). Thus, "[p]rima facie evidence, in the absence of contradictory evidence, requires a finding that the evidence is true… even in the presence of contradictory evidence, however, the prima facie evidence is sufficient to sustain the proposition to which it is applicable." *Id*.

This burden of production must be consistent with the language of the 760 CMR 56.07(2)(a)2, which describes the developer's case as proving compliance with federal *or* state standards *or* generally accepted standards. The regulation's use of the disjunctive "or," makes it clear this is not a requirement to prove compliance with every state and federal requirement that may be applicable, particularly when viewed in the context of this entire provision.[3] *See Moronta*

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

[3] The requirement of 760 CMR 56.07(2)(a)2 is distinguished in three ways from the burdens of persuasion imposed upon the parties in other subsections of 760 CMR 56.07(2): 1) by using the term prima facie case, it establishes a requirement of production, not persuasion; 2) by use of the disjunctive to separate the potential subjects on which to present a prima facie case, it precludes a requirement to

*v. Nationstar Mortg., LLC*, 476 Mass. 1013, 1014 (2016) (use of word "or" to separate prongs of statute indicates prongs are alternatives and either one would be sufficient on its own and it is not necessary to establish both), citing *Eastern Massachusetts St. Ry. Co. v. Massachusetts Bay Transp. Auth.,* 350 Mass. 340, 343 (1966) (word "or" is given disjunctive meaning "unless the context and the main purpose of all the words demand otherwise").

Our longstanding interpretation that the regulation requires a minimum showing serves the purpose of having the developer provide sufficient information to allow the Board to make its local concerns case. *Tetiquet River, supra,* No. 1988-31, slip op. at 11. "[E]ven where plans were incomplete, a developer that proposed to modify its plans to comply with State and Federal statutes or regulations had established a prima facie case." *Zoning Bd. of Appeals of Woburn v. Housing Appeals Comm.,* 92 Mass. App. Ct. 1115 (2017) (Rule 1:28 decision), citing *Holliston,* 80 Mass. App. Ct. 406, 416. In *Woburn,* the Appeals Court ruled that "where the developer here plans to comply with all applicable noise regulations, [the Appeals Court] similarly conclude[s] the HAC did not err in finding that the developer had established a prima facie case." *Woburn,* 92 Mass. App. Ct. 1115. *See Holliston,* 80 Mass. App. Ct., 406, 415-416 (to extent preliminary plans submitted are lacking or in fact admittedly do not comply with current State regulations or standards, developer's proposal does not end with plans when the developer proposes to make all modifications necessary to achieve compliance with state regulations).

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

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present evidence on all alternatives; and 3) unlike the other burdens which use the mandatory "shall have the burden of proving," this provision begins by stating, "[i]n the case of a denial, the Applicant *may* establish a *prima facie case*…." (Emphasis added).

attaching condition to address it). Such a condition may include a requirement that approval of a comprehensive permit is subject to compliance with applicable federal and state requirements.

In light of these precedents, we examine the testimony and exhibits submitted by the developer for our review of the prima facie case. *See Tiffany Hill, supra,* No. 2004-15, slip op. at 3, 6 (presiding officer denied motion for directed decision submitted on developer's pre-filed testimony; Committee ruled that evidence at hearing did not affect that ruling). Here, both the Board and Interveners undertook to supply evidence from their witnesses regarding the developer's prima facie case, opining about both the evidence submitted by the developer and about the state and federal regulations they argue are relevant to this issue. Their testimony is not relevant. We consider the developer's prima facie case for the purposes of this appeal based solely on evidence supplied by the developer. As we stated above, the Committee has no authority to determine whether a project will comply with state or federal requirements; nor may we waive any requirement of state or federal law. Any project we approve must still comply with all applicable federal and state requirements. *See, e.g., Tiffany Hill, supra,* No. 2004-15, slip op. at 11.

As discussed below, our review of the developer's evidence demonstrates that the developer has provided detailed plans describing the project, including emergency access, driveway safety, relationship to vernal pools and a coldwater fishery, stormwater, wastewater, and matters related to local planning and open space, providing evidence of future compliance with applicable state and federal law. That evidence is sufficient to establish its prima facie case.

In accordance with 760 CMR 56.07(2)(a)2, SLV was required to prove "with respect to only those aspects of the Project that are specifically identified in the Pre-Hearing Order as being 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." Superseding Pre-Hearing Order, § IV, ¶ 3. In support of its prima facie case, SLV submitted testimony of 10 witnesses.

As discussed in the sections below regarding the specific local concerns asserted by the Board and the Group, with respect to each of those concerns, the developer satisfied its obligation under 760 CMR 56.07(2)(a)2. The Pre-Hearing Order set out the issues in dispute in

this appeal for which SLV was required to make a prima facie case.[4] Superseding Pre-Hearing Order, § IV, ¶ 3. For the local concerns asserted by the Board and the Group, SLV presented evidence to comply with its prima facie case. The Board's argument that SLV's evidence failed to make a prima facie case because its and the Interveners' evidence rebutted SLV's evidence fails for the reasons we discussed in *Weston, supra,* No. 2017-14, slip op. at 14. The evidence presented by SLV is sufficient to meet the requirements for the prima facie case as established by the comprehensive permit regulation and Committee decisions.

**B. Discussion**

**1. Emergency Access and Snow Management**

In support of its prima facie case, SLV presented testimony of its multiple experts and introduced into evidence highly developed site plans and professionally prepared memoranda that state the provisions for emergency access meet accepted standards and state and federal codes. SLV brief, p. 15. SLV presented testimony and evidence of its two civil engineers, Carlton Quinn[5] and David Formato,[6] its traffic engineer Jeffrey Dirk,[7] and Jason Cleary, the Town's fire chief at the time of the hearing before the Board, who concurred that the project complied with the state fire code. Exh. 56, ¶ 19. Mr. Dirk noted that as the fire chief, Mr. Cleary was the Authority Having Jurisdiction (AHJ) under the state fire code. Exh. 59, ¶¶ 18-21; SLV

[4] The Superseding Pre-Hearing Order, drafted by the parties and issued by the presiding officer, identified the following as the areas for which the developer was responsible for making a prima facie case: emergency access; snow removal; vernal pool, wetlands and other relevant environmental impacts; adequacy of stormwater management and drainage arrangements; adequacy of wastewater management arrangements; consistency with Master Plan; impacts to cold water fisheries; and pedestrian/sidewalk issues. Superseding Pre-Hearing Order, § IV, ¶ 3 (Appellant/Applicant's Case).

[5] Mr. Quinn is a registered professional civil engineer experienced in coordinating multi-disciplinary reviews of large multi-family projects who performed civil engineering services and prepared various site plans on behalf of SLV. Exh. 56, ¶¶ 1, 4, 5, 10-11; SLV brief, p. 9.

[6] Mr. Formato is a registered professional civil engineer, Title V inspector and soil evaluator who has over 30 years of experience in the field of environmental science and over 25 years of experience in the design and permitting of municipal and private wastewater systems. Exh. 65, ¶ 2. Mr. Formato was retained by SLV to assist with assessing the viability of both onsite sewer and water as well as determining the feasibility of connecting to municipal systems. *Id.*, ¶ 3.

[7] Mr. Dirk is a registered professional engineer, as well as a certified Professional Traffic Operations Engineer, who has substantial experience reviewing and peer reviewing large multi-family housing projects, including projects proposed under c. 40B. SLV brief, p. 11; Exh. 59, ¶¶ 1, 3.

brief, p. 11. Additionally, the Board's traffic engineer, Environmental Partners Group (EPG), concurred that the project met minimum guidelines provided in the Massachusetts Department of Transportation's [DOT] Project Development and Design Guide. Exh. 30, p. 3.

Mr. Cleary, the Town's fire chief from 2020 to 2023, was responsible for reviewing all significant development projects in Manchester for compliance with the National Fire Protection Association (NFPA) fire codes adopted in Massachusetts. Exh. 58, ¶¶ 1, 3; SLV brief, pp. 12-13. He testified that the design met all codes and provided adequate measures for safety, and he concluded "that the Project driveway meets fire code standards for width and grade as well as for its ability to allow fire trucks to turn around." Exhs. 15; 56, ¶ 19.

Mr. Quinn noted that snow removal was an important aspect of the planning of this development, and sheet C-106 of the plans depicts areas of snow storage. Exh. 56, ¶ 24; SLV brief, p. 21. He submitted a memorandum to the Town planner describing the snow storage plan and stating that is an adequate size to accommodate greater than 5 feet of snowfall on the areas requiring snow removal. Exh. 10. SLV asserts that its plans and measures incorporated in Exhibit 10 clearly and specifically show capacity for snow removal and SLV's commitment to providing snow removal services is more than sufficient to show that the current planned snow removal capacity and efforts meet applicable standards, citing 760 CMR 56.07(2)(a)2. SLV brief, pp. 21-22. Mr. Quinn further stated:

> In my opinion as a registered professional engineer, and in keeping with the scope of my services, as described above, the Project complies with all State requirements and best management practices for issues pertaining to general civil engineering, stormwater management, sewer and water infrastructure, wetlands compliance and emergency access.

Exh. 56, ¶ 44. He also testified that the submitted plans contain pedestrian access that complies with all ADA requirements. *Id.*, ¶ 23.

Mr. Dirk testified on cross-examination that although the length of the driveway is longer than is typically seen as accepted practice, Tr. II, 127, "with the exception of the length of the roadway over which the Fire Chief has jurisdiction, the roadway meets all engineering standards to provide access to that project site." *Id.* at 126. He deferred to the fire chief to consider whether the driveway length would negatively impact first responders. *Id.* at 127. As discussed above, the fire chief determined the driveway is sufficient for emergency access and meets the proper width, grade, length and vehicle turnaround, as required by the fire code.

SLV argues that while the preliminary designs required at this stage need not be a final determination of every aspect of the project, they have been shown to generally meet applicable state, federal, and accepted industry standards for this type of development. SLV brief, p. 69.

We conclude the evidence submitted by SLV is sufficient to establish its prima facie case with respect to emergency access, snow removal, and driveway safety. *See Weston*, *supra*, No. 2017-14, slip op. at 12-13, and cases cited.

**2. Environmental Concerns**

**a) Stormwater**

In testifying that the project will comply with state requirements, Mr. Quinn referred to the stormwater management guidelines promulgated by the Massachusetts Department of Environmental Protection (DEP). Exh. 56, ¶ 25; SLV brief, p. 48. SLV's stormwater management systems include deep sump catch basis, sediment removal structures, subsurface infiltration systems, and bioretention systems. Exh. 56, ¶ 26; SLV brief, p. 48. Mr. Quinn testified that the systems were extensively reviewed by Beals and Thomas Inc. (B&T), the Board's peer review consultants, and, with the exception of minor issues, the reports of B&T (Exhibits 31 and 32) approve the design of the stormwater systems as complying with the DEP guidelines. Exh. 56, ¶ 27; SLV brief, p. 48.

**b) Vernal pools**

SLV retained Scott Goddard, a certified professional wetlands scientist with 25 years of experience who has reviewed wetlands issues for projects in more than 100 municipalities. Exh. 55, ¶¶ 1-2; SLV brief, p. 23. Mr. Goddard delineated the wetlands on the property and assisted SLV in obtaining an approved Order of Resource Area Delineation (ORAD) from the Town's conservation commission. Exh. 55, ¶ 3; SLV brief, p. 23. He testified that his office was primarily responsible for the delineation of wetlands, analysis of regulatory compliance with the Wetlands Protection Act (WPA) and the Town's wetlands bylaw, wildlife habitat analysis, and vernal pool study. Exh. 55, ¶ 5.

Mr. Goddard and his associates worked on wetlands issues with the Board's peer review consultants, B&T, focusing in part on vernal pools. Exhs. 32; 55, ¶ 6; 62, ¶ 6; SLV brief, p. 23. According to Mr. Goddard, the proposed project does not contemplate any work within the vernal habitat, or 100-foot buffer thereto as defined under the WPA. Exhs. 55, ¶ 8; 55B; SLV brief, p. 24. During the hearing before the Board, Mr. Goddard prepared and presented a vernal

pool study, which was presented for review by B&T and the Board; B&T performed site inspections to confirm the study's findings and methodology. Exh. 55, ¶ 9; 12; SLV brief, p. 24.

Despite the increased local buffer area surrounding vernal pools, the local bylaw does not have specific performance standards and, as such, the chair of the Town's conservation commission indicated the Massachusetts Water Quality Standards under 314 CMR 15.00 would have the most applicable standards. Exhs. 46; 55, ¶ 11; SLV brief, p. 25. Accordingly, SLV analyzed the issue through the lens of stormwater management, and as described below, Mr. Quinn concluded the project complies with the stormwater management standards applicable for discharges to Outstanding Resource Waters. Exh. 55, ¶ 11; SLV brief, p. 25.

With respect to stormwater, as noted by B&T, it was important to determine if the hydrologic regime of the vernal pools would be affected by the infiltration and lateral transmission of stormwater. Exhs. 32; 55, ¶ 12. To this end, as summarized by Mr. Quinn, the project design uses impermeable membranes to prevent lateral movement of storm water to avoid chemical or thermal impacts to the vernal pools. Exhs. 55, ¶ 12; 56, ¶ 28; SLV brief, p. 25.

Based on the testimony of two experts, Mr. Goddard and Mr. Quinn, highly developed site plans, a professional vernal pool and wildlife study, and a corroborating report from the Board's expert peer reviewer, B&T, all demonstrating that the project complies with state requirements and accepted standards for the protection of vernal pool function, we find the developer has met its prima facie case.

**c) Coldwater Fishery**

SLV notes that the regulation of coldwater fisheries arises primarily under State law and is not directly addressed in the Town's wetland bylaw. Nevertheless, SLV asserts it presented comprehensive direct testimony from Mr. Goddard and Mr. Quinn on the subject, demonstrating the project complies or will comply with the applicable state laws, regulations and guidance relating to coldwater fisheries. Exhs. 55, ¶¶ 11, 18-24; 56, ¶¶ 32-35; SLV brief, p. 45; SLV reply, p. 13.

With respect to the design of the project's stormwater management system potentially affecting Sawmill Brook, Mr. Quinn testified that the project complies with and implements the specific DEP guidelines that are applicable to coldwater fisheries, confirming the project complies with applicable state standards. Exh. 56, ¶ 35; SLV brief, p. 46.

In his testimony, Mr. Goddard further noted that compliance with DEP stormwater management guidelines, along with proper erosion control, which would be required by the federal National Pollutant Discharge Elimination System (NPDES) permit, will ensure there is no erosion or sedimentation into the stream. Exh. 55, ¶ 18; SLV brief, pp. 45-46. With respect to the project itself, Mr. Goddard noted that all stormwater will be treated and infiltrated in accordance with DEP Stormwater Guidelines for discharge to critical areas. Exh. 55, ¶ 19; SLV brief, p. 46. In other respects, he noted that the Sawmill Brook is regulated under the WPA, will be fully analyzed in a Notice of Intent filing with the Conservation Commission, and "likely meets all required performance standards under the WPA." Exh. 55, ¶¶ 20, 22. Mr. Goddard concluded that in his professional opinion, compliance with applicable state standards for stormwater compliance, which Mr. Quinn described in his testimony, combined with no impacts to the inner riparian zone, adequately addresses any concern for thermal or siltation impacts to Sawmill Brook. Exh. 55, ¶¶ 18-19.

Similarly, with respect to the design of the project's stormwater management system potentially affecting the brook, Mr. Quinn testified that the project complies with and implements the specific DEP guidelines that are applicable to coldwater fisheries. Exh. 56, ¶ 35; SLV brief, p. 46. He stated that road runoff will be collected in a stormwater management system that complies with the Stormwater Handbook Standard 6, "Stormwater Discharges Near or To Outstanding Resource Waters including Vernal Pools and Surface Water Resources for Public Water Systems." Exh. 56, ¶ 38(h).

Accordingly, we conclude the developer has met its prima facie case with respect to the Coldwater Fishery.

### 3. Local Planning Concerns

Where there are no specific state or federal standards addressing municipal planning concerns, the developer may establish a prima facie case by showing that its proposal conforms to relevant generally recognized standards. *See, e.g., 383 Washington Street, LLC v. Braintree,* No. 2020-03, slip op. at 7-8 (Mass. Housing Appeals Comm. Mar. 15, 2022) *Sunderland*, *supra*, slip op. at 9; *Swampscott*, *supra*, No. 2005-21, slip op. at 7; *Stuborn Ltd. P'ship v. Barnstable*, No. 1998-01, slip op. at. 4 (Mass Housing Appeals Comm. Sept. 18, 2002).

Mr. Quinn, SLV's civil engineer, testified to the project's compliance with "all State requirements and best management practices for issues pertaining to general civil engineering,

stormwater management, sewer and water infrastructure, wetlands compliance and emergency access." Exh. 56, ¶ 44. He and Mr. Goddard agreed that the stormwater management system met state requirements pertaining to coldwater fisheries and vernal pools. Exhs. 55, ¶¶ 8, 11, 18-19; 56, ¶ 35. Geoffrey Engler, a principal of the developer, SLV School Street, LLC, and an affordable housing developer and consultant with two decades of experience, testified regarding the housing proposal. Exh. 57, ¶¶ 1-3, 7. He testified that the project is generally consistent with the Town's Master Plan, and further that the site is "an excellent location" not only because of transportation options,[8] but also because of access for future residents to protected conservation areas for recreation.

Mr. Engler also testified that the project was designed to conform to the Town's Master Plan given its focus on the development of housing. Exh. 57, ¶ 10; SLV brief, p. 66. He further testified that the proposed development will not result in adverse impacts to any local planning concerns, as the project site is close to commuter roads and is at least one-quarter of a mile away from any existing residential property. Exh. 57, ¶ 10, 12; SLV brief, p. 66. There was also testimony from the owner of the property that he was aware of and considered the Master Plan as he was seeking purchasers for the property, and that as the Master Plan was being developed, some Town officials expressed informal opinions that the site was "a great place for housing." Exh. 61, ¶¶ 6-7; Tr. I, 176.

SLV notes that it is undisputed that the project site is located within the Town's Limited Commercial District (LCD), which "is not a district designed to maintain open space in an undeveloped manner, as it allows a variety of commercial and noncommercial uses … including religious, educational, child care, municipal, and public or private club uses, as well as agricultural and livestock uses, and business or professional offices, medical offices, and indoor recreational facilities." Exh. 2 (Zoning Bylaw), § 4.2; SLV brief, p. 65.

The Master Plan also specifically notes that "[o]ver 30% of land in town is permanently protected, providing abundant passive recreational opportunities, preserving habitat, protecting ground and surface waters, and contributing to the town's character." Exh. 4a, p. 8; SLV brief, p. 65. SLV argues that the Master Plan's open space priorities focus on enhancing those areas

[8] Proximity to the interchange of Route 128, a large, limited access highway, also alleviates local traffic concerns that often arise when large residential developments are proposed in more densely populated areas. *See* Tr. I, 212.

already protected, rather than adding additional protected open space land. Exh. 4a, pp. 25-27; SLV brief, pp. 65-66.

This evidence is sufficient to establish the developer's prima facie case with regard to municipal planning.

**4. Wastewater Treatment**

SLV provided wastewater and sewage plans, the testimony of Mr. Quinn (Exhs. 56, 63) and Mr. Formato (Exh. 65), a sewer capacity study (Exh. 23), and a sewer system capacity analysis (Exh. 25). SLV brief, p. 54. SLV asserts these submissions are more than sufficient to meet the minimal threshold required of SLV's prima facie case. *Id.*

Mr. Formato testified that SLV will address the state requirements of TR16 for sewer extensions at the design stage. Tr. I, 78, 90. Mr. Quinn's initial sewer capacity study showed that peak sewer volumes are within the capacity of municipal sewer, and specifically that "the existing sewer capacity within the flow path of the proposed development is adequate to accommodate the proposed sewer flows." Exh. 23, p. 2. The study further noted that because the sewer design for the project includes a storage and pumping system, "the projects [sic] peak capacities used in the analysis can be tailored to the existing sewer capacity and/or discharged to the municipal system at off-peak hours." *Id.*; SLV brief, p. 54.

Mr. Quinn elaborated upon the wastewater and sewer designs for the project in his prefiled direct testimony, emphasizing the fact that the original project design for private wastewater was shifted to a municipal sewer connection with favorable response from the Board. Exh. 56, ¶ 41; SLV brief, p. 55. He testified that, in his opinion as a registered professional engineer, "the Project complies with all State requirements and best management practices for issues pertaining to general civil engineering, stormwater management, sewer and water infrastructure, wetlands compliance and emergency access." Exh. 56, ¶ 44. Accordingly, SLV has satisfied the requirements of 760 CMR 56.07(2)(a)2 for its *prima facie* case.

## V. LOCAL CONCERNS

When a municipality has not achieved one of the statutory minima, a presumption exists that a substantial need for affordable housing exists that outweighs any asserted local concerns. 760 CMR 56.07(3)(a); *See Zoning Bd. of Appeals of Lunenburg v. Housing Appeals Comm.*, 464 Mass. 38, 42 (2013) ("there is a rebuttable presumption that there is a substantial Housing Need

which outweighs Local Concerns" if statutory minima are not met), quoting *Boothroyd v. Zoning Bd. of Appeals of Amherst,* 449 Mass. 333, 340 (2007), quoting *Hanover, supra,* 363 Mass. 339, 367 ("municipality's failure to meet its minimum [affordable] housing obligations defined in § 20 will provide compelling evidence that the regional need for housing does in fact outweigh the objections to the proposal"). As discussed below, the Board and Interveners have not proven a valid local concern that outweighs the need for affordable housing.

### A. Emergency Access and Snow Management

#### 1. Emergency Access

Access to the development would consist of one 1,800-foot-long driveway that wraps up around the knoll and around the building in a counterclockwise spiral that approaches closer to the building until it ends in front of the garage. There is no second point of egress for emergency access, so the driveway serves as the sole means of access and egress for all residents, visitors, service vehicles, and emergency vehicles. Exh. 68, ¶ 3. Four sections of the driveway are bounded by a three-tiered retaining wall system that reaches a maximum height of 22 feet.[9] The driveway has no shoulder and portions of it are bordered by wooden guardrails several feet away from the roadway with the retaining walls outside of the guardrails. Tr. III, 155-156, 163-164; Exh. 5a, Sheets C-102, C-103. The access driveway is 24 feet wide and designed with a boulevard entrance split into two separate lanes for 300 feet that begins at the northeastern portion of the site, at an elevation of 52 feet, where it intersects with School Street. Exh. 5b (Grading Plan Sheet C-103). The driveway runs west of and perpendicular to School Street and, at an elevation between 62 and 68 feet, it curves southwest as it gradually increases in elevation and wraps around the northwest side of the building. *Id.* At its southwestern most point, at an elevation of about 108 feet, the driveway curves southeast until it reaches an elevation of 120

[9] The first set of retaining walls, approximately 250 feet long, are along both sides of the driveway, several feet away from the edge of the driveway located at the split-lane entrance to the project site. At the second location, for approximately 100 feet, the inside of the driveway approaches a retaining wall that wraps around the southwestern corner of the building. Third, for approximately 200 feet, as the driveway wraps up and around the southeastern corner of the building, a retaining wall is planned on the outside of the driveway, where a wooden guardrail several feet from the roadway separates the retaining wall from the driveway. Lastly, behind the same guardrail, for approximately 300 feet, a retaining wall wraps around the outside of the driveway and terminates before the driveway turnaround. Exh. 5a, Sheets C-102, C-103.

feet at its southern most point. From there, it curves northeast alongside the southeastern side of the building, ranging in elevation from 120 to 124 feet. The driveway then wraps closer to the northeast corner of the building, curving northwest and dipping slightly in elevation into the cul-de-sac style driveway in front of the building's garage, at a final elevation of 114 feet. *Id.* An ADA-compliant ramp near the entrance to the building merges into a sidewalk that travels alongside the driveway. Exh. 20.[10]

The Board argues the roadway poses substantial safety concerns if it becomes blocked. It argues that there was no consideration of non-fire safety emergencies, including personal health emergencies, vehicle accidents, weather issues, the inability of cars to pull over, or the necessity of an evacuation or other blockage on the driveway. It suggests that in an emergency, the roadway serving as the only evacuation route and only way for emergency vehicles to access the site poses a danger for the residents. The Board asserts SLV introduced little to no evidence with regard to its roadway design to explain the safety concerns other than compliance with the Fire Code and failed to explain how the proposed roadway conforms to generally recognized design standards to protect the health and safety of residents, pedestrians, and travelers along the steep, narrow and curving roadway. Board brief, pp. 24, 25, 29.

The Board's sole witness testifying regarding roadway safety is Lawrence Beals, who stated he is experienced in planning, engineering consulting, project management and regulatory matters. Exh. 68, ¶ 1; Board brief, p. 10. Mr. Beals does not identify himself as a professional

[10] While sidewalks and pedestrian access were identified as an area of local concern, the Board failed to address this issue in its brief aside from a single footnote that solely addresses emergency access. *See* Board brief, p. 25, n.14. The Board's purported local concerns regarding sidewalks and pedestrian access were not sufficiently briefed are therefore waived. *See Sunderland*, *supra*, slip op. at 3; *Hilltop Preserve Ltd. P'ship v. Walpole*, No. 2000-11, slip op. at 2 n.1 (Mass. Housing Appeals Comm. Apr. 10, 2002); *An-Co, Inc. v. Haverhill*, No. 1990-11, slip op. at 19 (Mass. Housing Appeals Comm. June 28, 1994).

civil engineer.[11] In turn Mr. Beals relied primarily on the subdivision regulations to support his testimony. Exh. 40.[12]

Mr. Beals testified that the 1,800-foot single means of access and egress is "grossly inadequate." He stated that the roadway was "too long, too steep and too narrow, all in violation of applicable safety standards," and asserted its deficiencies compromise public safety and put the residents at risk during an emergency such as medical, fire, severe weather, or evacuation. Exh. 68, ¶¶ 4, 14; *see id.* ¶¶ 1-4. He testified that the fire access located on the south side of the building intersects the roadway at a 90-degree angle and the radius of that turn is insufficient to allow a fire truck to turn onto the fire access road from the roadway, thereby rendering it unusable for a fire truck.[13] *Id.*, ¶ 12. Noting that the building design shows a single access to the

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[11] While SLV characterizes Mr. Beals as "an engineer who was originally retained by opponents to the project" (SLV brief, p. 16), it is not evident from this record that Mr. Beals is in fact an engineer. The Board does not represent him to be an engineer, nor does his pre-filed testimony, which includes his curriculum vitae. Rather, his CV indicates his expertise is in the area of soil science; he has a Master of Science in Soil Science and is a Certified Professional Soil Scientist. This fact is relevant to our credibility determinations, since, although the parties stipulated all of their proffered expert witnesses were experts, Tr. I, 19-20, Mr. Beals did not show he is an expert in civil engineering or traffic issues or including roadway safety and design. We take this into consideration in examining the credibility and weight of his testimony, which disputed that of: Mr. Quinn, a registered professional engineer with a bachelor's degree in civil engineering who has been a licensed civil engineer in Massachusetts since 2012; Mr. Dirk, a registered professional civil engineer and certified Professional Traffic Operations Engineer who has been licensed in Massachusetts since 1995; and Mr. Cleary, the Town's fire chief at the time of the hearing before the Board who was the Authority Having Jurisdiction under the fire code. Exhs. 56, ¶¶ 1-2; 58, ¶¶ 1-3, 5; 59, ¶¶ 1-3; SLV brief, p. 9. We also note that his testimony was based almost exclusively on the Town's subdivision regulations, which are not binding on this project. *See* note 12, *infra*.

[12] Although the Town's subdivision regulations do not govern this development since it is not a subdivision, we agree with the Board that they can be informative in reviewing the project design in light of a legitimate local safety concern. SLV brief, p. 16; Board brief, pp. 11-12. *See* 760 CMR 56.05(7) ("waivers from subdivision requirements are not required (although a Board may look to subdivision standards, such as requirements for road construction, as a basis for required project conditions, in which case the Applicant can seek Waivers from such requirements)"). This is especially true as it is our practice to look at all factors involved in evaluating the safety of a roadway's design. *Lexington Woods*, *LLC v. Waltham*, No. 2002-36, slip op. at 9 (Mass. Housing Appeals Comm. Feb. 1, 2005).

[13] Mr. Beals' testimony that a fire truck cannot turn onto the fire access road located on the south side of the building is immaterial. *See* Exhs. 5a, Sheet C-106; 68, ¶ 13. Mr. Cleary testified that there is no fire code requirement for 360 degrees of access to the building; rather, the code requires that the fire department is able to get within 50 feet of an entrance, which Mr. Cleary testified it can do. Exh. 58, ¶ 6. "Between ground ladders, aerial ladders and stairwells with standpipes, the fire department can access the remainder of the building." *Id.* Mr. Cleary's conclusions were supported by two engineers, Mr. Quinn and

garage located under the building, Mr. Beals asserted that "[w]ithout a second point of access or egress, a garage fire could be catastrophic, particularly for the residents in the building above." He expressed concern with the possibility of battery fires in electric vehicles parked in the garage below the building, stating that the current practice is to let those vehicles burn because there is no effective means of extinguishing an electrical vehicle fire.[14] *Id.*, ¶ 13. He testified that the handling of an electrical vehicle fire in a single access garage below a residential building puts those residents at risk. *Id.*, ¶ 13. He provided no basis for his testimony on this issue.

Mr. Quinn, a registered professional civil engineer experienced in coordinating multi-disciplinary reviews of large multi-family projects, performed civil engineering services and prepared various site plans on behalf of SLV.[15] Exh. 56, ¶¶ 1, 4, 5, 10-11; SLV brief, p. 9. He noted that the site's "topography has significant slope that requires substantial regrading in order to accommodate the building construction and access driveway." Exh. 56, ¶ 16. He testified that he worked closely with SLV's architect and transportation engineer to develop a safe and adequate means of access that satisfies all applicable safety codes. *Id*. Noting that access to the site would be a primary consideration in the Board's decision, he pointed out that the SLV team of professionals made substantial effort in designing a safe and compliant access drive, with a particular focus on access for the Town's fire department. Exh. 56, ¶¶ 15-16; SLV brief, p. 9. He stated the ultimate design that they arrived at was "the best possible alternative for the Property" in that it maximizes the quality of access and infrastructure placement. *Id.,* ¶ 16.

Mr. Quinn stated that the length of the driveway was established to ensure that the roadway grade met state and local requirements. He noted that the plans provide "numerous places along the driveway where fire apparatus can be staged to assist in fighting fires." Exh. 56,

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Mr. Dirk, as well as SLV's architect, Mr. Riggs. Moreover, the fire access road is not depicted on the fire truck turning plan. Exh. 5a, Sheet C-107. None of SLV's expert witnesses relied on such access in determining that emergency access is sufficient.

[14] Mr. Beals' concerns regarding the risk of electrical vehicle fires appear to be speculative and made without support. Mr. Cleary, on the other hand, considered the adequacy of the project's fire safety features, which include a comprehensive sprinkler system and redundant standpipes throughout the building, as well as enhanced access through the building and parking garage. As discussed below, he determined that the roadway design is adequate for emergency vehicles to access the property, and a second access road is not required.

[15] Mr. Quinn's design is depicted on the site plans (Exh. 5) and is summarized in his comprehensive memorandum (Exh. 17). SLV brief, p. 9.

¶ 17(c); *see* ¶ 17(d); SLV brief, p. 10. Mr. Quinn testified that the width of the driveway complies with applicable fire safety codes. Exh. 56, ¶17(d). The access driveway also utilizes a boulevard entrance that separates the driveway into two independent lanes, providing an added measure of safety in the event that some blockage may occur at the project entrance. SLV brief, p. 10; Exh. 56, ¶ 18. Mr. Quinn also testified that the plans contain pedestrian access that complies with all ADA requirements, including slopes accessible to people who use wheelchairs. He noted that the fire and police chiefs testified at the Board hearing that emergency access is adequate, stating the police chief's letter submitted at the Board hearing stated the proposed design was "acceptable if residents were afforded a dedicated means to evacuate the site on foot." Exh. 56, ¶¶ 15, 23; *see* Exh. 59, ¶¶ 12-13. Mr. Dirk, SLV's traffic expert, also testified regarding emergency access. He stated he worked closely with the project team to address issues pertaining to the design of a safe and adequate access driveway. Exh. 59, ¶¶ 1, 3, 11-12; SLV brief, p. 11. In reiterating the Town's fire chief's endorsement of the driveway design, Mr. Dirk stated that the fire chief's conclusions are not mere opinions, rather they are determinative and entitled to deference as he was the Authority Having Jurisdiction at the time of the hearing before the Board, a premise with which the Board's traffic engineering firm, EPG, agreed in its March 31, 2022, peer review letter. Exh. 59, ¶ 18-21; SLV brief, p. 11.

Daniel Riggs, SLV's project architect, is a registered architect with substantial experience designing multi-family buildings who worked closely with the project team on the issue of emergency access. Exh. 60, ¶¶ 3, 11; SLV brief, p. 12. He designed the building to include state-of-the-art fire alarms, a comprehensive sprinkler system and redundant standpipes throughout the building. His design also included enhanced access through the building and parking garage. Exh. 60, ¶ 12. He testified that, in his professional opinion, the project's building was "designed in a manner that will adequately accommodate emergency personnel." *Id.*, ¶ 13.

Mr. Cleary's review of the project for the local hearing before the Board included hydrant and standpipe locations, sprinkler and fire alarm systems, and physical access for emergency vehicles, such as whether the Town's largest fire truck could adequately access, maneuver, and turn around on the site. Exh. 58, ¶ 3; SLV brief, p. 13. He familiarized himself with the project, met with SLV's design team to discuss code compliance and, upon his review, he issued a letter to the Board on January 21, 2022, summarizing his findings. Exhs. 58, ¶¶ 4-5; 15; SLV brief, p. 13. In his letter, Mr. Cleary stated, in full:

> I have conducted several reviews of the proposed plans for the 40B projects and have met with the architect and engineers on many occasions. I have reviewed the concerns regarding the need for the second access road. Understandably, a second access road for emergency vehicles would be ideal. However, as the Authority Having Jurisdiction (AHJ); and in accordance with NFPA 1 and the Massachusetts Fire Code; and having consulted with the Massachusetts Department of Fire Services; I have determined that the current single split roadway design is adequate for emergency vehicles to access the property, and a second fire/access road is not required.
>
> The roadway meets the proper width, grade, length, and vehicle turnaround at the end to accommodate our apparatus as is required by code. The building is required to and will be equipped with the latest in fire protection, to include a full fire alarm system, sprinkler and standpipe systems, remote annunciators, a Knox box, a BDA radio booster (if required), as well as the proper water supply and correct locations for fire hydrants. An approved property maintenance plan will need to include specifics regarding snow removal and the ability to keep the roadway clear and accessible for emergency vehicles.

Exh. 15. He reiterated these conclusions when questioned by the Board during its hearing on February 9, 2022. Exh. 56, ¶ 20. Additionally, Mr. Cleary testified before the Committee, where he stated that: fighting a fire at other older buildings was actually more difficult due to inadequate water supply and lack of sprinkler systems; here there are no overhead wires or mature trees approximate to the driveway thereby decreasing the likelihood of blockage; the parking garage is equipped with additional standpipes to assist if there is a car fire; with a combination of ground access, aerial ladders, ground ladders and stairwells equipped with standpipes, emergency access in the event of a fire is assured; the Manchester fire station is on School Street in close proximity to the property; and mutual aid is available to assist in the event of any large structural fire. Exh. 58, ¶ 6. Mr. Cleary concluded that "it is my opinion as an experienced fire chief that this will be a very safe building. There is no residential structure in [the Town] with a comparable amount of safety features. I am confident that the [Town's] Fire Department will be able to access the site and address emergencies in a safe and expedient manner." *Id.*, ¶ 7. He also stated that "[a]s to concerns regarding ALS/ambulance service, if we can easily maneuver our ladder truck on the site, we can certainly maneuver an ambulance." *Id.*, ¶ 6.

We find the testimony of the developer's engineers, Mr. Quinn and Mr. Dirk, as well as the Town's former fire chief, Mr. Cleary, who testified that this will be an accessible and very safe building, and that the project's driveway, as designed, provides adequate emergency access,

to be more credible than that of Mr. Beals. Overall, the testimony of Mr. Beals that emergency access is inadequate is belied by the ample, more credible evidence presented by SLV. Therefore, the Board has not proven a local concern that outweighs the regional need for affordable housing regarding emergency access.

**2. Grade, Length, and Width of Access Drive**

The Board argues that because the purpose of the subdivision regulations provides for the protection of health and safety, and because the driveway exceeds the subdivision regulations' maximum grade for arterial roads, the driveway grade is "impermissibly hazardous." Board brief, p. 13. Mr. Beals testified that for an arterial street, defined as a street serving more than 120 dwelling units, the subdivision regulations specify a maximum grade of 5%. *Id.*; Exh. 68, ¶ 10, citing Exh. 40, § 7.09(D)10. However, he testified, the proposed driveway would range in grade from 7.5% to 10%. Exh. 68, ¶ 10.

The Board asserts the driveway has grades as high as 8% and culminates in a 4% slope at the cul-de-sac dead-end. Board brief, p. 35, citing Mr. Dirk's testimony on cross-examination. Tr. II, 114-116. He stated the average grade is 4.9%, or 3.4% if the 325 feet of driveway in front of the garage are included. Exh. 63, p. 16; SLV brief, p. 16. He testified, "the grades get up to about 7 and a half percent, but I'm not clear as to whether there's any places where it might be higher than that," Tr. II, 114, also stating that the grade is less than 2% as it approaches School Street. "Then it rises as you proceed into the project site. And so, it's a gradual rise, probably less than [1%] tying into School Street. Then it rises up 2 percent, then probably 4, then it gets to something in excess of 7 to 7.5 percent." Tr. II-116. "I'm not sure how a decision was made that you can't exceed 5 percent because if you look at the engineering standards that's not what it says and not what the Fire Code says." Tr. II, 127. This is consistent with Mr. Quinn's testimony that in "general practice, the maximum slope requirement refers to the centerline maximum slope, which is 7.5%." Exh. 63, p. 17.

SLV notes that Mr. Beals testified regarding the subdivision regulations, not the zoning bylaws and that, according to Mr. Quinn and Mr. Dirk, the project driveway meets the zoning dimensional requirements for driveways. Exh. 63, pp. 15-16; SLV brief, p. 17. Mr. Quinn explained that the driveway meets state and local requirements for roadway grade. Exh. 56, ¶17(d); SLV brief, p. 10. Mr. Quinn testified that the 1500-foot driveway "gently traverses the site's slope" with an average profile slope of 4.9%; including the additional 325 feet of driveway

proposed from the first-floor access to the podium parking access reduces the average profile slope to 3.4%. Exh. 63, pp. 16-17. He further testified that although the plan notes the maximum slope of the driveway is 10%, that slope is conservatively measured from the inside radius of the driveway, but as a general practice, the maximum slope requirement refers to the centerline maximum slope, which is 7.5%. *Id.* Finally, he testified that the proposed driveway curb cut, alignment, length and profile meet the current local zoning bylaw dimensional requirements for driveways and thus no relief is required from the zoning bylaw for this driveway. The Town's building commissioner also opined that this is not a common driveway and thus no waiver relief is necessary from any common driveway bylaws. Exh. 63, p. 17.

Further, Mr. Quinn noted that after denying SLV's project, the Board approved a larger commercial project across the street that will have more employees than SLV's projects will have residents, will service more cars than SLV's project, and will have a single access driveway with grades exceeding 10%. Exh. 63, p. 16, ¶¶ 5-6; SLV brief, p. 16. Mr. Quinn testified that he reviewed the Board's December 13, 2023, decision approving the Old Quarry LLC project and noted the Board did not reference the subdivision regulations as a guide on how to design a driveway access. Exh. 63, p. 16, ¶ 7-8.

We note that the Board makes no mention of § 8.4 of the Town's zoning regulations, which provide a maximum driveway grade of 10%, and it is undisputed that the driveway grade is below 10%. Exh. 2. Instead, it points to stricter grade requirements of the Town's subdivision regulations that relate to arterial roads as evidence that a steeper grade is unsafe. Exh. 68, ¶ 10; Board brief, p. 13. Those subdivision regulations provide maximum grades of up to 9% for roads servicing 10 or fewer dwelling units. Exh. 40, p. 35. Presumably, roads with grades of up to 10% are not *per se* unsafe; otherwise, the Town would not allow them under any circumstances. In any event, we find credible the testimony of Mr. Quinn, Mr. Dirk, and Mr. Cleary, who all conclude the driveway meets the local zoning bylaw dimensional requirements and those required by the Massachusetts Fire Code.

The Board asserts that § 6.2.8 of the Town's zoning bylaw prohibits any common driveways from exceeding 500 feet in length.[16] Board brief, p. 11; Exh. 2, p. 61; Tr. II, 100-101.

[16] There is no § 6.2.8; we assume the Board intended to cite § 8.4 of the Town's zoning bylaw, which regulates common driveways and provides, among other things, the following standards: a 16-foot minimum driveway width; a maximum driveway grade of 10% and a maximum driveway length of 500

Section 8.3.7.a of the Town's Subdivision Rules and Regulations prohibits dead-end streets or cul-de-sacs from exceeding 500 feet, unless a greater length is deemed desirable by the Board because of topography or other local conditions. Board brief, p. 11. The Board asserts that SLV's engineer, Mr. Quinn, agreed that the purpose of subdivision standards is to protect "the health and safety of the residents of the housing."[17] Board brief, p. 11, citing Tr. III, 118. Mr. Beals testified that this 500-foot requirement is "a common standard throughout the Commonwealth of Massachusetts utilized by most cities and towns to protect public safety." Exh. 68, ¶¶ 7-8. He stated that communities immediately surrounding the Town (Beverly, Gloucester, Hamilton, and Wenham) have all established similar standards.[18] *Id.*

Mr. Beals also testified to the historical rationale for the 500-foot length limitation, noting that, according to the Pioneer Institute for Public Policy Research, "[a] requirement of 500 – 600 feet is standard in many municipalities because fire hydrants historically were placed at the entrance to the road and fire trucks carried 600-foot hose line." Exh. 68, ¶ 9. This project is designed to have four fire hydrants located in close proximity to the building. Exh. 5, Sheet C-107. Mr. Cleary stated that "[w]ater volume and pressure are required to meet the needs of the fire department and the Massachusetts Fire Code." Exh. 58, ¶ 6. The project design addresses this concern regarding the Town's common driveway length limitation because the fire

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feet. It also provides that these standards may be waived when such action is in the public interest. Exh. 2, p. 61.

[17] Since § 8.4 "may be waived when … such action is in the public interest and not inconsistent with the purpose and intent of the Zoning By-Law and these design standards," Exh. 2, p. 61, we consider all relevant features of the development in evaluating the driveway length. We also note that previous decisions of the Committee have approved single access roadways that exceeded the local requirements for length. *See, e.g., Burley Street, LLC v. Wenham*, No. 2009-12, slip op at. 5-6, 10 (Mass. Housing Appeals Comm. Sept. 27, 2010) (approving 1,160-foot single-access roadway); *Edgartown*, *supra*, No. 2006-09, slip op. at 17-18 (Mass. Housing Appeals Comm. Apr. 14, 2008) (approving 1,597-foot single-access roadway); *Tiffany Hill, Inc. v. Norwell*, No. 2004-15, slip op. at 25-26, 31 (Mass. Housing Appeals Comm. Sept. 18, 2007) (approving single-access roadway approximately 1,000 to 1,100 feet in length). Therefore, allowing a common driveway that exceeds the 500 feet specified in the bylaw under the circumstances here is consistent with our precedents.

[18] Generally, and in this case, we do not credit testimony of parties' witnesses regarding the purpose of local regulations. *See Braintree, supra,* No. 2020-03, slip op. at 14 (finding expert testimony is not credible as to purported intent of bylaw requirements). In any event, the subdivision regulations state their purpose: Section 1.3 of the subdivision bylaw provides that "[t]hese Subdivision regulations have been enacted for the purpose of protecting the safety, convenience and welfare of the [Town's] inhabitants…." Exh. 40.

department will have access to several fire hydrants located on the project site, ensuring adequate firefighting capabilities.

Here, the private driveway intended to serve 136 dwelling units would be 1,800 feet in length from School Street to the parking garage entrance. Board brief, p. 12; Exhs. 30, p. 4; 40. The Board contends that the roadway does not meet generally accepted, or local standards, for safety, particularly when considered in light of other dangerous roadway elements. Board brief, p. 12.

Mr. Dirk, on cross-examination, stated that the length of the driveway is longer than what is typically seen as accepted practice. Tr. II, 127. He testified that "with the exception of the length of the roadway over which the Fire Chief has jurisdiction, the roadway meets all engineering standards to provide access to that project site." *Id.*, 126. He deferred to the fire chief to consider whether the driveway length would negatively impact first responders. *Id.*, 127. As discussed above, the fire chief determined the driveway is sufficient for emergency access and meets the proper width, grade, length and vehicle turnaround, as required by the fire code.

Mr. Beals pointed to the subdivision regulations' requirement that an arterial street, defined as a roadway that serves more than 120 dwelling units, must have a pavement width of at least 34 feet. Board brief, p. 13; Exh. 68, ¶ 10. Here, the project design shows a driveway width of 24 feet. Board brief, p. 13, citing Tr. III, 154-156, 163. Notably, Mr. Beals did not address the driveway's compliance with the 16-foot minimum driveway width required by § 8.4 of the zoning bylaws.

As stated above, Mr. Quinn testified that the width of the driveway complies with applicable fire safety codes. Exh. 56, ¶17(d). This was confirmed by Mr. Cleary, who concluded "that the Project driveway meets fire code standards for width and grade as well as for its ability to allow fire trucks to turn around." Exh. 15.

The testimony of Mr. Beals that subdivision regulations' arterial street requirements should be the width benchmark for this private driveway is inapposite, even if the driveway serves the number of dwellings identified for arterial streets. There are significant differences in the traffic patterns on a roadway serving many single-family homes and a driveway leading to a

single residential building.[19] The Board did not demonstrate that a wider driveway is necessary to protect the health and safety of the residents. Not following an inapplicable subdivision regulation is insufficient to demonstrate a local concern that outweighs the need for affordable housing. The fact that the access driveway is intended to service a multi-family development does not change the use of the driveway to an arterial roadway as it is a private way, not a throughway, and will serve only as access and egress to the development.

**3. Snow Removal**

Mr. Beals testified that "[f]or such a long steep driveway, especially one facing north, a steep grade creates an unsafe condition for two-way traffic, particularly during winter conditions with snow and ice." Exh. 68, ¶ 10. "The north facing driveway surface will be more prone to icing during the typical freeze/thaw cycles of New England winters." *Id.* He also testified that "[p]lowing up a steep grade is extremely difficult and depending on the weight and depth of snow, it might not be possible to plow. The snow removal difficulty is exacerbated by the narrow roadway width, single sidewalk for pedestrians, and a number of retaining walls in close proximity to the roadway surface." *Id.* He provided no evidence to support these conclusory statements.

Mr. Quinn testified that snow removal was an important aspect of the planning of this development, and sheet C-106 of the plans depicts areas of snow storage. SLV brief, p. 21; Exh. 56, ¶ 24. He noted that SLV has committed to retaining a snow removal contractor that will remove snow immediately upon snowfall. *Id.* Mr. Quinn submitted a memorandum to the Town planner that described the snow storage plan and stated that it is of adequate size to accommodate greater than five feet of snowfall on the areas requiring snow removal. Exh. 10.

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[19] The Town's subdivision regulations recognize this by providing increasing width requirements for increasingly higher-volume streets: 18 feet for "lanes" (that serve no more than 10 dwelling units); 22 feet for "minor streets" (that serve no more than 40 dwelling units); 30 feet for "collector streets" (that serve no more than 120 dwelling units); and 34 feet for "arterial streets" (that serve no more than 120 dwelling units or are to be used for major through traffic with volume in excess of 1,200 vehicles per 24-hour period). Exh. 40, pp. 3-4, 41. The Board sought to bring to our attention the 2016 Subdivision Regulations (linked in its brief but not introduced into evidence). Board brief, p. 11 n.7. Like the courts, the Committee will not consider information that is not part of the evidentiary record. *See, e.g., Adoption of Helen*, 429 Mass. 856, 863 (1999) (judge may not rely on facts that are not properly admitted in evidence); *Care & Protection of Benjamin*, 403 Mass. 24, 27 ("the judge could not properly consider facts not in evidence"). Even if this version of the subdivision regulations were in evidence, which it is not, the road width requirements follow the same logic: 20 feet for lanes; 22 feet for minor streets; 24 feet for collector streets; and 34 feet for arterial streets.

SLV asserts that the plans and measures incorporated in Exhibit 10 clearly and specifically show capacity for snow removal and SLV's commitment to providing snow removal services is more than sufficient to show that the current state for planned snow removal capacity and efforts meets applicable standards, citing 760 CMR 56.07(2)(a)2. SLV brief, pp. 21-22.

We accept Mr. Quinn's testimony that the snow removal plans and SLV's commitment to providing snow removal services are sufficient to address snow removal upon snowfall. We do not credit Mr. Beals' speculative testimony that snow removal along the single access drive would be difficult due to its grade. Mr. Beals offers no basis for his conclusion that plowing may not be possible due to the road grade and weight and depth of snow. Thus, the Board failed to establish a local concern with regard to snow removal that outweighs the need for affordable housing.

The circumstances here are sufficiently different than those we considered in *Lexington Woods*, *supra*, No. 2002-36, slip op. at 20 (concluding that the combination of problematic elements of a narrow, serpentine, and steep single access road led to a health and safety concern that outweighed the regional need for affordable housing). Here, the former Manchester fire chief has stated that the single access driveway does not present safety concerns, because the project has enhanced fire safety features, including standpipes and a sprinkler system. *See id*. at 16 ("This Committee has noted that sprinklers can improve fire protection for residents."). Viewing the characteristics of the proposed access driveway as a whole, we conclude that, unlike in *Lexington Woods,* the driveway is not narrow nor serpentine nor steep. The length of the roadway, combined with its other features, do not present the safety concerns in *Lexington Woods.* Moreover, we find that the snow removal plan is adequate and agree with SLV's engineers and the Town's former fire chief that, on this record, emergency access is sufficient. For the foregoing reasons, the Board has not demonstrated a local safety concern with regard to the driveway that outweighs the need for affordable housing.

**B. Environmental Concerns**

The Board argues, with support by the Interveners, that due to the extensive clearing of vegetation, blasting, changes to topography, and other site design constraints, its denial of the project should be upheld on the ground that the proposed housing does not adequately protect the natural environment with respect to the vernal pools and a nearby Coldwater Fishery in Sawmill Brook, a perennial stream. Intervener brief, p. 9. The Board argues that the need for affordable

housing does not outweigh values of environmental protection in the Town. Board brief, pp. 14-15; Exh. 3B, pp. 12-13.

**1. Manchester Bylaws and Regulations**

In support of their environmental concerns arguments, the Board and Interveners point to the Town's Wetlands Bylaw and Wetlands Regulations,[20] which they assert are more restrictive in protecting environmental resources than the WPA.[21] Section 4 of the Wetlands Bylaw defines vernal pools and streams as resources areas. Exh. 3A, pp. 3-4. The boundary of a vernal pool includes the vernal pool itself, plus 100 feet in all directions. Exh. 3A, p. 3. The Wetlands Bylaw then places another 100 foot buffer zone from the boundary of vernal pool, effectively creating a 200-foot jurisdictional area around the vernal pool. Exh. 3A, pp. 1, 4. Section 1.2 of the Bylaws provides that:

> this By-Law is intended to utilize the Home Rule authority of the Town to:
> …
> 1.2.1 protect salt marshes, freshwater wetlands, streams, and coastal banks to a greater degree than under the [WPA];
> 1.2.2 protect vernal pools as an additional resource area recognized by the Town as significant, but not included in the [WPA].

*Id.* For permission to alter a resource area, or lands within a specified buffer zone thereof, the Bylaw requires evaluation of the effects of the alteration on its resource areas. Section 9.7 of the Wetlands Bylaw provides that:

> In reviewing activities within a Resource Area Buffer Zone, the ConCom shall presume a Resource Area Buffer Zone is important to the protection of the Resource Area(s) because activities undertaken in the Resource Area Buffer Zone have a high likelihood of adverse impact upon the Resource Area(s), either immediately, as a consequence of the activities, or over time, as a consequence of daily operation or existence of the activities. Adverse impacts from such activities

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[20] SLV has requested waivers of the following provisions of the Wetlands Bylaw: § 1.2.2 (vernal pools resource area); § 2.2 (definition of "alter"); § 4.4 (establishing presumption of significant adverse effect unless applicant demonstrates otherwise by clear and convincing evidence); § 6.1 (Notice of Intent requirements); and § 9 (standards of review for applications under local wetlands bylaw).

SLV has requested waivers of the following provisions of the Wetlands Regulations: §10.1 (no build and no disturb zones); §§ 2.17 and 2.18 (definitions of no build zone and no disturb zone); § 4.4.2 (delineation and review of vernal pools); § 8.2 clear and convincing standard); and § 9.7 (standard of review for vernal pools). Exh. 6A.

[21] They also refer to the Town's Master Plan, which we discuss below. *See* § V.C, *infra* for discussion of local planning concerns.

> and use can include, without limitation, erosion, accretion, siltation, loss of groundwater recharge, degradation of water quality, excess nitrogen and phosphorous loading and loss of wildlife habitat.

Exh. 3A, p. 9; Board brief, pp. 15-16. The Board also argues that to obtain a waiver from requirements of the Wetlands Bylaw and Regulations, the Bylaw requires an "Alternatives analysis" and an assessment of "significant immediate or cumulative adverse effects." Board brief, p. 16, citing Exh. 3A, pp. 8-9. It cites the requirement in § 9.7 of the Regulations that states "[p]rior to issuance of a permit for work or activity which alters a Vernal Pool, the Applicant shall demonstrate by clear and convincing evidence as set forth in The Alternatives Analysis that there is no Practicable Alternative to the work or activity proposed." *Id*., p. 16.

**2. Vernal Pools**

The Town's Wetlands Bylaw treats the vernal pool resource area as extending 100-feet from the border of the vernal pool and provides an additional 100-foot buffer beyond that first 100-feet as part of the resource area, with a 25-foot no disturb zone and 50-foot no-build zone within that outer 100-foot buffer. Exh. 3A, p. 4. Section 4.2 of the Wetlands Bylaw states:

> Except as permitted by the [Conservation Commission] pursuant to this By-Law or as otherwise allowed by this By-Law, no person shall commence to alter lands within 100 feet of any: …vernal pool… ("Resource Area Buffer Zone(s)").

The Board argues that SLV has failed to provide the necessary analysis with respect to probable impacts of the project on the hydrologic regime of the vernal pools that is required for the Board to grant a waiver under § 9.7 of the Wetlands Regulations, which states that:

> Prior to the issuance of a permit for work or activity which Alters a Vernal Pool, the Applicant shall demonstrate by Clear and Convincing Evidence as set forth in an Alternatives Analysis that there is no Practicable Alternative to the work or activity proposed. Any Alteration which impacts the topography, soil structure, plant community composition, vegetation canopy or understory, hydrologic regime, drainage patterns, migratory paths of Vernal Pool species and/or water quality of a Vernal Pool shall be presumed to have a Significant Immediate and Cumulative Adverse Effect to the Vernal Pool and the wetlands values protected by the By-Law.

Exh. 3B, p. 14.

The Board relies upon the testimony of its expert witnesses, Patrick C. Garner, a wetland scientist, professional land surveyor, and hydrologist, and Scott Horsley, who is also a hydrologist. Both have over 30 years of experience in their fields. Exhs. 69, ¶ 1; 71, ¶ 1. Mr. Horsley testified that, in his opinion water from "the majority of the proposed impervious areas

within the northern vernal pool watershed will be routed outside of the current vernal pool watershed to the two underground infiltration systems" and that this "represents a significant alteration to the hydrologic budget of the vernal pool." Exh. 71, ¶ 55. He testified that SLV's "hydrogeologic investigations … [are] inadequate to provide a sustainable site design" and that the developer failed to provide an alternatives analysis as required by the Wetlands Regulations. *Id.*, ¶¶ 17, 21. He also testified that SLV failed to provide "hydrologic budgets…to assess impacts on vernal pools or bordering vegetated wetlands." *Id.*, ¶ 17. SLV's expert, Mr. Goddard testified that:

> [a]ll proposed work is outside of this buffer under the WPA and therefore we are in compliance with standards of not impairing the site's capacity to function as vernal pool habitat/wildlife habitat, as described in the wildlife habitat/vernal pool study by Goddard Consulting. Even under the more enhanced local standards, we have demonstrated no material impact to vernal pool function. The Board's peer review consultant agreed.

Exh. 62, ¶ 66. He testified that:

> All of Manchester's resource areas protected under its bylaw have a 30-foot No Disturb Zone (NDZ) and a 50-foot No Build Zone (NBZ). Work for the Project generally stays out of these zones. However due to the vernal pool resource area, some work is required in the no disturb zone and in the no build zone, as shown on the plans. In the northern portion of the site, work in the NDZ and NBZ is comprised of the stormwater management system. Along the eastern portion of the project, work in the NDZ and NBZ includes portion of the driveway and retaining wall. There is no practical alternative to moving either the stormwater system or roadway out of these NDZ and NBZ that would result in less impacts while still preserving the viability of the proposed affordable housing Project. Furthermore, as described herein, and as will be further presented under an NOI, the Project design mitigates any adverse impacts to these areas.

Exh. 55, ¶ 23; *see* Exh. 55B.

Noting that the project plans propose work within the locally protected buffer zones to the vernal pools, Exh. 69, ¶ 19; *see* Exh. 11, Mr. Garner stated that, "[a]s there has been no Alternatives Analysis, there is no legitimate basis for waivers under the Bylaw" and that it was his opinion that "the Project as currently designed would cause alterations to the [vernal pools] and their associated Resource Areas that are not allowed under the Bylaw and the Manchester Wetlands Regulations. In particular, the Project's extensive stormwater system will cause alterations to the water budgets of the certified [vernal pools] on and adjacent to the Project site." Exh. 69, ¶¶ 26, 28; *see* Exh. 11. Mr. Garner's testimony that the project will "substantially alter" the vernal pools was based largely upon his comparison of the water budgets of each vernal pool

pre-and post-development, which he alleged none of SLV's consultants had done. *Id.*, ¶¶ 29, 45. He testified that a "water budget" is "a comparison of pre- and post-development conditions regarding changes to watershed areas, impervious areas, and water velocity and volume changes entering the [vernal pool]." *Id.*, ¶ 29. Mr. Garner stated that the Project "will compromise the function of the VPs impair water quality, and reduce the capacity of the VPs to provide wildlife habitat…." *Id.*, ¶ 28.

The Interveners make essentially the same argument, relying on the testimony of Mr. Garner, Mr. Horsley and John Chessia proffered by the Board.[22] They argue that Mr. Chessia's testimony found "discrepancies" in the developer's HydroCAD model, which they allege "includes inaccurate assumptions, such as a direct connection between vernal pools even where they are distinct depressions." Interveners' brief, p. 16; Exh. 72, ¶ 16. They argue that, together, the testimony of Messrs. Chessia, Garner, and Horsley establishes the project does not comply the Town Wetlands Bylaw and Wetlands Regulations and that, on cross examination, SLV's own consultants conceded several points that corroborate these experts.[23] Interveners' brief, p. 17. Accordingly, the Board and the Interveners argue that the Board's denial on the ground that the project does not adequately protect the vernal pools should be upheld.

In rebuttal, SLV relies upon testimony of Mr. Goddard, Kenneth Milender[24] and Mr. Quinn, who disputed Mr. Garner's and Mr. Horsley's conclusions asserting the project's adverse impacts on vernal pools. During the Board's hearing, the Town's Conservation Commission requested that Mr. Goddard prepare a wildlife habitat and vernal pool study in part because the

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[22] Mr. Chessia has been a registered professional engineer since 1992 and has "extensive experience designing and reviewing residential projects proposed under Chapter 40B." Exh. 72, ¶ 1. While the Board submitted Mr. Chessia's testimony as part of its case, its briefs make no reference to his testimony in support of its arguments.

[23] Much of this "corroboration" testimony that Interveners allege supports their position consists of testimony that is not in dispute, i.e., that "vernal pools enjoy more stringent protection" under the Wetlands Bylaw than under the WPA, and that a water budget pursuant to the Massachusetts Stormwater Handbook has not been provided by SLV. Exhs. 56, ¶ 36; 63, ¶ 60. Further, the Interveners argue that the developer was required to perform an alternatives analysis but did not do so and suggest, incorrectly, that SLV did not request a waiver from that requirement. Exhs. 3A; 3B; 6A; Interveners brief, p. 20. *See* note 20, *supra.* The Interveners have not argued that SLV will fail to comply with a local provision it has not sought to waive.

[24] Mr. Milender has been "a full-time practicing engineer and scientist in the field of geotechnical and environmental engineering as well as hydrogeology since 1987." Exh. 64, ¶ 1.

wetland bylaw has enhanced jurisdiction over vernal pools compared to the WPA. SLV brief, p. 24. Accordingly, Mr. Goddard undertook the study, which included weekly inspections of the six vernal pools on and immediately surrounding the property. Exh. 55, ¶ 7; SLV brief, p. 24. SLV argues that the testimony of its experts, and the various reports, studies and plans that they submitted, supports a conclusion that the project will not impair vernal pool function, as identified under the wetlands bylaw and regulations. SLV brief, p. 43. The Wildlife Habitat Assessment and Vernal Pool Study (Wildlife Study) conducted by Goddard Consulting, LLC, explained that there are six vernal pools that were surveyed as part of that study (including one new vernal pool identified while surveying) and three certified vernal pools, two of which are located off site but are near the project site. "All these areas, except the new area identified this year, were surveyed in the spring of 2021 as part of the ANRAD permitting process with the Manchester Conservation Commission." Exh. 12, p. 31. A primary vernal pool function is to support and foster certain wildlife habitat. Exh. 12; SLV brief, p. 24. The Wildlife Study did not identify any rare plants or animals and concluded that all plants and animals observed and identified on-site are common and are not listed as either Special Concern, Threatened, or Endangered by Natural Heritage. Exh. 12, p. 38. Mr. Goddard testified that the Wildlife Study concluded that, following construction, a substantial amount of upland habitat would still be available both on-site and in the surrounding natural areas to provide habitat for the vernal pool species. Exh. 55, ¶ 13.

Mr. Goddard further testified that the Board's own consultants, B&T, [25] reviewed the project and materials submitted by SLV and concluded that, subject to its suggested conditions, no material adverse impacts to the vernal pools would result.[26] Exh. 32, p. 10. With regard to the

[25] SLV notes as significant that B&T concurred with Mr. Goddard's analysis and conclusion on vernal pools, but the Board then chose not to submit testimony from B&T at the hearing, relying instead upon Interveners' experts, Mr. Garner and Mr. Horsley, who were originally retained by opponents to the project. SLV brief, p. 30.

[26] A summary of B&T's suggested conditions include: providing additional stormwater management information for third party review during the Notice of Intent process; providing mitigation measures to protect the habitat such as deploying silt fences during breeding season and creating woody debris piles on the forest floor; providing the Town with additional documentation regarding vernal pools to third party reviewers during construction; limiting blasting to time of the year restrictions; recording of a conservation restriction; requiring the developer to provide evidence of compliance with the federal

alternatives analysis, Mr. Goddard testified that such an analysis was not required because the project was designed "in such a way that it does not have an adverse impact on the vernal pool habitat," and therefore, in his opinion, it was an unnecessary step. He testified that the "purpose of the Alternatives Analysis is to see when impacts are proposed if those can be lessened, reduced or avoided or mitigated." Tr. II, 40.

SLV also argues that substantial portion of Mr. Horsley's testimony was flawed and based upon incorrect data and assumptions, as noted in the rebuttal testimony of Mr. Quinn and Mr. Milender. *See* Exhs. 63; 64. Mr. Milender testified that Mr. Horsley's conclusions were flawed because: he did not provide "justification for the hydrogeologic parameters he used in his mounding analysis for Vernal Pool A (south) [and w]ithout such justification, his analysis is unreliable." (Exh. 64, p. 10); Mr. Horsley misapplied his groundwater recharge rates to the northerly Vernal Pool. (Exh. 64, p. 9); and [i]t was unclear how Mr. Horsley arrived at his assertion that the seasonal high groundwater level was "7 feet above the bedrock surface" where SLV received no documents to substantiate this claim. Exh. 64, p. 6. Based upon these factors, it was his opinion that the data supplied by Mr. Horsley is unreliable and cannot be used to reach a conclusion that the project will not function as designed or will not adequately mitigate effects on vernal pools. *Id.*, p. 7.

Mr. Quinn testified that he also disagreed with Mr. Horsley's and Mr. Garner's conclusions concerning the impacts of the project on the resource areas because SLV had mitigated the stormwater as provided in DEP Stormwater Guidelines to the point where a water budget was not needed. Tr. III, 43-45. He testified that the "proposed impervious areas of the project are being recharged into the vernal pool watersheds per the MassDEP stormwater guidelines." Exh. 56, p. 11. Further, he testified that the "southern vernal pool is topographically upstream of the northerly vernal pool, as the wetland naturally drains from north to south. The most conservative design was provided as the southern vernal pool is within the northerly vernal pools watershed." *Id.*, p. 14. He went on to state that "the Northerly Vernal Pool is fed from the stream abutting the vernal pool to the North," *Id.*, ¶ 38(a), and that the Sawmill Brook "is hydraulically connected to the now certified [northerly] vernal pool, and therefore a water budget

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Endangered Species Act; use of erosion control measures; and pre-and post-construction vernal pool monitoring. Exh. 32, pp. 19-21.

analysis from the site is unnecessary because it is clearly insignificant compared to the groundwater being fed from the stream." On cross-examination, he testified that the watershed essential to the vernal pool encompasses all of the sub-watersheds on the existing watershed plan and that ultimately the water from those existing watershed areas ends up in the Sawmill Brook, which is, in turn, hydraulically connected to the vernal pool. Tr. III, 87. Therefore, Mr. Quinn stated his opinion that Mr. Horsley's analysis is "faulty because the proposed impervious areas noted would in fact be infiltrated within the same watershed as the vernal pool and not require a water budget analysis as the stormwater is clearly infiltrated into the same watershed." Exh. 56, ¶ 38(e). Mr. Quinn's opinion that water entering the stream in that location will end up connected to the vernal pool is based on the findings of the ANRAD process. Tr. III, 65.

We find the testimony of Mr. Goddard, Mr. Quinn, and Mr. Milender overall to be more credible and relevant than that of the Board's and Interveners' witnesses. We accept their opinions that the project will not impair vernal pool function and find that the Board's witnesses have not shown otherwise. In particular, the testimony and other evidence offered by the Board and Interveners did not go so far as to establish any definable impact that the proposed project would have on the wetland resources, much less one that would arise solely from waivers of the Town's wetlands bylaws and regulations. Mr. Horsley's testimony on the vernal pool issue focused on SLV's lack of a water budget analysis and alternatives analysis, the need for which SLV's evidence credibly disputed. SLV's testimony established that the stream is hydraulically connected to the certified vernal pool, and therefore a water budget analysis was unnecessary. Exh. 63, p. 12. Furthermore, Mr. Quinn testified that the use of impermeable membranes along the sides of the stormwater system will prevent lateral movement of infiltrated stormwater, thus preventing any hydrological impact to the vernal pools.[27] Exh. 56, ¶ 28. In addition, the Wildlife Study established, with extensive and detailed evidence and findings, that SLV's project would not adversely impact vernal pool function and noted that all plants and animals observed and identified on-site are common and are not listed as either Special Concern, Threatened, or Endangered by Natural Heritage. Exh. 12, pp. 9, 38.

[27] SLV requested several waivers from the Wetlands Bylaws and Wetlands Regulations, while arguing that, notwithstanding those waiver requests, the Board demonstrated no adverse impact to wetland function. Exhs. 63, ¶ 9; 55, ¶¶ 16, 17; SLV brief, p. 38.

Moreover, the Board's and Interveners' arguments that the developer bears the burden to justify its requested waivers by demonstrating no adverse impacts or by performing an alternatives analysis are misconceived. We dismissed that argument in *Scituate, supra,* No. 2007-15, slip op. at 24-26*,* where we stated, "the stringent procedural requirements of the local wetlands regulations—the burden of proof and requirement to show no alternative available—bear on the importance of the issue to the town. They do not establish the burden of proof in this Chapter 40B proceeding. Since the definition of [Isolated Vegetated Wetland] exists only as a local, not state, requirement, the Board must show the local concern that warrants expanding the definition of protected resource areas beyond that identified by the WPA." *Id.* at. 25-26. The Board and Interveners have not met this requirement.

The focus of our inquiry is on whether the Board's action is consistent with local needs. For that analysis to take place, the Board has the burden to prove a local concern protected a provision of Manchester's local requirements or regulations that is more stringent than what is required under state or federal law. 760 CMR 56.02: *Local Requirements and Regulations* (defined as provisions that "are more restrictive than state requirements"); *see also Holliston, supra,* 80 Mass. App. Ct. 406, 417, 420.The testimony of the Board's witnesses, while noting that the development will not comply with all local requirements and must obtain waivers of them, does not demonstrate that the harmful impacts they foresee will occur. In addition, even assuming the adverse impacts would occur, they have not shown that any such impacts would result solely from allowing the project to proceed with the requested local waivers. Here, as in *Scituate,* they have not "show[n] the local concern that warrants expanding the definition of protected resource areas beyond that identified by the WPA." *Scituate, supra,* No. 2007-05, slip op. at 26. Simply put, they have not shown that allowing SLV's planned activity in the locally identified buffer zones has an adverse effect that would not occur if the restrictions in the buffer zones were met. Rather they have suggested SLV will not meet state requirements as well. Thus, they have not shown that their anticipated adverse impacts will result if all state requirements are met.

As we have previously found in *Hingham, supra, Herring Brook Meadow, supra*, and as discussed in *Holliston*, *supra*, 80 Mass. App Ct. 406, 420, simply identifying the existence of a local resource area by itself does not establish a local concern. *Hingham, supra*, No. 2016-05, slip op. at 37. *See Weston Dev. Group v. Hopkinton*, No. 2000-05, slip op. at 18-21 (Mass.

Housing Appeals Comm. May 26, 2004); *River Stone, LLC v. Hingham*, No. 2016-05, slip op. at 35-37 (Mass. Housing Appeals Comm. Sept. 23, 2022), citing *Holliston, supra*, 80 Mass. App. Ct. 406, 420 (Board failed to establish local concern where it had done nothing more than point out that the proposal violates the town's stricter bylaw). Not only must a board show there is a more restrictive local requirement or regulation, but it must also show that the local rule protects against a specific harm against which the state and federal requirements do not. *Holliston, supra,* 80 Mass. App. Ct., 406, 417; *see* 760 CMR 56.02: *Local Requirements and Regulations.* We have described this requirement in a similar way in *Scituate*, *supra,* No. 2007-15, slip op. at 25, where we held that a board had to show that the local bylaw or regulation applies to the proposed development, and "that the specific interests identified in [the local rule] are important at the site." In essence, the harm the stricter local provision protects against must be one not protected by state or federal law.

Since the Board and Interveners here have not shown this, they have failed to demonstrate a valid local concern applicable to the project, much less that such a concern outweighs the need for affordable housing. *Holliston, supra,* 80 Mass. App. Ct. 405, 417, 420; *Scituate, supra,* slip op. at 23-26; *Sunderland*, *supra*, 464 Mass. 166, 171. We also note that the Board and the Interveners failed to make the required demonstration, particularly as SLV's experts testified and B&T's reports showed there will be no adverse impacts to the vernal pool habitat. Exhs. 32, p. 10; 56, ¶ 39; 62, ¶ 6. Accordingly, the Board did not meet its burden of proof by establishing local concerns that outweigh the regional need for affordable housing.

**3. Coldwater Fishery**

The project site lies adjacent to a 1600-acre wilderness known as the Manchester-Essex Wilderness Conservation Area and Sawmill Brook. Exh. 1, p.12, ¶ 31. Sawmill Brook is a perennial stream that has been designated a Coldwater Fish Resource (Coldwater Fishery) under 321 CMR 5.00. Exh. 39. It is one of a handful of remaining brooks in northeastern Massachusetts that provide adequate water quality and habitat to support populations of Wild Brook Trout, which were found in surveys of Sawmill Brook as recently as 2019. *Id.*

The Board and Interveners argue the project will negatively impact the Coldwater Fishery in Sawmill Brook.[28] Board brief, pp. 3, 5; Exhs. 39; 69, p. 4; 71, p. 5, ¶ 15. Specifically, they claim that the project does not adequately protect the Coldwater Fishery from impacts from the clearing, blasting, topography changes, and other site design elements of the project. Board brief, pp. 14-15; Exh. 1, pp. 9-11. They argue that the developer failed to demonstrate compliance with the Town's Wetlands Bylaw and Regulations that relate to protection of these areas. Intervener brief, pp. 22-24; Intervener reply, pp. 1-2; Board reply, p. 6. The Board and Interveners allege that the developer failed to provide the necessary information and analysis that would have allowed the Board to assess potential negative impacts on the Coldwater Fishery, and as such the Board could not condition the project to adequately protect the environment. Intervener reply, p. 2. Accordingly, they argue that protection of the Coldwater Fishery against negative impacts or damage from the project is a valid local concern supporting the Board's denial.[29]

The Board relies on a letter from the state Division of Fisheries and Wildlife (DFW) to highlight what the Board argues is the critical importance of the Coldwater Fishery. Board brief, pp. 19-20; Exh. 39. In a letter dated February 3, 2022, addressed to the Board, DFW confirmed that Sawmill Brook is a designated Coldwater Fish Resource as defined in 321 CMR 5.00 and recognized as an Outstanding Resource Water. Board brief, p. 20, citing Exh. 39. DFW explained that:

> [i]n general, allowing a large development along any wild trout stream could have potentially negative impacts on water quality, streamflow, and instream habitat

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[28] The Board and the Interveners coordinated on the issue of impacts to wetland resource areas and coldwater fisheries, and the Board deferred to the Interveners for purposes of cross-examination of certain witnesses and briefing of certain issues. Board brief, p. 37; Board reply, p. 6. The alleged impacts on the Coldwater Fishery are common interests between the two parties, and the Board incorporated by reference the facts and arguments raised by Interveners in their briefing relating to the coldwater fisheries. Board reply, p. 6.

[29] In the Superseding Pre-Hearing Order, the Board cites to a number of local regulations, in addition to several state regulations, in support of its position that protection of the Coldwater Fishery is a valid local concern: local Wetlands Bylaw Sections 1.2.2; 2.2; 2.9; 4.1.1; 4.4; and 9; and Wetland Regulations Sections 10.1, 10.1.1, and 10.1.2; 2.17; 2.18; 4.4.2; 8.2; 9.7; and 12.4. Superseding Pre-Hearing Order, § IV, ¶ 5.

The Interveners similarly cite to several provisions of the local Bylaw and Regulations: Bylaw Sections 1.2, 2.2, 2.7, 2.8, 2.9, 4.1, 4.2, 4.4, 9.3, 9.7, 9.11, 12.1, 14, and Regulations Sections 1.1, 1.2. 1.3, 2.2, 2.3, 2.8, 2.12, 2.17, 2.18, 2.22, 2.24, 2.25, 2.28, 2.32, 4.4.2, 5.5.4, 8, 9.1, 9.2, 9.4, 9.5, 9.7, 10, 10.1, 11.2, 12. Superseding Pre-Hearing Order, § IV, ¶ 6.

> with concurrent negative impacts to the wild trout population in the system. Brook Trout require water temperatures consistently under 68 degrees Fahrenheit to reproduce, grow, and survive, so any additional stressors in the system that may lead to increased water temperatures are problematic. Major concerns with any development project are loss of riparian and upland forest cover followed by conversion to impervious surfaces, stormwater runoff, and increased water use.

*Id.* The Board argues the project's proposed tree clearing and construction of impervious surfaces will be in close proximity to Sawmill Brook and will negatively impact the area through the temperature of stormwater that is recharged to groundwater, concerns raised by DFW as potential harms to coldwater fisheries. Board brief, p. 20, citing Exh. 48, p. 9. The Board's expert, Mr. Horsley, in a letter addressed to Interveners' counsel dated July 27, 2022, stated that groundwater in the immediate area has been measured at 47 degrees Fahrenheit, and provides a cooling baseflow to the brook under current conditions. *Id.* He also stated that stormwater runoff from solar-heated impervious surfaces can exceed 95 degrees, and in his view a "cumulative impact analysis of thermal impacts" is therefore required. *Id.* He stated the investigations conducted by the developer were inadequate, and the developer made no attempt to assess the thermal impacts on the Coldwater Fishery. Exh. 71, ¶ 17.

Although Mr. Chessia testified that coldwater fisheries are entitled to enhanced protection under the DEP Stormwater Handbook, he did not address any stricter local requirements or regulations related to coldwater fisheries and focused only on the DEP requirements. Exh. 72, ¶ 22; Intervener's brief, p. 23. Mr. Horsley did not address Sawmill Brook and the alleged impacts on the Coldwater Fishery in any detail in his testimony, making only a passing reference to it by alleging "no attempt has been made to assess thermal impacts" on the Coldwater Fishery. Exh. 71, ¶ 17; Interveners' brief, p. 24. He further testified that in his opinion the project would compromise the wetland resource areas in proximity to the site. Exh. 71, ¶ 69. While Mr. Garner did reference Sawmill Brook in his testimony, he did not provide any analysis of how the Coldwater Fishery will be affected. Exh. 69, ¶¶ 61, 64 The Interveners also rely on the letter from DFW as evidence of the importance of Sawmill Brook and the potential negative impacts of large development. Exh. 39; Intervener's brief, pp. 23-24. But SLV correctly notes that DFW expressly stated it did not have the opportunity to closely review the proposed project itself, and therefore it refrained from giving any opinion on its impact on the brook and the Coldwater Fishery. Exh. 39.

As it does with respect to vernal pools, the Board cites the requirement in the regulations for an alternatives analysis, and that a request for a permit must "demonstrate by clear and convincing evidence…that there is no Practicable Alternative to the work or activity proposed." Board brief, p. 16, citing Exh. 3A, § 9.7. The Board claims the developer failed to provide analysis regarding the probable thermal impacts of the project on the Coldwater Fishery, among other things.[30] *Id*. The Board also argues that its Master Plan shows that the Town imposes stricter standards than the state on coldwater fisheries. It argues that in the Town's Master Plan the Town identified specific areas for the preservation and improvement of Sawmill Brook, where maintaining the vegetation and integrity of the brook and stream banks, and controlling the intensity of water flow, are important to protect these assets.[31] Board brief, p. 19, citing Exh. 4A, pp. 15, 61.

The Interveners also argue the Town's local bylaws and regulations are more stringent than applicable state standards embodied in the WPA, 310 CMR 5.00, the Massachusetts Stormwater Handbook and Surface Water Quality Standards, 314 CMR 15.00.[32] Interveners brief, p. 17; Interveners' reply, p. 1. They argue the Town Wetlands Bylaw and Regulations

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[30] This provision of the Regulations pertains specifically to vernal pools, not coldwater fisheries or streams. However, § 8.2 of the Regulations requires that "[a]n applicant shall have the burden of proving by a Clear and Convincing Evidence that any work or activity proposed in a Resource area (other than land subject to flooding or inundation by groundwater, or surface water or coastal storm flowage or flooding) will not have a Significant Immediate or Cumulative Adverse Effect upon the wetlands values protected by the By-Law." Exh. 3B.

[31] The Master Plan is not a local requirement or regulation adopted by the Town. *See* § V.C, *infra,* for the discussion of Town planning as an additional argument for establishing local environmental concerns.

[32] The Interveners suggest that the Board is the "local regulatory authority" authorized to administer 310 CMR 5.00, as it relates to coldwater fisheries, for purposes of a comprehensive permit, in a manner similar to the role of the Conservation Commission under the WPA. Interveners brief, pp. 4, 17. 22; Interveners reply, p. 4. They also argue that coldwater fisheries are defined as "Critical Areas" under the Massachusetts Stormwater Handbook, that the project site is in a "critical area tributary to both a Coldwater Fishery and Certified Vernal Pools," and the project fails to meet Standard 6 of the Stormwater Handbook. They argue the project also fails to comply with state water quality standards. Interveners' brief, p. 23. None of these arguments pertaining to alleged noncompliance with the state WPA, 310 CMR 5, the Massachusetts Stormwater Handbook and state Surface Water Quality Standards (314 CMR 15.00) demonstrate the existence of local concerns here. *See* § III, *supra.* Moreover, the project's effect on Sawmill Brook will still be examined fully upon the submission of a Notice of Intent to the Town's Conservation Commission, as required under the WPA. Exhs. 55, ¶ 20; 62, ¶¶ 14, 24; Tr. II, 7; SLV reply, p. 13; *see Pembroke*, *supra*, No. 2019-04, slip op. at 22 (noting developer still required to file NOI to comply with state requirements).

specifically protect the Coldwater Fishery in Sawmill Brook. Interveners' brief, pp. 17, 23. They assert that an express purpose of the Bylaw is the protection of fisheries, and that the regulations explicitly protect the water quality of streams. *Id.*, citing Exhs. 3A, § 1.1; 3B, § 9.5.[33] They also rely on the DFW letter cited by the Board, above, to support their claims the project will negatively impact the Coldwater Fishery. Interveners' brief, p. 24. In their view, the close proximity of Sawmill Brook to the project supports the local concern regarding potential negative impacts to temperature, wildlife, habitat, and other things.

The Interveners argue that, in order to condition the permit properly and provide any requested waivers, the alternatives analysis pursuant to Wetlands Bylaw § 9.5, is required before any permitted work that will alter a stream. *Id.*, p. 4; Tr. II, 7-10. The Interveners claim that the developer failed to provide the Board with the information needed and requested by the Board to evaluate any negative effects from the project and condition any permit in order to address those concerns. Interveners reply, p. 2.

SLV argues that neither the Board nor the Intervener have provided sufficient evidence that addresses alleged harms specific to any impact on the Coldwater Fishery. SLV reply, p. 11-12. It argues that, although the Board's witness, Mr. Garner, referred to Sawmill Brook several times, he did not explain how the portion of Sawmill Brook adjacent to the project would be affected, instead, referring to an area of the brook potentially near proposed sewer infrastructure that was not raised as an issue in the Superseding Pre-Hearing Order. SLV brief, pp. 46-47; Exh. 69, ¶ 60. Similarly, Mr. Horsley's pre-filed testimony made only one reference to the brook and provided no opinion or analysis regarding the project's impact upon the brook. Exh. 71, ¶ 15; SLV brief, p. 46.

Mr. Goddard, SLV's professional wetlands specialist and consultant, testified that the developer endeavored to respond to concerns regarding any impacts to Sawmill Brook, and that the major concerns with coldwater fisheries were temperature changes and siltation resulting

[33] Section 9.5 of the Regulation provides: "[p]rior to the issuance of a permit for work or activity which alters a Stream, the Applicant shall demonstrate by Clear and Convincing Evidence as set forth in an Alternatives Analysis that there is no Practicable Alternative to the work or activity proposed. Any Alternation which may adversely affect the water quality of the stream (as measured by sediments, nutrients, bacteria, temperature, dissolved oxygen, and toxic chemicals) or its ability to support fish and other aquatic life shall be presumed to have a Significant immediate and Cumulative Adverse Effect to the Stream and values protected by the By-Law." Exh. 3B.

from improperly designed stormwater management facilities. Exh. 55, ¶ 18. He stated that compliance with DEP Stormwater Management guidelines will ensure that stormwater is properly treated and infiltrated before reaching the stream, and that proper erosion controls and regular inspections will also ensure that no erosion or sedimentation enters the stream. *Id.* He further testified that the developer is not proposing the removal of forest cover within 100 feet of the stream (and that outside of 100 feet, much of the forest cover surrounding the stream and wetlands will be left intact) and that all stormwater will be treated and infiltrated according to DEP Stormwater guidelines required for discharge to critical areas. *Id.*, ¶ 19. In his opinion, compliance with the state standards for stormwater adequately addresses any concerns for thermal or siltation changes to Sawmill Brook. *Id.*

Mr. Quinn, SLV's civil engineer, testified that while there is no dispute that the project contains some of the regulated riverfront to the Sawmill Brook, any impact from the project will not significantly affect it. Exh. 56, ¶ 34. He agreed that the closest disturbance is over 100 feet from the brook, stating there will be no inner riparian disturbance within those 100 feet. *Id.* He further stated that the project's stormwater management system complies with the required state DEP standards and guidelines for stormwater management proposed near coldwater fisheries. *Id.*, ¶ 35. SLV argues that the Board and Interveners have not shown that Sawmill Brook is located in close enough proximity to the project where disturbances would cause negative impacts. SLV reply, p. 13.

The Interveners also argue that the project requires extensive blasting upgradient of Sawmill Brook, the impacts of which have not been fully assessed, and directional drilling in the cloverleaf to Route 128 for a new sewer main, which will adversely affect the Coldwater Fishery. Interveners' brief, p. 24. On behalf of the Interveners, Lynn Atkinson[34] testified that the "approximate location of the unnamed tributary stream that I observed and photographed is shown as a dashed blue line" on plans submitted by Mr. Garner on behalf of the Board. Exh. 74, ¶ 3. It is difficult to determine from the hand-drawn plans submitted by Mr. Garner the exact distance from the proposed drilling and access pit in relation to Sawmill Brook. Exh. 74, Figure 5. Relying on this, the Interveners argue that "carelessness of a design, even a preliminary one,

[34] Ms. Atkinson is a member of the ten persons group and is a trustee of the Manchester Essex Conservation Trust. Exh. 74, ¶ 1.

where the drill pit would be located in a Coldwater Fishery … was indicative of the Developer's lack of attention to environmental concerns." *Id.* Mr. Formato stated on cross-examination that "[c]onceptually, you would not put a drilling pit in a stream." Tr. I, 60, 64. Regarding directional drilling, he testified that "[d]irectional drilling piping under any stream, highway, has challenges that are inherent with the technology. But that is the purpose of directional drilling, [it] is to minimize impacts and allow infrastructure to be installed in situations such as that." Tr. I, 48. Mr. Formato stated that the drilling plan is conceptual at this stage, and at the time of permitting, mitigation concerns can be discussed with the Town. Exh. 65, pp. 7, 9. In addition, Mr. Goddard testified that "[u]nder the [WPA] and [Manchester] Wetlands Bylaw, Sawmill Brook has a 200-foot jurisdictional area from the Mean Annual High Water (MAHW) line. Any work proposed within this area requires a Notice of Intent under the WPA," and therefore compliance with the WPA. Exh. 55, ¶ 20. Neither the Board nor the Interveners offered expert testimony that drilling that complies with state requirements would adversely impact the Coldwater Fishery in a manner that is protected more strictly by local requirements than by state standards.

Mr. Quinn stated the project's stormwater management system complies with DEP requirements for facilities close to coldwater fisheries and that impacts from the stormwater management system have been mitigated to the extent required by the DEP Stormwater Handbook. Exh. 56, ¶ 35; Tr. III, 43-44; SLV reply, p. 13. As SLV points out, the regulation of coldwater fisheries operates primarily under the state regulations and guidelines identified by the Interveners. Consideration of those state standards is outside the purview of our local concerns analysis, except to the extent the Board and Interveners are required to show the local requirements are stricter than state requirements.[35] *See* SLV reply, p. 13, citing *Weston*, *supra*, No. 2017-14.

The Board and Interveners argue that the requirements to provide an alternatives analysis and to demonstrate no adverse effect on a resource area constitute stricter local standards for consideration of the environmental impact of the project on the Sawmill Brook. However, their reliance on the developer's lack of an alternatives analysis regarding the project's impact on the Coldwater Fishery does not establish a valid local concern that outweighs the need for affordable housing. *See* Exh. 3B, §§ 8.2, 9.4. Board brief, p. 16; Interveners brief, pp. 12-13, 20-23. As discussed in § V.B.2, "stringent procedural requirements of the local wetlands regulations—the

[35] *See* note 31, *supra*.

burden of proof and requirement to show no alternative available … do not establish the burden of proof in [a] Chapter 40B proceeding, where the burden of proof regarding local concerns rests with the Board and Interveners. *Scituate, supra,* No. 2007-15, slip op. at 24-26*,* Here the Board and Interveners have failed to identify a legitimate local requirement necessary to protect against specified harms that could not be protected by the state scheme. *See Weston, supra*, No. 2017-14, slip op. at 17, citing *Holliston*, *supra*, 80 Mass. App. Ct., 405, 417, 420; 760 CMR 56.02: *Local Requirements and Regulations*. The Board and Interveners failed to establish the potential damage specifically relating to the Coldwater Fishery, and none to show that the Town's local wetlands bylaw and regulation protect against harms for which compliance with state requirements would be inadequate. More is required than simply identifying a requirement of a particular local bylaw or regulation*. See Weston*, *supra*, No. 2017-14, slip op. at 38-39, citing *Holliston*, *supra*, 80 Mass. App. Ct. 406, 419 ("where the DEP is charged with providing for the protection of health, safety, public welfare, and the environment … the board must be able to demonstrate that its local concerns will not be met by the State standards enforced by the DEP").

Accordingly, the Board and Interveners have not demonstrated a legitimate local concern with respect to the project's impact on the Coldwater Fishery that outweighs the regional need for affordable housing.

**4. Stormwater**

The only local requirement pertaining specifically to stormwater management that SLV requested to waive is § 6.15—Stormwater management special permit. SLV seeks to a waiver of the requirement for a stormwater management special permit, with review by the Board under the comprehensive permit review process, rather than by the planning board. However, the waiver list contains no request to waive substantive stormwater management provisions. Exhs. 6A, 6B. As a matter of course, the comprehensive permit proceedings incorporate the review of all local boards that would have to review and issue permits. "The [comprehensive permit law] allows [an applicant] that wishes to construct low or moderate income housing 'to circumvent the often arduous process of applying to multiple local boards for individual permits and, instead, to apply to the local board of appeals for issuance of a single comprehensive permit.'" *Lunenburg, supra*, 464 Mass. at 40, quoting *Board of Appeals of Woburn v. Housing Appeals Comm.*, 451 Mass. 581, 583 (2008) *See* 760 CMR 56.07(6)(c) ("A Comprehensive Permit issued by order of the Committee shall be a master permit which shall subsume all local permits and

approvals normally issued by Local Boards....”). Although only the Board’s case includes stormwater management as a local concern,[36] both the Board and the Interveners make arguments regarding asserted inadequacies of the developer’s stormwater management system in relation to their arguments that the treatment of stormwater will adversely impact the vernal pools and the Coldwater Fishery. Their arguments have been addressed in the sections on those environmental resources.

As discussed above, the Board argues B&T had raised the issue that the proximity of a retaining wall could create lateral movement of stormwater, Board brief, pp. 16-17. but Mr. Quinn explained that the use of impermeable membranes on the sides of the system prevents the possibility of lateral stormwater movement. Exh. 56, ¶ 28(a); SLV brief, p. 49. Similarly, B&T raised concerns about vertical, rather than lateral, infiltration, and Mr. Quinn again noted that the placement and use of impermeable membranes will force vertical infiltration. Exh. 56, ¶ 28(b); SLV brief, p. 49. Mr. Quinn also noted that B&T’s concern about chemical and thermal impacts are addressed by the use of impermeable membranes that preclude undesirable infiltration. Exh. 56, ¶ 28(c); SLV brief, p. 49. Mr. Quinn further testified that he and his firm adequately performed water runoff calculations, with no concerns being raised by B&T. He noted the project’s location atop a hill means there is no steady flow of groundwater that would impact the stormwater system. He gave the opinion that the designed overflow system discharges stormwater at safe velocities given existing ground cover in the event of a 100-year storm, and SLV’s project reduces peak flows and volumes to the existing drainpipe and runoff culvert connection. Exh. 56, ¶ 29, Responses 1, 11, 16, 17, 32; SLV brief, pp. 49-50.

To the extent the Board and Interveners make other arguments about inadequacies of SLV’s stormwater management plans, they both argue that SLV has failed to comply with relevant state requirements, including the Massachusetts Stormwater Handbook, the WPA and Massachusetts Surface Water Quality Standards regulations. Interveners brief, pp. 13-14; Board brief, p. 17. They argue that SLV was required to perform a water budget analysis required by the Massachusetts Stormwater Handbook. Board brief, p. 17, citing Exh. 71, pp. 29-31, 36-37; Interveners brief, pp. 13-14, citing Exh. 69, ¶ 28-31, 45. The Board also argues that SLV was

[36] In support of that claim, the Board listed the following local requirements: Wetlands Bylaw §§ 1.2.2; 2.2; 2.9; 4.1.1; 4.4; and 9; and Wetlands Regulations §§10.1, 10.1.1, and 10.1.2; 2.17; 2.18; 4.4.2; 8.2; 9.7; and 12.4. Other provisions cited by the Board are state requirements. Superseding Pre-Hearing Order, pp 4-5. None of the identified local bylaws and regulations establish local stormwater standards.

required by the Handbook to install monitoring wells to measure seasonal high groundwater and approximate annual recharge, arguing they used incorrect guidelines for conducting their analyses. Board brief, pp. 18-19, citing Exh. 71, pp. 14-17. They did not identify local requirements or regulations specifically pertaining to stormwater management that SLV seeks to waive.

"[W]e have long noted that the Committee has no [] authority to hear a dispute as to whether a developer is adhering to state or federal law." *Weston, supra,* No. 2017-14, slip op. at 17, quoting from *Green View Realty, LLC v. Holliston,* No. 2006-16, slip op. at 10 (Mass. Housing Appeals Comm. Jan. 12, 2009), *aff'd sub nom. Holliston v. Housing Appeals Comm.,* 80 Mass. App. Ct. 406 (2011), *F.A.R. den.,* 460 Mass. 1116 (2011), quoting from *O.I.B. Corp. v. Braintree*, No. 2003-15, slip op. at 6-7 (Mass. Housing Appeals Comm. Mar. 27, 2006) (holding that it is not "the role of either the Board or this Committee to adjudicate compliance with state standards"), *aff'd,* No. 2006-1704 (Suffolk Super. Ct. July 16, 2007). *See* § III, *supra.*

Therefore, neither the Board nor the Interveners have demonstrated a local concern with regard to stormwater management that outweighs the regional need for affordable housing.

### C. Local Planning Concerns

The Board and Interveners also contend that the denial of the comprehensive permit should be upheld because the proposed development is inconsistent with the Town's Master Plan and its Open Space and Recreation Plan.[37] Board brief, pp. 5-10, 30-33; *see* Exhs. 4A; 4B; Interveners' brief, pp. 25-30. Their primary argument is based on provisions in the Town's Master Plan that refer to the protection of natural resources. Specifically, the Board notes that the Master Plan included "three major elements of its 'Community Vision,'" identifying the following:

- To preserve the unique character of Manchester -by-the-Sea and protect our natural resources;
- To support more housing choices for varying income levels and to allow community members to "age in place"; and
- To attract and retain diverse businesses in town.

[37] The Interveners argue only with regard to the Master Plan. There is no reference in their brief or reply brief to the Open Space and Recreation Plan.

Board brief, p. 5, citing Exh. 4A, p. 5. The Interveners argue the "Master Plan protects natural environmental resources by limiting growth to appropriate locations." Interveners brief, p. 27; *see* Exh. 4A, pp. 6, 40.

The Sawmill Brook is identified in the Open Space and Recreation Plan (OSRPlan) as a resource for the protection of wildlife habitat, among other things. Exhs. 4A; 4B. The OSRPlan states: "The Town of Manchester is abundant with wildlife due to its large areas of open space and undeveloped parcels and the diversity of ecosystems. With widespread forestlands, wetlands and coastal areas, Manchester supports large populations of wildlife and wildlife habitats. Manchester shares many of the same species with neighboring towns and those found in eastern New England." Exh. 4B, p. 36. The OSRPlan specifies that the "Sawmill Brook watershed includes the major part of the woodlands north of Route 128," which includes the site of the proposed development.[38] Exh 4B, p. 9; Board brief, p. 5. This plan also notes that the Department of Fisheries and Wildlife has identified "environmentally sensitive" cold water fisheries in the Town, as well as "23 Certified Vernal Pools and 22 Potential Vernal Pools as shown on NHESP layers of GIS maps." Exh. 4B, pp. 36-37.

The Master Plan specifically identifies Sawmill Brook for improvement projects to address water quality, habitat, and flooding impacts on "many areas and resources from just south of Route 128 to Central Pond and the Central Street Tide Gate where it empties into Manchester Harbor." Exh, 4A, p. 15; Board brief, p. 5. Under the Manchester zoning bylaw, the residential use proposed here is not permitted in the Limited Commercial District (LCD) in which the site in this case is located.

Pursuant to 760 CMR 56.07(3)(g), the Committee is required to consider municipal and regional planning concerns raised by the Board. The planning issue presented is whether construction of housing on a wooded hill in the LCD, located near the Sawmill Brook, raises concerns, as expressed in Manchester's Master Plan and Open Space and Recreation Plan (OSRPlan), that are sufficient to establish a valid local concern that outweighs the regional need for affordable housing. In considering the Town's planning documents, which are not bylaws or regulations and therefore do not have the force of law, we apply a standard we have developed

[38] The Master Plan notes that "approximately a third of the land [in the Town] is protected open space…." Exhs. 4A, p. 42; 12, p. 25.

over many years.[39] Initially, the Board must meet a three-part threshold test. First, is the town's master plan or other plan a bona fide, functioning planning tool? Second, does the master plan promote affordable housing? Third, have the town's plans been implemented in the area of the site? If any of these questions is answered "no," we will not consider municipal planning a legitimate local concern in the case before us.

If the threshold test is met, further analysis is required to determine the weight, if any, of the town's local planning concerns, which then must be balanced against the regional need for affordable housing. The local concern asserted by a municipality typically includes both one or more specific, narrow planning interests and the town's overall interest in the integrity of its planning process. The analysis of these interrelated interests is broken into several factors. The Board need not introduce evidence with regard to each of these, but it must introduce enough evidence to cumulatively establish a local concern of sufficient weight to outweigh the regional need for affordable housing. First, the Board may establish the extent to which the proposed housing is in conflict with or undermines the specific planning interest. Second, it may introduce evidence demonstrating the importance of the specific planning interest. Third, it may introduce evidence of the quality of the overall master plan (or other planning documents or efforts) and the extent to which it has been implemented, with particular emphasis on the housing element of the master plan or any separate affordable housing plan. Finally, the Board may demonstrate that municipal planning has brought about the construction of a substantial amount of affordable

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[39] *See, e.g., Harbor Glen Assocs. v. Hingham,* No. 1980-06, slip op. at 6-16 (Mass. Housing Appeals Comm. Aug. 20, 1982) (comprehensive permit denial upheld under a municipal plan developed for reuse of a large naval depot, had been zoned for an office park); *KSM Trust v. Pembroke*, No. 1991-02, slip op. at 5-8 (Mass. Housing Appeals Comm. Nov. 18, 1991) (town overruled based on inconsistencies between its zoning bylaw and master plan); *Barnstable*, *supra*, No. 1998-01, slip op. at 10-14 (denial of permit upheld based upon town's interest in preserving integrity of maritime business district); *Adams Road Trust v. Grafton*, No. 2002-38, slip op. at 25-28 (Mass. Housing Appeals Comm. Dec. 10, 2004) (zoning provisions not supported by master plan, but condition precluding connection to municipal water system upheld); *Brierneck Realty LLC v. Gloucester*, No. 2005-05, slip op. at 20-24 (Mass. Housing Appeals Comm. Aug. 11, 2008) (Board failed to demonstrate implementation of plan and that proposal was inconsistent with plan); *28 Clay Street Middleborough, LLC v. Middleborough*, No. 2008-06, slip op. at 11-21 (Mass. Housing Appeals Comm. Sept. 28, 2009) (town planning with regard to office park sufficient to support denial of permit); *Hollis Hills, LLC v. Lunenburg*, No. 2007-13, slip op. at 19-31 (Mass. Housing Appeals Comm. Dec. 4, 2009), *aff'd* 464 Mass. 38 (2013) (Board failed to demonstrate that proposal was inconsistent with town's plan); and *Herring Brook Meadow, supra*, No. 2007-15, slip op. at 27-38 (master plan failed to pass threshold test, nor was proposal inconsistent with plan), *aff'd* No. 2012-P-1681 (Mass. App. Ct. Jan. 31, 2014).

housing to address the community's needs. This final element is perhaps the most important in determining the viability and strength of municipal planning.

We note at the outset that in comparison with other cases in which we have considered municipal planning concerns, the Board in this case has presented little evidence for our consideration. It relies nearly entirely on the texts of the Master Plan and the OSRPlan, making general arguments, but providing virtually no testimony or documentary evidence to support them. The Interveners similarly present argument with little evidentiary support. Despite the weakness of these presentations, we will analyze what evidence they have identified or does appear in the record.

**1. The Three-Part Threshold Test**

At a minimal level, we assume, without deciding, that Manchester's master planning efforts pass our threshold test.[40] First, although there was no testimony concerning the history of planning in Manchester, there apparently was a master plan in 2000 and an open space plan in 1997. Exh. 4B, p. 12. The plans in evidence are a Master Plan adopted in 2019 and an OSRPlan adopted in 2014. Exhs. 4A, p. 66; 4B;[41] *see* Board brief, pp. 5, 31; Interveners brief, p. 28. No witnesses were presented in support of these plans.

Second, in considering whether the Manchester planning supports affordable housing, the record is similarly thin. No testimony in support of affordable housing efforts was introduced, nor were any housing reports or plans with more detailed strategies entered into evidence, although there is reference in the Master Plan itself to a Housing Production Plan and an Affordable Housing Trust.[42] Exh. 4A, pp. 28, 29, 70. However, the text of the Master Plan does

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[40] "We do not view this three-part threshold to be a high one. …in Massachusetts, the quality of master planning in general, and of affordable housing planning in particular, has advanced considerably since we first articulated [the threshold] test in *Pembroke* in 1991, and we expect that any town that would assert its planning efforts in support of denying a comprehensive permit should easily be able to establish these three basic characteristics of its planning efforts. Thus, in most cases, our real focus is on the analysis that follows the threshold test, that is, on the analysis that allows us to determine the weight of the town's local planning concern that is to be balanced against the regional need for affordable housing." *Andover, supra*, No. 2012-04, slip op. at 6-7.

[41] The OSRPlan notes that there had been similar plans in the past, but "a lapse of several years" and an uncompleted draft plan in 2005. Exh. 4B, p. 3.

[42] In its brief, the Board suggests that the Committee review information on the Town website to ascertain how much money the Town Meeting appropriated to the Affordable Housing Trust. Board brief, p. 32 n.16. As noted in note 19, *supra,* the Committee will not consider information that is not part of the evidentiary record.

identify eight primary recommendations, and among these are three referring to housing: "ED-2: Consider Revising zoning in the General District to permit more commercial and residential opportunities Downtown in a matter sympathetic to existing character; H-1: Modify zoning to encourage housing of the size, style, and prices appropriate for downsizing household, elders, young families, singles, and couples…; [and] H-2: Increase and integrate housing that is affordable…with mixed-income ownership and rental options," and there is also a section describing, as a priority, "Support of a Diversity of Housing Options." *Id.*, pp. 9-11, 28-29. The Board notes that to address the Town's housing needs, the Master Plan identified several parcels owned by the Manchester Housing Authority for redevelopment—the Plains, Newport Park, and Loading Place Road, and the possibility of adding mixed-income housing on the seven-acre Pleasant Street public housing site was raised. Board brief, p. 6; Exh. 4A, pp. 28-29.[43] The Board has not argued that any of these recommendations have been implemented.

Third, there is also only a minimum of evidence with regard to whether municipal plans have been implemented in the area of the site. As noted by the Interveners in particular, there is some evidence regarding commercial development on a nearby site that was previously a quarry, and we agree that this development is consistent with the Master Plan and the zoning in the LCD. Tr. III, 129-130, 136. But there was no testimony from any party about what should be considered the "the area of the site." Arguably we should consider implementation in all or most of the LCD, which is large, encompassing all of Manchester that is north of Route 128. *See* Exh. 2, p. 129 (zoning map). There is no evidence concerning its exact size, but 238 acres of it is "potentially developable." Exh. 4A, p. 42; *see* Interveners' brief, p. 27. Consideration of a single developed site within such an area or even within a portion of it is hardly sufficient to inform the analysis we would normally engage in. Similarly, we should consider evidence of implementation of the Sawmill Brook improvements identified in the Master Plan, as well as implementation of the OSRPlan, but the Board has not identified such evidence. Nevertheless, since this is the only evidence presented by any of the parties, and since it is consistent with the Master Plan, we find that, at the minimum threshold level, the Master Plan has been implemented in the area of the site. The Board has not argued that the OSRPlan was implemented in the area of the site.

[43] The Master Plan also contemplated potential "residential care and assisted living facilities" only if the developer and the Town reached a development agreement. Exh. 4A, pp. 20-21; Board brief, p. 31.

**2. The Four-Part Analysis: Manchester's municipal planning concerns are insufficient to outweigh the regional need for affordable housing.**

**a) The extent to which the proposed housing is in conflict with or undermines the specific interests**

We note at the outset that the Board's arguments with regard to municipal planning are slightly different from the most common approaches. Typically, arguments with regard to a master plan assume that development is appropriate on the site under consideration and suggest that housing is not the planned use. Similarly, the strongest arguments with regard to an open space plan typically are that the site under consideration has been specifically designated for protection from development.

Under the Manchester zoning bylaw, the residential use proposed here is not permitted in the LCD in which the proposed site is located. The Board argues that "the Master Plan notes that potential development sites should be examined to ensure 'appropriate protection for natural resources in the area.'" Board brief, p. 7, citing Master Plan, Exh. 4A, p. 20. It also argues the "Master Plan supports a planned development process for suitable developments not otherwise allowed as of right in the LCD so that Town Meeting approval of a zoning amendment would be realistically expected." *Id.* The Board faults SLV for declining to follow "the process for approval of its otherwise prohibited residential use in the LCD, as specifically stated in the Master Plan. Board brief, p. 7, citing Tr. I, 136. It argues that the degree and intensity of the proposed use is inconsistent with the limited commercial uses allowed as of right in the LCD and the proposed project does not meet design standards that apply. Board brief, p. 7, citing Exh. 2, pp 23-24, 40-43.

Here, the Board has commingled arguments about development planning and open space protection. It points out that the proposed housing here is both generally inconsistent with development plans in the area and, in addition, the area is one with open space value and near natural resources to be protected. On a superficial level, this may appear to create a stronger, cumulative argument. But this commingling has a significant weakness, since each of these goals for the area of the site potentially undercuts the other one. Almost without exception, development in rural and suburban communities takes place on undeveloped land, which in most cases has environmental value. Thus, the development goals of any master plan are inherently in conflict with the broad preservation goals of an open space plan. In the particular area of Manchester in which the proposed housing site is located, this conflict is quite apparent, even

within the Master Plan itself, and our task is to sort out the interests expressed in both plans and their relationship to the need for affordable housing that is addressed by the Comprehensive Permit Law.

The Master Plan, which addresses land use planning, states a preference for commercial development in the LCD and the zoning bylaw does not permit residential uses. The Board argues that to protect natural resources, the Town identified the Sawmill Brook, which is near the site and affects flooding from just south of Route 128 to Central Pond. Board brief, p. 5. It argues that the area was intended to remain wooded or to contain buildings with footprints of no more than 40 percent of a large site. Exh. 2 at 23-24; Exh. 4B at 20-21. Board brief, pp. 5-6. Limited commercial projects—including health care, wellness, recreation and education facilities, a hotel, residential care and assisted living facilities—were recommended in the Limited Commercial District to increase Town revenue. Board brief, pp. 6-7, 31; Exh. 4A, p. 7. The Board argues that the developer declined to avail itself of a process in the zoning bylaw for discretionary approval of residential uses in the LCD. Board brief, p. 7. It maintains that the Town's plans were legitimately adopted, function as valid planning efforts, and promote affordable housing. Board brief. *Id.*, p. 31. It concludes that the Town's Master Plan and zoning both show a careful effort to promote affordable housing while not compromising the goals of environmental protection. Board brief. *Id.*, pp. 32-33.

The Interveners make similar arguments with regard to the Master Plan, namely that the Town's Master Plan seeks to preserve natural resources by limiting growth in environmentally sensitive areas. Interveners' brief, p. 27. It points out that "[o]ver half of Manchester is zoned for residential use, but less than eight percent (8%)—only 238 acres—is in the LCD" and that the "23-acre site accounts for ten percent of all land area available for commercial development in the entire Town." *Id.* It points to "anecdotal evidence" that supports the Town's planning efforts, namely a commercial project across the street from the site, the location of an old quarry, a cleared site developed with minimal environmental damage. *Id.*, pp. 28-30.

Therefore, the proposed housing is generally in conflict with the Town's stated interests. The extent of that conflict is another question, and we will examine several factors.

First, the Board has not shown what negative impact, if any, on the LCD that housing would have in this location. The housing is proposed in a peripheral, isolated location—at the

very southern edge of the large LCD, adjacent to the Exit 15 interchange of Route 128, a major, limited access highway. Exh. 2, p. 129 (zoning map). The Board introduced no evidence to show precisely the extent to which the proposed housing would undermine specific commercial interests. *Cf. Andover, supra*, No. 2012-04, slip op. at 15-17 (sole remaining vacant lot in eleven-lot office and industrial park deemed suitable for residential development); *Barnstable*, *supra*, No. 1998-01, slip op. at 10-14 (irreplaceable harbor-front location for maritime uses). More specifically, this is not a case in which there will be little land left for commercial development if housing is built, even on this rather large, 23-acre site. Rather, as noted above, 238 acres of the LCD remains "potentially developable." Exh. 4A, p. 42; *cf. Andover, supra*, slip op. at 4, 13-15.

Second, not only is there little evidence of specific negative commercial impact, but some evidence in the record contradicts the Board's arguments. For instance, in a section of its brief in which it addresses both the Master Plan and the OSRPlan, the Board argues that "the area was intended… to support only a small and limited commercial zone, with small building footprints that occupy no more than 40% of a large site." Board brief, pp. 5-6. But, due to hilly topography, less than half of the site in question is buildable, and the building itself as proposed will cover well less than 40% of the site. Tr. 1, 152; see Exhs. 5A; 5B.

Finally, one of the Master Plan's eight primary recommendations is to develop a strategic plan for the LCD. Exh. 4A, p. 20. It suggests that zoning changes may be in order, noting that the strategic plan "would also recommend appropriate zoning for the LCD." *Id.* It seems likely that this does not envision changes that would permit development of family housing, but rather uses such as "residential care and assisted living facilities." But that the Town seems poised to loosen its commitment to purely commercial development in the LCD is some indication that the residential housing proposed here is not deeply in conflict with the Town's planning interests. The Board's and Interveners' arguments of negative impact on the Master Plan focus on environmental harm—allegations of harm to vernal pools and the coldwater fishery. As discussed above, they have failed to demonstrate the project will harm those environmental interests identified in the Master Plan. Thus, the Board has not proven that the proposed housing conflicts with the Master Plan to any great extent.

With regard to open space planning, the area in which the site is located is one of many areas that are identified in the OSRPlan as desirable for open space preservation. The entire LCD—the "remaining unprotected woodlands north of Route 128,"—is listed among

"candidates" "for potential acquisition or protection by other means." Exh. 4B, p. 76 (Goal 2(1)). More specifically, however, the general area of the proposed housing (Old School Street, Shingle Place Hill, Sawmill Brook) is identified as one of several "key unprotected parcels," that bears some relation to flooding. *Id.*, p. 32. However, the exact relationship of the proposed site to these general concerns is unclear. And, on the other hand, the proposed 23-acre site is relatively small in comparison to the large, 3,400-acre Manchester-Essex Woods, in which it is located, at the very most southern part. Exh. 4B, p. 31; Exh. 2, p. 129 (zoning map). In addition, although it abuts undeveloped land, it is also immediately adjacent to Exit 15 of Route 128.

However, since both planning documents address the area of the site, and provide for different municipal goals, we do not find that the Board has proven any significant degree of conflict with the OSRPlan.[44]

**b) The importance of the specific local planning interests**

It is often difficult to evaluate the importance of local planning interests at a particular site, as distinct from the degree a proposal is in conflict with them. The Board has offered no significant proof beyond what we discuss above. We find that the Board has not proven great importance of the planning interests articulated in its Master Plan as they relate to the site in question.

Similarly, the Board has done little to present testimony or documentary evidence—beyond the OSRPlan itself, as also discussed above—to show the importance of local open space interests with regard to this specific site. It has not attempted to catalogue the various open space values on the site and on surrounding areas or to compare them with the value of already designated open space elsewhere in the Town. And, in fact, several facts in the plan militate against the Board's position. First, the Town is already "blessed with abundant open space from the public parks and beaches along its scenic coast to hundreds of acres of connected and undeveloped uplands and wetlands along its northern border to open pastures and pockets of woodlands throughout town…. Thanks to a history of benevolence and private and public actions over 1,600 acres representing 32% of the town's total land area are partially or fully protected." Exh. 4A, p. 54. Second, the location of the proposed site—at the southern edge of the

[44] The Master Plan also reinforces environmental concerns in the area of the nearby Sawmill Brook, including the need to retain vegetation to limit flooding. Exh. 4A, pp. 15, 57; *see* Board brief, p. 5.

Manchester-Essex Woods, adjacent to a major highway interchange—is less critical than some other areas. It is different, for instance, from when "more than 100 acres *in the heart* of the Manchester-Essex Woods was put under agreement for residential development [and the] MECT [Manchester Essex Conservation Trust] negotiated acquisition of the land for conservation…."[45] (emphasis added) Exh. 4B, p. 31. We find that the Board has not shown great importance of the open space interests relating to the housing site.

**c) The quality of the overall plans and the extent to which they have been implemented to support affordable housing**

In examining the quality of municipal planning efforts, we generally prefer to have the benefit of expert testimony. *See Andover, supra*, No. 2012-04, slip op. at 8, n.15. Here, our analysis, and also the strength of the Board's case, is limited since none was presented. Further, for the master plan in particular, we place great emphasis on the housing element of the plan, which:

> must not only promote affordable housing, but to be given significant weight, the Board must show to what extent it has been an effective planning tool. …that specific, effective action items have been enumerated to encourage the building of affordable housing, that potential sites for affordable housing have been identified, and that town staff or volunteer groups have been assigned responsibility for specific actions and have followed through on those actions. Among the issues to be considered with regard to implementation is whether zoning bylaws have been adopted and regulations promulgated in support of goals established in the master plan.

*Id.*, slip op. at 8.

> A plan that contains indisputably outdated concepts—such as rigidly separated uses rather than provisions for mixed uses in appropriate locations—will have less weight than a more progressive plan. Similarly, a plan with no provisions for multi-family zoning will have much less weight than one with well-crafted multi-family provisions.

*Id.*, slip op. at 8, n.15.

The Manchester Master Plan discusses affordable housing in a number of places, and the Board argues that § 9.2 of the Zoning Bylaw establishing residential conservation clusters to promote denser housing while preserving open space in subdivisions, and § 9.3 (its inclusionary

[45] This is not to say, however, that the proposed site is unimportant. When the property was put up for sale by the previous owner, although the Town itself apparently expressed no interest in preserving it as open space, the MECT did approach the owner, though no agreement was reached. Tr. I, 181-182; Exh. 61, ¶¶ 7-10. This says little, however, about exactly how important the site is.

zoning bylaw), which requires 10% of subdivisions to be affordable units, promote affordable housing. Board brief, p. 32, citing Exh. 2, pp. 65-66, 74-75. Our review shows that the inclusionary zoning bylaw refers to developments of 11 dwelling units. Exh. 2, § 9.3.5(1), p. 75. And § 6.3.2 of the bylaw refers to properties of six units or less. Exh. 2, p. 40. But the only provision in the use table concerning multi-family housing (defined as three or more units) indicates that dwellings of "not more than four dwelling units" are allowed only in one zoning district, and there only by special permit (Use A-5). Exh. 2, § 4.2, p. 22. The inclusionary zoning bylaw itself is certainly designed to encourage construction of affordable housing, but the Board has presented no evidence with regard to whether it has been implemented or is effective. Nor has the Board shown that the Affordable Housing Trust has produced affordable housing. Thus, the Board has not brought any evidence to our attention to demonstrate that the Town has actually facilitated development of affordable housing.

Moreover, the Board's argument based on the text of the Master Plan is weak. It asserts that the Town "identified … parcels as available to support its affordable housing goals." Board brief, p. 6. The parcels it cites, however, are The Plains, Newport Park, and Loading Place Road, plus the possibility of "adding mixed-income housing on the seven-acre Pleasant Street site owned by the Town." *Id.* It does not point out that the first three are sites that are already owned by the Manchester Housing Authority and might be "redevelop[ed]," and that the Town-owned site is "currently housing DPW [Department of Public Works] facilities." Exh. 4A, pp. 28-29.

Finally, there is evidence of potential exclusionary zoning practice. In 2000, a new 1,000-acre residential zoning district was created, 500 acres of which were undeveloped. The minimum lot size was increased from one acre (in existing Single Residential District C) to two acres. Exh. 4B, p. 12. Such zoning, while not illegal *per se*, may be an example of policy that excludes lower income residents.[46] *See, e.g., Hanover*, 363 Mass. 339, 348-349, 384 n.28, citing *County Supervisors of Fairfax County v. Carper*, 200 Va. 653 (1959 (invalidating two-acre minimum lot

[46] Policies that impede affordable housing development come in many forms. The Board also argues that "[t]he Applicant purposely declined to avail itself of the [existing zoning] process for approval of its otherwise prohibited residential use…," which it appears to agree would have been a "colossal waste of time." Board brief, pp. 7, 31. It suggests that there could have been an amendment to the zoning bylaw or that a development agreement could have been negotiated with Town officials. *Id.*, p. 31. But the reason the developer applied for a comprehensive permit and the purpose of the Comprehensive Permit Law is to cut through the red tape and uncertainty involved in such approaches by providing a single, simple permitting process before the Board.

size requirement as exclusionary to low income groups); Boudreaux, *Lotting Large: The Phenomenon of Minimum Lot Size Laws*, 68 Me. L. Rev. 1 (2016).

Thus, the Board has not shown that the quality of the Master Plan, particularly with respect to effective implementation in support of affordable housing, is such that it should be accorded great weight. Nor has it presented evidence that the OSRPlan is weighty in the sense of being a particularly high-quality plan that has been effectively implemented.

**d) The results achieved from affordable housing planning**

The Board has presented no evidence concerning housing created as a result of affordable housing planning, much less a substantial amount. *See Andover*, *supra*, No. 2012-04, slip op. at 9. The only evidence in this regard is ambiguous—but unrebutted—testimony by the developer's principal that "the Manchester-by-the-Sea master plan to this day, to the best of my knowledge, has not developed any multifamily residential housing of any significance whatsoever." Tr. I, 130.

It would be unusual for housing to be developed as a result of open space planning, and therefore it is not surprising that this adds no weight to the Board's argument, though neither does it detract from it. Thus, the Board has proven nothing that would add weight to its case with regard to the fourth factor—results.

**e) Conclusion**

In summary, we have found that the housing proposed here is not in conflict with Manchester's Master Plan to any great extent, and that any conflict with the OSRPlan is diminished by the provisions of the Master Plan and the LCD. Further, the Board has not proven the importance of either the general planning interests or open space interests with regard to this particular site. Neither has it proven that the Town's overall planning efforts are of such quality, particularly with regard to effective implementation in support of affordable housing, that they should be accorded great weight. And, finally, it has not shown positive results. Therefore, we conclude that the Board has not sustained its burden of proof, but that, on the contrary, the local concerns it has asserted are not sufficient to outweigh the regional need for affordable housing.[47]

[47] The Interveners also make a novel argument: "State law prohibits use variances except where they are expressly authorized by a municipal bylaw…. The Manchester Zoning Bylaw does not authorize use variances [which would permit residential uses in the LCD]. To the contrary, it prohibits them…. Because the Manchester ZBA is not authorized to grant use variances as a matter of state law,… then neither is the

### D. Wastewater Treatment

The Board's arguments with regard to the proposed wastewater system are based upon two issues: Capacity of the Town's sewer system and the manner in which the developer proposes to install the sewer system.

#### 1. Capacity

The project proposes an extension of and a connection to municipal water and sewer systems. Exh. 56, ¶ 41. The development's wastewater will be collected via an onsite gravity pipe sewer collection system in an underground septic tank at the entrance to the site and pumped southerly approximately 4,000 feet down School Street and discharged to the municipal sewer system. Exh. 23. Mr. Quinn's initial sewer capacity study shows that peak sewer volumes are within the capacity of municipal sewer, and specifically that "the existing sewer capacity within the flow path of the proposed development is adequate to accommodate the proposed sewer flows." *Id.*, p. 2.

The current sewer treatment plant has a maximum total capacity of 670,000 gallons per day (gpd), and current existing flows vary between 470,000 to 550,000 gpd, so the current remaining available capacity is estimated between 96,000 to 200,000 GPD. Exh. 25, p. 4. The proposed development will produce an estimated flow of 25,250 gpd and an estimated peak flow of 145,464 gpd, according to Mr. Quinn. Exh. 23, p. 1. Chuck Dam, the Town's Director of the Department of Public Works (DPW), testified at the Board hearing that he agreed "that there's likely no significant impacts [of the proposed system] to our existing capacity or system." Exh.

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Committee. Nothing in Chapter 40B permits the waiver of state law or compels the adoption of a bylaw authorizing use variances in Manchester." Interveners' brief, p. 31. This argument fails. That Manchester Town Meeting has enacted a zoning bylaw prohibiting use variances is not the same as state law prohibiting use variances. While there is no indication of any improper intent on the part of Town Meeting, the effect of the prohibition—if we were to accept the Interveners' argument—would be to create a barrier to the development of affordable housing. The intent of Chapter 40B is the opposite. Authorization by comprehensive permit of housing in a commercial district, overriding a local zoning provision, is not in conflict with state law. The Interveners' argument is essentially an attack on the core intent of the Comprehensive Permit Law—to override restrictive zoning ordinances and bylaws that would prevent a board from approving a proposal that is otherwise reasonable and consistent with local needs. *Hanover*, 363 Mass. 339, 363, 365-366. We note that in other zoning contexts the legislature has also authorized certain protected uses to override restrictive use provisions where no use variance is authorized under the local bylaw. *See Regis College v. Town of Weston*, 462 Mass. 280, 289 (2012) (Dover Amendment represents specific exception to general power of municipalities to adopt and enforce zoning regulations and bylaws).

37, p. 13. At the Board hearing, Mr. Dam stated that the Town is authorized by DEP to discharge 720,000 gpd of flow. Generally speaking, the Town uses between 600,000 to 620,000 gpd, leaving roughly 100,000 gpd surplus. *Id.*, p. 22. The estimated flow of 25,250 would be roughly 20 percent or less of the available surplus. *Id.*, p. 24. He also testified that the Town's flows have gone down as a result of the Town's efforts to eliminate inflow and infiltration. *Id.*, pp. 34-35. Mr. Formato testified that, as proposed, the sewer system will utilize a pump station which will have the ability to regulate the flow rate to meet the requirements of the municipal sewer system. Exhs. 37, pp. 57-58, 62-63; 65, p. 7.

The Board contends that the new sewer main for the project would take up most of the available capacity of the Town's sewer, if not exceed it, under peak flow conditions. Board brief, p. 26. The Board's expert, Sean Reardon,[48] testified that SLV's engineers adequately estimated the peak domestic flow from the project, but "inexplicably included no consideration of inflow or infiltration (I/I) in its analysis.[49] "Under state regulations promulgated by the [DEP], 314 CMR 7.05(1)(a)(1), all new sewer extensions must be designed in accordance with TR16, which is the universally-recognized standard for design of municipal sewer systems in Massachusetts." Exh. 70, ¶ 22. TR-16 requires consideration of "maximum groundwater infiltration." *Id.*; Tr. I, 86. Mr. Reardon testified that he used dry and wet weather flows from the 2017 Comprehensive Wastewater Management Plan (CWMP) to develop I/I contributions into the sewer system and, based upon that data, testified that the system's "sewer capacity will be exceeded in almost every case during even the 'dry season' and some cases by more than double the available capacity during the 'wet season.'" Exh. 70, ¶¶ 24-26. Mr. Reardon also testified that the Town has "a well-documented history of I/I problems in its sewer system" as evidenced by the CWMP, which cites to a 2013 study that found that 273,000 gpd of peak infiltration enters the sewer system, and that 1,473,000 gallons of inflow enters the system during a design storm event. Exh. 70-D, pp. 19, 83.

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[48] Mr. Reardon is a licensed professional engineer with over 30 years of experience in civil engineering design and regulatory permitting of land development projects. Exh. 70, ¶¶ 1-3.

[49] Mr. Formato testified that infiltration is generally water entering the sewer system from groundwater while inflow, which is non-wastewater, enters the sewer system from unidentified sources such as precipitation coming in through manhole covers or discharges from basement sump pumps. Tr. I, 87.

SLV's expert, Mr. Formato, agreed that I/I must be considered when designing sewer systems and capacity. Tr. I, 77. He testified on cross-examination that he was familiar with TR16, which is "generally recognized as the standard guidance document for municipal sewer design in Massachusetts." Tr. I, 76. He stated that TR16 requires a substantial consideration for infiltration and inflow when designing sewers. *Id*. He testified that "the study that was done by Allen & Major measured actual flow in the sewer for a period of time" and if Mr. Quinn's analysis was based on actual flow data, whatever infiltration and inflow was being imparted to the system during the measuring periods would have been captured in those numbers. *Id.*, 76, 89. He further testified that Mr. Reardon's methodology was incorrect because he made "several assumptions and presentations of data in [his] testimony that are not supported by good engineering practice and the information available from the Town's own sewer system studies." Exh. 65, p. 5. He testified on cross-examination that Mr. Reardon was "actually adding a peaking factor to infiltration and inflow numbers. Those, because of the nature of them, are not—you don't peak an infiltration number, it's a constant flow." Tr. I, 80. Mr. Formato testified that "the issue with [Mr. Reardon's] approach, because he was using the averages for the entire town as measured at the treatment facility, and that's just not proper practice." Tr. I, 82; Exh. 65, p. 5. He stated that "it's important to understand that that infiltration and inflow that was happening during the measuring period was there, it just wasn't specifically broken out." Tr. I, 89. Therefore, the Board's argument that I/I was not considered by SLV's engineers, Mr. Formato testified, is misleading.

During the Board's cross-examination, Mr. Formato testified that the data necessary for a determination of compliance with TR16's I/I requirements has not yet been addressed and that the data provided to the Board was a conceptual tool to provide a "current snapshot of the system, provide a limited amount of data," to indicate if there are major problems with the system. Tr. I, 78. He stated that the TR16 requirements will be addressed at the design stage. *Id.*, 90. Even considering the asserted over-estimation of the I/I by Mr. Reardon, Mr. Formato testified that it would be appropriate to conduct a further sewer capacity analysis "and that once the full design and permitting of the proposed connection is underway, the full assessment of the sewer system we will be connecting into will be analyzed and, if further deficiencies are identified, mitigated to remove sufficient I/I as necessary to allow for the connection into the system." Exh. 65, p. 7. He concluded that "the facts support the viability of the conceptual

design of the water and sewer system connections into the Town's existing infrastructure." *Id.*, p. 11.

We credit Mr. Formato's testimony that, under SLV's preliminary design, there is adequate capacity to accommodate the project and that SLV is committed to address mitigation efforts in the final design of the project's sewer system. The evidence presented establishes sufficient capacity for the proposed system and the developer's willingness to identify mitigation measures to address the Board's concerns. Furthermore, our regulations provide that when the Board raises inadequate capacity as a local concern, it not only has the burden of proving that inadequacy of services is a valid local concern that outweighs the regional need for housing, but it also has the additional burden of proving that due to unusual practical circumstances the installation of adequate services is not technically or financially feasible. 760 CMR 56.07(2)(b)4; *see Oceanside Village, LLC v. Scituate,* No. 2005-03, slip op. at 12 (Mass. Housing Appeals Comm. July 17, 2007); *Brierneck Realty LLC v. Gloucester,* No. 2005-05, slip op. at 19-20 (Mass. Housing Appeals Comm. Aug. 11, 2008); *Hollis Hills, LLC v. Lunenburg,* No. 2007-13, slip op. at 7-8 (Mass. Housing Appeals Comm. Dec. 4, 2009), *aff'd* 464 Mass. 38 (2013). The Board has not provided any evidence that the installation of adequate services is not technically or financially feasible. Accordingly, the Board has not presented sufficient evidence of a local concern regarding sewer capacity that outweighs the regional need for affordable housing.

**2. Directional Drilling**

To connect to the municipal sewer system, SLV's proposal would require directional drilling of 600 feet of a 4-inch force main under Route 128 on land owned by the DOT, to connect to the sewer main that will be located within the project driveway. Exhs. 23, p. 3; 70, ¶ 13; Tr. I, 108. The Board argues that, because neither the Town nor the developer has maintenance rights to the land owned by the Commonwealth, if a water main break occurs, the Town would need to coordinate traffic and road shutdowns with the Commonwealth in order to restore services to the affected homes. Board brief, p. 26; *see* Exh. 70, p. 15. Additionally, the Board argues that this so-called "blind" directional drilling method, unlike open cut installations, is rarely used to install sewers as it comes with "more risk, both during and after installation." Exh. 70, ¶ 15. According to the Board, even the developer's consultant, Mr. Formato, conceded

that, "whenever possible," gravity sewer mains should be installed by the "open cut" method. Tr. I, 70-71.

The Board argues that the developer did not address concerns about the insufficient diameter of the 4- inch pipes to prevent main breakages and the issues with maintenance authority to repair any such breakages under the highway owned by the state. However, the Board makes no argument that the directional drilling relates to a local concern protected by a provision of Manchester's local requirements or regulations that is more stringent than what is required under state or federal law.

Mr. Formato testified that "directional drilling for pressurized sewer, water, gas pipes (etc.) is a standardized and approved approach to pipeline installation and is regularly done throughout the US." Exh. 65, p. 4. He further pointed to the Town's CWMP, in which the Town designated the zoning district in which the project is located for future development and, "specific to the methods of wastewater disposal, noted that it was assumed that the existing municipal sewer system would be expanded to the [zoning district] by directionally drilling a forcemain under Route 128." *Id.* In response to the Board's argument regarding risk of a water main break and access for repair, Mr. Formato testified that:

> the proposed crossing would be made with PVC pipe installed in the directional drilled casing, which is resilient and not prone to breaks, as are older pipe materials. Further, at the appropriate (design and permitting) stage of the project, these types of considerations can be discussed with the Town and implemented to mitigate concerns with regard to drilling access pits constructability, maintenance and repair. At a minimum, related to the operation of a water system, the design will include hydrants and isolation valves on each side of RT 128 within the School Street right of way (ROW) in close proximity to the directional drill access pits for this proposed crossing, in order to allow for isolation and operation of the system in the event of maintenance, etc.

Exh. 65, p. 9. He also testified that there is already a municipal water main crossing under Route 128 for service to the Manchester Athletic Club, establishing that the Town already operates and maintains water infrastructure under the highway. *Id.*, p. 9. Mr. Formato testified that the "configuration of the process by which the direction drilling would need to be done must still be determined and any access rights, easements, etc. would need to be secured as a condition of performing this work." In his opinion, it is "not logical or appropriate to use the fact that the technical and permitting aspects of this portion of the project have not been completed as proof that it is not a viable option." *Id.*, p. 7. Mr. Formato testified that "at the appropriate (design and

permitting) stage of the project, these types of considerations can be discussed with the Town and implemented to mitigate concerns with regard to drilling access pits constructability, maintenance and repair." *Id.*, p. 9.

The Board's evidence failed to show that the proposed directional drilling poses a threat of failure or increased risk to the surrounding area either during construction or after installation. The Board's focus was based upon speculation of harm, but it offered no credible evidence showing such installation to be inherently more prone to risk of breakage. *See Hastings Village, Inc. v. Wellesley*, No. 1995-05, slip op. at 32-33 (Mass. Housing Appeals Comm. January 8, 1998) (board failed to introduce evidence to show proposed underground sewer line would be inherently more prone to rupture than existing sewer lines town had previously approved).

The Board makes no argument that there are local bylaws or regulations that prohibit or govern directional drilling that are stricter than state requirements. The sewer system will be installed pursuant to final plans approved by the DPW, as well as any applicable state requirements. See Exh. 1-C. Since we will include a condition requiring compliance with all state and local regulations governing directional drilling within Sawmill Brook, we find that there are no local concerns regarding directional drilling that outweigh the regional need for affordable housing. We find that neither the Board nor the Interveners have met their burden to prove that installation of the sewer system by means of directional drilling is a local concern that outweighs the regional need for affordable housing.

## 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 Board is not consistent with local needs. The decision of the Board is vacated, and the Board is directed to issue a comprehensive permit that conforms to this decision as provided in the text of this decision and subject to the following conditions.

1. Any specific reference to the submission of materials to Town officials or offices for their review or approval shall mean submission to the appropriate municipal official with relevant expertise to determine whether the submission is consistent with the final comprehensive permit, such determination not to be unreasonably withheld. Such official may consult with other officials or offices with relevant expertise as they deem necessary or

appropriate. In addition, such review shall be made in a reasonably expeditious manner, consistent with the timing for review of comparable submissions for unsubsidized projects. *See* 760 CMR 56.07(6).

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

a. The Development shall be constructed as shown on the site plans set out in and prepared by Allen & Major Associates, Inc., revised per comments May 5, 2022. Exh. 5A.

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

c. The developer shall submit final construction plans for all buildings, roadways, stormwater management systems, and other infrastructure to Manchester by-the-Sea Town entities, staff or officials for final comprehensive permit review and approval pursuant to 760 CMR 56.05(10)(b).

d. All Manchester by-the-Sea Town staff, officials and boards shall promptly take whatever steps are necessary to permit construction of the proposed housing in conformity with the standard permitting practices applied to unsubsidized housing in Manchester by-the-Sea.

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

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

a) Construction in all particulars shall be in accordance with all applicable local zoning and other bylaws, regulations and other local requirements in effect on the date of SLV School Street, LLC's submission of its comprehensive permit application to the Board, except those waived by this decision or in prior proceedings in this case.

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

the Board or this decision.

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

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

e) The Board and all other Manchester by-the-Sea Town staff, officials and boards shall take whatever steps are necessary to ensure that a building permit and other permits are issued to SLV School Street, LLC, without undue delay, upon presentation of construction plans, pursuant to 760 CMR 56.05(10)(b), that conform to the comprehensive permit and the Massachusetts Uniform Building Code.

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

g) This comprehensive permit is subject to the cost certification requirements of 760 CMR 56.04(8) and EOHLC guidelines issued pursuant thereto.

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

**HOUSING APPEALS COMMITTEE**

Shelagh A. Ellman-Pearl, Chair

Lionel G. Romain

James G. Stockard, Jr.

December 3, 2024

# Exhibit B

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