COMMONWEALTH OF MASSACHUSETTS

HOUSING APPEALS COMMITTEE

OCEANSIDE VILLAGE, LLC

v.

SCITUATE ZONING BOARD OF APPEALS

No. 05-03

DECISION

July 17, 2007

TABLE OF CONTENTS

I. PROCEDURAL HISTORY … 1

II. FACTUAL OVERVIEW … 3

III. JURISDICTION … 3

IV. REGIONAL NEED FOR LOW OR MODERATE INCOME HOUSING … 4

V. BURDENS OF PROOF … 5

A. Appellant's Burden of Proof … 5

B. Board's Burden of Proof … 6

VI. LOCAL CONCERNS REGARDING PLANNING AND SITE DESIGN … 6

A. Density, Open Space, Buffers and Scenic Road Impact … 6

B. Building Design Issues … 10

VII. LOCAL CONCERNS REGARDING MUNICIPAL SERVICES … 12

A. Municipal Services in General … 12

B. Sewer Service … 14

C. Water Service … 24

VIII. OTHER LOCAL CONCERNS … 31

A. Requested Waiver from Local Requirements … 31

B. Conditions in Board's Decision … 33

IX. LEGAL FEES … 39

X. CONCLUSION … 40

COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

OCEANSIDE VILLAGE, LLC,	)	
Appellant,	)	
v.	)	No. 05-03
SCITUATE ZONING BOARD OF APPEALS,	)	
Appellee.	)	

DECISION

This is an appeal pursuant to G.L. c. 40B, §§ 20-23, and 760 CMR §§ 30.00 and 31.00, brought by Oceanside Village, LLC (Oceanside), from a decision of the Scituate Zoning Board of Appeals (Board) with respect to an application for a comprehensive permit for property located in Scituate, Massachusetts. The Board's decision granted a comprehensive permit but imposed conditions that were determined to effectively constitute a denial of the comprehensive permit. *Oceanside Village, LLC v. Scituate,* No. 05-03, slip op. at 3-9 (Mass. Housing Appeals Committee Jan. 6, 2006 Rulings on Board's Motion to Strike and on Appellant's Motion for Determination of Denial of Comprehensive Permit). For the reasons set forth below, we order a comprehensive permit to issue to conform to this decision.

I. PROCEDURAL HISTORY

On August 27, 2003, Oceanside submitted an application to the Board for a comprehensive permit for a 250-unit condominium project on approximately 50 acres in

Scituate, Massachusetts. The project was to be financed by the New England Fund administered by the Massachusetts Housing Finance Agency (MassHousing) or through MassHousing's Housing Starts Program. Exh. 32, ¶ 12.

The Board's decision, filed with the Town Clerk on January 21, 2005, indicates that the public hearing began on December 4, 2003 and continued on January 22, April 13, June 30, July 29, September 23, November 10 and December 15, 2004. Exh. 1. The Board's decision was written as a grant of the comprehensive permit with conditions, including the limit of the number of units to 150 and a number of other conditions, and denials of various requested waivers of local provisions.

On February 9, 2005, Oceanside filed its appeal with the Housing Appeals Committee. Two members of an informal local organization called the Proving Grounds Group sought permission to participate as Interested Persons. The Committee held a Conference of Counsel on March 4, 2005. The Board thereafter filed a motion to strike challenges to certain conditions and subsequently Oceanside filed an opposition to the motion to strike and a motion to deem the decision a denial of the comprehensive permit. The presiding officer granted the motion to participate as interested persons, denied the motion to strike and granted the motion to deem the decision a denial. *Oceanside Village, supra.* See Pre-Hearing Order, § II, ¶ 1; Exh. 1. These rulings have been reviewed by the Committee and they are incorporated into this decision as rulings of the full Committee.

The presiding officer conducted a Pre-Hearing Conference on February 17, 2006 and issued a Pre-Hearing Order on March 21, 2006. On April 11, 2006, the Board filed a Motion in Limine, seeking to exclude certain subjects of evidence, which the presiding officer subsequently denied. On April 14, 2006, the parties submitted a Statement on Stipulated Comprehensive Permit Conditions, which established that a comprehensive permit, if issued, or ordered to be issued, by the Committee should contain Condition 59, but should not contain Condition 60, of the Board's decision.[1] The parties thereafter submitted pre-filed

1. Condition 59 sets out requirements pertaining to the discovery or release of any hazardous materials during construction and requires the installation of air monitors, among other things. Condition 60 would have required turning lanes from the project's entrances onto Town roads. Exh. 1.

direct testimony and Oceanside filed pre-filed rebuttal testimony. The Committee's *de novo* evidentiary hearing commenced on July 17, 2006 in Scituate and continued on July 18 and 20, 2006 in Boston, consisting of sworn witness testimony for the purposes of cross-examination. The presiding officer also conducted a site visit. Following the submission of a verbatim transcript, the Board and Oceanside filed their post-hearing memoranda. The Board moved for a proposed decision in accordance with 760 CMR 30.09(5)(h) and G.L. c. 30A, § 11(7), which the presiding officer issued on May 29, 2007. The Committee accepts the parties' stipulation regarding Conditions 59 and 60 of the Board's decision and incorporates it into this decision. The Town of Scituate has not satisfied any of the statutory minima set forth in the second sentence of the definition of "consistent with local needs" in G.L. c. 40B, § 20.

II. FACTUAL OVERVIEW

The Appellant proposes to construct 250 units of condominium housing on an approximately 50-acre parcel between Hatherly and Tilden Roads in Scituate known as the "Proving Grounds." The units are proposed to be a mix of townhouses and garden style flats. The 169 townhouses are proposed to be located in buildings of two to six units, constructed on the eastern and central portions of the site closer to Hatherly Road and the Atlantic Ocean. The 81 garden-style apartments are intended to be in three 27-unit buildings on the western portion of the site, closer to Tilden Road. Exhs. 3; 33, ¶ 9. Two entrances are proposed, one on Tilden Road and one on Hatherly Road. Wetlands extend into the site from Tilden Road. Exhs. 2; 33, ¶ 35; 43, ¶ 11. The parcel is considered a "brownfield" since it historically was used as a U.S. Army proving ground for testing of ordnance and weapons, a textile finishing business and a radio station for Voice of America. Exhs. 1, 3. Additional facts specific to the disputed issues are addressed below in the discussions of these issues.

III. JURISDICTION

To be eligible to proceed on a comprehensive permit application before a zoning board, or to bring an appeal before the Housing Appeals Committee, an applicant must fulfill three jurisdictional requirements. Oceanside meets the site control requirements of 760 CMR

31.01(1)(c). Pre-Hearing Order, § II, ¶ 3. The Board contends that if the New England Fund (NEF) is the subsidy program Oceanside will utilize, it has not met the jurisdictional requirements set forth in 760 CMR 31.01(1)(a) (limited dividend organization status) and 31.01(1)(b) (fundability). Pre-Hearing Order, § III, ¶ 6. The Board has chosen to rely on the resolution of this issue through the outstanding appeal in *Town of Middleborough v. Housing Appeals Committee,* 66 Mass. App. Ct. 39, 845 N.E. 2d 1143 (2006), further appellate review granted, 447 Mass. 1105, 851 N.E. 2d 1078 (2006). We find that Oceanside has met the fundability and limited dividend jurisdictional requirements.

IV. REGIONAL NEED FOR LOW OR MODERATE INCOME HOUSING

The Board argues that there is no significant regional need for low or moderate income housing. It argues that the Town has addressed affordable housing with its Inclusionary Zoning Bylaw and Affordable Housing Plan, that it has approved every Chapter 40B project in recent memory and has required developers of market rate multi-unit developments to include affordable units, and that there has been a significant decrease in the number of low income persons in the Town. Exh. 44-1, p. 6. Scituate's Affordable Housing Plan was not approved by DHCD. Tr. I, 100-105; see Exh. 45-1, p. 21.

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

Because of the existence of the rebuttable presumption, typically evidence of the regional housing need is not specifically introduced in appeals before the Committee. Here

the Board has submitted evidence seeking to rebut the presumption. We find, however, that the Board's evidence, including evidence regarding the Inclusionary Zoning Bylaw, the Affordable Housing Plan, the existence of various affordable housing units in Scituate, and the numbers of low income persons in Scituate, does not rebut the presumption of a regional need for low and moderate income housing.

V. BURDENS OF PROOF

A. Appellant's Burden of Proof

When the Board has denied a comprehensive permit, the ultimate question before the Committee is whether the decision of the Board is consistent with local needs. Under the Committee's regulations, a developer has alternative means to prove its case before the Committee. First, a developer "may establish a *prima facie* case by proving, with respect to only those aspects of the project which are in dispute, that its proposal complies with federal or state statutes or regulations, or with generally recognized standards as to matters of health, safety, the environment, design, open space, or other matters of local concern." 760 CMR 31.06(2). Alternatively a developer may prove that "local requirements or regulations have not been applied as equally as possible to subsidized and unsubsidized housing." 760 CMR 31.06(4); G.L. c. 40B, § 20.

The Board contends that Oceanside has failed to make its *prima facie* showing that the proposal complies with state or federal requirements or other generally recognized standards. It also contends that Oceanside has failed to prove unequal treatment. Oceanside argues, relying on testimony of its experts and documentary evidence submitted, that it has sufficient evidence of compliance with state or federal requirements or generally accepted standards with respect to certain contested issues, and that it has demonstrated unequal treatment as to the remaining issues. As we discuss below with respect to each contested issue, we find that Oceanside has met its burden.

B. Board's Burden of Proof

Once the Appellant has demonstrated that that its proposal complies with state or federal requirements or other generally recognized standards, the burden then shifts to the Board to prove first, that there is a valid health, safety, environmental, design, open space or other local concern that supports the denial of a comprehensive permit, and second, that such concern outweighs the regional need for low or moderate income housing. G.L. c. 40B, §§ 20, 23; 760 CMR 31.06(6). See *Hanover, supra,* 363 Mass. 339, 365; *Hilltop Preserve LTD Partnership v. Walpole*, No. 00-11, slip op. at 4 (Mass. Housing Appeals Committee Apr. 10, 2002).[2] The Board has raised a number of local concerns, but has focused primarily on the areas of municipal services, particularly water and sewer access; and planning and design, both with respect to site density, open space, buffers and scenic road impact, and the aesthetic design of the buildings. Those local concerns were expressed in the Board's decision as denials of requested waivers and conditions imposed on the project.

If one of the local concerns put forth by the Board to justify its *de facto* denial is based on the inadequacy of existing municipal services or infrastructure, it not only has the burden of proving that inadequacy of services or infrastructure is a valid local concern that outweighs the regional need for housing, but under our regulations it also has the additional burden of proving that due to "unusual topographical, environmental, or other physical circumstances" the installation of adequate services is not technically or financially feasible. 760 CMR 31.06(8).

VI. LOCAL CONCERNS REGARDING PLANNING AND SITE DESIGN

A. Density, Open Space, Buffers and Scenic Road Impact

Through its expert testimony, Oceanside presented *prima facie* evidence that the designs of the townhouse condominiums and the garden style buildings meet or exceed

2. By contrast, there is no shifting burden of proof regarding unequal treatment: The developer simply has the burden of proof, and the Board may attempt to rebut the developer's proof. 760 CMR 31.06(4). If the developer meets its burden, we will rule that the Town violated Chapter 40B, § 20 and the *de facto* denial will be vacated.

generally recognized standards. Exh. 33. The most significant of the issues raised by the Board is expressed in its position that the site should support no more than 150 units, include a 30-foot buffer, and eliminate the "garden-style" apartments. The Board argues that the project leaves inadequate usable open space, is incompatible with the development of the neighborhood and contains inappropriately sized buildings, and therefore warrants a reduction in density, citing *CMA, Inc. v. Westborough,* No. 89-25 (Mass. Housing Appeals Committee June 25, 1992).[3]

The project site is in a residential neighborhood zoned A-3 Residential with a Residential Cluster District overlay.[4] Exh. 32, ¶¶ 9-10. To the north, east and south of the site, existing development is a dense mix of small single family homes with an average of seven units per acre. Exh. 33, ¶ 10. To the west of the site along Tilden Road, less dense residential development exists with about two units per acre. Exh. 33, ¶ 10. The Oceanside site would have 250 condominium homes with a mix of town homes and garden flats, clustered on 15 acres with approximately 35 acres of open space, wooded areas and wetlands. Exh. 42, ¶ 7; Exh. 33, ¶ 30.

The developer argues this density of about five units per acre provides a transition between the very densely developed area near the ocean and the less dense development to the west. Oceanside also states that, by comparison, the Cluster District Bylaw would allow the development of four units per acre or about 200 units, by special permit. Exhs. 32, ¶ 10; 33, ¶ 10.

The parties disagree about whether comparison to the Cluster District bylaw is relevant because the Board argues that the location of wetlands on the site would not hypothetically permit 200 units on the project site under that bylaw.[5] However, it is not

---

3. The Board also argues that a reduction in density is necessary to address local concerns about water usage and sewer access. These issues are addressed below.

4. An A-3 district requires a minimum lot size of 10,000 square feet. Exh. 48, § 340.

5. Oceanside disputes the Town planner's testimony that the Cluster District Bylaw requires that detention basins of 2,500 square feet or more be put in a separate lot, eliminating that area from counting toward the permitted number of units. Tr. I, 115-117; Exh. 39, ¶ 19; Exh. 48, § 420.1.L., § 610.1 (requiring lot areas to be exclusive of any land under water bodies, bogs, swamps, wet

necessary to determine this question, as the range in density of the surrounding neighborhood is not incompatible with the proposed overall site density. See Exh. 32, ¶¶ 8, 10; Exh. 48, § 500.4.B. This level of density alone is insufficient to find a valid local concern that outweighs the need for affordable housing.[6]

The Board also argues that the number of units limits the amount of useable open space for recreation. Both the Town Planner in her testimony before the Committee and the Town Housing Partnership in the proceedings before the Board objected to the amount of open space for children. The planner also recommended a community building for gatherings and indoor recreation. Exh. 39, ¶ 5. The Board argues that the wetlands and detention basins should not count as open space, and that the proposed tennis court and half basketball court are poorly located with insufficient parking spaces. Board brief, p. 29-30. Oceanside's expert testified however, that the Village Green in the center of the development would be a gathering place and recreational area, that additional recreational outlets exist on the property of the adjoining Wampatuck School and that Oceanside would provide walking trails through the woods and would connect the abutting school to the sidewalk system with a walking trail. Exh. 33, ¶¶ 31-32; Exh. 43, ¶¶ 4- 5. The need for a community building does not represent a sufficient local concern. We find that the Board has not demonstrated a local concern with regard to open space that outweighs the need for affordable housing.

The Town Planner also testified that the reduction in density is appropriate to address the proposed size of the garden apartments. She considered the scale of these buildings, located at the entrance to the site at Tilden Road, to be out of proportion with the surrounding

---

meadows or marshes as defined in G.L. c. 131, § 40). The planner also said the project is too spread out throughout the site to be a cluster development. Tr. I, 121-122.

6. Oceanside also argues that this development exhibits many of the smart growth characteristics under the Department of Housing and Community Development's (DHCD) Smart Growth Evaluation Criteria, including that the project constitutes redevelopment of an underutilized site, involves remediation of a brownfield, abuts an elementary school, conforms to Uniform Design Standards and visitability features for mobility impaired residents, adopts the Environmental Protection Agency's Energy Star guidelines, provides affordable housing, and fits the characteristics of an infill project. Exh. 32, ¶ 16; Exh. 42, ¶¶ 5-9. See Exh. 39, ¶ 15. The developer also states that building on streets where municipal utilities already exist, rather than extending lines in the streets outside the site, is another characteristic of smart growth. Exh. 42-1, p. 2. The Town Planner testified that smart growth is not the same as "sustainable development." Tr. I, 119-120.

community because of their high roofs and box-like structure. Exh. 39, ¶ 4. The garden apartments would stand approximately 45 feet, or 10 higher than the height permitted by zoning. Exh. 33, ¶ 13. Oceanside argues that buildings of similar height exist elsewhere in Scituate. Exh. 43, ¶ 2, Exh. 43-1. While we agree with the Board that the most of the other buildings with comparable heights are generally located in or near the harbor downtown or are in the Planned Development Zoning District, rather than a residential area of one- and two-story homes, Exh. 39, ¶ 18, houses exist in the immediate neighborhood that tower over their neighbors because of the small lot size and distance between houses. Exh. 43, ¶ 2; Exh. 43-1.

Moreover, the developer's expert witness also testified that Oceanside's garden apartments are further from the nearest house and a buffer of vegetation and trees as tall as or taller than these building will remain at the site and present an essentially solid visual barrier between the garden apartments and the street. Exh. 43, ¶¶ 2-3. The Town Planner acknowledged that her opinion that the buildings would cast long shadows on nearby homes was given without knowledge that the trees in the buffer are taller than the buildings, and that she had no shadow or other building height studies to support her view that the garden apartments would be visible to neighboring homes. Tr. I, 84-87, 96, 98-99; Exh. 39, ¶ 4. The planner also based her opinion on the belief that the buffer of trees would be clear cut as had occurred at market rate developments on scenic roads. Tr. I, 88-89. She also stated that all trees in the area of the proposed detention basin near Tilden Road would have to be removed, affecting Tilden Road's status as a scenic road. Tr. I, 88, 112-113; see G.L. c. 40, § 15C; Exh. 39-C.

We find the testimony of the developer's witness that the trees will be taller than these buildings to be more credible than that of the Town Planner. Similarly, we credit his testimony that the buffer of trees along Tilden Road and Rainbow Court will remain after construction as indicated on the site plans. Exh. 33, ¶¶ 33-34; Exh. 43, ¶ 3; Exh. 3e. While we agree with the planner that the garden apartments will be quite high for the residential area, we find that the Board has not established a local concern with respect to the height of the proposed garden apartments that outweighs the need for affordable housing. Moreover,

even though it is not essential to our decision, the buffer of trees as indicated on the plans will provide an adequate visual barrier between the buildings and the neighborhood.

Similarly the Board has not demonstrated a valid local concern with respect to the 30-foot buffer. The Board contends that a 30-foot buffer should exist around the property to shield the adjacent homes from the noise and lighting impacts of a dense development. The Town Planner stated that the Cluster District Bylaw requires a 60-foot buffer and the planning board has required similar buffers in market rate developments. Exh. 39, ¶ 24. The developer's expert described the expected encroachments within the 30-foot buffer, which appear to be minimal. Exh. 43, ¶ 9. The Board has not presented sufficient evidence of the potential for noise and light impacts to warrant the requirement of the buffer beyond the extent proposed by the developer. We will not require a complete 30-foot perimeter buffer but expect that the developer will conform to the encroachments Oceanside's witness described.

Finally, the Town Planner's testimony of the impact on the scenic road and the number of trees to be removed from the site during construction is contradicted by that of the developer's expert who stated that no stone walls would need to be removed to install the entrance to the development on Tilden Road. Of the trees in the Tilden Road right of way, he testified that fewer than 10 to 12 would need to be removed and the remaining 700-plus feet of frontage along Tilden Road would be unchanged. Exh. 43, ¶ 8. We cannot conclude that this would severely damage the scenic road character of Tilden Road. Moreover, the planner's concern about the need for a planning board hearing is misplaced, given the Chapter 40B comprehensive permit process.

We find that the Board has not established a local concern with respect to density or open space that outweighs the need for affordable housing.

B. Building Design Issues

In her testimony, the Town Planner expressed great concern with the design and aesthetics of the buildings, particularly the garden style units. This concern was similarly voiced by the Board in its comprehensive permit decision. Exh. 1. The planner relied on a design review process used by the Planning Board for a number of years, which in March

2006 was adopted by the Town and codified in the Town's zoning bylaw. Exh. 39, ¶ 10. However, these requirements were not enacted by the Town and in effect at the time of the application for a comprehensive permit and therefore are inapplicable. The Committee has long held that "any regulation not in effect at the time of the filing of the application [for a comprehensive permit] will not be applied to [the] project." *Weston Development Group v. Hopkinton*, No. 00-05, slip op. at 8-11 (Mass. Housing Appeals Committee May 26, 2004). Also see *Northern Middlesex Housing Associates v. Billerica*, No. 89-48, slip op. at 8-12 (Mass. Housing Appeals Committee Dec. 3, 1992); 760 CMR 31.07(1)(j). This rule is as applicable to a comprehensive or master plan as it is to other local regulations put forth by the Board as justification for its action on the request for a comprehensive permit. See *Meadowbrook Estates Ventures, LLC v. Amesbury,* No. 02-21, slip op. at 12 (Mass. Housing Appeals Committee Dec. 12, 2006).

Moreover, to require affordable housing developers to conform to style requirements – particularly those that were not articulated – when the same is not required of market-rate development, risks contravening the "equal application" provision in G.L. c. 40B, § 20. See *Cirsan Realty Trust v. Woburn*, No. 01-22, slip op. at 5 n.5 (Mass. Housing Appeals Committee June 11, 2003) (absent exceptional circumstances, Committee is reluctant to consider local concerns that town has not previously chosen to regulate), and *Walega v. Acushnet*, No. 89-17, slip op. at 6 n.4 (Mass. Housing Appeals Committee Nov. 14, 1990) (Committee considered local issue not previously regulated at local level because concern was pressing and no other body was addressing it).

Because specific design requirements were not part of the regulatory scheme at the time of the application for a permit, our examination turns to the extent to which style was generally regulated by the Town at the time of Oceanside's application. Section 1030.3 of the Town zoning bylaw, which the Board argues was in effect then, permitted the Board to impose conditions "reasonably appropriate to protect the neighborhood" including "modification of the exterior features or appearance of the structure." Exh. 48, § 1030.3. This, however, does not demonstrate that the conditions the Board sought to impose, such as a requirement of cedar shingles rather than vinyl siding, or the elimination of units featuring

garages prominently, are based on valid local concerns. Nor has the Board provided evidence that supports a finding these represent local concerns that outweigh the need for affordable housing.

We note also that the Board has also objected to Oceanside's proposal, in this *de novo* proceeding, to modify the design of these buildings to mitigate the aesthetic concerns of the Board.[7] Board brief, p. 28. While we will not impose any requirement on Oceanside, we encourage the parties to discuss these issues in an effort to address the Board's concerns. An aesthetic concern such as this one may be appropriate for negotiation between the parties.

VI. LOCAL CONCERNS REGARDING MUNICIPAL SERVICES

A. Municipal Services in General

The Board raises lack of capacity with regard to the provision of both water and sewer services to the proposed development. As noted above, 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 31.06(8). Because all of the implications of this regulatory provision are not obvious, a review of the law in this area should be helpful, as it pertains to the questions of both sewer and water access in this case.

We discussed the background concerning the issue of municipal services in some detail in *Hilltop Preserve*, No. 00-11, slip op. at 5-15. We noted there that under traditional land use law, although a town is generally obligated to provide services on an equal basis, it "is permitted to exercise a reasonable and fair discretion in determining whether and upon what terms to make extensions of its lines." *Id.* at 7, quoting from *Rounds v. Board of Water & Sewer Commissioners of Wilmington*, 347 Mass. 40, 44, 196 N.E. 2d 209, 213 (1964). Although the right to connect to a common sewer cannot be refused as a matter of discretion

7. We do not consider the suggested aesthetic and style changes to constitute a substantial change. See 760 CMR 31.03.

if there is reasonable sewer capacity, "if the connection would at once overload the sewer and risk serious flooding and danger of injury to persons or property, immediate [connection to a sewer] would not be required.... The sewer commissioners are not empowered to postpone presently sought connections to give precedence to connections contemplated for the future...." *Clark v. Board of Water & Sewer Commissioners of Norwood*, 353 Mass. 708, 710-711, 234 N.E. 2d 893, 895 (1968) (as reasonable sewer capacity existed to serve petitioners' buildings, they had right to connections).

More importantly, a number of Housing Appeals Committee cases have interpreted the stricter obligation under the Comprehensive Permit Law to provide municipal services. In one of our earliest cases, we held that possible inadequacies of water supply could not justify denial of a comprehensive permit where the entire town would benefit from various needed improvements, in regard to which the town had been derelict. *Millhaus Trust of Upton v. Upton*, No. 74-08, slip op. at 20-21 (Mass. Housing Appeals Committee July 8, 1975). In a 1976 case, where no neglect by the town was alleged, we permitted a developer to construct a new sewer line at its own expense, noting that such arrangements between municipalities and developers were common. *Woodcrest Village Assoc. v. Maynard*, No. 72-13, slip op. at 18-19 (Mass. Housing Appeals Committee Feb. 13, 1974), *aff'd*, 370 Mass. 64, 345 N. E. 2d 382 (1976). On the other hand, in 1982, we held that under exceptional factual circumstances where there were no practical solutions to the problem presented by the development proposal and a significant financial burden was faced by the town, a permit could properly be denied. *Berkshire East Assoc. v. Huntington*, No. 80-14, slip op at 19-23 (Mass. Housing Appeals Committee June 1, 1982).

The *Huntington* case is the only case of which we are aware in which the Board was able to meet the burden established in the regulations to prove the existence of "unusual topographical, environmental, or other physical circumstances." 760 CMR 31.06(8). However, since the early decades of the Comprehensive Permit Law, we have interpreted our regulations more liberally than is required by the simple language of § 31.06(8). We provided the following analysis in 1992 in a case involving roadway improvements:

> [T]here is a strong argument under our regulations that ... costs of improving the infrastructure should not be borne by the developer. Clearly, inadequate

> streets cannot be grounds for denial of a comprehensive permit when it is technically and financially feasible … to improve them. 760 CMR 31.06(8). It is less clear whether the developer can be required to contribute to the cost. Though our early cases point to an answer in the negative, the fiscal climate in the state and local communities has changed in recent years. We hold that because it is now a common practice to require large residential developments to contribute to infrastructure costs, and since here other developments … have done so …, the developer must contribute….

CMA, No. 89-25, slip op. at 36. In 2002, we stated the rule again: "What may properly be required of the developer is that it provide limited off-site water or sewer services or mitigate specific problems if necessitated by the new development itself." *Hilltop Preserve,* No. 00-11, slip op. at 15. Also see *id.* at 26-29 and cases cited.

B. Sewer Service

Oceanside has requested a permit granting it access to the Scituate sewer system. Oceanside submitted evidence that its proposed connection to the Town sewer system complies with state or federal requirements or other generally recognized standards. Exh. 35, ¶ 15.

The Board raises a number of arguments in opposition to Oceanside's request for access to the Town sewer system. It first argues that the Committee has no authority to grant sewer access outside the specific terms of the Scituate bylaw that incorporates its Growth and Connection Control Plan (GCCP). It states that under the terms of the GCCP, Oceanside's project has the lowest priority level and therefore cannot be granted access out of turn. In support of this argument, it claims, first, that the Administrative Consent Order (Sewer ACO) administered by the Department of Environmental Protection (DEP), and a contractual agreement mandated by the updated ACO, prohibit any sewer connections that do not comply with the requirements of the GCCP; and second, that the Sewer Commission is not a local board within the meaning of G.L. c. 40B, and therefore not subject to the authority of the Board or the Committee. For the reasons set out below, we find that the Committee and the Board have the authority to review the bylaw under the local concern standards as well as with respect to equal treatment between subsidized and unsubsidized housing.

1. The Scituate GCCP and Sewer Agreement

On April 13, 1987, the DEP issued the Sewer ACO to address a situation of the Town of Scituate depositing wastewater into a tidal ditch that is a tributary to the Herring River. Exhs. 53-54. Although the Sewer ACO generally prohibited new connections to the Town sewer system, between 1987 and 2001, the Town was allowed to grant "[a] number of waivers to this moratorium … in areas where system failure existed and no other alternatives were available to the homeowners." Exh. 13, § 2.2.1.

The Sewer ACO was amended by DEP on December 12, 1994. It was also amended once in 1997 and twice in 2002. Exhs. 54; 57; 35, ¶ 11. The 1994 ACO ordered Scituate to adopt a growth and connection control plan (GCCP) to limit new sewer connections or other increases in flow. Exh. 54. In addition, based on requirements in the 1994 ACO, Scituate improved its Wastewater Treatment Facility (WWTF), and increased its capacity to 1.6 million gallons per day (mgd) of wastewater flow in 2001. Exh. 35, ¶ 12. At the 1997 Scituate Annual Town Meeting, the Town approved and adopted the GCCP, dated January 1996, as a general by-law. Exhs. 17; 18. The GCCP sets forth a hierarchy of types of housing to receive new sewer connections or increases in flow.

On January 3, 2005, DEP notified the Town that DEP "will no longer seek to enforce compliance" with the ACO. Exhs. 35B; 36, ¶ 13; Tr. I, 107. The parties disagree regarding the legal implication of the DEP letter lifting the ACO. The Board contends that a change in the scheme for granting sewer service or its application remains subject to DEP's authority and consequently is outside the scope of "local concerns." It argues that even though the ACO is lifted the DEP requires Scituate to comply with the bylaw and DEP would have to approve any bylaw change to permit an exemption for affordable housing.

The Board also contends that sewer service is governed by a separate agreement among the Town, DEP, the Department of Environmental Management, the Massachusetts Coastal Zone Management Office, the Department of Fisheries and Wildlife and Environmental Law Enforcement and the North River Commission (Agreement). Exh. 54, § 5.8. The Board argues that the 1994 ACO required Scituate to follow the terms of this Agreement, including the requirement that a growth and connection control plan be

approved, adopted and implemented to ensure the capacity of the new WWTF is not exceeded. Exh. 54, Attachment 1. The Board argues that this Agreement is still in effect and bars sewer connections not specifically permitted by the GCCP. Tr. I, 153. It also argues that even though the ACO is lifted, DEP requires that future sewering efforts should be coordinated in accordance with an existing Comprehensive Wastewater Management Plan. Exhs. 35B; 36, ¶ 13.

Oceanside argues that neither the ACO nor the Agreement remains in effect and that the Comprehensive Wastewater Management Plan is not the GCCP. It also argues that the DEP had only mandated that *some* growth and connection control plan should be in place, and not the specific priorities set out in the GCCP, and the Town Administrator testified that the Town may now grant sewer capacity without DEP approval. Tr. I, 145-146; see Tr. I, 128-129. The Agreement states:

> Growth Control Plan
>
> A Growth and Connection Control Plan and Review Process must be approved, adopted and implemented to ensure that the capacity of the new WWTF is not exceeded. The plan must include limiting additional hook-ups, reduction of I/I, water conservation and recycling, industrial source reduction and increasing treatment capacity to a maximum to be approved by the DEP in consultation with the DEM and the DMF. At the point when the average flows within the system for any quarter equal or exceed 80 percent of the average daily volume of discharge the WWTF was designed to treat during the quarter in which high ground water flows occur, the DEM and the DEP shall be notified and the plan shall be activated to avoiding exceeding plant capacity....

Exh. 54, Attachment 1 (Condition #7). As with the ACO, the Agreement does not mandate specific priorities to be included in the GCCP. Between 1987 and January 2005, the DEP regulated sewer connections in Scituate under the ACO. Since the DEP lifted the ACO, the Agreement does not prevent Scituate from modifying its priorities for sewer connections, subject to the constraints in the Agreement regarding available capacity.

2. The Scituate Department of Public Works as a Local Board

The Board also argues that even if the GCCP is no longer controlled by the DEP or the Agreement, the Committee may not order a change in priorities for sewer connection because the Scituate Department of Public Works (DPW) is not a local authority or board

that can be supplanted by the Board of Appeals or the Committee under Chapter 40B.[8] See Exh. 36, ¶ 1. This argument fails. As the Supreme Judicial Court pointed out in *Dennis Housing Corp. v. Zoning Bd. of Appeals of Dennis*, 439 Mass. 71, 785 N.E. 2d 682 (2003), Chapter 40B's definition of "local board" does not contain an exhaustive or exclusive list of the local agencies and officials who qualify as local boards:

> The "local boards" whose ordinary jurisdiction may be exercised by the zoning board under G.L. c. 40B, § 21, are defined as "any town or city board of survey, board of health, board of subdivision control appeals, planning board, building inspector or the officer or board having supervision of the construction of buildings or the power of enforcing municipal building laws, or city council or board of selectmen." G.L. c. 40B, § 20. The list of local agencies and officials that comprise the definition of "local board" is not intended to be a list of the precise names of such local agencies, but rather encompasses local agencies and officials performing comparable functions to the listed forms of "local board."

Id. at 78. The Court also noted that the Committee similarly interprets the term "local board" to include all boards that "perform functions usually performed by locally created boards." 760 CMR 30.02. The Committee has previously determined that a town sewer department constitutes a local board for the purposes of Chapter 40B. See *Wilmington Arboretum Apts. Associates Limited Partnership v. Wilmington,* No. 87-17, slip op. at 25-28 (Mass. Housing Appeals Committee June 20, 1990). Also see *Peppercorn Village Realty Trust v. Hopkinton,* No. 02-02, slip op. at 13 n.10 (Mass. Housing Appeals Committee Jan. 26, 2004). There is no reason why the Scituate DPW should be outside the scope of Chapter 40B; its functions, relating to the supervision and performance of municipal services, are comparable to those of boards listed in the statute. We find that it is a local board within the meaning of Chapter 40B and our regulations. We therefore conclude that the Committee has the authority to determine whether the GCCP represents a valid local concern that outweighs the need for affordable housing and may enter orders concerning sewer service.

---

8. The Board makes the same argument with respect to the Committee's authority to grant a water connection permit. The same reasoning applies with respect to water service.

3. Scituate's Available Sewer Capacity

The current permitted capacity of the Scituate Wastewater Treatment Facility is 1.6 mgd. Pre-Hearing Order, § II, ¶ 4; Tr. II, 87. A March 2001 Sewer Expansion Study performed for Scituate indicated that the 1.6 mgd limit gives the Town the sewer capacity it will need through 2020. Exh. 13, Table. 4-3. The Study also noted the Town's "desire to ultimately provide sewers to all homes within the community." Exh. 13, § 5.4.

Under the WWTF limit, a total of 210,000 gallons per day (gpd) are available under the 12-month rolling average for wastewater flows for the Town. Tr. II, 87-88. Based on that amount, and the testimony of the Board's and the developer's expert witnesses, there is currently sufficient capacity to accommodate the anticipated wastewater flows for Oceanside, based on either of the Board's 40,260 gpd or 52,800 gpd estimates of daily water consumption.[9] Exh. 41, ¶¶ 12, 17. An active municipal sewer line fronts the Oceanside Village site on Longley Road. Pre-Hearing Order, § II, ¶ 5. As noted above, absent overriding local concerns, the Board may not postpone a presently sought connection to give precedence to connections contemplated for the future. *Clark, supra*, 353 Mass. 708, 710-711. The next question is whether the GCCP, although not controlling, provides a valid local concern that outweighs the need for affordable housing.

4. Local Concerns Advanced by the Scituate GCCP

The Sewer Expansion Study submitted to the Town in March 2001 identified certain areas of the Town, based on their inability to support on-site septic systems, as priority districts to receive sewer extensions.[10] Exh. 13, § 3.3. The site on which the proposed Oceanside project is to be built is not within a priority district. The Town GCCP established

---

9. As discussed below, the Board used both of these figures to estimate Oceanside's water consumption. The amount of wastewater generated by a residence is generally less than water consumption by that residence. Exh. 35, ¶¶ 22, 25. Oceanside's expert conservatively estimated wastewater flows of 43,750 gpd. Since we find below that 43,750 gpd is the most credible estimate of water usage for the project, this estimate of wastewater flow is likely to be high. Exh. 35, ¶ 28.

10. Those areas include the Greenbush/Reservoir Area (Districts 23 and 28); The Cliffs (Districts 30 -33); Musquashcut Pond (District 1A); Front Street (Districts 24-25); North Scituate (Districts 3, 6 and 10); and Minot (District 1). Exh. 27.

the following priority categories for receiving connections, extensions or increases in flow from the Town sewer system.

1. Existing homes with public health problems caused by on-site wastewater disposal.
2. Connection of existing homes (when requested by owner) on already sewered streets not previously connected.
3. Increases in flow of existing residences and commercial buildings on already sewered streets.
4. Connection of new homes on already sewered streets. To be limited to new homes constructed on lots not requiring subdivision approval. No new subdivisions allowed to connect to already sewered streets or to new sewers until priority district sewering has been completed.
5. Connection of existing homes in priority districts to new sewers. The priority Districts are based on each area's unsuitability for septic systems.
6. Connections of new homes in priority districts. To be limited to new homes constructed on lots not requiring subdivision approval.
7. Connection of subdivisions to already sewered or newly sewered streets.
8. Connection of subdivisions in priority districts.

Exh. 18, § 1.4, 1.5; Exh. 41, ¶ 33. The Board considers Oceanside's proposed project to be a subdivision. Exh. 41, ¶ 34.[11] Under the allocation in the GCCP above, subdivisions are the lowest priority. Although according to the Sewer Expansion Study, the Town had desired ultimately to provide sewer service to all residences in the Town, Exh. 13, § 5.4, the Scituate Town Administrator acknowledged that under the GCCP hierarchy, Oceanside would probably never be eligible for a sewer connection. Tr. I, 133.

The Board argues that because the WWTF lacks sufficient capacity to meet the needs of the entire town, additional flow capacity must be carefully allocated to meet the Town's priority needs, and granting capacity to Oceanside will upset the priorities of the GCCP. It contends that Oceanside has not demonstrated what effect "a blanket exemption" for

11. Technically, Chapter 40B projects are not subdivisions because they are constructed under a comprehensive permit law, G.L. c. 40B, §§ 20-23, rather than under the Subdivision Control Law, G.L. c. 41, §§ 81K-81GG.

affordable housing would have on the capacity of the WWTF or the Town's ability to sewer other higher priority areas. However, Oceanside is not requesting a blanket exemption for affordable housing. Furthermore, the record does not support a finding that granting the access to Oceanside would put at risk areas with health or safety concerns, such as residences with failing septic systems that cannot be repaired or replaced. Indeed, the priorities established by the GCCP include granting access to or increasing flow for residences with no demonstrated health or safety concerns because of their location on already sewered streets.

The Board argues that its bylaw adopting the GCCP represents a master plan that should be given considerable weight to determine consistency with local needs. See *KSM Trust v. Pembroke,* No. 91-02, slip op. at 6 (Mass. Housing Appeals Committee Nov. 18, 1991); *Harbor Glen Associates v. Hingham,* No. 80-06, slip op. at 12-14 (Mass. Housing Appeals Committee Aug. 20, 1982). It argues that the development of a comprehensive plan in the bylaw setting out hierarchies for the allocation of sewer connections demonstrates a valid local concern that outweighs the need for affordable housing. It argues that the purpose of the priorities established was to determine the areas of town most in need of sewerage to protect the Town's drinking water and supply and environment, as well as to ensure that the Town does not add more flow to the Town sewer system than the available capacity at the expanded wastewater treatment facility.

A municipality's sewer connection master plan, if established in isolation from an affordable housing plan, may risk containing the sort of local restrictions that the Comprehensive Permit Law was enacted to combat. See *Hilltop Preserve,* No. 00-11, slip op. at 26-27 (purpose of a sewer master plan is not to control development and it "may not be used as a barrier to the development of affordable housing"). If such plans are not created in isolation, however, but rather as part of a much broader comprehensive plan or master plan that makes adequate provision for the development of both affordable housing and multi-family housing generally, they may actually further the purposes of the Comprehensive Permit Law. This Committee has long held that a town's long-term municipal planning interests — when expressed in a *bona fide*, effective master plan or comprehensive plan— may be a sufficiently substantial local concern to outweigh the regional need for affordable

housing. *Stuborn Ltd. Partnership v. Barnstable*, No. 98-01, slip op. at 5-6 (Mass. Housing Appeals Committee Sept. 18, 2002) and cases cited; 760 CMR 31.07(3)(d).

In the case before us, Scituate's sewer plan, developed in the context of a DEP order, does not form a comprehensive plan with the Town affordable housing plan and inclusionary zoning bylaw. Although the Town argues it has worked to develop affordable housing and that the bylaw and the affordable housing plan are not subterfuges to avoid construction of affordable housing, its affordable housing plan has not been accepted by DHCD. Tr. I, 100. See Exh. 39, ¶¶ 13, 14, 18. The Board argues that because it approved 150 units of housing with an on-site septic system that could serve 154 units, see Exhs. 1, 22, it has not prohibited the construction of affordable housing.

While we agree that the GCCP should be accorded some weight in our consideration, the existence of a plan for prioritizing sewer connections is insufficient to establish a valid local concern that outweighs the need for affordable housing. Chapter 40B was enacted and in existence before the GCCP plan was developed. The GCCP could have been written to provide for affordable housing or reserve capacity for affordable housing developments.

This plan precludes the inclusion of a new multi-unit site into the sewer system. However, Chapter 40B projects are nearly always multi-unit projects. So far, according to the Board, except for one project approved before the existence of the ACO, the Chapter 40B projects approved by the Town have provided their own septic systems. Projects which the Board asserts include some affordable units, the Herring Brook and Harborside Village projects, both had pre-existing sewer connections.[12]

In order for the Board to prevail on this point, it must establish that the priorities set out fulfill a local concern that is greater than the affordable housing need. Priorities established for failing septic systems and for districts based on their inability to support on-site septic systems represent valid local concerns. However, the Board has not demonstrated that these areas will be jeopardized by the grant of sewer access to Oceanside. See Exh. 13,

---

12. The units at these developments identified as affordable do not qualify for inclusion on the Subsidized Housing Index. See Tr. I, 104-105.

Table 4-3. Scituate applied to the DEP for the Cliffs Area Sewer Extension Permit on December 5, 2003 and DEP issued the permit on December 23, 2004. Pre-Hearing Order, § II, ¶ 6. Moreover, as discussed below, the grant of sewer connections to market rate housing in non priority areas belies the severity of the local concern. Finally, the priorities favoring increasing capacity for existing residences over new multi-unit connections may favor existing residents over newcomers to the Town potentially raising Fair Housing concerns. We find that the Board has failed to demonstrate a valid local concern that outweighs the need for affordable housing.

5. Equal Treatment with Regard to Sewer Access

The priorities set out in the GCCP contain no direct reference to affordable housing. The only indirect reference is found in the provision that subdivisions fall at the bottom of the priority list. The Board argues that the GCCP treats affordable housing the same as market rate housing, because all subdivisions, whether affordable or market rate, are serviced last. Indeed, Oceanside has not introduced evidence of any large market rate subdivision similar in size to the proposed project that has been granted a connection.

During the period DEP enforced the ACO and since its lifting, Scituate has granted new sewer connections and increases in flow to market rate housing. From May 1988 to December 2001, Scituate approved at least 114 market rate residential and commercial property connections. Exh. 35, ¶¶ 54, 56; Exh. 35N-O. The Board's health department witness identified these as connections for residences with failing septic systems. Exh. 38, ¶¶ 1-6. The Board argues that sewer extensions were granted for areas with failing septic systems, poor soils and other conditions that required immediate relief without waiting for the moratorium to expire.

However, between February 2002 and June 2003, before the ACO was lifted, Scituate also sought and obtained DEP approval to grant 70 sewer approvals for new connections or increased flow to a total additional flow of 24,000 gpd. These included approval for Mill Wharf, a mixed residential and commercial project including 28 market rate condominiums on Scituate Harbor. Exh. 35, ¶¶ 57-59; Tr. I, 110-111. The Board argues that the increase in flow of approximately 4530 gpd granted to Mill Wharf during the moratorium fell within the

category of an increase in flow of existing residences and commercial buildings on an already sewered street. That project replaced commercial buildings and one residential apartment with retail and office space, a theater, a day spa and 28 units of market rate condominiums. Tr. I, 137-139; Exh. 35, ¶ 58.

The Town Administrator contended that the ACO modification granting the 24,000 additional gallons permitted a change in use of commercial and residential property. Tr. I, 140-142. He distinguished Oceanside from the Mill Wharf project by arguing that it is a sewer extension rather than a connection. The Mill Wharf buildings were already connected to the nearby sewer, but Oceanside's property is not connected to the sewer line running along Longley Road, adjacent to the site. Tr. 142-144. When the property abuts an existing sewer line, the distinction between a sewer *connection* and an *extension*, however, is a distinction without a difference in this case, as both require DEP approval in the ordinary course. See 314 CMR 7.05(5); Exh. 45, ¶ 3. The Town's Board of Health witness stated that the Town would allow new construction to be attached to an existing sewer running in front of that property. Tr. II, 51.

After the DEP lifted the ACO in January 2005, Scituate approved at least 86 new sewer connections for market-rate properties, of which about 25 were outside the newly sewered Greenbush area. Exh. 45, ¶ 4. These include approvals for new connections to the Greenbush Sewer Extension, Exh. 35L, and for market rate residences throughout Scituate, including market rate homes on Hatherly Road and Tilden Road, the streets on which the Oceanside project would front. Exh. 35, ¶¶ 60-61; Exh. 35L, T-U; Tr. I, 147-148. At least seven were for newly constructed market rate homes. Exh. 35, ¶ 61. A sewer hook up was granted to a new four bedroom house on Tilden Road eleven days after the DEP lifted the ACO. Tr. I, 148.

These examples of sewer connections (or extensions) granted to market rate housing during the moratorium and since 2005 demonstrate favorable treatment to new construction for market rate housing. The treatment of projects such as Oceanside's project as "subdivisions" which receive the lowest priority ensures that sewer access will not be granted to them. The granting of priorities to market rate homes for increased flow for additional

bedrooms and to new single family construction over affordable housing without the existence of health concerns such as failing septic systems is another example of unequal treatment. It is illogical for Scituate to say that affordable individual homes would be entitled to the same treatment as market rate individual homes, when the nature of Chapter 40B housing is that it requires increased density to subsidize the cost of affordable homes by the sale of market rate homes. We find that the Board has not adequately rebutted the developer's proof and Oceanside has met its burden of demonstrating unequal treatment in violation of G.L. c. 40B, § 20 and 760 CMR 31.06(4).

C. Water Service

Oceanside requested that the Board grant a water connection permit as part of the comprehensive permit. Active municipal water lines front the Oceanside Village site on Hatherly Road and Tilden Road. Pre-Hearing Order, § II, ¶ 8. Oceanside argues that connections of the units in the project would be done in accordance with generally accepted engineering standards. Exh. 34, ¶ 15. We find that the developer has met its burden of demonstrating compliance with state or federal requirements or generally accepted standards. The remaining issue is whether local concerns justify withholding the grant of a connection as part of the comprehensive permit.

The Board argues that even though its decision on Oceanside's application for a comprehensive permit authorized a water connection, none may be granted before Oceanside applies to the DPW for a permit. The Board argues that Oceanside never submitted an application for a water connection permit, it has not submitted evidence that the permit would not be granted upon the filing of an application, and that water connections, unlike sewer service are not subject to a hierarchy for granting permits. See Tr. III, 27-28. However, the Board also argues now that the Town's capacity is inadequate to grant a connection permit to Oceanside. This is somewhat inconsistent with its earlier determination to allow connection to the Town water service for 150 units.

As we discussed above, this Committee and the Board have the authority to act for local boards including the DPW and may issue the permit requested by Oceanside if it is warranted. The Board is mistaken in arguing that Oceanside must instead request a

connection permit from the DPW. Chapter 40B was enacted to provide for comprehensive applications and streamlined review. At first impression, it would seem that since the Board has authorized water service, albeit for fewer units, there may be no issue here to discuss and the permit should simply be deemed granted. See *Peppercorn Village,* No. 02-02, slip op. at 13 n.10 (ordering that Chapter 40B project receive municipal water connection based on the date of its local comprehensive permit application).

1. Scituate's Water Capacity

The Board argues that the refusal to grant a waiver of the DPW approval for a water connection is consistent with local needs because there is insufficient allowed capacity to provide water service to this project and because Oceanside never proved a regional need for affordable housing.[13] As discussed above, lack of capacity, by itself, however, is not a valid local concern. If a board raises the question of the inadequacy of existing municipal services or infrastructure, it has "the burden of proving that the installation of services adequate to meet local needs is not technically or financially feasible...." 760 CMR 31.06(8). See *Hilltop Preserve,* No. 00-11, slip op. at 10; *Franklin Commons Ltd. Partnership v. Franklin,* No. 00-09, slip op. at 11-16 (Mass. Housing Appeals Committee Sept. 27, 2001).

The parties dispute the amount of water capacity available for new connections. Oceanside argues that Scituate has sufficient water capacity to provide a connection to the project, and that denying a connection now while continuing to permit connections for market rate housing in Scituate denies the developer equal treatment as required by our regulations. The Board argues that permitted capacity is inadequate to support the project, and Oceanside should not be able to tie up water supply even though it is not ready to begin construction.

In this proceeding the Board relies on the Water Withdrawal Permit issued by DEP which imposes a limit on the gallons per day that may be consumed by the Town. Scituate is limited by that permit to using 1.73 mgd. Pre-Hearing Order, § II, ¶ 7; Exh. 40, ¶ 3. The capacity of the Scituate water treatment plant is 3.0 mgd. Tr. II, 64-65. The total "safe yield," of the water supply system, defined as the amount the Town could withdraw from the

13. We have already discussed above that a regional need for affordable housing exists.

environment without causing excessive environmental damage, is 2.4 mgd. Tr. II, 63-65; Exh. 15, p. 1-6; Exh. 16, p. 2-8.

In June 2003, after conducting a review of the Town's water capacity and needs, the Town's consulting engineering firm recommended that the Town immediately seek an increase in the 1.73 mgd supply limit from DEP because the approval process is lengthy. However, Scituate has not requested that DEP raise the water withdrawal limit. Exh. 34, ¶ 31; Tr. I, 162-163.

Until May 2002, the DEP had limited water use to 1.49 mgd. In the years 1999, 2000 and 2001, Scituate exceeded that 1.49 mgd limit, but there is no evidence of any adverse consequence from DEP as a result of the excess consumption. Exh. 41, ¶ 28; Tr. I, 160-161; Tr. II, 86. Since the Town was on notice of the need to request an increase in water usage, and the capacity of the water treatment facility is adequate to support an increase by DEP, the lack of a request for an increase places the fault for the limited capacity at the feet of the Board. As a result, the Board cannot show that it is technologically or "technically" infeasible to increase capacity. Since the Board has not met its burden of proving the installation of services adequate to meet local needs is not technically or financially feasible, there is no question that the proposed development should be given access to the municipal water system. In any event, as discussed below, we find that Scituate has sufficient permitted water capacity to grant a permit to Oceanside.

The parties agree that in estimating the historical water consumption, it is best to average several years' experience. The Board argues that the available capacity for new connections is only 50,000 gpd or .05 mgd. It derived this figure by subtracting an amount of 1.68 mgd as the average water consumption in Scituate over the period 1999-2005 from the 1.73 mgd limit imposed from DEP. Exhs. 34B-G; 41, ¶ 13; 44-4. See Board brief, p. 20.

Oceanside argues, however, that the Town water supply capacity and the calculation of the project's total water usage should be determined as of the date of Oceanside's application for a comprehensive permit to the Board. In October 2003, when Oceanside submitted its application to the Board, Scituate was using an average of 1.66 mgd or 70,000 gpd below the 1.73 mgd limit. Exh. 41, ¶ 28. In support of this position, Oceanside cites 760

CMR 31.07(1)(j), which provides that "[t]he bylaws, regulations, and other local requirements which apply in determining whether a comprehensive permit should be granted are those in effect on the date of the application to the Board." This provision does not afford the support the developer claims, however. It is intended to limit regulatory requirements to those in effect at the time of the application for a comprehensive permit. It is not intended to limit factual inquiries in a *de novo* proceeding solely to the time period of the comprehensive permit application. *Hanover, supra,* 363 Mass. 339, 371; G.L. c. 40B, § 22. Either party may bring matters not raised during the Board hearing before the Committee. *Merrimack Meadows Corporation v. Tewksbury,* No. 87-10, slip op. at 14-15 (Mass. Housing Appeals Committee Aug. 23, 1988).

Oceanside's expert also disputed the Board's 2005 annual consumption statistics on the ground that they improperly include what he considered to be inflated amounts of un-metered "other usage," e.g., well testing that was not actually consumed, and high amounts of unaccounted for water. He stated that if this data were accurate, Scituate would have a 30 percent annual increase in unaccounted for water, which would be inconsistent with a town charged with working to decrease unaccounted for water by detecting and fixing leaks. Exhs. 44, ¶ 5; 44-3; 44-4. He therefore disagreed with the Board's witnesses' view that current capacity was insufficient to accommodate Oceanside.

2. Oceanside's Anticipated Water Consumption

The question of the most credible method of estimating future water capacity for the project is considered based on all the evidence submitted in this proceeding. The testimony submitted by the parties is conflicting and presents a range of potential water consumption by a fully occupied development. The parties agreed that averaging consumption experience over a period of time was preferable to data for only one year. Under the Board's planning methodology, using an assumed "rule of thumb" of 80 gpd per person and a Scituate town-wide average of 2.64 persons per household, the Board's expert estimated 52,800 gpd water usage for the project. Exh. 41, ¶ 12; Tr. II, 66-67. The witness compared that estimate to the 50,000 gpd available under the DEP permit limit using the seven-year average withdrawal for the years 1999 to 2005. Exh. 41, ¶ 13. The Board argues that this method of computing

water usage should be granted great weight as a bona fide planning tool which does not treat subsidized housing differently than unsubsidized housing, citing *KSM Trust*, No. 91-02, slip op. at 6.

Substituting 2005 water consumption statistics instead of an average over seven years, the Board derived an estimated total usage for the project of 40,260 gpd based on the same assumption of 2.64 persons per unit, but an actual average usage for all residences in Scituate in 2005 of 61 gpd per person. The Board's witness testified that this exceeded the 20,000 gpd buffer it calculated was available for that year. Exh. 41, ¶¶ 15-19; Tr. II, 65, 68-69.

Oceanside argues that actual water supply records are most credible, relying on the DEP Bureau of Municipalities Guide to Comprehensive Wastewater Management Planning, which addresses projections of economic population growth, and provides:

> Estimates must be made for future residential, commercial, institutional, and industrial flows. To the greatest extent possible, estimates should be based on existing records of wastewater flows or on reliable water supply records adjusted for consumption and other losses. ... If no wastewater or water use records exist, the rationale for estimation of future flows should be fully documented.

Exh. 46, § 4.24(a). The Board's water expert stated that the DEP standards are intended for comprehensive wastewater plans. Tr. II, 83-85.

Oceanside's expert witness stated that Scituate's average water use from 1999 through 2004 was 190 gpd. Exh. 34, ¶ 16. He believed this would be too high for the proposed development because, with an average of 2.28 bedrooms per unit in the development, the number of persons per household would be significantly less than the town-wide average of 2.64, which is based heavily on single family homes which constitute 86 percent of residences in Scituate, a significant majority. Exh. 44, ¶ 1. He also noted that the Board's estimate of 52,800 gpd would assume an average of 211.2 gpd per unit, even though the Town's actual overall average water use was only 190 gpd. Exh. 34, ¶ 19. He offered 175 gpd per unit or 76.8 gpd per bedroom to derive 43,570 gpd as alternative "conservative" estimate. Exh. 34, ¶¶ 16-18, 25-26. Oceanside also submitted water usage reports for three condominium developments projects in three other Massachusetts towns, Abington, Andover

and Sutton, which reflected an average of 46-50 gpd per bedroom. According to Oceanside, based on those reports the proposed project, with 551 bedrooms, would have an estimated 25,346 to 27, 550 gpd. Exh. 34, ¶¶ 20-25. Oceanside's expert contrasted the range of actual water consumption statistics from these three towns to show that his estimate of 43,750 gpd was conservative. Exh. 34, ¶¶ 24-25.

The Board argues that both its estimates and Oceanside's exclude the effects of peak day demand or fire use which could have a significant impact in summer when the Town's population increases and water supplies are lower. It argues that communities typically wish to stay below their water withdrawal limit to account for these factors and to avoid adverse supply shortages. Exh. 41, ¶ 14. In addition, it disputes the relevance of the figures from the other three towns on the ground that they are not coastal communities which experience an influx of visitors in the summer months.

We disagree with the Board that peak demand and fire flows would increase these estimates significantly because system flows are measured in annual not daily usage amounts and already incorporate daily fluctuations. Exh. 44, ¶ 2. Further, although the water usage for the recent seven-year period has fluctuated without an obvious trend upward or downward over this period of time, we credit the opinion of the consultants to the Town who expected water usage to decrease because of increasing public awareness of water conservation. Tr. II, 58-59; Exh. 41, ¶ 28; Exh. 15, p. 2-6; Exh. 40, ¶ 6.

We agree with Oceanside that its calculations represent a conservative estimate, taking into consideration that the number of bedrooms is less than the average in the Town. We also credit the condominium statistics from the other towns for comparison purposes, but note that those lower flow data may reflect the fact that those towns do not receive an influx of summer guests as homes in Scituate do. However, the Board has not shown that condominiums, like single family houses, attract a large number of visitors in the summer months. Also, the Board's suggestion that Scituate, unlike those communities, is not a commuter town, is unpersuasive.

Finally, Oceanside has offered to contribute $25,000 to help reduce unaccounted for water by fixing water main leaks. Oceanside's witness testified that this contribution would be sufficient to save in excess of 40,260 gpd. Exh. 44, ¶¶ 7-10, 12.

Our examination of the evidence leads us to conclude that Oceanside's conservative estimate is the most credible. Thus we expect that the Town's water capacity is adequate to support a permit to Oceanside. Moreover, even with the Board's worst case scenario, the mitigation Oceanside has offered would appear to reduce the usage to an amount within the available capacity the Town is expecting. Therefore, on this record, we do not find that the Town lacks capacity to offer water service to Oceanside, especially if Oceanside provides the mitigation it has offered.[14] This is consistent with our precedent. See *Hilltop Preserve,* No. 00-11, slip op. at 15 and cases cited. Accordingly, the Board has not demonstrated a valid local concern with respect to water service that outweighs the need for affordable housing.

3. Equal Treatment with Regard to Water Connection Permits

Scituate has granted numerous water connection approvals to market rate homes between year end 1999 and 2004. The Town has also approved water connections for Harborside Village and the Residences at Herring Brook, multi-family developments currently under construction. Exh. 34, ¶¶ 34-36. The Herring Brook special permit application was made after Oceanside's comprehensive permit application. Exhs. 1; 32D. We note that in the Herring Brook special permit proceeding, held in 2005, town officials indicated there was sufficient capacity for that project. Exh. 32D, p. 2. The Board cannot now claim that there is insufficient capacity for Oceanside while permitting market rate projects with later application dates to connect to the municipal water system without falling afoul of the equal treat requirement. Oceanside's "place in line" for the receipt of a water permit should be determined as of the date of its comprehensive permit application to the Board. This Comprehensive Permit shall include an order that the Town grant a water connection permit to Oceanside as if it had received the permit on the date it filed the comprehensive permit application with the Town.

---

14. Nor do we find that the Board has shown that it is infeasible to address the capacity issue. The Town has the ability to apply to DEP to increase the limit to an amount within its actual capacity.

VIII. OTHER LOCAL CONCERNS

A. Requested Waiver from Local Requirements

Oceanside has requested that the Committee grant certain waivers from local requirements that the Board denied in its decision.

1. Water and Sewer Connection fees

Oceanside requests that the Board waive the Town water and sewer connection fees for the project. The Board denied that request in its decision. The developer's witness testified he believed that the current per-unit fees, respectively, for water and sewer connections are $6500 and $5000. Exh. 32, ¶¶ 28-30. These fees would total $2,875,000 (at $11,500 per unit). The developer's witness believed that these fees are unusually high and well above the generally recognized regional standard, particularly for subsidized housing developments. Exh. 32, ¶ 30. Although the Board argues in its brief that the developer only stated he believed the fees were at this level, the Board submitted no contrary evidence concerning the level of the connection fees, and it could have done so in prefiled testimony of its witnesses. The Board argues, however, that it is inappropriate for Oceanside to expect a waiver of all town fees, even for the market rate units, without specifying which fees are involved.

The case law of the Committee on the question of whether connection fees should be waived is sparse. In one previous case, the Committee refused to order fees waived, but noted that the developer "conceded" it had the burden of proving that the town has applied such fees unequally to subsidized and market-rate housing. See *Messenger Street Plainville Senior Housing Development Partnership v. Plainville,* No. 99-02, slip op. at 3-6 (Mass. Housing Appeals Committee Oct. 18, 1999); 760 CMR 31.06(4). In *Plainville,* the Committee stated that "the overall intent of the Comprehensive Permit Law is to lower barriers that stand in the way of the development of affordable housing, and therefore the Board not only has the power to reduce or eliminate water connection and other local fees, but also should make every effort to do so when appropriate." *Id.* at 6. The Committee ruled, though that the failure to waive connection fees does not violate Chapter 40B. *Id.*

On the record here, the developer has not shown unequal treatment in the application of sewer and water connection fees. No evidence exists in the record that comparable fees are not charged for market rate housing. Also the opinion that the fees are unreasonable is not supported by data comparing the fees to fees set in other communities. Therefore we do not find that the fees are excessive, particularly in light of the limited nature of the water and sewer resources in the Town at present.[15] While we believe that if indeed the fees are as high as indicated here, the Board should consider waiving the fees for the affordable units, we will not require it to do so. However, Oceanside shall be charged no per-unit water or sewer connection fee that exceeds the connection fee amounts the Town charged to comparable market rate residences as of the date of Oceanside's comprehensive permit application to the Board, October 27, 2003.

2. Wetlands Bylaws and Regulations and Board of Health Approvals

Oceanside seeks waivers from specified Scituate local wetlands bylaws and regulations, and argues that the Board has failed to demonstrate why its local requirements should be followed. It states that it has submitted evidence to show that its project meets state or federal laws or generally accepted standards with regard to wetlands.[16] 760 CMR 31.06(2). Exh. 33, ¶¶ 35-38; Exhs. 33L, 33M, 37. The Board has not demonstrated an overriding valid local concern to support these requirements. The requested waivers are granted.

---

15. We note that in a future case before the Committee, a proper showing that such fees are excessive might warrant a ruling to waive them as a barrier to affordable housing.

16. The primary environmental issue has been resolved by the parties through stipulation. Oceanside and the Board have agreed that Condition 59 of the Board's decision will be incorporated into any Comprehensive Permit. That Condition provides that Oceanside shall 1) during the construction process, notify the Board of Health of the discovery or release of any hazardous materials, and notify the Board of Health of any additional enforcement actions required by DEP or other governmental entities; 2) install air monitors along the property line between the site and the Wampatuck School property which provide for an audible alarm in the event air-borne hazardous materials that exceed state or federal limits are detected; and 3) allow the Board's environmental consultant to have reasonable access to the site during construction. Exh. 1. The Comprehensive Permit shall be modified to incorporate Condition 59 of the Board's decision.

3. Local setback requirement

Oceanside seeks a waiver from a Scituate local bylaw § 420.1.L. to allow a proposed five-foot setback to the lot line for grading associated with a detention pond. It states that it has submitted evidence to show that its project meets state or federal laws or generally accepted standards with regard to this issue. 760 CMR 31.06(2). Exhs. 33, ¶¶ 39-41; 33N, 33O. The Board has not demonstrated an overriding valid local concern to support its setback requirements. The requested waiver is granted.

B. Conditions in Board's Decision

Other issues raised by either Oceanside or the Board result from a condition stated in the Board's decision. While the conditions are no longer in effect, to the extent they represent local concerns that the Board has properly raised in this proceeding they will be considered. However, a failure to submit evidence or argument on any issue constitutes a waiver of that issue in this proceeding. See, e.g., *Rising Tide Development, LLC v. Sherborn,* No. 03-24, slip op. at 7, 19-20 n.23 (Mass. Housing Appeals Committee Mar. 27, 2006); *Washington Green Development, LLC v. Groton,* No. 04-09, slip op. at 3 n.2 (Mass. Housing Appeals Committee Sept. 20, 2005), citing *Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85, 653 N.E. 2d 595, 598 (1995).

Some of the provisions in the Board's decision constitute a requirement of the developer to appear in the future before the Board or otherwise seek from it further review and approval. In most instances, such a "condition subsequent" undermines the entire purpose of a single, expeditious comprehensive permit and is improper. *Peppercorn Village,* No. 02-02, slip op. at 22. Also see *Hastings Village, Inc.,* No. 95-05, slip op. at 33-34 (Mass. Housing Appeals Committee Jan. 8 1998), *aff'd,* No. 00-P-245 (Mass. App. Ct. Apr. 25, 2002); *Owens v. Belmont*, No. 89-21, slip op. at 13-15 (Mass. Housing Appeals Committee June 25, 1992); 760 CMR 31.09(3). With respect to some of the other issues raised by the Board, Oceanside argues that the Board seeks to include an unlawful requirement in the comprehensive permit that would be in excess of its authority. *Peppercorn Village,* No. 02-02, slip op. at 16-17; *Archstone Communities Trust v. Woburn,* No. 01-07, slip op. at 19-21 (Mass. Housing Appeals Committee June 11, 2003). Some of the Board's concerns,

however, merely relate to submission and approval of additional plans concerning issues that were not addressed in the preliminary plans submitted with the comprehensive permit application, and seek a review to determine consistency with applicable local regulation. Such requirements, so long as they do not require further hearing and approval by the Board, but rather entail only approval by the town official who customarily reviews such plans, are appropriate. *Peppercorn Village,* No. 02-02, slip op. at 22; *Owens,* No. 89-21, slip op. at 13-15.

Oceanside argues that the Board failed to submit any evidence on any of the regulatory issues below, and therefore the provisions should be excluded from the permit. It also argues that the Board has failed to show that there is a valid health, safety, environmental or other local concern that justifies establishing additional conditions.

1. Insurance and Bonding during Construction

Oceanside has met its burden to demonstrate unequal treatment in that the bonding requirements the Board seeks to apply have not been applied to market rate housing. 760 CMR 31.06(4). However, it became clear during cross-examination of the developer's witness that Oceanside would accept the bonding requirements imposed on the Herring Brook project, a market rate development project, which are more consistent with industry standards. The Committee may not waive state requirements. Subject to G.L. c. 41, § 81U, this Comprehensive Permit is revised to incorporate the Herring Brook provision Oceanside stated it would accept. Exh. 32, ¶¶ 23-27; Exh. 32D; Tr. II, 135-39; Exh. 48, ¶¶ 26, 30.

2. Catch Basins

The Board seeks to require that catch basins shall be located not more than 300 feet apart, and locations shall be shown on the plans. Oceanside states that it has provided *prima facie* evidence of compliance with state or federal laws or generally recognized standards with respect to the location of and distance between catch basins. The Developer has indicated catch basins will generally be located 300 feet apart except where topography makes the placement inefficient. 760 CMR 31.06(2). Exh. 33, ¶ 40; Exh. 3(g). It argues that the Board provided no contrary evidence. The Board argues that Oceanside has not submitted sufficient information for the Town's consulting engineer to determine if the

stormwater management system will be adequate, and argues that no waivers of the Town's requirement should be allowed. We find that the Board has failed to demonstrate a valid local concern for mandating the distance between the location of catch basins beyond that identified by Oceanside that outweighs the need for affordable housing. However, it is appropriate for final plans to indicate the location of all catch basins. This condition will be modified to include the requirement that the location shall be indicated on the plans or on an addendum to those plans and that the location of catch basins shall be consistent with the Committee's condition below regarding compliance with Department of Environmental Protection Stormwater Management Policy and Guidelines.

3. Construction Phasing Plan

The Board seeks to require Oceanside to submit a project phasing plan to the Board for approval, and to specify that prior to the issuance of building permits, all infrastructures shall be constructed as shown before the construction of any buildings, except roadway completion beyond the binder course. Exh. 1. Oceanside states that it has met its *prima facie* burden of showing that its project meets state or federal laws or generally accepted standards, 760 CMR 31.06(2) and has demonstrated unequal treatment in comparison to market rate housing. 760 CMR 31.06(4). The developer's witness stated that in general all infrastructures must be in place before the issuance of the occupancy permit, rather than the building permit. Exh. 32, ¶¶ 19-27.

The Board relies on the project eligibility letter from MassHousing which required that Oceanside submit a phasing plan to the Board. The Board notes that no phasing plan was submitted to the Board or the Committee. See Exhs. 2; 30. According to the developer's witness the first phase of the project would include 143 units. Tr. III, 30. The Board expressed concerns that the construction would be completed at a rate that would be difficult for the market to absorb. It also clarified that the requirement for the construction of infrastructure before the issuance of a building permit applies to each phase of construction rather than the entire project. See Exh. 32, ¶¶ 19-20.

Under the Committee's regulations, the Developer is required to show in its final approval with the subsidizing agency that it has complied with the requirements of 760 CMR

31.01(2)(a) and (b), which establish the requirements of project eligibility determinations. See 760 CMR 31.09(3). Although the Committee does not dictate to the subsidizing or monitoring agency the manner of performing its responsibilities, we expect that part of the final review and approval process will be consideration of a phasing plan Oceanside shares with MassHousing. We expect that Oceanside will comply with the phasing requirements applicable to market rate housing determined by the Town building inspector or other official with authority regarding the phasing of construction of infrastructure and the issuance of permits.

4. Construction Control Measures

The Board also seeks to require Oceanside to furnish screening during construction to prevent adverse impacts to neighboring properties caused by light, noise and dust, to require efforts to save significant trees and to require construction materials to be stockpiled in areas designated on the plans, with requirements to notify the Board of final disposition of construction materials. Oceanside has met its *prima facie* burdens of showing that its project meets state or federal laws or generally accepted standards. 760 CMR 31.06(2). The Board argues that Oceanside should be able to stockpile material in areas specified on the final plans. It argues that the screening and stockpiling requirements are consistent with local needs particularly because of the site contamination issues. To address the contamination issues, Oceanside shall specify in its final plans areas for stockpiling construction materials and site debris and materials and comply with those plans. In addition, to the extent that natural screening from trees is removed during construction, Oceanside shall provide the additional screening it has offered, particularly for areas that abut neighbors directly.

5. Construction of Affordable Units

The Board raises the concern that Oceanside's plans do not show the affordable units spread evenly across the site and that it would place a disproportionate number of affordable units in the "garden-style" buildings. Exh. 39, ¶ 20. Oceanside also plans that the affordable units elsewhere be the smallest units, and that none of the three-bedroom units be affordable. Oceanside's witness stated that affordable units would be spread throughout the townhouses and garden apartments and would be indistinguishable from market rate homes on the

outside. Exh. 32, ¶ 14. The Board also argues that Oceanside should construct affordable units on a schedule so that at least one affordable unit is built for every three market rate units. Oceanside's witness stated that this schedule would be followed. Exh. 32, ¶ 15.

As part of providing equal treatment between subsidized and unsubsidized housing, the developer and the town must ensure that the affordable units are well represented throughout the project and indistinguishable from the market rate units, including designating larger units as affordable. The Board raises appropriate concerns about the construction of the project so that the affordable units are dispersed throughout and not clearly identified. However, Oceanside has indicated that it will comply with these expectations. With respect to including affordable units among the three-bedroom units, we expect that the final review by the subsidizing agency will ensure that the affordable units reflect a mix of the entire housing stock of the Oceanside project. As agreed to by Oceanside, the construction of the project shall be phased in a manner that provides a proportionate number of affordable units constructed as market-rate units are built. Exh. 32, ¶ 15.

6. Town Review of Regulatory Agreement and Deed Rider

The Board argues that Oceanside has submitted an outdated regulatory agreement which demonstrates the need for the Town to review and approve it. Exhs. 32C; 32, ¶ 13. It seeks to require further review by the Board. The record on this issue is too sparse in light of the emerging policy issues that are the subject of several appeals before the Committee. On this record it is premature to rule on a matter that should be addressed by the appropriate policymaking authorities. If the parties are unable to resolve this issue with input from MassHousing, they may apply to the Committee for further consideration.

7. Development Fees, Profit and Final Audit

Oceanside objects to the exclusions of development or brokerage fees from permissible development costs. The profit requirements and final audit provisions are generally within the scope of responsibility of the subsidizing agency. See Exh. 2. In any event, the record on this issue is too sparse in light of the emerging policy issues that are the subject of several appeals before the Committee. On this record it is premature to rule on a matter that should be addressed by the appropriate policymaking authorities. If the parties

are unable to resolve this issue with input from MassHousing, they may apply to the Committee for further consideration.

8. Submission of As-Built Plans

All that may be required after issuance of the comprehensive permit is routine inspection during and after construction by the appropriate town official (or, if the Board so desires, its consulting engineers) for compliance with the comprehensive permit, the final written approval by the entity that issued the project eligibility letter, and applicable state and federal codes. 760 CMR 31.09(3). However, "the developer must comply with local requirements with regard to all details *not* included in the application." (Emphasis in original.) *Owens*, No. 89-21, slip op. at 14 n.9, and "the building inspector, the town engineer, or any other local official normally involved in issuing the building permit can of course consult with whomever he or she chooses." *Id.* at 15. No special condition need be imposed in this instance, as Oceanside is expected to comply with any local requirements in this regard.

9. Modification of Permit

The Board's proposal for a condition that permits the Board to modify the permit, to the extent it defers to state law, is superfluous. The Board's jurisdiction to modify the permit is based on a request from the developer and is not within its authority to initiate. The modification of permits shall conform precisely to the Committee's regulations governing modifications of permits. See 760 CMR 31.03(3).

10. Submission of Plan Revisions to Board after Comprehensive Permit is Final

The Board has not established a local concern for requiring plan revisions to be submitted to the Board within 60 days after the comprehensive permit becomes final that outweighs the need for affordable housing. Under the Comprehensive Permit Law, the developer need submit only preliminary site development plans and preliminary architectural drawings to the Board for approval. 760 CMR 31.02(2). Requiring subsequent review by the Board of the construction details "undermines the... purpose of a single, expeditious comprehensive permit...." *Peppercorn Village,* No. 02-02, slip op. at 22. Therefore the local

concern, to the extent it has been expressed, is outweighed by the need for affordable housing.

IX. LEGAL FEES

Oceanside requests that the Committee order the Board to refund fees paid for services of its legal counsel for performing legal assistance in reviewing the comprehensive permit application. The Board objects to the return of these fees. It argues that the Committee lacks jurisdiction to review whether counsel is an outside consultant for the purpose of advising the Board regarding a comprehensive permit application under Chapter 40B.

In *Page Place Apartments, LLC v. Stoughton,* No. 04-08, slip op. at 17-20 (Mass. Housing Appeals Committee Feb. 1, 2005), we ruled that the Committee has jurisdiction to address this issue. Also see *Pyburn Realty Trust v. Lynnfield,* No. 02-23, slip op. at 21-24 (Mass. Housing Appeals Committee Mar. 22, 2004). In *Hanover*, *supra*, 363 Mass. 339, the Court determined that by enacting G.L. c. 40B, the Legislature intended to provide a mechanism for relief from exclusionary zoning practices, defined as any local requirements or regulations that prevent the construction of affordable housing. *Id.* at 354. Most germane to this issue is the Court's holding that the Housing Appeals Committee has the authority to override, when necessary, local requirements and regulations, including zoning bylaws and ordinances, in order to promote the construction of low and moderate income housing in cities and towns. See *id.* at 355-356, 363. Therefore, Chapter 40B cannot be read as narrowly as argued by the Board. Such an interpretation would provide a means by which some municipalities could frustrate the intent of the statute by charging excessive or inappropriate fees to prevent the construction of affordable housing. *Page Place,* No. 04-08, slip op. at 18. Requiring an applicant to pay the town's attorney costs could deter some developers from applying for a comprehensive permit, particularly for projects involving a small number of units. *Pyburn*, No. 02-23, slip op. at 23.

The Board also contends that, even if the Committee does have jurisdiction, the Board properly charged Oceanside for these legal fees. It argues that *Pyburn* applies only to appeals of approvals of comprehensive permits with conditions challenged as rendering the

project uneconomic. The Board relies on § 21 of c. 40B, which provides that boards "shall have the authority to use the testimony of consultants" and on G.L. c. 44, § 53G,which relates to the imposition of reasonable fees by a board of appeals for the employment of outside consultants in the review of a comprehensive permit.

Section 53G does not authorize a local board to assess fees, but only to deposit any fees collected in a special account. *Pyburn,* No. 02-24, slip op. at 23 n.17, citing *TBI, Inc. v. Board of Health of North Andover*, 431 Mass. 9, 18, 725 N.E. 2d 188 (2000). Section 53G implies that the authority to collect these fees must be derived from some other source and specifically refers to G.L. c. 40B, § 21. "An administrative agency ... has considerable leeway in interpreting a statute it is charged with enforcing, and regulations adopted by the agency stand on the same footing as statutes, with reasonable presumptions to be made in favor of their validity." *Student No. 9 v. Board of Educ.*, 440 Mass. 752, 762-763, 802 N.E. 2d 105 (2004).

The Board's argument ignores the distinction between the payment of counsel fees for the litigation of a board proceeding and the payment of consultant fees for a legal expert consultant or witness. See *Pyburn*, No. 02-24, slip op. at 22-24 and n.15 ("consultant" as used in statute is to provide "testimony" or "explanation" on technical aspects of proposed project to assist board in determining if project is consistent with local needs). As the Committee has already determined that nothing in G.L. c. 40B, § 21, suggests that the payment of attorney fees is considered part of "outside consultant review fees," the Board must refund the legal fees paid by Oceanside.

X. 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 Scituate Zoning Board of Appeals is not consistent with local needs and applies unequal treatment in its requirements of Oceanside compared to market rate housing. The decision of the Board is vacated and the Board is directed to issue a comprehensive permit as provided in the text of this decision and the conditions below.

1. The comprehensive permit shall conform to the application submitted to the Board except as provided in this decision.

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

(a) The development shall be constructed as shown on drawings by Marchionda & Associates, L. P., dated July 13, 2004. Exh. 3.

(b) Design and construction shall be in compliance with the state Department of Environmental Protection Stormwater Management Policy and Guidelines. Prior to the commencement of construction, the applicant shall submit to the Scituate DPW a stormwater management report prepared by the project engineer that demonstrates that the final plans meet the DEP Stormwater Management Policy and Guidelines.

(c) Oceanside shall provide the water service mitigation it has offered to the Town of Scituate, namely a contribution of $25,000 for the purpose of accelerating leak repairs to water mains that the Town identifies through leak detection surveys mandated by its Water Withdrawal Permit. Exh. 21.

(d) Oceanside shall comply with Condition 59 set out in the Board's decision, namely, during the construction process, Oceanside shall immediately notify the Board of Health of the discovery or release of any hazardous materials, and any notification of additional enforcement actions received from or instituted by the DEP or any other government entity shall be promptly provided to the Board of Health. Oceanside will install air monitors along the property line between the Premises and the Wampatuck School property which provide for an audible alarm in the event that air-borne hazardous materials that exceed state or federal limits are detected. Oceanside shall allow the Board's environmental consultant to have reasonable access to the site during construction. Exh. 1, ¶ 59.

(e) The Town of Scituate shall issue all approvals and submit all governmental filings necessary to facilitate Oceanside's access to the municipal sewer system and the municipal water system.

3. Should the Board fail to carry out this order within thirty days, then, pursuant to G.L. c. 40B, § 23 and 760 CMR 31.09(1), this decision shall for all purposes be deemed the action of the Board.

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

(a) Construction in all particulars shall be in accordance with all presently applicable local zoning and other by-laws except those waived by this decision.

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

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

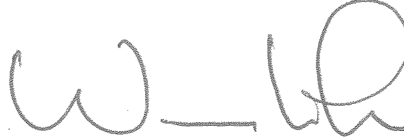
(d) No construction shall commence until detailed construction plans and specifications have been reviewed and have received final approval from the subsidizing agency, until such agency has granted or approved construction financing, and until subsidy funding for the project has been committed.

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

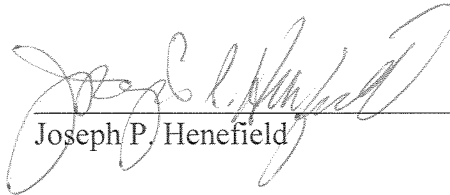
This decision may be reviewed in accordance with the provisions of G.L. c. 40B, § 22 and G.L. c. 30A by instituting an action in the Superior Court within 30 days of receipt of the decision.

Housing Appeals Committee

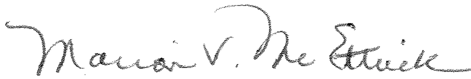
Issued: July 17, 2007



Werner Lohe, Chairman

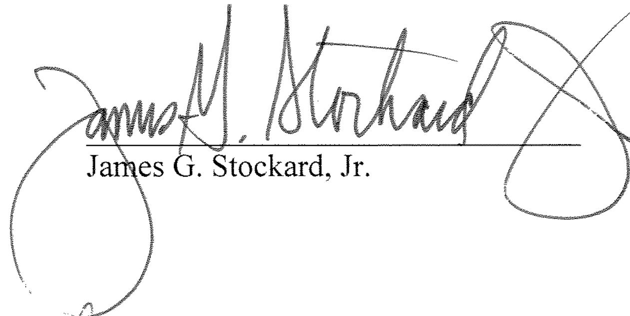


Joseph P. Henefield



Marion V. McEttrick

Christine Snow Samuelson



James G. Stockard, Jr.

Shelagh A. Ellman-Pearl, Presiding Officer

Certificate of Service

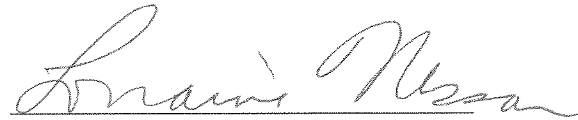
I, Lorraine Nessar, Clerk to the Housing Appeals Committee, certify that this day I caused to be mailed, first class, postage prepaid, a copy of the within Decision in the case of Oceanside Village, LLC v. Scituate Zoning Board of Appeals, No. 2005-03, to:

Paul D. Wilson, Esq.
Benjamin B. Tymann, Esq.
Mintz, Levin, Cohen, Ferris,
Glovsky & Popeo
One Financial Center
Boston, MA 02111

Barbara St. Andre, Esq.
Petrini & Associates, PC
161 Worcester Road, Suite 304
Framingham, MA 01701

Ms. Christine Loeb
Ms. Veronica M. Kent
The Proving Grounds Group
189 Hatherly Street
Scituate, MA 02066

Dated: 07/17/07



Lorraine Nessar, Clerk
Housing Appeals Committee