COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

HANOVER R.S. LIMITED PARTNERSHIP

v.

ANDOVER ZONING BOARD OF APPEALS

No. 12-04

DECISION

February 10, 2014

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COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

HANOVER R.S. LIMITED PARTNERSHIP, Appellant	)	
v.	)	No. 12-04
ANDOVER ZONING BOARD OF APPEALS, Appellee	)	

DECISION

I. INTRODUCTION

Most cases that arise under the Comprehensive Permit Law involve a conflict between design elements of a proposed affordable housing development and local concerns as expressed in specific zoning bylaws or other local requirements. But a more subtle issue that has arisen repeatedly is the tension between the need to construct affordable housing—particularly rental apartment buildings—and municipalities' interest in requiring development to conform to their broad municipal planning efforts. Thus, in 1984, this Committee upheld the town of Hingham's denial of a comprehensive permit in an area which, under a municipal plan developed for reuse of a large naval depot, had been zoned for an office park.[1] In 1991, we found against the town of Pembroke based on inconsistencies between its zoning bylaw and its master plan, and in the process, we articulated a three-part test for preliminary evaluation of such plans.[2] In 2002, referring to that test, we upheld the denial of a permit based upon the town of Barnstable's interest

1. *Harbor Glen v. Hingham,* No. 80-06, slip op. at 6-16 (Mass. Housing Appeals Committee Aug. 20, 1982).

2. *KSM Trust v. Pembroke*, No. 91-02, slip op. at 5-8 (Mass. Housing Appeals Committee Nov. 18, 1991).

in preserving the integrity of its maritime business district.[3] Since then, several other cases involving planning have come before us, extending the line of decisions involving municipal planning concerns.[4] In addition, our regulations require us to consider these concerns. See 760 CMR 56.07(3)(g). And, most recently, two cases—the instant case, and an unrelated, but somewhat similar case in Hanover[5]—have focused our attention on this difficult area of the Comprehensive Permit Law. We are keenly aware that since the first case in Hingham, the affordable housing environment, the municipal planning environment, and our regulations have evolved. See, e.g., n.14, below. The current cases have again presented us with new variations on familiar factual circumstances. Though the basic logic of the line of decisions stretching back nearly thirty years remains sound, these cases have presented an opportunity to clarify the standard we apply, which, we hope, will help communities better understand the interplay between affordable housing development and municipalities' legitimate local concern in master planning so that these frequently conflicting interests can be harmonized.

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3. *Stuborn Ltd. Partnership v. Barnstable*, No. 98-01 (Mass. Housing Appeals Committee Sep. 18, 2002).

4. Among the more important of over a half dozen cases in this area are *Adams Road Trust v. Grafton*, No. 02-38, slip op. at 25-28 (Mass. Housing Appeals Committee Dec. 10, 2004) (zoning provisions not supported by master plan, but condition precluding connection to municipal water system upheld); *Brierneck Realty, LLC v. Gloucester*, No. 05-05, slip op. at 20-24 (Mass. Housing Appeals Committee Aug. 11, 2008), *aff'd* No. 10-P-361 (Mass. App. Ct. Apr. 11, 2011) (Board failed to demonstrate implementation of the plan and that the proposal was inconsistent with the plan); *28 Clay Street Middleborough, LLC v. Middleborough*, No. 008-06, slip op. at 11-21 (Mass. Housing Appeals Committee Dep. 28, 2009) (Town planning with regard to office park sufficient to support denial of permit); *Hollis Hills, LLC v. Lunenburg*, No 07-13, slip op. at 19-31 (Mass. Housing Appeals Committee Dec. 4, 2009),-*aff'd* 464 Mass. 38 (2013) (Board failed to demonstrate that the proposal was inconsistent with the plan); and *Herring Brook Meadow, LLC v. Scituate*, No. 07-15, slip op. at 27-38 (Mass. Housing Appeals Committee May 26, 2010) (master plan failed to pass the threshold test, nor was the proposal inconsistent with the plan), *aff'd* No. 10 PS 432685 (HMG) (Land Ct. Jul. 27, 2012), *appeal pending* No. 2012-P-1681 (Mass. App. Ct.).

5. *Hanover Woods, LLC v. Hanover*, No. 11-04 (Mass. Housing Appeals Committee Feb. 10, 2014).

II. PROCEDURAL HISTORY

On August 19, 2011, Hanover R.S. Limited Partnership applied to the Andover Zoning Board of Appeals for a comprehensive permit pursuant to G.L. c. 40B, §§ 20-23 to build mixed-income rental housing to be known as the Lodge at Andover on a ten-acre site in an office and industrial park at 30 Shattuck Road, Andover.[6] The housing is to be financed either by the Massachusetts Housing Finance Agency (MassHousing) or the New England Fund of the Federal Home Loan Bank of Boston. Exh. 1.

By decision of September 7, 2012, the Board denied the comprehensive permit, and the developer appealed to this Committee. Six businesses located in the park near the proposed housing site were granted permission to participate in the hearing as interveners pursuant to 760 CMR 56.06(2)(b).[7] Following the Committee's normal practice, in order to structure the *de novo* hearing and narrow the issues presented, the parties and interveners negotiated a Pre-Hearing Order, which was issued by the presiding officer on February 4, 2013 pursuant to the Committee's regulations. Prefiled testimony was received from nineteen witnesses, a site visit and three days of hearings to permit cross-examination of eight of those witnesses were conducted, and post-hearing briefs were filed.

In their brief, the interveners requested, pursuant to G.L. c. 30A, § 11(7), that the Committee issue a proposed decision. The Committee met on December 17, 2013 as a quasi-judicial board pursuant to G.L. c. 30A, § 18("meeting")(d). Though the full record, including pleadings, evidence, and briefs, was before it, the longstanding practice of the Committee has been to provide a proposed decision when requested by a party. See 760 CMR 56.06(7)(e)(9). In this case, however, by oversight, the Committee neglected to respond to the request, and thus inadvertently proceeded to consider the evidence and issued a decision on December 17, 2013. The interveners, upon receiving that decision, moved that the decision be nullified and reconsidered. The presiding officer granted the

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6. The current proposal is for 248 rental units; the original proposal was for 288 units. Exh. 2, p. 4; 42, ¶ 14.

7. Eisai, Inc.; RREEF America REIT III Corp. Z1; Phillips Electronics of North America, Inc.; Andover Five, LLC; and MKS Instruments, Inc. participated as a group. WRT-Andover Property, LLC also participated. See Rulings on Motions to Intervene, Dec. 7, 2012.

motion, declared the December 17 decision to be a *proposed* decision, and permitted the parties to file written arguments and objections for the Committee's further consideration. The Committee reconsidered the matter,[8] and now issues this final decision.[9]

III. FACTUAL OVERVIEW

The northernmost part of Andover is a large area that is within a bend in the Merrimack River and surrounds the River Road interchange of Interstate Route 93; it is zoned for commercial and industrial uses only, and is known as the River Road Industrial D Area. See Exh. 5-B, 8-A. Within this area, on a dead-end boulevard named Shattuck Road and a smaller loop road off of Shattuck Road called Tech Drive, is an office and industrial park consisting of ten large businesses and one vacant lot. See Exh. 21. The businesses all include offices and some also have research and development or light industrial uses. Tr. I, 24-30, 104-105, 115-116; III, 9, 10-16, 25. After development of this area began in the early 1980s, Boston Properties Limited Partnership purchased a large lot referred to as 30-40 Shattuck Road. Exh. 42, ¶ 5; 51, ¶ 15. It built an office building on 40 Shattuck Road, and then subdivided the lot to create a lot known as 30 Shattuck Road—the single vacant lot—which is about ten acres in size and has 560 feet of frontage and is 800 feet deep. *Ibid.*

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8. The interveners had also requested that they be permitted to present oral argument before the full Committee. The presiding officer asked the parties to brief this question, and the Committee considered the request before it began deliberations on reconsideration on February 10, 2014. As it has done in previous cases, it hereby denies the request. See *Sugarbush Meadow, LLC v. Sunderland*, No. 08-02, slip op. at 2, n.1 (Mass. Housing Appeals Committee Jun. 21, 2010); *LeBlanc v. Amesbury*, No. 06-08, slip op. at 2 (Mass. Housing Appeals Committee May 12, 2008); *Tiffany Hill, Inc. v. Norwell*, No. 04-15. slip op. at 4 (Mass. Housing Appeals Committee Sep. 18, 2007). Concerning practical considerations which limit the full Committee's ability to hear evidence and argument, see *Wilmington Arboretum Apts. Assoc. Ltd. Partnership v. Wilmington*, No. 87-17, slip op. at 3, n.2 (Mass. Housing Appeals Committee Order Sep. 28, 1992), *aff'd*, 39 Mass. App. Ct. 1106 (1995)(rescript).

9. This decision reached by the Committee on reconsideration is virtually identical to the proposed decision. None of the issues addressed in the proposed decision bears further discussion. But the developer, in its comments on the proposed decision, raised an issue not addressed in the proposed decision. That is, it requested "discussion of and an express finding regarding... satisfaction of the site control requirement" found in 760 CMR 56.04(1)(c). Such a finding is unnecessary, however, since the parties stipulated that the developer "has received a determination of Project Eligibility pursuant to 760 CMR 56.04...." Pre-Hearing Order, § II-3 (Feb. 4, 2013). As a matter of law, a Project Eligibility determination is conclusive evidence of site control. 760 CMR 56.04(6); also see 760 CMR 56.07(2)(a)(1).

After being unsuccessful in marketing this lot for commercial development, it entered into a purchase and sale agreement with the developer in this case, Hanover R.S., which intends to build affordable housing.[10] Exh. 42, ¶¶ 7-8. The developer proposes to build 248 units of rental housing in four buildings, a playground, a swimming pool, and a 5,000 square-foot clubhouse. Exh. 42, ¶ 15; Exh. 3, sheet CP-5.

IV. LOCAL PLANNING CONCERNS

A. The Planning Standard

In all appeals under the Comprehensive Permit Law, the ultimate question before the Committee is whether the decision of the Board is consistent with local needs. G.L. c. 40B, § 23; 760 CMR 56.07(1). When the local Board has denied a permit, the developer may establish a *prima facie* case by showing that its proposal complies with state or federal requirements or other generally recognized design standards.[11] 760 CMR 56.07(2)(a)(2). The burden then shifts to the Board to prove first, that there is a valid local concern that supports the denial, and second, that the concern outweighs the regional need for housing. 760 CMR 56.07(2)(b)(2); also see *Hanover v. Housing Appeals Committee*, 363 Mass. 339, 365 (1973); *Hamilton Housing Authority v. Hamilton*, No. 86-21, slip op. at 11 (Mass. Housing Appeals Committee Dec. 15, 1988). One sort of local concern that may be asserted by a Board is its interest in municipal master planning. In evaluating such cases, we use a standard, which, as noted above, has developed over many years.

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10. The vast majority of the site is zoned Industrial D, though the rear of the site backs up to houses on Brundrett Avenue, and a very small, "dog-leg" portion of the site—which will not contain any housing—is zoned Single-Family Residence C. Tr. I, 29-30, 103; Exh. 21.

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

As a threshold matter, the Board must present sufficient evidence concerning its master plan (or similar planning documents, as described in our regulations)[12] to meet a three-part test:

1. Is the plan *bona fide*? Was the plan legitimately adopted, and does it continue to function as a viable planning tool in the town?

2. Does the plan promote affordable housing? If a town has a master plan, it should have a distinct, detailed section addressing affordable housing—"the housing element." In addition to the master plan itself, towns typically should have a free-standing housing plan, which will often include components such as a housing needs assessment. If a town has no formally adopted master plan, then, if it wishes to assert that it has nevertheless engaged in comparable planning activities, it certainly should be expected to have a very robust housing plan. See, e.g., *28 Clay Street Middleborough, LLC v. Middleborough*, No. 08-06, slip op. at 17-19 (Mass. Housing Appeals Committee Dep. 28, 2009). And in all cases, whatever documents have been adopted by the appropriate town bodies, it must be clear that a major aspect of the community's planning is the promotion of affordable housing.

3. Has the plan been implemented in the area of the site? Are zoning provisions and other formal actions taken by the town in the area of the site consistent with the plan? Has development in the area been substantially consistent with the plan?

If any of these questions is answered, "No," we will not consider the master plan a legitimate local concern and we will not consider it in making our decision. We note that we do not view this three-part threshold to be a high one. Of course, we give each element of the test careful consideration. See, e.g., *Herring Brook Meadow, LLC v. Scituate*, No. 07-15, slip op. at 33-37 (Mass. Housing Appeals Committee May 26, 2010), *aff'd* No. 10 PS 432685 (HMG) (Land Ct. Jul. 27, 2012), *appeal pending* No. 2012-P-1681 (Mass. App. Ct.); *Hollis Hills, LLC v. Lunenburg*, No 07-13, slip op. at 25-29 (Mass. Housing Appeals

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12. The master plan that is the focus of the examination is the one in effect at the time of the developer's application. *Paragon Residential Properties, LLC v. Brookline*, No. 04-16, slip op. at 45 (Mass. Housing Appeals Committee Mar. 26, 2007); *Meadowbrook Estates Ventures, LLC v. Amesbury*, No. 02-21, slip op. at 12 (Mass. Housing Appeals Committee Dec. 12, 2006), *aff'd* No. 08-P-1240 (Mass. App. Ct. Sep. 16, 2009).

Committee Dec. 4, 2009), 464 Mass. 38 (2013); *28 Clay Street Middleborough, LLC v. Middleborough*, No. 008-06, slip op. at 17-19 (Mass. Housing Appeals Committee Dep. 28, 2009). But in Massachusetts, the quality of master planning in general, and of affordable housing planning in particular, has advanced considerably since we first articulated this test in *Pembroke* in 1991, and we expect that any town that would assert its planning efforts in support of denying a comprehensive permit should easily be able to establish these three basic characteristics of its planning efforts.

Thus, in most cases, our real focus is on the analysis that follows the threshold test, that is, on the analysis that allows us to determine the weight of the town's local planning concern that is to be balanced against the regional need for affordable housing.[13] This local concern typically includes both one or more specific, narrow planning interests and the town's overall interest in the integrity of its planning process. Consistent with our precedents and regulations, the analysis of these complex, interrelated interests can be broken into several factors. The Board need not introduce evidence with regard to each of these, but it must introduce enough evidence to cumulatively establish a local concern of sufficient weight to outweigh the regional need for affordable housing. The Board may establish the weight of its local planning concern by demonstrating the following:

1. The extent to which the proposed housing is in conflict with or undermines the specific planning interest.

13. In the past, we have said, "The answers to the three threshold questions determine the amount of weight we give the plan." See *28 Clay Street Middleborough, LLC v. Middleborough*, No. 08-06, slip op. at 12 (Mass. Housing Appeals Committee Sep. 28, 2009). A more accurate statement is that it is an *analysis* that is similar to the answers to the questions that determines the weight given the plan.

2. The importance of the specific planning interest, under the facts presented, measured, to the extent possible, in quantitative terms, for instance, the amount of economic cost associated with lost tax revenues, the value of potential jobs forfeited, the amount additional costs incurred,[14] or the nature and extent of environmental loss associated with the proposed housing.

3. The quality[15] of the overall master plan (or other planning documents or efforts) and the extent to which it has been implemented. A very significant component of the master plan is the housing element of that plan (or any separate affordable housing plan). The housing element must not only promote affordable housing, but to be given significant weight, the Board must also show to what extent it is an effective planning tool. That is, typically the Board should at least show that specific, effective action items have been enumerated to encourage the building of affordable housing, that potential sites for affordable housing have been identified, and that town staff or volunteer groups have been assigned responsibility for specific actions and have followed through on those actions. Among the issues to be considered with regard to implementation is whether zoning bylaws have been adopted and regulations promulgated in support of goals established in the master plan.

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14. Note that other than in exceptional cases, a comprehensive permit may not be denied based upon the inadequacy of municipal services. 760 CMR 56.07(2)(b)(4). Thus, for example, lack of school capacity or the cost of adding capacity cannot justify the denial of a permit. Therefore, a Board would not be heard to argue that one of the costs associated with building affordable housing in an area zoned for light industry is that overall school costs would increase because of additional children in the community.

15. As always, we will rely on expert testimony in determining the professional quality of any plan. A plan that contains indisputably outdated concepts—such as rigidly separated uses, rather than provisions for mixed uses in appropriate locations—will have less weight than a more progressive plan. Similarly, a plan with no provision for multi-family zoning will have much less weight than one with well thought-out multi-family provisions.

4. The amount of affordable housing that has resulted from affordable housing planning.[16] How many affordable housing units have been constructed? When were they constructed? What type of housing has been constructed—rental or ownership, family or age-restricted, multiple bedroom or small units, for special needs populations or for senior citizens, etc.? In sum, has the housing plan brought about the construction of a substantial amount of affordable housing to address the community's needs?[17]

B. Local Planning Concerns in Prohibiting Construction of Housing in the River Road Industrial D Area Do Not Outweigh the Regional Need for Affordable Housing.

The central issue presented in this case is whether the proposed development is inconsistent with Andover's long-term planning concerns, specifically with reference to its prohibition of residential uses in its Industrial D district.[18]

16. For many years, the comprehensive permit regulations have reinforced our own precedents, requiring us to consider municipal planning. See760 CMR 31.07(3)(d). That provision has recently been strengthened to explicitly include housing planning. Currently, 760 CMR 56.07(3)(g) provides:

"Municipal and Regional Planning. The Committee may receive evidence and shall consider the following matters:

"1. a municipality's master plan, comprehensive plan, housing plan, Housing Production Plan, or community development plan;

"2. the applicable regional policy plan; and

"3. the results of the municipality's efforts to implement such plans."

In addition, the Department of Housing and Community Development amended the regulations to provide standards for both housing planning and for the progress that towns can be expected to make in building affordable housing. 760 CMR 56.03(4), 56.03(5). These latter planning and production standards, however, do not directly inform our review of master planning, but rather provide a safe harbor for towns that meet them. 760 CMR 56.03(1)(b), 56.03(1)(c). The clarification of our standards with regard to municipal planning that is provided in this decision is, in part, in response to the public policy changes that these regulations represent.

17. The construction of housing not anticipated in the plan will not normally be considered. We note that 760 CMR 56.07(3)(g)(3) requires us to consider "the results of the municipality's *efforts to implement such plans....*" (emphasis added). Thus, recitation of the town's percentage of affordable housing as reported in the DHCD Subsidized Housing Inventor, alone, will typically be of little probative value.

18. Several separate issues were listed in the Pre-Hearing Order, § IV (Feb. 4, 2013); also see Developer's Brief, pp. 20-37. Most of them were not briefed by the Board and Interveners, and therefore have been waived. See *An-Co, Inc. v. Haverhill*, No. 90-11, slip op. at 19 (Mass. Housing Appeals Committee Jun. 28, 1994), citing *Lolos v. Berlin*, 338 Mass. 10, 13-14 (1958).

1. The developer's case

Because there are no specific state or federal standards addressing comprehensive planning concerns, the developer may establish a *prima facie* case by showing that its proposal conforms to generally recognized standards. *Stuborn Ltd. Partnership v. Barnstable*, No. 98-01, slip op. at. 4, (Mass Housing Appeals Committee Sep. 18, 2002).

The manager of the proposed development, an experienced real estate development specialist, testified that location of the housing was "ideal" and similar to other infill residential developments in existing office and industrial parks. Exh. 42, ¶ 17(d). More important, the developer introduced extensive testimony from an experienced municipal planner. See Exh. 46, ¶¶ 1-7. He reviewed the housing proposal and the most critical of the town's planning records, and found that Andover has "promot[ed] multi-family and high density housing in industrial districts," and concluded that the development is consistent with the town's planning documents. Exh. 46, ¶¶ 10-12, 14-28, n.b. ¶¶ 15, 24. While it is by no means conclusive with regard to the issues in this case, the testimony of these two witnesses is sufficient to establish a *prima facie* case with regard to comprehensive planning concerns. 760 CMR 56.07(2)(a)(2).

2. The Board's Case

a. Three-Part Threshold Test: Andover's master planning efforts pass our threshold test.

First, Andover has a solid history of planning. The town prepared its first master plan in 1956 and 1957. Exh. 50, ¶6; 51-B; 51-C. At that time, the "Northerly Industrial Zone" was identified—including the area in which the current site is located—and it was zoned industrial. Exh. 51, ¶ 9; 51-B, p. 13(§ III-E). A new plan was prepared in 1965, and in 1969 the town's industrial zones were redefined to consist of three different levels: "Industrial D" was the most restrictive level, designed to encourage office parks and light industry—particularly research and development. Exh. 51, ¶¶ 10-13. The northern area became known as the "River Road Industrial D Area," and was expanded in 1974, 1976, and 1981. Exh. 51, ¶ 12. The Shattuck Road office and industrial park in which the site is located began to be developed in the late 1970s and 1980s. Exh. 51, ¶ 15. Updating of the 1965 master plan began in 1983, and a final plan was adopted in 1992. Exh. 6; 50,

¶ 10. In 2010, another update of the master plan began. Exh. 11; 50, ¶ 24. A draft was prepared in 2011, but it was not adopted until 2012—after the developer applied to the Board for a comprehensive permit. Exh. 38-D; 50, ¶ 24.

The developer argues that because the 1992 plan was twenty years old when it filed its comprehensive permit application, it had not continued to function as a viable planning tool in the town. Developer's Brief, p. 43. But in fact, even its own planning expert, though he challenges the Board's interpretation of the planning documents and how or whether the town actually applied them, implicitly acknowledges Andover's planning efforts. That expert discusses, among other documents, the 1992 Andover Master Plan (Exh. 6), the 1992 Andover Housing Report (Exh. 7), the 2004 Andover Community Development Plan (Exh. 8), the 2004 Andover Housing Plan (Exh. 9), the 2010 Mid-Year Review Master Plan Update[19] (Exh. 11), and the 2012 Andover Master Plan (Exh. 34). Exh. 46, ¶ 14, 16. He relies upon those documents, and provides his interpretation that they support mixed-use development, including the locating of housing in industrial zones, even concluding that "the 2012 Master Plan... echoes notes struck by the 1992 Master plan...." Exh. 46, ¶¶ 15-27. Similarly, he calls the plan a "credible effort." Tr. II, 98.

The Board's experts testified in detail concerning planning in Andover. See Exh. 49, 50, 51, 52. Generally, their testimony was that planning in Andover has been thoughtful and sophisticated. See, e.g., Exh. 49, ¶ 24; 52. ¶ 27.

We find that it is not critical that the 1992 Master Plan had not been formally superseded at the time of the developer's application. Andover's planning documents and efforts, considered in their entirety, are clearly legitimately adopted, and they are viable planning tools that satisfy our requirement that the town's plan be *bona fide*. Also see *28 Clay Street Middleborough, LLC v. Middleborough*, No. 06-16, slip op. at 17 (Mass. Housing Appeals Committee Sep 28, 2009)(finding economic development planning to constitute a *bona fide* plan, even in the absence of a formally adopted master plan).

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19. The title of this document is misleading. Unlike the other, much more comprehensive planning documents, this "update" is merely a short document summarizing the need and process envisioned for updating the master plan.

Second, at a threshold level, Andover's planning promotes affordable housing. Building upon a public process and drafting done by the Andover Housing Partnership Committee, and in conjunction with the development of the town's master plan, the Andover Planning Board adopted a detailed Housing Report in 1992. The document is more than a report, however, since it includes detailed goals, objectives, and "housing strategies and recommendations." Exh. 7, pp. 28-32, 33-44. Further, the 2004 Andover Community Development Plan Executive Summary addresses affordable housing in a section entitled "Summary of Actions." Exh. 8, § IV-B (pp. 20-21).

Third, the plan has been implemented in the area of the site. The clearest indication that the plan has been implemented is that the entirety of the Shattuck Road office and industrial park—except for the single lot on which the developer proposes to built housing—has been developed as offices and light industry. Exh. 51, ¶ 15; Exh. 21. The developer makes much of the fact that a 96-unit affordable housing development called Casco Crossing was constructed on a parcel of land also in the Industrial D zone and abutting the proposed site at the rear. See Developer's Brief, p. 45; Exh. 46, ¶ 12; Tr. I, 21, 24, 30. But the location of that development is not entirely inconsistent with the town's overall planning goals for that area. The housing is located not in one of the office and industrial subdivisions, but rather on a freestanding lot at 168 River Road to the west and south of the business development. It is close to, though not directly abutting the single-family homes in the single-family zone adjacent to the industrial zone. Exh. 21. Thus, the character of its location is quite different from that of most of the River Road Industrial D Area, and it in fact functions as a transitional use between the business uses and the single-family homes on Brundrett Avenue and River Road to the south. Tr. I, 67-68, 79, Exh. 21; 52, ¶ 24; 53, ¶ 77. Approval of this housing does not show a degree of inconsistency sufficient to establish that—overall—the town's plans have not been implemented. Cf. *KSM Trust v. Pembroke*, No. 91-02, slip op. at 7 (Mass. Housing Appeals Committee Nov. 18, 1991).

We find that Andover's planning efforts—particularly the 1992 Andover Master Plan and related documents and efforts—satisfy the three threshold requirements that we apply for consideration of those efforts as legitimate local concerns.

b. Four-Part Analysis: Andover's municipal planning concerns are insufficient to outweigh the regional need for affordable housing.

(1) The extent to which the proposed housing is in conflict with or undermines the specific interest

(a) The Board raises three specific planning interests. It argues first that housing on the proposed site conflicts with longstanding, but unsuccessful efforts to develop the site for commercial or industrial use. Board's Brief, p. 23. At first glance, it would appear that the existence of such a conflict is obvious. All of the lots in the Shattuck Road office and industrial park other than the proposed site contain business as a result of the general prohibition of residential uses in all of Andover's industrial zones. Tr. II, 13. But the developer argues that because the town's plans have contemplated and the Board has actually approved some multi-family housing in industrial districts, its proposal does not undermine the town's planning interests. We disagree, and find that there is at least some degree of conflict.

Specifically, the developer points to a number of factors that suggest that exceptions to the prohibition of residential uses might be acceptable. For instance, included in the 1992 Andover Master Plan's overall goals is "to encourage a variety of housing to give citizens more choice and opportunities in how and where they would like to live...." Exh. 6, p. 1. A specific objective is to "[e]ncourage a diversity of compatible land uses, such as offices, multi-family and commercial. Exh. 6, p. 7 (¶ 7.2). This, and the idea that some of that diversity of land use could include rental developments in industrial zones, is consistent with (though not required by) the general comments in the housing element of the master plan that "[p]roviding lower-cost housing for employees of Andover's manufacturing companies is... [a] need the Town should address," and "[f]uture employment... will depend on the amount of available housing within commuting distance to work."[20] Exh. 6, pp. 58, 55.

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20. The developer also argues, based on a notation on the Action Plan included in the 2004 Community Development Plan, that the town encouraged exceptions to the prohibition on residential uses in the Industrial D district. On that plan, nearly half of the Industrial D zone (though not the proposed development site) is designated "Expand Affordable Housing Opportunities." Exh. 8-A. This corresponds to an ambiguous provision in the overall plan which states an intention to "[r]etain and expand existing affordable housing sites in the

Further, the developer and its expert witness point out that as a result of the flexibility reflected in the above policy considerations, some housing *has* been permitted in industrial zones. As noted above, on River Street very near the proposed site, a large rental complex, Casco Crossing, was permitted. In addition, there is an extended-stay hotel near the entrance to the interstate highway. Tr. I, 27-28, 36. Further, housing developments in the Industrial A and Industrial G districts in other parts of town were approved by the Board under the Comprehensive Permit Law. Tr. I, 40-42, 86.

The developer's expert concluded that "Andover has supported the planning policy of promoting multi-family and high density housing in industrial districts." Exh. 46, ¶ 15; also see Tr. II, 95. But that statement ignores a number of other equally important policy statements. In particular, the 1992 Andover Master Plan also includes the objective of "protect[ing] the integrity of the Industrial Zoning Districts. Changes in the uses allowed in these areas... should be made only after careful study ...." Exh.6, p. 6 (¶ 6.3). And, counterbalancing the testimony of the developer's expert was extensive testimony from the Board's and Interveners' experts that Andover has engaged in a consistent program of economic development planning in the Industrial D district over the years. Exh. 49, ¶¶ 14-24, 26; 50, ¶¶ 17, 20, 28-31; 51, ¶¶ 12-15; 52, ¶¶ 15-19. Their conclusion was that "Andover has taken a thoughtful, consistent approach to development in the [Industrial D] area," and the proposed housing development "surrounded by industrial uses, would... significantly undermine Andover's long-term planning efforts...." Exh. 49, ¶ 26; Exh. 52, ¶ 27.

After reviewing all of this evidence, we find that it is not accurate to state that Andover has "promoted" multi-family housing in industrial districts, but rather that a more accurate statement of town policy is that of the of the town's senior planner: "The Town of Andover supports and promotes affordable housing initiatives when

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northern industrial area." Exh. 8, p. 27 (§ VI-C(1)). Andover's senior town planner testified, however, that the intention of this designation was not to refer to new development, but rather to focus efforts on retaining or expanding affordability with reference to two large, existing affordable housing developments in the residential zone on the east side of the interstate highway—developments in which affordability restrictions were expiring or had already expired. Exh. 52, ¶ 19; Tr. I, 88-89, 94-96. We find that testimony, which is supported by the testimony of a second witness, to be credible. Exh. 52, ¶ 19; also see Tr. II, 65-66, 69,

proposed... in an area that is reasonable and does not negatively impact the economic incentives...." Exh. 50, ¶ 45.

Thus, we find that construction of housing on the proposed site is in fact in conflict with the town's specific planning interest in developing all of the lots in the park for commercial or industrial use. The importance of this conflict is discussed below.

(b) The second specific planning interest raised by the Board is that after housing is built there are likely to be practical conflicts between the residential and the surrounding commercial or industrial uses. Board's Brief, p. 23. Given the location of the housing within the office and industrial park, it is virtually inevitable that the adjacency of the uses will result in some conflicts—perhaps only very minor ones (e.g., children occasionally riding bicycles on private property, etc.). We will assume that the proposed housing is in conflict with the town's interest in this regard, and explore the importance of this interest below.

(c) Third, the Board argues that a residential use on this site will negatively impact municipal tax revenues. Board's Brief, p. 25. As with the matter of conflicts resulting from adjacency of uses, it is virtually self-evident that there will be real estate tax revenue ramifications to permitting a residential use instead of a commercial or industrial use, and this matter is addressed more fully below in the context of the more important question of exactly how great the economic cost associated with this issue is.

In summary, we conclude that that there are three specific planning interests with which the proposed housing is in conflict. As is often the case, none of these is compelling in the abstract, and thus, we must analyze their importance in, to the extent possible, quantitative terms.

(2) The importance of the specific local planning interest

(a) The strongest argument made by the Board to show the importance of the town's specific planning interest in developing all of the lots in the Shattuck Road area for commercial or industrial use is that jobs that would eventually be generated by such a use on the proposed site will never materialize. Unrebutted testimony indicates that a business located on the site could generate between 400 and 800 new jobs. Exh. 58, ¶ 32. The exact value of these jobs and potentially broader ramifications are difficult to quantify, however.

First, it is by no means apparent that a business employing those workers would not simply locate in another part of Andover. Second, in certain respects the town's interest initially seems more compelling than in our earlier case of *28 Clay Street Middleborough, LLC.* That is, here the parcel in question is the last vacant parcel in the office and industrial subdivision, while the *Middleborough* subdivision was only partially built out, and thus prospective businesses had their choice of other parcels. But on the other hand, because the proposed lot here is the last vacant lot, the Board cannot point to possible foregone employment associated with future businesses that might be reluctant to locate in a subdivision whose future is uncertain.[21] See *28 Clay Street Middleborough, LLC v. Middleborough*, No. 08-06, slip op. at 21 (Mass. Housing Appeals Committee Dep. 28, 2009); also see Exh. 58, ¶ 33; Tr. III, 26.

On the evidence presented to us, we find that the importance of the interest in job creation in this situation is relatively low.

(b) The Board and Interveners have also attempted to show that there is an important interest in preventing conflicts that may arise after construction between the users of adjacent residential and commercial industrial sites. See, e.g., Interveners' Brief, p. 49. The primary witness in this regard testified that existing businesses in the area "conduct activities (biological R&D and manufacturing) that are intensive land uses and contain characteristics of 'heavy' or 'intense' land uses that are not compatible with residential uses," but he provided few specifics. Exh. 58, ¶ 23. In fact, later in his prefiled testimony, he seemed to acknowledge that his concerns were somewhat speculative. For instance, he stated, "*Should* compatibility issues arise..., existing tenants may... relocate." Exh. 58, ¶ 39. On cross-examination, he acknowledged that all of the ten existing business sites contain offices, and indicated that while many of them also contain research and development activities or manufacturing, their operations are not of the sort that would generally be perceived as offensive. Tr. III, 9, 20, 9-21. On redirect examination, he pointed to no specific incompatibilities, but stated only that "there are businesses that simply need to be and want to be isolated from residential uses." Tr. III, 31.

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21. The argument that an existing business might leave and potential replacements might be reluctant to locate near residences is too speculative to bear serious consideration.

Other witnesses provided little additional specificity. A planning expert who had served as the town's director of planning and later on the zoning board of appeals, testified that residential and industrial uses are incompatible, but provided no specifics. Exh. 51, ¶¶ 2, 16-19; Tr. I, 43-54, 69-71, 77. Another experienced planner, after extensive testimony on other issues, noted simply that at some times the area is quiet, but that at others she had witnessed "noise disturbance and heavy truck traffic;" she did not go on to offer an opinion that this amounted to incompatibility between the uses. Exh. 52, ¶ 27. To the contrary, the developer's planning expert testified, "I have visited the property and the area surrounding it. I have not observed or experienced any abutter-generated noise vibrations, fumes, odors, truck traffic or the like that I think would adversely impact residents...." Exh. 46, ¶ 42.

We find that the town's interest in preventing conflicts between residential and office and industrial uses at this location is of negligible importance.

(c) The board argues that the permitting of housing will negatively impact municipal tax revenues. Board's Brief, p. 25. The most specific evidence presented is testimony of one of the Interveners' witnesses that "A new industrial or commercial facility on the site could be valued for assessment purposes from between $25 million and $40 million, resulting in annual property tax revenue to the town of Andover of $600,000 to $1,000,000." Exh. 58, ¶ 32. The Board's witness testified, however, that Andover offers tax benefits to business property owners, and that all of the existing businesses on Shattuck Road currently generate only about $1,500,000 in tax revenue. Exh. 49, ¶¶ 21-24. This evidence presented is ambiguous, and without further elaboration it is insufficient to show that foregone tax revenues are of great importance.

(3) The quality of the overall master plan and the extent to which it has been implemented

As noted previously, there is a long history of planning in Andover, but we will focus on the 1992 Master Plan and activities since then. In general, we accept the

testimony that master planning in Andover has been thoughtful and consistent. See, e.g., Exh. 49, ¶ 24; 52. ¶ 27. In most respects, Andover's approach seems professional and up to date. For example, even the developer's expert acknowledges—though admittedly in support of a different point—what he implies are forward-looking approaches. He notes that Andover "has supported the planning policy of promoting multi-family and high density housing in industrial districts... [and has] actually fostered development for mixed use...." Exh. 46, ¶ 15.

A major shortcoming, however, is that even though master planning suggested and zoning has provided for some higher density residential development and variety of housing types, multifamily housing is not permitted as of right anywhere in town. Exh. 5-A, § 3.1.3 (Appendix A), Table 1. That is, the vast majority of the community is zoned for single-family houses, for general business, or for commercial and industrial uses. Exh. 5-B. There are several very small "Apartment" districts[22] and one "Mixed Use" district near the center of town.[23] Exh. 5-B. But even in these districts, multi-family[24] or mixed use developments are allowed only by special permit. Exh. 5-A, § 3.1.3 (Appendix A, Table 1). True "Multi-Dwelling Apartment Buildings" (not to exceed twelve units) are not even permitted in the mixed use district. Exh. 5-A, §§ 3.1.3 (Appendix A, Table 1), 7.6.3.

Similarly, the 1992 Master Plan gave careful thought to affordable housing. It did this in two ways. First, the Master Plan itself contained a "Housing Element" that included a needs assessment, and descriptions of "initiatives," "issues," and "strategies and recommendations." Exh. 6, pp. 50-71. At the same time, the Andover Planning

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22. Though they are not described in the record, the apartment districts appear small enough that they may simply designate individual existing apartment complexes. See Exh. 5-B.

23. Since there is only one such district, it cannot be said that Andover has truly embraced the concept of mixed use.

24. The requirements for multi-family developments are quite strict. For example, each lot must be not less than ten acres nor more than 25 acres; there may be not less than three nor more than six units per building; the number of units with more than four rooms is limited; etc. See Exh. 5-A, § 7.3.

Board adopted a longer, supplemental "Housing Report," which had also been prepared by its housing subcommittee, which included members of the Andover Housing Partnership Committee and others. Exh. 7. Some of the goals, objectives, housing strategies, and recommendations were identical, and in certain areas, more detail was provided. See, Exh. 7, pp. 28-32, 33-44. Further, the 2004 Andover Community Development Plan Executive Summary, which was prepared for the town by a consultant working with the Andover Community Development and Planning Department, addresses affordable housing in a section entitled "Summary of Actions." Exh. 8, § IV-B (pp. 20-21). This, too, was supplemented by a similar housing plan, which involved the Andover Housing Partnership Committee as well as the planning department. Exh. 9. These plans enumerated specific action items, and there is evidence that they were effective planning tools. See, e.g., Exh. 50, ¶¶ 32-45; 52, ¶¶ 18-19, 26. This evidence is not detailed, however, nor is it clear to what extent town staff or volunteer groups have been assigned responsibility for specific actions and have followed through on those actions.

Reviewing the Andover master planning activities in their entirety, we find that it is of moderate quality.

As noted above, from the evidence presented, it is difficult to determine the extent to which master planning in Andover has been implemented. Certain recommendations have clearly been adopted, however. For instance a Housing Trust Fund was created, and the town's zoning bylaw was amended to provide for affordable housing by special permit on nonconforming lots.[25] Exh. 50, ¶ 11; Tr. III, 58, 81; also see discussion above.

Andover also appears to have implemented economic development portions of the Master Plan. See, e.g., Exh. 49, ¶¶ 15-18, 58, ¶¶ 28029.

We find that Andover has generally implemented its master plan.

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25. The bylaw also has an inclusionary zoning requirement that 15% of Planned Development units and of Assisted Living Residences be affordable. Exh. 5, §§ 7.2.4, 7.4.4; 49, ¶ 13.

(4) The results achieved from affordable housing planning

Compared to many communities, there is a great deal of affordable housing in Andover. In fact, in 2004, with 1,310 countable units on the DHCD Subsidized Housing Inventory, the town had surpassed the Comprehensive Permit Law's threshold of having 10% of its housing stock be affordable housing. Exh. 9, pp. 20-21; 50, ¶ 36. By 2006, however, due to expiration of affordability restrictions in a number of large developments ("expiring use"), the town had "lost" 320 affordable units and again dropped below 10%; it was at 9.3% when the developer in this matter filed its application with the Board.[26] Exh. 2, p. 8, ¶ 29(a); 50, ¶ 36. Many of the affordable units in Andover have been and continue to be multi-family units. That is, in the 1980s, almost 600 units of multi-family affordable housing had been developed, and between 1990 and 2011, 723 more multi-family units had been added. Exh. 50, ¶¶ 34, 35.

Whether this affordable housing was built *as a result* of the town's planning efforts is a different matter, however. In fact, there are indications that much of this housing was built *despite* the town's master plan and affordable housing plan. "In the last 30 years, ...sixteen [Comprehensive Permit developments] were approved and built without opposition from a town Board." Exh. 50, ¶ 45. Only "a small number" of such proposals were denied.[27] *Ibid.* Though the town certainly receives credit for every affordable unit in its pursuit of the Comprehensive Permit Law's statutory minimum of 10%, we note that 760 CMR 56.07(3)(g)(3) requires us to consider "the results of the municipality's *efforts to implement such plans....*" (emphasis added). Thus, much of the affordable housing built in Andover does little to show the results of its planning efforts.

We find that Andover has achieved, at best, moderate results as a direct result of its housing planning.

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26. Though the record does not show the exact number of affordable units in Andover at the time of the developer's application, it was presumably the same as in May 2012, when the percentage remained 9.3%, with 1,148 countable units. Exh. 39.

27. Presumably, some of these were built as well. See, e.g., *Taylor Cove Development, LLC v. Andover*, No. 09-01 (Mass. Housing Appeals Committee Ruling on Motion for Summary Decision Jul. 7, 2009). In addition, an indeterminate, yet presumably much smaller number of scattered site units proposed by the Andover Community Trust, a local non-profit organization, were approved by the Board. Exh. 50, ¶ 44; Tr. II, 82-83.

(5) Summary

In summary, we have found that the importance of the three specific planning interests asserted by the Board–none of which is unusually compelling in the abstract—is at best relatively low. The interests asserted are not comparable in any way to, for example, the interest in preserving maritime uses in the *Barnstable* case. See *Stuborn Ltd. Partnership v. Barnstable*, No. 98-01, slip op. at. 10-14, (Mass Housing Appeals Committee Sep. 18, 2002). The town's master plan is of moderate quality and has generally been implemented. And, we find that the results of its housing planning are at best moderate. Balanced against this, the town's failure to meet its statutory minimum 10% housing obligation "provide[s] compelling evidence that the regional need for housing does in fact outweigh the objections to the proposal." *Board of Appeals of Hanover v. Housing Appeals Committee*, 363 Mass. 339, 367, 413 (1973). We draw particular attention to the use by the Supreme Judicial Court of the word "compelling," which highlights the reality that the relatively low goal of 10% is a minimum, and that well more than 10% of most communities' housing stock would need to be low or moderate income housing in order to satisfy the growing need for affordable housing. On balance, we conclude that the Board has not sustained its burden of proof, but that, on the contrary, the local concerns it has asserted do not outweigh the regional need for affordable housing.[28]

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28. In the Board's decision, there was reference to regional housing need in Andover and surrounding communities in 2012—namely that about 9% of all housing in the region was housing counted on the Subsidized Housing Inventory—but the significance of this information was not briefed by the parties. See Exh. 2, p. 8, ¶¶ 31, 32. Evaluation of such information is no simple matter. See *Hollis Hills, LLC v. Lunenburg*, No 07-13 (Mass. Housing Appeals Committee Dec. 4, 2009), *aff'd* 464 Mass. 38 (2013); *Sugarbush Meadow, LLC v. Sunderland*, No. 08-02 (Mass. Housing Appeals Committee Jun. 21, 2010) , *aff'd* 464 Mass. 166 (2013). Since the matter has not been briefed, we will not consider it. *Lolos v. Berlin*, 338 Mass. 10, 13-14 (1958); *Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85 (1995); *Hollis Hills, LLC v. Lunenburg*, No. 07-13, slip op. at 35, Mass. Housing Appeals Committee Dec. 4, 2009) , *aff'd* 464 Mass. 38 (2013); *An-Co, Inc. v. Haverhill*, No. 90-11, slip op. at 19 (Mass. Housing Appeals Committee Jun. 28, 1994).

IV. INFECTIOUS INVALIDITY

Intervener DC-15 Shattuck Road, LLC, which owns the lot across Shattuck Road from the site, argues that the Board's decision should be upheld because the project will create zoning nonconformities on its property.[29] Brief of Intervener DC-15 Shattuck Road, LLC, pp. 2-5. Specifically, if the proposed housing is built, nearly all of the parking that currently exists at this intervener's location would become non-conforming because of a provision in the town zoning bylaw that requires 100-foot setbacks for parking and driveways on commercial lots in the Industrial D district when they abut a residential lot. Exh. 5-A, § 4.1.4.3(a); 59, ¶¶ 12-17; 60-A. In addition, a similar provision in the bylaw would prohibit construction of any new structure in a small area at the front of the intervener's site because that area would be within 300 feet of the proposed housing. Exh. 5-A, § 4.1.4.3(b); 59, ¶¶ 18-19; Exh. 60-A.

Since the intervener's lot is fully developed at present, it is difficult to see any practical concern with regard to this nonconformity. See Exh. 60-A. But it argues that if there were to be future redevelopment of the site, the need to obtain a variance if structures were contemplated in these areas "impose[s] a high degree of risk and uncertainty... and therefore reduce[s] the ability to develop and... increase the value of [the] property." Exh. 59, ¶¶ 21-23.

This argument is similar to one that the developer has violated the common-law principle of infectious invalidity, which provides that "a property owner may not create a valid building lot by dividing it from another parcel rendered nonconforming by such division." *81 Spooner Rd., LLC v. Zoning Bd. of Appeals of Brookline*, 461 Mass. 692, 694 n.6 (2012). As such, it raises a matter which might, at least in some circumstances,

29. The Board has not joined in this argument. Nevertheless, since the developer has not argued, as it perhaps could, that this is primarily or exclusively a matter of public policy that must be raised by the Board, we assume without deciding that an intervener has standing to raise this question.

be a legitimate local concern.[30] *Zoning Board of Appeals of Lunenburg v. Housing Appeals Committee*, 464 Mass. 38, 54 (2013) ("a zoning or planning board violation is a local concern, not a violation of State law that the HAC has no authority to override").

The facts presented to us by the intervener are sufficient to prove—at best—harm to its interests that is highly speculative, and any local concern raised thereby is certainly insufficient to outweigh the regional need for affordable housing.

V. 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 Andover Board of Appeals is not consistent with local needs. The decision of the Board is vacated and the Board is directed to issue a comprehensive permit with the following conditions.

1. The comprehensive permit shall conform to the application submitted to the Board.

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

3. 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:

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30. We have addressed similar concerns, and found them unconvincing, in a number of cases. See *Sandwich Housing Partners, II v. Sandwich, No. 07-02*, slip op. at 5-6, (Mass Housing Appeals Committee Summary Decision Jun. 13, 2011); *Hollis Hills, LLC v. Lunenburg*, No 07-13, slip op. at 33-34 (Housing Appeals Committee Dec. 4, 2009), *aff'd*,464 Mass. 38 (2013); *Taylor Cove Development, LLC v. Andover*, No. 09-01, (Mass. Housing Appeals Committee Ruling on Motion for Summary Decision Jul. 7, 2009); *Delphic Assoc., LLC v. Middleborough*, No. 00-13, slip op. at 8-9 (Mass. Housing Appeals Committee Jul. 17, 2002), *aff'd* 449 Mass. 514 (2007); *Woodridge Realty Tr. v. Ipswich*, No. 00-04, slip op. at 18-23 (Mass. Housing Appeals Committee Jun. 28, 2001).

(a) Construction in all particulars shall be in accordance with all presently applicable local zoning and other by-laws except those specified for waiver in the developer's application to the Board, waived in prior proceedings in this case, or waived by this decision.

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

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

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

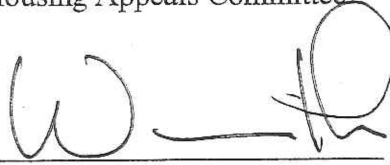
(e) This comprehensive permit is subject to the cost certification requirements of 760 CMR 56.00 and DHCD guidelines issued pursuant thereto.

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

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

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

Housing Appeals Committee



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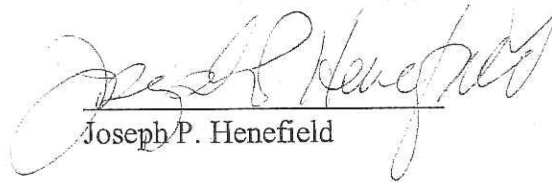

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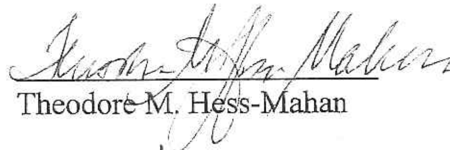

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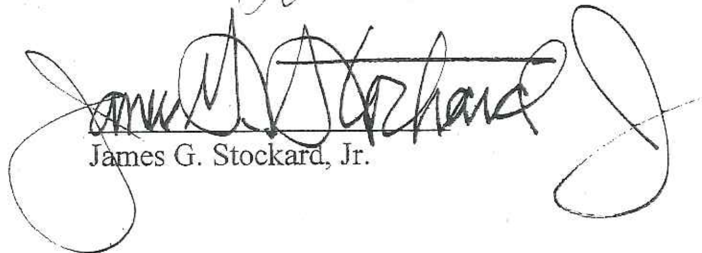

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