COMMONWEALTH OF MASSACHUSETTS

HOUSING APPEALS COMMITTEE

LEVER DEVELOPMENT, LLC and
VILLAGE AT OAKDALE ASSOCIATES, LLC

v.

WEST BOYLSTON ZONING BOARD OF APPEALS

No. 04-10

DECISION

December 10, 2007

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HOUSING APPEALS COMMITTEE

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DECISION

This is an appeal pursuant to G.L. c. 40B, §§ 20-23, and 760 CMR §§ 30.00 and 31.00, brought by Lever Development, LLC (Lever), from a decision of the West Boylston Zoning Board of Appeals (Board) with respect to an application for a comprehensive permit for property located in West Boylston, Massachusetts. The Board's decision granted a comprehensive permit, but imposed conditions that were determined in this appeal to effectively constitute a denial of the comprehensive permit. Exh. 1; see *Lever Development, LLC v. West Boylston,* No. 04-10, slip op. at 6-10 (Mass. Housing Appeals Committee Dec. 16, 2005 Rulings on Notice of Change to Appellant's Proposal, Board's Request for Remand and Appellant's Motion in Limine to Determine Burden of Proof) (Scope of Review Rulings).

I. PROCEDURAL HISTORY

On or about June 17, 2003, Lever submitted an application to the Board for a comprehensive permit for the construction of 124 rental apartment units of housing in West

Boylston, Massachusetts. Lever proposed to finance the Project through the Department of Housing and Community Development under the Low Income Housing Tax Credit Program. Exhs. 1; 100, ¶¶ 7-8.

The decision indicates that the public hearing opened on July 10, 2003 and continued through March 8, 2004, with hearings held on August 21, September 22, October 23, and November 20, 2003, and January 15, February 10 and March 8, 2004. The hearing closed on March 8, 2004. During the course of the hearing, Lever submitted several revisions to its project. Exh. 1.

On April 16, 2004, the Board issued a decision granting a comprehensive permit with conditions based on what it considered to be a revised application for 96 units. The decision was filed with the Town Clerk on April 20, 2004. The decision reduced the number of units to 68 by removing the top story of each of the remaining buildings. Exh. 1.

On May 7, 2004, Lever filed its appeal with the Housing Appeals Committee. The Committee held a Conference of Counsel on May 21, 2004.[1] Following that conference, several preliminary motions were addressed. On June 18, 2004, Stephen and Susan Conforti, abutters to the project site, moved to intervene. The presiding officer denied their motion but granted them leave to participate as interested persons. See 760 CMR 30.04(4). *Lever Development,* No. 04-10 (Mass. Housing Appeals Committee Sept. 20, 2004 Ruling on Motion to Intervene). On July 20, 2004, Lever filed a motion for partial summary decision on the ground that certain conditions imposed by the Board were contrary to tax credit program requirements and federal law or were impermissible conditions subsequent or otherwise outside the scope of the Board's authority. The presiding officer granted partial summary decision with respect to Conditions 2, 13, 22, 23, 24, 25 and 38. *Lever*

1. The Chairman of the Housing Appeals Committee presided over the initial Conference of Counsel and issued the rulings on the motion to intervene and for partial summary decision. In December, 2004, this matter was assigned to the below named hearing officer, who presided over the remainder of the proceeding.

Development, No. 04-10, slip op. at 1-4 (Mass. Housing Appeals Committee October 25, 2004 Ruling on Motion for Partial Summary Decision) (Summary Decision Ruling).[2]

The present presiding officer conducted a Pre-Hearing Conference on December 21, 2004. Thereafter Lever filed a motion for accounting of application and peer review fees and a notice of project change under 760 CMR 31.03. On March 2, 2005, Lever sought leave to file late a motion in limine to determine the burden of proof, alleging that the Board's decision was *de facto* a denial of the comprehensive permit. In response, the Board filed a Motion to Remand/Notice of Determination of Substantial Change. The presiding officer determined that the notice of change did not represent a substantial change, denied the motion to remand, allowed the late motion and granted the motion to deem the Board's decision a *de facto* denial of the comprehensive permit. *Lever Development,* No. 04-10, slip op. at 5, 7 (Mass. Housing Appeals Committee Dec. 16, 2005 Scope of Review Rulings). We concur in the reasoning and determinations of the presiding officers in the Summary Decision Ruling and the Scope of Review Rulings. Those rulings are incorporated into this decision as rulings of the full Committee.

The parties then executed a Joint Pre-Hearing Order which the presiding officer issued on May 5, 2006. On May 5, 2006, the Board moved to dismiss on the ground that Lever had not established fundability under 760 CMR 31.02(2). On May 26, 2006, the Board filed a Motion for Remand Pursuant to Site Eligibility Letter. The presiding officer denied these motions. The parties submitted pre-filed direct testimony and Lever filed pre-filed rebuttal testimony. The Committee's *de novo* evidentiary hearing commenced on July 24, 2006 in West Boylston, followed by a site visit. At that hearing session, the parties agreed to waive oral cross examination, except for later cross-examination of rebuttal testimony of one witness, which took place on September 6, 2006.

Following the close of the hearing, both parties filed post-hearing briefs. In its brief, the Board focused largely on arguments that the presiding officer wrongly determined that

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2. The ruling invalidated the age restriction on residents contained in Condition 2. *Id.* at 2-3. Lever, however, requests retention of Condition 2's second sentence, "The Applicant may, at his own choosing, vary the ratio of affordable units from 50% to 100%." Exh. 1. We shall require the inclusion of this condition in the permit.

the Board's decision was a *de facto* denial of the comprehensive permit and that the matter should have been remanded to the Board in response to Lever's Notice of Change. Board brief, pp. 1-4. The Board also renewed its arguments that the presiding officer's ruling was in error because the Committee has no jurisdiction to determine that an approval constitutes a *de facto* denial, and that the Notice of Project Change should have been found to be substantial, warranting a remand to the Board. Lever requested 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 November 14, 2007. Thereafter Lever and the Board each submitted written Objections to the Proposed Decision, which were presented to the Committee for its consideration along with the rest of the record.

II. FACTUAL OVERVIEW

The project is proposed to be located on a 9.82-acre parcel of land at 94 North Main Street, West Boylston, Massachusetts. The site is a so-called "pork chop" shaped parcel with limited frontage on North Main Street, approximately two-thirds of a mile from the Route 140/Interstate 190 interchange. Exh. 100, ¶ 7. A two-family house exists on the site near North Main Street. The site consists of open meadow and heavily wooded areas. It increases in elevation from North Main Street toward the eastern rear portion of the site, abutting property owned by the Department of Conservation and Recreation (DCR). The site is bordered to the west by several single-family homes on North Main Street; to the north, by houses from the Stillwater Heights Subdivision; and to the south, by an existing multi-family structure. The area is zoned as a Single Residential Zoning District. Exhs. 24; 96, ¶ 11; 97, ¶ 16; 100, ¶ 7; 102, p. 2; 68.

The project is proposed to be 124 units in four buildings encompassing approximately 9.12 acres of the existing 9.82-acre site. Lever proposes to subdivide the property and separate the existing home on a .7-acre lot. The project has direct access to both municipal sewer and municipal water, from the project's frontage on Route 140. Exh. 100, ¶ 15.

Three of the Project's buildings (one 14-unit building and two 28-unit buildings) are intended for all ages and will contain a total of 70 apartment units. A total of 53 of these family apartments will be reserved for low-income residents. These buildings will consist of

3½ stories, with 3 stories on the uphill side and 4 stories on the downhill (walk-out) side. No onsite recreational facilities are currently planned, according to the evidence in the record. Exh. 100, ¶ 16. See Exhs. 40, 41, 42A-42R, 61 and 68.

The fourth building, containing a total of 54 apartment units, is intended to be a 3½-story senior and handicapped housing facility for independent living, with an elevator and common activity areas. Some units are to be fully equipped as handicapped units, and others designed to allow for later conversion to handicapped units. A total of 40 of these apartments will be reserved for low-income residents. The common areas in the senior building will include sitting areas, dining areas, a residential-grade kitchen, an exercise room, an office, a wrap-around patio or terrace, and an expansion area sized for the possible future addition of a commercial kitchen. While this is an independent living facility, the common areas will be provided to enable the residents to age in place at the facility. The facility is designed to permit the possibility of an elder-care provider to offer a menu of assisted-living services to the residents on an a la carte basis. Exhs. 100, ¶ 17; 42A-42R.

Lever currently intends that 93 apartments will be reserved for low-income renters (60 percent of median income), of which forty are designated for residents over age 55. A total of 31 market rate units are planned, of which 17 will be designated for all ages. As currently designed, there will be a total of 202 parking spaces provided, including 9 handicapped parking spaces. All 124 units will have an 8' x 8' balcony or patio, as well as an 8' x 8' basement storage cage. Exh. 100, ¶¶ 16-18.

III. PRELIMINARY ISSUES

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 requirements. The parties have stipulated that Lever is a limited dividend organization as required by 760 CMR 31.01(1)(a), and that it controls the site as required by 760 CMR 31.01(1)(c). Pre-Hearing Order, § II.

The Board indicated in the Pre-Hearing Order that it would challenge whether Lever had demonstrated that the project is fundable under 760 CMR 31.01(1)(b). Lever presented evidence of fundability in the site approval letters issued by DHCD. Exhs. 51, 58. The

Board's failure to submit evidence or argument on this issue constitutes a waiver of the issue in this proceeding. See, e.g., *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).

The parties have also stipulated that West Boylston has not satisfied any of the statutory minima defined in sentence two of the definition of "consistent with local needs" in G.L. c. 40B, § 20. Pre-Hearing Order, § II. See 760 CMR 31.04; 31.06(5); 31.07(1)(e). As case law and Committee precedents establish, the fact that West Boylston does not 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).

IV. MOTIONS

In its brief, the Board challenges the presiding officer's determination that the Board decision was a denial of the comprehensive permit. It argues that G.L. c. 40B, § 23 expressly limits the scope of the Committee hearing and the Committee lacked jurisdiction to determine whether an approval by a zoning board should be treated as a denial. It also argues that this case did not warrant a determination that the decision was a denial because there was a reasonable basis for the Board's reduction in the number of units., i.e., removal of the top story of the buildings to alleviate legitimate local concerns that the proposed large buildings, in light of the steep site topography, would loom over the existing neighborhood of single family homes and have a dramatically adverse effect on the neighborhood. Board brief, pp. 1-3. The presiding officer addressed these concerns at length in her ruling. The Board's request for reconsideration is denied. See *Lever Development,* No. 04-10, slip op. at 2-6 (Scope of Review Rulings).

The Board also argues that the presiding officer should have remanded the matter to the Board in response to the Appellant's Notice of Change. The Board argues that the changes to the project were substantial and there was no good cause for not originally presenting the details to the Board. Specifically it refers to changes to the roadway and parking configurations which involved alteration of storm water management plans for the project, issues affecting size, configuration and positioning of the proposed buildings, traffic circulation and emergency vehicle access. It argues that those should not have been deemed insubstantial. The Board had ample opportunity to present its arguments as part of its motion to remand. In her ruling, the presiding officer noted that the Board had considered a 124-unit proposal for much of the duration of its hearing. The Board also argues that the appeal was of a 96 unit proposal, rather than a 124 unit proposal; thus the Notice of Project Change represents an increase of more than 10 percent in the number of housing units proposed. See 760 CMR 31.03(2)(a). The presiding officer addressed these concerns at length in her ruling. The Board's request for reconsideration of the motion to remand is denied. See *Lever Development,* No. 04-10, slip op. at 2-6 (Scope of Review Rulings).

V. STANDARD OF REVIEW

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. We find that the developer has established, with respect to disputed aspects of the project, that its proposal complies with federal or state statutes or regulations, or with generally recognized standards regarding health, safety, the environment,

design, open space, or other matters of local concern. In some instances, it has also established that the Board's imposition of a condition constituted unequal treatment.

Once the Appellant has demonstrated that its proposal complies with state or federal requirements or other generally recognized standards with respect to the aspects of the project in dispute, 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).

If one of the local concerns put forth by the Board to justify its 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 it also must prove that the installation of adequate services is not technically or financially feasible. See 760 CMR 31.06(8). In that instance, Lever may rebut the Board's case by proving "that preventive or corrective measures have been proposed which will mitigate the local concern...." 760 CMR 31.06(9).

VI. LOCAL CONCERNS REGARDING SITE DESIGN

The Board raises a number of local concerns that it argues warrant the conditions set out in the decision. However, as with any appeal of a denial, the Board may seek to demonstrate that a local concern (represented by a stated condition or not) outweighs the need for affordable housing. While the conditions are no longer in effect, to the extent they address valid local concerns that outweigh the need for affordable housing, those concerns may warrant upholding the Board's denial of the comprehensive permit. If the Board proves the existence of a serious local concern that warrants a condition rather than outright denial of the comprehensive permit, we will address the concern by condition in our decision. See *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 26-28 (Mass. Housing Appeals Committee June 25, 1992).

The concerns that the Board briefed after the hearing are addressed below. As we have noted above, a failure to submit evidence or argument on any issue constitutes a waiver of that issue in this proceeding. The Board chose not to argue a number of issues identified in the Prehearing Order that were reflected in conditions and denials of waivers. Those are deemed waived for the purposes of this proceeding. See, e.g., *Washington Green,* No. 04-09, slip op. at 3 n.2.

A. Building Design

The Board argues that the project is incompatible with the character and architecture of the neighborhood and will have a detrimental impact on the quality of life of the residents now living in the area. Exh. 102, p. 4. It specifically argues that the buildings represent a different building type than exists in the neighborhood. The Board also argues that the texture, color and finish of the proposed buildings have not been analyzed by the developer. It argues that the buildings increase the scale and density of the area, and introduce new massing and man-made materials to the site creating visually distinct appearances. It argues that a 60 to 120 foot grade increase over the base elevation of North Main Street magnifies the effect of the changes in scale, massing and color and texture of the new buildings, exacerbating their intrusion into the neighborhood. Board brief, pp. 6-7.

1. Building Height

The Board seeks adoption of requirement for the removal of the top story of each of the buildings. Exh. 1, Condition 1. This reduction is not necessary to conform to zoning requirements. Lever's architect testified that the height specified in the Appellant's proposal conforms to the West Boylston zoning bylaws. This witness testified that the height of the project complies with applicable federal or state statutes. See Exhs. 96, ¶¶ 11-14; 43.

The Board argues that the large buildings to be built immediately behind single family residential lots would be out of character with the existing neighborhood and would adversely affect the existing neighborhood. The Board's chairman, who is also an abutter to the site, testified that the project proposed is located in a neighborhood known as "the Village of Oakdale," which has been listed on the Historic Register for historically significant places.

He stated that "at the top of the steeply sloped project site, the proposed project would literally loom over the Oakdale neighborhood, destroying the aesthetics, character, and quality of life in the neighborhood."[3] Exh. 102, p. 4. The Board argues that the developer's witness' testimony about intervening tree cover does not address the concerns about visual impact. Board brief, p. 6.

The Board's evidence on this issue is lacking in a number of respects. First, the Board has not identified a local rule or regulation that the proposed height of the buildings would violate. The Board ordinarily should not be permitted to inquire into an issue or place restrictions on affordable housing if the Town has not previously regulated the matter in question. See *9 North Walker Street Development, Inc. v. Rehoboth*, No. 99-03, slip op. at 4-5 (Mass. Housing Appeals Committee Nov. 6, 2006 Decision of the Committee on Remand) (Remand Decision), citing *Walega v. Acushnet*, No. 89-17, slip op. at 6, n.4 (Mass. Housing Appeals Committee Nov. 14, 1990); *Sheridan Development Co. v. Tewksbury*, No. 89-46, slip op. 4, n.3 (Mass. Housing Appeals Committee Jan. 16, 1991). While under certain circumstances it may be appropriate for the Committee to review important health and safety issues that are not specifically governed by local regulation, those situations arise when exceptional circumstances exist that could not have been anticipated by the Town, and when review of the issue may not take place outside the context of this appeal. See *Hamlet Development Corp. v. Hopedale*, No. 90-03, slip op. at 8-15 (Mass. Housing Appeals Committee Jan. 23, 1992); *Walega*, No. 89-17, slip op. at 5-7. That is not the case here.

In addition, the Board's testimony provides no specifics regarding the way in which the building will negatively impact the quality of life of the residents, other than that the large buildings might be seen by these residents. In rebuttal, Lever introduced testimony concerning the screening provided by trees. Its witness stated that even when the deciduous tress have defoliated, a significant visual barrier would remain from the evergreen trees and the trunks and limbs of the deciduous trees and existing homes on North Main Street. Exh. 103, ¶ 9; see Exh. 103A-103C. The Board argues that this testimony failed to demonstrate

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3. Because he is an abutter, the Board's chairman did not serve on the Board in the proceedings in this matter.

the existence of a significant visual barrier when deciduous trees defoliate for the winter. It argues that Lever provided no survey of the percentage cover of deciduous compared to evergreen trees, nor any survey of tree size by height, trunk caliper and branch width. While we agree that Lever's witness did not guarantee that the deciduous tree cover would completely screen the project buildings from the neighbors, the Board has erroneously placed the burden of this issue with the developer. It is the Board's burden to prove the existence and seriousness of a local concern. We find the testimony of Lever's witness to be very thoughtful, careful and credible, and we find that the screening provided by the existing tree cover is adequate. We find that the Board has not demonstrated a valid local concern with respect to the height of the buildings that would outweigh the need for affordable housing.

Lever also argues the Board's decision subjects its project to unequal treatment compared to market rate residential development. Lever submitted evidence that despite the compliance of its proposed buildings with the height requirements of the zoning bylaw for the Single Residential District in which is it located, as well as with the height requirement for any zoning district in the Town, it has been subjected to a requirement not imposed on market rate projects.[4] Exh. 96, ¶¶ 11, 13. Lever argues that none of the top floors of certain identified market rate projects were required to be eliminated, nor did any of those projects have any other requirements related to the height of the structures imposed on them that exceed the requirements set forth in the zoning bylaw. Exh. 100, ¶ 48. We find that the Board has treated this project differently than market rate housing with regard to compliance with building height requirements. This constitutes an additional separate basis for rejecting the Board's requested height reduction.

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4. The market rate projects Lever compares for the purpose of its unequal treatment arguments are: 1) the Oakdale Rehabilitation and Skilled Nursing Center, located one lot away from the project in the same zoning district (an 82-bed nursing home granted a variance from the Board to allow for a modified commercial use in a residential zone); 2) the Century Farms Subdivision, a 20-lot residential subdivision granted approval for a definitive plan in August 2004; 3) the Bonnie View II Subdivision, a four-lot residential subdivision granted approval for a definitive plan in April 2004; 4) Hillside Village Adult Community, a 118-unit over-55 project on a 33-acre parcel granted a special permit and site plan approval in November 2001. Exh. 100, ¶¶ 47A, 47B, 47C; Exhs. 44, 45, 47, 57, 65, 66, 67, 74-76.

2. Roof Design

The Board also seeks to change the design of the roof from the gable roof designed by the architect in favor of a hip roof. It provided no evidence to demonstrate a local concern supporting this requirement, except that Lever once offered such a design. Lever acknowledges that it did submit a hip roof design to the Board as part of a potential settlement, see Exh. 100, ¶ 49, but it argues that this offer does not justify imposition of the requirement. Moreover, Lever's architect testified that the gable roof design is consistent with the style and design of homes in the Oakdale neighborhood and West Boylston generally, including historic homes and homes in the Stillwater Heights subdivision. Exh. 96, ¶ 7. Therefore the Board has not demonstrated a valid local concern with regard to roof design that outweighs the need for affordable housing.

Lever also argues that this condition subjects its project to unequal treatment because the market rate projects were not subjected to such a requirement. Exh. 100, ¶ 49. This Committee has previously stated that 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*, No. 89-17, slip op. at 6 n.4 (Committee considered local issue not previously regulated at local level because concern was pressing and no other body was addressing it).

In this instance, the Board has not identified any specific or general design requirements that were part of the regulatory scheme at the time of the application for a permit. Therefore this requirement would subject the project to unequal treatment compared to the other market rate projects. We will not impose any requirement on Lever. We note, however, that the parties are free to engage in discussions regarding aesthetic concerns.

B. Site Layout

1. Density, Open Space and Recreation

The Board argues that the site is too dense and there is little, if any, open space or recreational amenities provided in the project design. It states that the project is "literally bursting at the seams" on the "relatively small and steeply sloped project site" of 9.82 acres. Board brief, pp. 4-5; Exhs. 9, 10. The Board also raises the principles of smart growth and sustainable development to support its position that the site location of the project is inappropriate. Exh. 92, 102, 106. In particular it argues that the proposed development violates the ten Sustainable Development Principles of the Massachusetts smart growth policy, including: revitalization of the community or reuse of existing infrastructure; creation of walkable districts mixing commercial, civic, cultural, educational and recreational activities with open space and housing for diverse communities; utilization of inclusive community planning considering abutters' concerns; enhancement of the environment rather than development of previously undisturbed land; conservation of natural resources; and access to public transit. Exh. 92; Board brief, pp. 7-8.

Lever testified that the site will meet six of the 10 Sustainable Development principles, exceeding the smart growth requirements necessary for a site eligibility determination, including providing low-income rental housing for families, the elderly and the handicapped within less than one mile from an important North/South transportation corridor in Central Massachusetts. Exh. 100, ¶ 20; Exh. 92.

Lever argues that its project engineer, architect and other professional testimony support the design of the project. It states that open space will constitute more than 56 percent of the project's land area. Exh. 41. Lever acknowledges that there are no on-site recreational amenities currently planned. Exh. 100, ¶ 16. Lever's principal testified, however, that indoor amenities for the senior residents were planned: the project contemplates that for the senior building, the common areas will include sitting areas, dining areas, a residential-grade kitchen, an exercise room, an office, a wrap-around patio or terrace, and an expansion area sized for the possible future addition of a commercial kitchen. Exh. 100, ¶ 17.

In *Dennis Housing Corp. v. Dennis*, No. 01-02 (Mass. Housing Appeals Committee May 7, 2002), the Committee upheld the denial of a comprehensive permit based upon a finding that open space was inadequate. There, the Committee applied the guidance of the Cape Cod Commission Regional Policy Plan and stated:

> Evaluation of open space should involve both review of relatively objective performance standards and more subjective consideration of whether the extent of lot coverage has compromised the design to an unacceptable degree. Local standards, whether couched in terms of open space or lot coverage, are quintessentially the sort of local requirements that may be overridden pursuant to the Comprehensive Permit Law under appropriate factual circumstances.

Id. at 8.

> What is ultimately more important, however, than technical compliance with standard open space requirements is whether the particular design before us responds appropriately to the site itself and the surrounding area. See *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 26-27 (Mass. Housing Appeals Committee, Jun. 25, 1992). From this perspective, two of the most important attributes of open space are that it creates an agreeable visual environment and that it provides recreational opportunities.

Id. at 10. In both *Dennis* and *CMA*, however, the boards introduced detailed testimony of experts to support a determination that the project lacked sufficient open space. The Board introduced no such testimony here. The general comments of the Board's chairman, an abutter, do not take the place of such expert guidance. See Exh. 102, p. 3. In *CMA*, the Committee determined it had the authority to modify the project. *Id.* at 26-28. Given the developer's statement that no outdoor recreational amenities are currently planned, we will impose a condition requiring an outdoor family-centered active recreational area.[5]

2. West Boylston Master Plan

The Board also argues that the proposed project is inconsistent with the West Boylston Master Plan, which provides that the Oakdale section of town "should be preserved as a traditional New England Village with small scale commercial activity" and "residential uses and architecturally compatible buildings that reflect the existing development pattern."

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5. Lever's request for the approval of the recreation area drawing submitted with its Objections to the Proposed Decision is denied.

Exh. 108, pp. 3, 12, 87, 92. The Board argues that it is inconsistent with the Master Plan to concentrate senior housing in this area because the Master Plan contemplates a new home for the Town's senior community center at the home of the existing senior center, elsewhere in town and accessible from the proposed development only by motor vehicle. Exh. 108, pp. 3, 12, 87, 92.

These requirements were not enacted by the Town or 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).

3. Single Access Roadway

With respect to concerns related to the design of the access roadway, we find that Lever, through its prefiled testimony and exhibits, has provided evidence that its proposal complies with federal or state requirements or other generally recognized standards. Exhs. 97, ¶¶ 46-50; 48.

The Board argues that the single access roadway presents a safety hazard because of the number of units proposed and expected vehicle traffic. Exh. 102, p. 2. It argues generally that there is inadequate access in the event of an emergency, particularly for the rear area of the site on the uppermost hill. Board brief, p. 6.

Lever argues that the testimony of its professional engineer, and the traffic report entered into evidence demonstrate that the access to the project is safe and adequate. Exhs. 97, ¶¶ 46-50; 48. By contrast, it argues, the Board's witness lacks the expertise to evaluate the access to the site. Tr. I, 17. In their correspondence regarding Lever's progress in

addressing safety concerns during the Board proceeding, the police and fire chiefs referenced no concerns related to roadway access. Exhs. 15, 16, 24; Exh. 100, ¶ 10.

Each roadway must be considered on its own merits based upon "an analysis of all the characteristics of the roadway taken together." *Lexington Woods, LLC v. Waltham*, No. 02-36, slip op. at 19 (Mass. Housing Appeals Committee Feb. 1, 2005) (upholding denial of comprehensive permit for a steep, winding, 1,000-foot roadway serving 36 townhouse condominium units). In this case, the record does not indicate that the driveway presents insurmountable design problems. Cf. *OIB Corp. v. Braintree,* No. 03-15, slip op. at 8-11 (Mass. Housing Appeals Committee Mar. 27, 2006) (approximately 100 units located on two cul-de-sacs well beyond standard established by town). The Board, in its comprehensive permit decision, granted permission for a single access entryway to the project for a 68- unit development; here Lever seeks approval of a 124-unit project. On the evidence in this record, the Board has not demonstrated that the safety risks associated with the driveway design constitute a valid local concern that outweighs the need for affordable housing.

4. Divisional Island on the Access Roadway

The Board argues generally that a rational basis exists to support a requirement for a "small divisional island at the mouth of the project roadway/driveway, with appropriate directional signage to be approved by the Board's engineer." See Exh. 1, Conditions 17, Condition 11(g). A general argument that a different design is rational or reasonable rather than specific proof that the proposed design is dangerous or otherwise unacceptable is inadequate to demonstrate a valid local concern that outweighs the need for affordable housing.

Lever's expert testified that constructing the project roadway with a 30-foot width without a divisional island is consistent with generally recognized standards as to matters of health, safety, and design, particularly since the intersection has good sight lines. Moreover, Lever's engineer testified that widening the roadway from 24 to 30 feet in response to request of the fire and police chiefs obviated the need of a divided entry. The police and fire chiefs concurred that if the roadway were widened from 24 to 30 feet in that area, the divisional island would be unnecessary. Exh. 97, ¶¶ 49-50; see Exh. 48, p. 10; Exhs. 15, 16, 61; 68. In

response, the Board has not submitted any testimony to justify this requirement, and it will not be included in the permit. We need not reach Lever's unequal treatment argument on this issue.

5. Altering Roadway, Requiring Vegetative Buffer and Parking Layout

The Board seeks to require Lever to shift the project roadway closer to the lot containing the existing home on the site, so that the roadway is 25 feet from the house; provide a dense vegetated buffer between the roadway and the adjacent property; and shift the parking area for the 14-unit building 20 feet from the adjacent property lines. See Exh. 1, Condition 16. Again, the Board generally asserts that a "rational basis" exists to support the requirements. As we note above, an argument that a requirement is rational or reasonable rather than specific proof that the alternative is dangerous or otherwise unacceptable is inadequate to demonstrate a valid local concern that outweighs the need for affordable housing.

Lever submitted expert testimony indicating that the layout of the roadway complies with zoning requirements. Exh. 97, ¶¶ 10-15; See Exhs. 24, 31, 40, 41, 43. The Board has not demonstrated a valid local concern in this regard. Moreover, given the roadway's compliance with zoning requirements, imposing this requirement on Lever would constitute unequal treatment.

With regard to the requirement of a vegetated buffer, the Board did not provide evidence on the issue. Here Lever's expert testified that the planned vegetation will provide a sufficiently dense vegetated buffer between the project roadway and the adjacent properties. Exh. 97, ¶ 16. The Board has not shown a valid local concern in this regard that outweighs the need for affordable housing.

Lever's witness also testified that the requirement of a 20-foot setback of parking areas from adjacent property lines exceeds any potentially applicable bylaw. By its terms, the bylaw applies only to parking areas in Business and Industrial Districts, and there are no setbacks otherwise applicable to parking areas for residential uses in the zoning bylaws. See Exh. 97, ¶¶ 17-21; Exh. 43.

The Board has not demonstrated a valid local concern that outweighs the need for affordable housing to require the inclusion of the provisions of Condition 16 or the denial of the waiver expressed in Condition 11(q). Moreover, the imposition of this requirement would constitute unequal treatment.

6. Stormwater Management System

The Board by Condition 28 required that Lever's stormwater management systems be designed to meet or exceed all best management practices and the Massachusetts Stormwater Management Guidelines and required the Board's engineer to forward written approval of the final design system to the Board. The Board argues that it is concerned about the issue of potential flooding of adjacent or nearby public ways and therefore has a rational basis for the condition. Board brief p. 11. As we stated above, an argument that a requirement is rational or reasonable rather than specific proof that the alternative is dangerous or otherwise unacceptable is inadequate to demonstrate a valid local concern that outweighs the need for affordable housing.

Compliance with stormwater management requirements is subject to the jurisdiction of DCR because the site is in the Wachusett Reservoir watershed. See Exh. 100, ¶ 63; Exh. 26. The Board has not demonstrated a local regulation in force regarding stormwater management and therefore has not demonstrated a valid local concern for requiring additional review. Thus, the imposition of the Board's requested condition would constitute unequal treatment toward Lever. Consistent with our general practice, we will include a condition that requires compliance with the DEP Stormwater Management policy and review by DCR.

VII. LOCAL CONCERNS REGARDING MUNICIPAL SERVICES

A. Water Service

Lever has met its burden of demonstrating compliance with state or federal requirements or generally accepted standards with regard to water service. Exh. 98. The Board argues that neither the Board nor the Committee has the authority to grant water service on behalf of the West Boylston Water District (Water District) because the Water District is not a local board within the meaning of G.L. c. 40B.

1. The West Boylston Water District is a Local Board

The Board argues that the Water District's enabling statute gives it jurisdiction over the Wachusett Reservoir, a state resource, which supplies water to the greater Boston area through the Massachusetts Water Resources Authority. St. 1933, c. 352, pp. 631-632. It argues that because it administers a state statute, protecting a state resource, the Water District is not a local authority or board that can be supplanted by the Board or the Committee under Chapter 40B.

As the Supreme Judicial Court pointed out in *Dennis, supra,* 439 Mass. 71, 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).

Lever points out that Chapter 352 provides that the inhabitants of the Town of West Boylston "shall constitute a water district ... for the purpose of supplying themselves with water for the extinguishment of fires and for domestic and other purposes." Exh. 78. It also states that the inhabitants of the water district may elect a board of commissioners with authority to act for the water district "subject, however, to such instructions, rules and regulations as the district may by vote impose." Exh. 78, §§ 1, 8, 9. Lever argues that because the Water District ultimately is controlled by town meeting vote, it is a local board

within the meaning of Chapter 40B under *Wilmington,* No. 87-17, slip op. at 25-28 and *Maynard Bd. of Appeals v. Housing Appeals Committee*, 370 Mass. 64, 69 (1976). We agree.

There is no reason why the Water District should be outside the scope of Chapter 40B; its functions and role in the Town 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 order the issuance of a water connection permit.

2. Adequacy of Water Supply

In Condition 5 to its decision the Board required Lever to provide evidence that the "volume and pressure of water is adequate for fire suppression purposes." Exh. 1. The Board submitted prefiled testimony of one witness on the subject of water capacity and pressure. That witness, the Board's chairman and an abutter to the site, testified generally that "water quality and pressure is an issue now in Oakdale," and that the fire department would have difficulty fighting fires with the lack of adequate pressure. Exh. 102, p. 3. In its brief, however, the Board did not mention that testimony and made no argument regarding the adequacy of water to meet the needs of the project or of the Town if the water connection is granted. The Board has therefore waived this argument. See, e.g., *Washington Green,* No. 04-09, slip op. at 3 n.2.

In any event, we note that Lever submitted testimony of two expert witnesses concerning the adequacy of the water supply for the project, and in its brief, presented lengthy arguments that it is entitled to a water connection permit because the Town has an adequate water supply for the project; average and peak water demands from the project would not cause significant impact on water pressure for other users of the water system; the project complies with needed fire flow requirements through the use of domestic sprinklers; and there is no legitimate technical or financial infeasibility to water connection. Exhs. 98; 17, 19, 24.

Lever also points to a report of the Water District stating that in the summer of 2006, the Water District would complete water main replacement and construction of a booster pump station to increase pressure. Exh. 94, p. 5. Therefore it argues that even if there is any negative impact on the water system as a result of fire flows to the project, the completed upgrades to the

water system should eliminate those pressure issues. We agree that the testimony of the Board's witness, who is not an expert, is outweighed by the expert testimony in support of the adequacy of the water system, as well as the views of the Town's Water District consultant and staff and the West Boylston Fire Chief. Tr. I, 17; Exhs. 103, p. 3; 17, p. 4; 19, p. 1; Exh. 24.

The Board has not demonstrated any local concern that warrants withholding the grant of a water connection as part of the comprehensive permit. The Board's reliance on its argument that the Water District is not a local board and therefore no connection permit could be granted under Chapter 40B is inadequate to demonstrate a local concern. A water connection permit is warranted, and it will be included in the comprehensive permit.

B. Sewer Service

Lever has requested a permit granting it access to the West Boylston sewer system. Lever submitted evidence that its proposed connection to the Town sewer system complies with state or federal requirements or other generally recognized standards. Exh. 99. We find that the developer has met its *prima facie* burden.

The Board argues that it lacks authority to grant a sewer connection. See Exh. 1, Condition 6. The Board argues that it may not alter the Intermunicipal agreement with the Town of Holden to increase the permitted capacity for West Boylston to service the project, implying that granting a permit to the project would cause the system to exceed its capacity.

Lever argues that the wastewater infrastructure and agreements allow the connection, there is adequate capacity to support servicing the project, the project's wastewater will not violate any municipal wastewater agreements, and there is no legitimate technical or financial infeasibility to a sewer connection.

1. Authority of the Board with respect to Sewer Connections

In its brief Lever argues that the West Boylston Board of Sewer Commissioners is a local board and therefore authorized to grant sewer connections or extensions because it is also the West Boylston Board of Selectmen. See Exh. 88, Article 23. Also see *Padden v. West Boylston*, Worcester Superior Court, Civ. Action No. 03-1849 (Oct. 28, 2003) ("The Board of Selectmen is an elected board of West Boylston. The Selectmen act as the Board of Sewer Commissioners."), *rev'd on other grounds,* 64 Mass. App. Ct. 120 (2005).

We agree that the Town Board of Sewer Commissioners constitutes a local board for the purposes of G.L. c. 40B, § 20. However, the Board's argument does not focus on this point; rather it states, "the comprehensive permit law does not confer upon the Board the authority to exercise jurisdiction over ... the Town of Holden" or "to enter into, or amend, contracts on behalf of West Boylston." Board brief p. 14. We need not reach the question of whether the Committee is authorized to alter Intermunicipal contracts on behalf of the Town, because, as shown below, we find that granting sewer access to the project will not require any such alteration.

2. Sewer Capacity

At the time of Lever's application, the Town sewer system was under construction by DCR. The settlement of enforcement actions by the Department of Environmental Protection (DEP) against DCR and the Massachusetts Water Resources Authority concerning contamination of the Wachusett Reservoir led to the design and construction of a system including the installation of sewer mains and several pump stations in West Boylston based on a 1994 study, the Wastewater Facilities Plan for West Boylston-Holden-Wachusett Reservoir Watershed (Facilities Plan). Exhs. 14A, 99, ¶ 10.

According to the Facilities Plan, the new sewer system infrastructure was planned to service approximately 1,769 residential and 109 large commercial lots. *Id.*; Exh. 101, ¶ 4. The project site is in an area of the Town being serviced by these newly installed municipal sewers. Wastewater from the project would flow to the Oakdale Pump Station and eventually to the main Town pump station, the Woodland Street Pump Station, which also receives wastewater from sewer districts in the Town of Holden. It pumps the combined flows to DCR's Rutland/Holden Interceptor Sewer, which ultimately discharges to the Upper Blackstone Water Pollution Control Facility in Millbury, Massachusetts. Exh. 99, ¶ 11.

The Agreement for Wastewater Collection and Transmission Services between the Town of Holden and the Town of West Boylston entered in 1999 (Wastewater Agreement), Exh. 29, allocates costs between West Boylston and Holden for maintenance and operation of the Woodland Street Pump Station. It also allocates the capacity in the Woodland Street Pump Station between the wastewater flows from Holden and West Boylston. Holden is

allocated 154,175 gallons per day (gpd) and West Boylston is allocated 614,014 gpd. Neither town is permitted to exceed these daily wastewater flows until the agreement is renegotiated. Exhs. 99, ¶ 12; 29; 101, ¶ 5; 105, ¶ 5. Exh. 14B.[6]

The parties do not dispute that under the Wastewater Agreement, the maximum permitted capacity allocated to West Boylston is 614,014 gpd. In arguing that a sewer connection may not be granted, the Board's brief only alluded to the question of capacity and generally referred to the testimony of the Director of Public Works who testified regarding sewer capacity in the Town. Exh. 101. The conclusory reference to the testimony of the witness does not rise to the level of argument on the issues. Board brief, p. 14. See, e.g., *Washington Green,* No. 04-09, slip op. at 3 n.2.

Lever's environmental engineering expert testified that the Town wastewater system had adequate capacity in the sewer mains and the pump stations to serve the project and the Town would not have to construct additional infrastructure to accommodate the project's flows. Exh. 99, ¶ 22. Another witness for Lever, who was the DCR Project Coordinator responsible for the Town's sewer program, also supports connecting the project to the Town's sewer system, and at the time of Lever's application to the Board, gave his opinion that the West Boylston sewer had adequate capacity. Exh. 105. Lever also points out that the Board's witness, the Director of Public Works, formerly Superintendent of Sewers and Drains, agreed at the time of the application to the Board that adequate capacity existed. See Exhs. 73, 86.

Based on analysis of average daily flow data from the Woodland Street Pump Station for periods in 2003 and 2005, Lever's engineering expert testified that wastewater flows from the project would not exceed the capacity of the Woodland Street Pump Station or violate the terms of the Wastewater Agreement.[7] Using Title 5 design wastewater flow values to calculate the

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6. Other sewer usage agreements between DCR and the City of Worcester also incorporate the flow limitations of the Wastewater Agreement. See Exhs. 30; 31; 99, ¶ 13; 105, ¶ 6.

7. Based on his review of daily flow data in 2003, the expert found that 37.3 percent of the total number of lots projected to be connected at 100 percent build-out was using only 15.2 percent of West Boylston's wastewater flow allocation at the Woodland Street Pump Station. Exh. 99, ¶¶ 15-16. Making a conservative assumption that all new connections were in West Boylston rather than Holden, he calculated an average daily flow for 2005 attributable to West Boylston and found that the Town used only 28.4 percent of its available capacity at the Woodland Street Pump Station to provide service to 63.9 percent of the maximum number of anticipated users. Thus he found that

wastewater flows for the project, he projected total design flow for the project of 24,270 gpd. Based on his review of daily flow data, he testified that the Woodland Street Pump Station had more than adequate capacity to handle the flows from the project at the time of the comprehensive permit application without forcing West Boylston to violate the Wastewater Agreement. Exh. 99, ¶¶ 9-21; Exh. 64.

The Board's witness testified that Lever's assumptions of capacity were not relevant because the Board of Health has mandated universal connection to the system by October 2006. Exh. 101, ¶ 7. He stated that the developer's witnesses ignored the reality of 100 percent connection to the sewer system. Exh. 101, ¶¶ 7-9.

The DCR Project Administrator, however, reached the same conclusion as the developer's engineering expert that sufficient capacity existed to permit the connection of the project, based on his own calculations assuming 100 percent build-out in the Town. He testified that the Town's mandatory connection requirement has no impact on his and the engineering expert's opinions. He also indicated that full build-out was expected to occur by 2020, not October 2006. Exh. 105, ¶¶ 9-15; Exh. 28.

The Board also has not demonstrated the installation of sewer service is "not technically or financially feasible" under 760 CMR 31.06(8). The Town Sewer Superintendent appeared to take the position that the plan for 100 percent build-out in the Town under the assumption that site was projected to provide 10 homes justifies denial of a sewer connection to ensure sufficient capacity in the future to accommodate the entire Town. See Exh. 101, ¶ 7. However, towns may not reserve capacity for other potential future users at the expense of affordable housing. "[S]ewer commissioners are not empowered to postpone presently sought connections to give precedence to connections contemplated for the future...." *Oceanside Village, LLC v. Scituate,* No. 05-03, slip op. at 12-13 (Mass. Housing Appeals Committee July 17, 2007), quoting from *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). The existence of an Intermunicipal agreement with Holden does

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excess capacity currently exists at the Woodland Street Pump Station to service remaining anticipated users. Exh. 99, ¶¶ 18-19.

not alter this result in this instance. Cf. *K. Hovnanian at Taunton, Inc. v. City of Taunton,* 37 Mass. App. Ct. 639, 645 (1994).

The Board's argument that it intends to provide connections to all residents in the town and only accounted for 10 residences at the project site is insufficient to support withholding a sewer connection. That plan was not in existence at the time of Lever's comprehensive permit application. Moreover, 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. *Oceanside,* No. 05-03, slip op. at 20-21, citing *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). Again, such a master plan must be in effect at the time of the application to the Board for a comprehensive permit.

In any event, Lever's environmental engineer accounted for a complete build-out and sewer connection of the Town in his analysis based on 2003 and 2005 usage patterns. Exh. 99, ¶¶ 15-21. The DCR project administrator also stated that his assumptions that the Town had adequate sewer capacity for the project took into account full build-out with all connections made to the sewer system. Exh. 105, ¶¶ 9-15. We find the testimony of the developer's witnesses to be more credible than that of the Board witness in this regard. We agree with Lever that the mandatory sewer connection regulations for West Boylston will still leave more than adequate capacity for the project at the Woodland Street Pump Station. Therefore the Board has not shown a valid local concern that outweighs the need for affordable housing.

3. Equal Treatment with Regard to Sewer Access

Lever also argues that the Town has treated market rate and affordable projects differently with regard to sewer access. It points to the Board's approval in 2005 of a variance for the nursing center located down the street from the site, that expanded that facility by 13,525 square feet, adding 10 additional beds, and increasing wastewater flow to the Woodland Street Pump Station up to an additional 1,500 gpd. It notes that the Board's decision granting approval did not refer to reserved capacity for existing, undeveloped lots or possible violation of the Intermunicipal agreements. Exh. 57, 74, p. 2. Lever also points out that the Bonnie View and Century Farms subdivisions were both approved although they were originally counted as a single residential unit in the Facilities Plan capacity calculations, resulting in approval of four units for Bonnie View and 20 units for Century Farms. Exhs. 44, 45, 14A. In light of these examples, Lever argues that the Board has not treated this Chapter 40B project in the same manner as it has treated market rate facilities. The Board's witness stated that the difference in treatment is based on the distinction between expanding existing sewer connections and extensions of sewers. Exh. 101, ¶ 10. We need not decide this issue, as we have concluded that the Board has not demonstrated a valid local concern that outweighs the need for affordable housing in its refusal to grant a sewer connection. Therefore, we will require the Board to order such a connection.

VIII. OTHER LOCAL CONCERNS

A. Project Issues

1. Renaming the Project

Requiring the Appellant to change the name of the project from the "Village at Oakdale," subject to review and approval of the Board, is based on the Board's position that the residents in the neighborhood take pride in the long-established historic district designated as "Oakdale Village" in the Town. Exh. 102; Board brief, p. 12. The Planning Board also indicated that the name was confusing because of prior use of the name. Exh. 9. It also stated that the word "village" is not appropriate for buildings of this size.

Lever's witness testified that typically confusion arises from the names of roadways, and that the roadway's name has not been selected. He stated no safety personnel had

objected to the name. Given the extreme similarity of the two names and the obvious and serious public safety implications of confusing names, we will require Lever to obtain the fire chief's approval of the name of the development.

2. Earth Removal Operations

The Board seeks to impose a number of requirements concerning earth removal operations. Exh. 1, Condition 11(a). See Exhs. 11, 36, 43. Lever argues that the Board may not impose the earth removal requirements it seeks. Lever argues that because there will be no removal of earth from the site, the Earth Removal Bylaw is not applicable. It contends that if this were a market-rate project, no earth removal permit would be necessary. Its engineer testified that there will be no removal of earth from the project site because the final grades and elevations can be designed so that earth from the excavation of building foundations and roadway cuts will be utilized on site. He stated that the balancing of the earth materials on site will be in compliance with generally accepted engineering practices and principles. Exh. 97, ¶ 28. He also testified that because the site is not within the aquifer protection district, only "removal" of earth, rather than "relocation," triggers the bylaw. Exh. 97, ¶¶ 25-31. Lever has met its *prima facie* burden that the project will comply with generally accepted engineering practices with regard to earth removal or relocation.

Lever's witness also testified that the types of restoration contemplated by the Earth Removal Bylaw are inconsistent with a residential development, and in his experience he has never seen such an earth removal bylaw applied to this type of development. Exh. 97, ¶ 30. Finally Lever argues that the operations of this project fall under the exemption to the Earth Removal Bylaw in § 2.3 "[r]emoval of earth under agreements governing road construction in an approved subdivision," because this proceeding includes the approval of a subdivision plan. Exhs. 36, 68, 97, ¶ 31. The Board relies upon the text of the decision, Exh. 1, p. 7, and testimony of its abutter witness, the chairman of the Board. Exh. 102, p. 6. It argues that the condition is rational because the developer intends to blast into heavily sloped and ledged parcel and therefore the input of the Town Earth Removal Board should be credited. Board brief, p. 11. The Board argues that because this development is so different than that permitted under existing zoning, it warrants additional regulation under *9 North Walker*

Street Development v. Rehoboth, No. 99-03, slip op. at 10-11 (Mass. Housing Appeals Committee June 11, 2003).

As we stated above, the Board ordinarily should not be permitted to inquire into an issue or place restrictions on affordable housing if the Town has not previously regulated the matter in question. See *9 North Walker Street,* No. 99-03, slip op. at 4-5 (Remand Decision), citing *Walega*, No. 89-17, slip op. at 6, n. 4; *Sheridan*, No. 89-46, slip op. 4, n.3. Given the longevity of Chapter 40B, arguments that proposed multifamily development of this sort raises earth removal concerns that were not previously anticipated by the Town are ordinarily unpersuasive. See *Dexter Street, LLC v. N. Attleborough*, No. 00-01, slip op. at 6 (Mass. Housing Appeals Committee July 12, 1990); *Hamlet,* No. 90-03, slip op. at 15. On this record, the Board has not established that the unusual circumstances contemplated by *9 North Walker Street* are found here. The Board has not demonstrated a valid local concern that outweighs the need for affordable housing with respect to this requirement and the requested waivers are granted. Moreover, the imposition of the Board's condition, exceeding local zoning requirements, would constitute unequal treatment toward Lever.

3. Conveyance of 2.5 acres of Land to Town

The Board argues that Condition 31, requiring conveyance of a 2.5 acre open space parcel to the Town is supported by a rational basis, noting that the conveyance was offered by Lever during the hearing before the Board. Exh. 1, p. 3, ¶ 5. Simply because the developer made an offer that was not accepted by the Board is not a basis for the Board to subsequently incorporate that offer as a requirement. It is not within the Board's authority to require the conveyance, and no such condition shall be included in the permit. This condition would furthermore constitute unequal treatment toward Lever.

B. Board's Oversight

The Board seeks oversight continuing past the issuance of the comprehensive permit over certain aspects of the project. Some of the conditions sought by the Board may require 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. v. Wellesley,* No. 95-05, 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).

Other conditions may otherwise be in excess of a board's 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). To the extent that certain conditions merely relate to 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, those 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. 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. However, since this decision provides for construction to be in accordance with all presently applicable local zoning and other by-laws, and all other local requirements, except those waived by this decision, as well as all applicable state and federal requirements, such concerns should be protected.

1. Review of Landscaping Plans

The Board seeks to defer its review of Lever's compliance with zoning bylaw requirements regarding landscaping within setbacks and parking area landscaping. Exh. 43, §§ 3.6.E.1. and 3.6.E.6. See Exh. 1, Conditions 11(f), 11(h) and 19. The Board argues that

deferred review is necessary because it granted Lever a comprehensive permit based only on preliminary plans. It argues that this requirement is permitted to ensure the detailed plans are consistent with the comprehensive permit, final written approval and applicable state and federal codes, as required by 760 CMR 31.09(3). It also points out that the Committee's guidelines for review of comprehensive permits states that the Board may not require final plans before granting a comprehensive permit, but that before construction begins final plans should be submitted. Board brief, p. 9. The Board argues that the regulations authorize the Board to condition approval upon the developer securing approvals from state and federal agencies with respect to the project subsequent to the issuance of the comprehensive permit. 760 CMR 31.08(2)(d). It argues that Condition 19 is therefore authorized under this regulation.

Lever argues that the Board had the landscaping plans available at the hearing and should have addressed its concerns at that time. Lever's expert witness testified that the abundance of naturally-occurring vegetation provides adequate landscaping to screen the project and adjacent properties. See Exh. 97, ¶¶ 34-37; Exh. 61. This witness also testified about the extent of landscaping provided in and around parking areas.

Based on this testimony, we find that the landscaping planned for the project is adequate. Exh. 97, ¶¶ 38-41. All that may be required by way of further review 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).

2. Review of Construction Plans

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 in Conditions 7 and 11(k), is outweighed by the need for affordable housing. The Town is permitted routine inspection and oversight in accordance with applicable local regulations to determine conformance with the plans and with local building codes and applicable federal and state codes as a condition of release of occupancy permits. See *Owens*, No. 89-21, slip op. at 13-15. 760 CMR 31.09(3). See Exh. 97, ¶¶ 43-45; Exh. 100, ¶¶ 27-29. 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. Requiring Lever to undergo additional approvals not imposed on market rate projects would constitute unequal treatment.

3. Demonstration of Compliance with Massachusetts Fair Housing Act

The Board argues that the regulations authorize the Board to condition its approval upon the developer securing approvals from state and federal agencies with respect to the project subsequent to the issuance of the comprehensive permit. 760 CMR 31.08(2)(d). It argues that requiring Lever to demonstrate compliance with the Massachusetts Fair Housing Act , see Condition 14, is therefore authorized under this regulation. To the extent the Board seeks further review, it requests an inappropriate condition subsequent which undermines the purpose of a single, expeditious comprehensive permit. See *Peppercorn Village,* No. 02-02, slip op. at 22. Although compliance with state requirements does not fall within the local concerns that are the province of the Board, as is our custom we will require this comprehensive permit to be conditioned on a developer obtaining all required state and federal permits.

4. Review of Documents by Town Counsel Prior to Issuance of Building Permit

The Board also seeks review by Town Counsel of various documents before issuance of the building permit. This would be an improper condition subsequent and would undermine the purpose of a single, expeditious comprehensive permit. See *Peppercorn Village,* No. 02-02, slip op. at 22. The Town is permitted routine inspection and oversight in accordance with applicable local regulations to determine conformance with the plans and with state and local building codes as a condition of release of occupancy permits. See *Owens*, No. 89-21, slip op. at 13-15.

5. Issuance of Occupancy Permits

The Board seeks to require Board engineer approval for all infrastructures before issuance of occupancy permits, other specifications required by the Board's engineer after review of the final construction plans, and Board authorization for the release of occupancy permits. The Board argues that is an exercise of its authority to properly secure infrastructure issues within the streamlined comprehensive permit procedure, and it is akin to a "covenant" approved under the Subdivision Control At., G.L. c. 41, § 81U to secure the completion of project infrastructure. Therefore it argues that the project is not being treated unlike any other subdivision in the Town, and the board is justified in importing provisions of the subdivision control act in "designing streamlined conditions for the project." Board brief, p. 9. Further review by the Board is an improper condition subsequent which undermines the purpose of a single, expeditious comprehensive permit. See *Peppercorn Village,* No. 02-02, slip op. at 22. The Town is permitted routine inspection and oversight in accordance with applicable local regulations to determine conformance with the plans and with state and local building codes as a condition of release of occupancy permits. See *Owens*, No. 89-21, slip op. at 13-15.

IX. WAIVERS

In its decision, the Board granted a number of Lever's waivers from local requirements. Those waivers have not been at issue in this proceeding and are incorporated into this decision. In addition, Lever has requested that the Committee grant certain waivers from local requirements that the Board denied in its decision. See Exh. 1, Condition 11(a) through 11(r).

A. Sewer Betterment Assessments

Lever requests that the Board waive the Town sewer betterment charges for the senior and affordable units in the project (107 of the 124 units). Exh. 1, Condition 11(r); Exh. 100, ¶ 41. The Board denied that request in its decision. The Board argues that neither the Board nor the Committee has jurisdiction to waive the sewer betterment assessments, relying on its general argument that the Board of Sewer Commissioners cannot act with regard to the Intermunicipal agreement. Board brief, p. 12; Exh. 101, ¶ 10. As we have already discussed,

the Board and this Committee have jurisdiction to authorize sewer permits. Similarly, this jurisdiction extends to the ability to waive fees, if warranted.

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. The Court held that the 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.

A betterment assessment is generally intended to allow the municipality to recoup all or a portion of the cost of constructing an improvement that provides a benefit to a limited and determinable area.[8] Exh. 99, ¶¶ 25-26. Lever argues that the local regulations establishing these sewer betterment assessments are intended to protect low income residents. Exh. 88, Article 22; Exh. 100, ¶ 43. It asserts the Town requested state legislation deferring betterment assessments payments for low income homeowners and the elderly. Exh. 100, ¶ 45; Exhs. 89, 88, Art. 23, § 4. Lever argues that the requested waiver would not reduce the assessment collection to less than 100 percent of the sewer system project cost attributable to the site. Lever argues it would result in a more uniform and equitable collection of sewer system project costs, and would be consistent with the Town's policy of lessening the burden of sewer fees on low income and elderly residents. Lever also argues, based on its witness' testimony, that if the waiver is not granted, the Town will realize a substantial windfall from the payment by Lever of sewer betterment fees for just the market-rate units well in excess of the recoupment requirement of Article 22. Exh. 100, ¶¶ 40-45; Exh. 99, ¶¶ 27-29.

Under the waiver Lever seeks, it would remain responsible to pay sewer betterment fees for the 17 market rate family units in the project.[9] The current uniform betterment fee of

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8. By contrast a connection fee is a one-time payment at the time a user connects to his building to the sewer system. A sewer use fee is a periodic payment generally calculated on the basis of sewer use. Exh. 99, ¶¶ 25-26.

9. Of the 124 units in the project, a total of 107, or 86 percent, of the units are for elderly or low income residents. Exhs. 99, ¶ 27; 100, ¶ 41.

$3,884.38 per residential unit established under Article 22, was set to cover 100 percent of the sewer project cost. Exh. 100, ¶ 44. At $3,884.38 in assessments per unit, Lever's total payment for the 17 units would be $66,017.46. Exhs. 99, ¶ 27; 100, ¶ 41.

Lever contrasts this payment with the total payments that would be owed under the most expansive interpretation of construction permitted on the site as of right. According to the Vice Chairman of the Board of Sewer Commissioners "[t]he capacity plan and agreement with the Town of Holden presumed that 10 single-family homes would be built on this lot." Exhs. 8; 99, ¶ 28; 100, ¶ 42; 101, ¶ 6. It argues that West Boylston could only have anticipated receiving sewer betterment fees at most for 10 single-family homes, or $38,843.80 at current rates. Exhs. 99, ¶¶ 28-29; 100, ¶ 42. Therefore, it argues that the difference between the assessment for 17 and 10 units represents a windfall to the Town of more than $27,000 resulting from the seven sewer connection fees it never anticipated. Exh. 100, ¶ 43; Exh. 99, ¶ 29.

Lever's engineering expert testified that connecting the project to the sewer system will not require the Town to construct any additional infrastructure. He also stated that all 124 units will pay sewer use fees, offsetting any incremental expenses caused by the project for the operation and maintenance costs of the sewer system. Exhs. 99, ¶ 29; 100, ¶ 44. Lever also points out that the assessment of the betterment fee for all 124 units would total $481,663.12. Exh. 100, ¶ 44. It argues that this would be in contradiction to the Town meeting vote to assess no more than 100 percent of the actual project cost. Exh. 100, ¶ 44.

Lever argues that grant of the waiver is consistent with the Town regulation to limit the collection to 100 percent of project costs. It also reduces the windfall to the Town, and provides financial relief to the low income and elderly residents to the project consistent with Article 23 at the 1997 Town Meeting.

Article 23 authorized the Board of Selectmen to petition the Legislature to authorize the Selectmen to defer betterment assessments to low income homeowners. Exh. 88. That Article, and the statute enacted authorizing the deferral, apply only to low income homeowners, not elderly homeowners who are not low income. Exh. 88, 89. The Board's

only testimony on the subject states generally that the betterment assessments do not constitute unequal treatment. Exh. 101, ¶ 10.

The case law of the Committee on the question of whether utility fees should be waived is sparse. In *Messenger Street Plainville Senior Housing Development Partnership v. Plainville,* No. 99-02, slip op. at 3-6 (Mass. Housing Appeals Committee Oct. 18, 1999, 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 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, however, that the failure to waive connection fees does not violate Chapter 40B. *Id.* Also see *Oceanside,* No. 05-03, slip op. at 31-32.

In light of the Town's commitment to reducing fees for low income residents, and its expressed wish to limit recoupment to 100 percent of the sewer infrastructure costs, a waiver for the affordable units is warranted and reasonable. This decision is consistent with the goal of rendering low and moderate income housing accessible.

B. Notice of Project Change

Lever argues that it requires an additional dimensional waiver and pavement issues to be addressed as a result of the Notice of Project Change.

1. Additional Dimensional Waiver

In its Decision, the Board granted "all dimensional waivers that are necessary to construct the project shown on the Plans, as may be conditioned hereby." Exh. 1, Condition 11. Lever states that the approval of the Notice of Project Change requires one additional dimensional waiver, for the front setback for Lot 5. Exh. 97, ¶¶ 54-59; Exh. 68. We agree with the developer's expert witness that the one additional dimensional waiver is insignificant and consistent with the original design. The Board has not submitted evidence or argument on this issue. The requested waiver is granted.

2. Pavement Waivers

Lever requests a waiver from Section VII(A)(2) (Improvements/Streets and Roadways) of the Subdivision Rules and Regulations, which requires at least 18 inches of good, clean bank gravel and at least 4 inches of select gravel. Exh. 60. The preliminary grading plan for the project includes a pavement cross section detail, which deviates from the Subdivision Rules and Regulations by reducing the 18 inches of bank gravel to 8 inches. In addition, the roadway will utilize Cape Cod berm. Lever's engineer testified that anything more than a 4-inch layer of crushed gravel over an 8-inch layer of gravel is an excessive requirement for the roadway construction for this site, and that the 12-inch thick roadway base contemplated meets with standard engineering practice. Exh. 41; Exh. 97, ¶ 60-62.

The Board's only testimony was non expert testimony by its chairman abutter witness, who only generally referred to the effect of steepness of the slope on pavement thickness requirements. Exh. 102, p. 6. The testimony of the developer's expert is detailed, considered and credible. Accordingly the requested waiver is granted.

X. FEES

Lever objects to the payment of the Board's legal fees and to the amount assessed for application fees and fees incurred for financial review of the project. It requests an order from the Committee directing the Board to return excessive fees paid. See Exh. 1, Condition 35. The Board argues that the Committee has no jurisdiction to order the return of fees charged as consultants' fees to the developer during the Board hearing process.

A. Legal Fees

As the Committee has frequently stated, beginning in *Pyburn Realty Trust v. Lynnfield,* No. 02-23, slip op. at 21-24 and n.15 (Mass. Housing Appeals Committee Mar. 22, 2004), the Board may not charge the developer for the payment of counsel fees for the litigation of a board proceeding. In *Pyburn,* the Committee contrasted the role of a "consultant" as used in G.L. c. 40B statute to provide "testimony" or "explanation" on technical aspects of a proposed project to assist a board in determining if a project is consistent with local needs) with the advocacy role of litigation counsel. *Id.* Nothing in G.L.

c. 40B, § 21, suggests that the payment of attorney fees is considered part of such "consultant" fees.

Moreover, 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. *Id.* at 23. 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. The Court held that the 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. Also see *Page Place Apartments, LLC v. Stoughton,* No. 04-08, slip op. at 17-20 (Mass. Housing Appeals Committee Feb. 1, 2005). Lever is not obligated to pay for the Board's attorney's fees. Exh. 104, ¶ 2-4. See Exh. 93; Exh. 1, p. 11.

B. Financial Pro Forma Review Fees

Lever has paid a total of $14,700 to the Town for peer review consultant fees. Exhs. 93; 100, ¶ 32. Lever objects to the payment of the portion of fees incurred for review of the financial pro forma which it contends exceeded the appropriate scope of review and violated its instructions in providing the funds. Lever brief, p. 49. It argues that it should not be required to pay for the Board's fees for preparing an alternative financial pro forma. *Id.* See Exh. 100, ¶¶ 32-39; Exh. 37, 39. It argues that the Board agreed Lever would not be responsible for work to prepare an alternate financial pro forma or to evaluate funding programs other than the LIHTC program. According to Lever, the financial report of the Board's consultant focused on areas Lever had stated it was unwilling to fund, and the Board was not authorized to remove funds from the escrow account to pay for the scope of work ultimately performed by the Board's consultant. Exh. 100, ¶ 36, Exh. 93. It argues that it paid an excess fee of $2,000, which the Board had agreed to return, but did not refund. Exh. 100, ¶ 36. The Board indicates in its decision that it agreed to reduce the scope of services. Exh. 1, p. 2.

As discussed above, in contrast to legal fees, peer review fees are generally permitted to be assessed. 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). Here, however, Lever argues that generally review of the economics of the development is "within the province of the subsidizing agency, and in most cases not a proper subject of inquiry for the Board." *Id.*, citing *CMA*, No. 89-25, slip op. at 24. Also see 760 CMR 31.07(4). Lever argues that it attempted to limit the Board's review, which expanded to an analysis of other funding sources never proposed or considered by Lever.

That the developer sought to limit the financial review is not a basis to reduce the allowable fee. Here, however, it appears that the Board's review exceeded the agreed-upon scope. The issue for us is whether the fee was charged for a purpose within the Board's authority under Chapter 40B. The Board has not shown that its fee was properly part of the analysis of whether its local concerns outweigh the regional need for affordable housing. *CMA*, No. 89-25, slip op. at 24. The Board may not spend review fee funds for independent studies on behalf of the Board. See Housing Appeals Committee Model Local Rule 4.00. Particularly when the Board has agreed to the limitation, requiring the developer to pay for fees solely for alternate pro formas is outside the scope of a consultant's "testimony" or "explanation" on technical aspects of proposed project to assist the Board in determining if a project is consistent with local needs. *Pyburn*, No. 02-24, slip op. at 22-24 and n.15. Lever is not obligated to pay $2,000 of the financial consultant's fee paid by the Board.

C. Application Filing Fee

Lever also argues that the filing fee charged by the Board is exorbitant and represents unequal treatment by comparison to the fees charged by the Town for market-rate projects. Exh. 59. The Board charged Lever a base fee of $500 plus $100 per unit (for a total fee of $12,900). According to the Town, this fee covers postage, legal advertising and administrative expenses. Exh. 100, ¶¶ 30-32. The Town charges a total application fee of only $350 for variances and special permits. Exh. 59. For the Planning Board Special

Permit/Site Plan Review of the Hillside Village project of 118-unit market-rate units, the Board charged an application fee of $350. Exh. 81.

The Board submitted no argument on the question of unequal treatment in the charging of filing and other review fees. On the record before us, we find that the differential in filing fees for Lever and market rate projects constitutes unequal treatment and order a refund of $12,550, which constitutes the amount of the fee paid in excess of $350. Exh. 93.

D. Fees to be returned to Lever

A return of excess fees is warranted under G.L. c. 44, § 53G ("Any excess amount in the account attributable to a specific project, including any accrued interest, at the completion of said project shall be repaid to the applicant or to the applicant's successor in interest and a final report of said account shall be made available to the applicant or to the applicant's successor in interest"), as well as the Board's rules, which state: "At the completion of the Board's review of a project, any excess amount in the account, including interest, attributable to a specific project shall be repaid to the applicant or the applicant's successor in interest." Exh. 59. Lever is entitled to a refund of the monies paid which have been disallowed. First, the record shows that Lever paid a total of $12,900 for application fees, of which $12,550 must be returned to it. In addition, for consultant fees, Lever has paid into escrow a total of $14,700. The Board's accounting indicates the total of consultant expenses is $21,267. See Exh. 93. Of that total, attorney's fees of $13,117 and financial consultant fees in the amount of $2000 have been disallowed. Therefore, of the $14,700 already paid, Lever is entitled to return of $8,550. Exh. 93. These overpayments, totaling $21,100, are due to be returned with any accrued interest. G.L. c. 44, § 53G.

XI. 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 West Boylston Zoning Board of Appeals is not consistent with local needs. The decision of the Board is vacated, and the conditions imposed therein are void, unless expressly adopted in this decision. The waivers of local requirements granted by the Board in its decision are incorporated into this decision.

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 as modified by the Notice of Change submitted to the Housing Appeals Committee except as provided in this decision.

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

(a) Subject to the provisions of Paragraph 2(b) and 2(c), the development shall be constructed as shown on drawings by Marchionda and Associates, L.P., signed and stamped November 23, 2004. See Exhs. 40, 41, 42A-42R, 61 and 68.

(b) Design and construction shall be in compliance with the Department of Environmental Protection Stormwater Management Policy subject to the Department of Conservation and Recreation.

(c) The design shall include an outdoor family-centered active recreational area.

(d) Lever may, at its own choosing, vary the ratio of affordable units from 50 percent to 100 percent.

3. The Board shall return to Lever $21,100 in overpaid fees, plus any accrued interest as specified in this decision.

4. The Board shall endorse the subdivision plan (Exhibit 68) as Approval Not Required.

5. 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.

6. 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) Design and construction in all particulars shall be in accordance with all presently applicable local zoning and other by-laws, and all other local requirements, except those waived by this decision, as well as all applicable state and federal requirements.

(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

Dated: December 10, 2007

Werner Lohe, Chairman

Marion V. McEttrick

Christine Snow Samuelson

James G. Stockard, Jr.

Shelagh A. Ellman-Pearl, Presiding Officer