COMMONWEALTH OF MASSACHUSETTS

HOUSING APPEALS COMMITTEE

HOLLIS HILLS, LLC

v.

LUNENBURG ZONING BOARD OF APPEALS

No. 07-13

DECISION

December 4, 2009

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HOUSING APPEALS COMMITTEE

HOLLIS HILLS, LLC Appellant v. LUNENBURG ZONING BOARD OF APPEALS, Appellee	)	No. 07-13

DECISION

This is an appeal pursuant to G.L. c. 40B, §§ 20-23, and 760 CMR § 56.00, brought by Hollis Hills, LLC (Hollis Hills), from a decision of the Lunenburg Zoning Board of Appeals denying a comprehensive permit with respect to property located in Lunenburg, Massachusetts. For the reasons set forth below, the decision of the Board is set aside and the comprehensive permit is ordered consistent with this decision.

I. PROCEDURAL HISTORY AND BACKGROUND

On February 13, 2006, Hollis Hills submitted an application to the Board for a comprehensive permit for the construction of 146 condominium units on approximately 33.8 acres on Hollis and West Streets adjacent to Electric Avenue in Lunenburg. (Pre-Hearing Order, § II, ¶ 1; See Exhs. 1-5. The project was to be financed under the Housing Starts Program of the Massachusetts Housing Finance Agency (MassHousing) or the New England Fund Program (NEF) of the Federal Home Loan Bank of Boston. Exh. 1. Pre-Hearing Order, § II, ¶ 5.

The Board's public hearing on the application began on March 22, 2006.[1] The Board voted to close the public hearing on June 13, 2007. It held additional sessions on June 27, July 11, 18 and 25, and August 7, 15 and 21, 2007. Pre-Hearing Order, § II. ¶¶ 1, 2.

By decision filed with the town clerk on August 21, 2007, the Board denied Hollis Hills' application for a comprehensive permit. Pre-Hearing Order, § II, ¶ 4; Exh. 7. On September 7, 2007, Hollis Hills filed its appeal with the Housing Appeals Committee. The presiding officer held a conference of counsel on October 10, 2007. Mark S. Testa, an abutter to the site, moved to intervene in the appeal. The Board moved to dismiss the appeal. The presiding officer granted Mr. Testa's motion to intervene in part and denied the Board's motion to dismiss. Following a pre-hearing conference, the parties submitted pre-filed direct testimony and Hollis Hills filed pre-filed rebuttal testimony, and the Board and developer submitted motions regarding the pre-filed testimony and the addition of certain exhibits.

On May 4, 2009, the Committee's *de novo* evidentiary hearing commenced in Lunenburg, with sworn cross-examination and a site visit conducted by the presiding officer. The evidentiary hearing continued in Boston at the Committee's offices on May 5, 6 and 8, 2009. Following the submission of transcripts, Hollis Hills, the Board and Mr. Testa filed their post-hearing memoranda. With the presiding officer's consent, the Citizens' Housing and Planning Association (CHAPA) and The Greater Boston Real Estate Board (GBREB) submitted a joint post-hearing memorandum as *amici curiae* on the issue of the regional need for affordable housing.

II. FACTUAL OVERVIEW

Hollis Hills seeks approval for a project consisting of 136 condominium units in attached townhouses.[2] The developer received funding approval from MassHousing under both MassHousing's Housing Starts Program and the NEF. Exh. 1. The project site includes

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1. Hollis Hills agreed to the Board's opening the public hearing more than 30 days after the filing of its application. Pre-Hearing Order, § II, ¶ 1.

2. Although its original request was for 146 units, Hollis Hills now requests approval of 136 units, consistent with a revised proposal it had submitted to the Board during that body's proceedings. Exh. 172, ¶ 14; Exh. 6.

four parcels totaling 33.86 acres with frontage on West Street, Hollis Road and Electric Avenue, all public ways, and Carr Avenue, a private roadway. Most of the project site is zoned as Residential A Zoning District, but a 0.83 acre portion of the site fronting on Electric Avenue is in the Commercial District. Exhs. 3-6; 100; 172, ¶¶ 6-8, 11; 173, ¶ 29. A portion of the site is currently improved with a building containing a bar and residential apartments, an asphalt parking lot, and a softball field, as well as a single-family house. Most of the remaining area of the site is undeveloped land. The pork chop lot that fronts on Electric Avenue (Electric Avenue Parcel) contains wetlands and a building that crosses the lot line onto this parcel from the abutting parcel at 321 Electric Avenue. The project site is proposed to have four points of access, including two on West Street, one on Hollis Road and one on Carr Avenue. Exh. 172, ¶¶ 6-7.

Carr Avenue runs from the site, past one single family house (the Ruiz House) to Whalom Road, a public way near the site of the former Whalom Amusement Park. Carr Avenue is owned by Intervener Mark S. Testa, who owns abutting property on which he runs a miniature golf course and a driving range, the Lakeview Driving Range. Across Carr Avenue from the golf course and driving range, Mr. Testa also owns property that serves as a parking lot for his customers. The developer has proposed to grade, crown and pave Carr Avenue; install stormwater controls, including catch basins, a detention basin, vegetated swales and replacement culverts; and build a sidewalk, speed bumps and signs, as well as a pedestrian crosswalk and 25-foot aprons for people and equipment crossing Carr Avenue between the mini-golf and driving range business and the parking lot across the street. Exhs. 172, ¶ 7; 173, ¶¶ 36, 47-48; 181, ¶¶ 4, 11; Exhs. 104-105, 140. Hollis Hills has agreed that the condominium documents for the project would provide that the condominium association would be responsible for the maintenance of Carr Avenue. Tr. IV, 8. Additional facts specific to the disputed issues are addressed below in the discussions of the issues.

III. MOTIONS

A. Motion to Intervene of Mark S. Testa

In seeking to intervene, Mr. Testa requested participation regarding traffic on Carr Avenue affecting his clientele; the developer's modifications to Carr Avenue interfering with his business; the alleged increase of drainage of water onto his property as a result of the project and the potential for flooding on his property; the potential loss of trees on his property from the modifications to Carr Avenue; and the risk to residents of the project from golf balls hit on the driving range. The presiding officer granted him leave to participate with respect to the: 1) surface water runoff from the project site onto his property; 2) impact of a traffic increase on pedestrian and equipment safety on Carr Avenue; and 3) effect of the project on the tree buffer on Carr Avenue. Pre-Hearing Order, § III.B., ¶ 1.[3]

B. Board's Motion to Dismiss

Early in the proceeding, the Board moved to dismiss the appeal on the ground that the Appellant lacked control of the site because of various issues regarding legal access, as well as alleged improprieties relating to the purchase of the Electric Avenue Parcel which contains a portion of a building constructed on the abutting lot at 321 Electric Avenue. The presiding officer denied the motion, finding that site control existed because of the developer's ownership rights to the parcels that make up the project site.

In its post hearing brief, the Board renewed its objections to the project on site control grounds and asked the Committee to reverse the presiding officer's decision based on the arguments in its original motion. As the presiding officer noted, questions of legal access to the site which involve adjudication of complex title disputes or similar matters between private parties are best left to the expertise of the courts. *Bay Watch Realty Tr. v. Marion*, No. 02-28, slip op. at 5-6 (Mass. Housing Appeals Committee Dec. 5, 2005). Also see *Meadowbrook Estates Ventures, LLC v. Amesbury,* No. 02-21, slip op. at 17 (Mass. Housing Appeals Committee Dec. 12, 2006), *aff'd,* 75 Mass. App. Ct. 1103 (2009) (even where not

3. As noted below, the Intervener has waived the issues of pedestrian and equipment safety on Carr Avenue and removal of trees from Carr Avenue.

simply access but actual control of site is at issue, developer need only establish colorable claim of title). Even if genuine disputes exist regarding Hollis Hills' rights to access the project site from Carr Avenue, install sewer utilities within the Carr Avenue right-of-way, or access the project site from Electric Avenue, those issues should be decided by the courts and resolved at closing or before construction begins. *See Bay Watch Realty Tr. v. Marion, supra,* slip op. at 5-6; *Princeton Development, Inc. v. Bedford*, No. 01-19, slip op. at 4 (Mass. Housing Appeals Committee Sept. 20, 2005) (site control is matter of ownership, not access); *Autumnwood LLC v. Sandwich*, No. 05-06, slip op. at 2-4 (Mass. Housing Appeals Committee Nov. 4, 2005 Ruling on Motion to Dismiss ...) (undisputed access to site is not essential element of site control). We also decline, as did the presiding officer, to address the Board's argument that principles of "infectious invalidity" and the merger doctrine preclude a finding of site control. *See Autumnwood LLC v. Sandwich, supra*, slip op. at 3; *Board of Appeals of Hanover v. Housing Appeals Committee*, 363 Mass. 339, 378 (1973) (true interest of boards of appeals is ensuring that lingering questions of title are laid to rest before construction begins).[4] The Board's request to overturn the presiding officer's decision is denied.

C. Board's Motion to Defer Decision

After the submission of post-hearing briefs, the Board moved to defer the Committee's decision until the full complement of Committee members specified in G.L. c. 23B, § 5A, the Committee's enabling statute, were appointed and able to consider the matter. The Board pointed out, correctly, that currently the Committee consists of only four members. Pursuant to § 5A, the Housing Appeals Committee normally consists of five members. Occasionally, when a member's term ends, a vacancy occurs until a replacement is appointed. This is not a matter of concern unless an insufficient number of members exists to form a quorum. However, since a quorum of the Committee consists of a simple majority, there are enough members to conduct the review process and the Board's motion is therefore denied.

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4. As discussed below in Section VI.B. below, however, the Board has also raised "infections invalidity" as a local concern that should preclude the issuance of the comprehensive permit.

IV. BURDENS OF PROOF

A. Appellant's Burden of Proof

1. Project Eligibility Requirements

To be eligible to proceed on a comprehensive permit application before the Board, or to bring an appeal before the Housing Appeals Committee, Hollis Hills was obligated to fulfill three requirements under 760 CMR 31.01(1).[5] The Board has stipulated that it does not contest the Appellant's qualification as a limited dividend organization for the purpose of G.L. c. 40B, § 20 and the Committee's regulations. Pre-Hearing Order, § II, ¶ 6. Thus, the developer has met the limited dividend organization requirement of § 31.01(1)(a). Hollis Hills has received a determination of project eligibility under MassHousing's Housing Starts Program and the NEF. Pre-Hearing Order, § II, ¶ 5. This determination establishes compliance with the fundability requirement of 760 CMR 31.01(1)(b). The Board did contest Hollis Hills' establishment of site control under 760 CMR § 31.01(1)(c). The presiding officer, however, denied the Board's motion to dismiss the appeal on that ground, ruling that Hollis Hills had established site control for the purposes of this proceeding. The presiding officer's determination on the motion to dismiss resolves the question of site control pursuant to § 31.01(1)(c). See Section III.B. above.

2. Compliance with Statutes, Regulations or Standards

When the Board has denied a comprehensive permit, the central question before the Committee is whether the decision of the Board is consistent with local needs. G.L. c. 40B, § 20. Under the Committee's regulations, a developer has alternative means to prove its case before the Committee. A developer "may establish a *prima facie* case by proving, with respect to only those aspects of the Project which are in dispute (which shall be limited, in

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5. At the time Hollis Hills brought its appeal, 760 CMR 30.00 and 31.00 governed comprehensive permit appeals pursuant to G.L. c. 40B. Effective February 22, 2008, the Department of Housing and Community Development (DHCD) promulgated a revised regulation, 760 CMR 56.00, which, by its terms, superseded 760 CMR 30.00 and 31.00 in most respects. However, since the issuance of the project eligibility letter preceded the promulgation of 760 CMR 56.00, the former regulation, 760 CMR 31.01(1), applies to the project eligibility requirements. See 760 CMR 56.08(3)(c), 56.04(1), 56.04(4).

the case of a Pre-Hearing Order, to contested issues identified therein), that its proposal complies with federal or state statutes or regulations, or with generally recognized standards as to matters of health, safety, the environment, design, open space, or other matters of Local Concern." 760 CMR 56.07(2)(a)2. Alternatively a developer may prove that "Local Requirements and Regulations have not been applied as equally as possible to subsidized and unsubsidized housing." 760 CMR 56.07(2)(a)4.

Hollis Hills has met its *prima facie* burden on the issue of compliance with generally accepted design standards, state standards or federal standards with regard to the issues in dispute. Indeed, the Board has raised no issue with Hollis Hills' *prima facie* case in general or in particular. See generally Exhs. 172-174.

B. Board's Burden of Proof

Once the Appellant has demonstrated that its proposal complies with state or federal requirements or other generally recognized standards, the burden then shifts to the Board to prove that there is a valid health, safety, environmental, design, open space or other local concern that supports the denial of a comprehensive permit, *and* that such concern outweighs the regional need for low or moderate income housing. G.L. c. 40B, §§ 20, 23; 760 CMR 56.07(2)(a)2. and 56.07(2)(b)2. See *Hilltop Preserve LTD Partnership v. Walpole,* No. 00-11, slip op. at 4 (Mass. Housing Appeals Committee Apr. 10, 2002), citing *Hanover, supra*, 363 Mass. 339, 365, and *Hamilton Housing Authority v. Hamilton*, No. 86-21, slip op. at 11 (Mass. Housing Appeals Committee Dec. 15, 1988).[6] 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 affordable housing,

6. By contrast, there is no shifting burden of proof regarding unequal treatment: The developer simply has the burden of proof, and the board may attempt to rebut the developer's proof. 760 CMR 56.07(2)(a)4. If the developer meets its burden, the Committee will rule that the Town violated Chapter 40B, § 20 and the denial will be vacated.

but it also must prove that the installation of adequate services is not technically or financially feasible. 760 CMR 56.07(2)(b)4.[7]

A board may show conclusively that its decision was consistent with local needs by proving that one or more of the grounds in 760 CMR 56.03(1) has been satisfied. The parties have stipulated that Lunenburg has not met any of the statutory minima set forth in the second sentence of the definition of "consistent with local needs" in G.L. c. 40B, § 20 or in 760 CMR 56.03(3).[8] Pre-Hearing Order, § II, ¶ 8.

The fact that Lunenburg does not meet the statutory minima regarding affordable housing establishes a rebuttable presumption that a substantial regional housing need outweighs local concerns. 760 CMR 56.07(3)(a). See G.L. c. 40B, § 20. The 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." *Hanover, supra,* 363 Mass. 339, 367. Also see *Woburn Board of Appeals v. Housing Appeals Committee*, 66 Mass. App. Ct. 1109 (2006), *further appellate review denied, Board of Appeals of Woburn v. Housing Appeals Committee*, 447 Mass. 1107 (2006). In previous cases before the Committee, the consideration of the regional need for affordable housing has focused simply on whether the municipality had achieved one of the specific statutory or regulatory indicators of compliance with minimum housing standards. In this case, the Board submitted evidence to rebut the regional need for affordable housing. Because the arguments and evidence are novel in this appeal, the parties have briefed the issue extensively. Additionally CHAPA and the GBREB submitted an *amicus curiae* brief to assist the Committee in considering the issues.

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7. The Board indicated in the Pre-Hearing Order that it would raise questions about the capacity of the municipal sewer system to serve the project. However, it did not address this issue directly in its brief, but only peripherally in the "Sewer Planning" section of its Summary of Evidence. See Board brief, ¶¶ 23-43. In any event, it did not present evidence demonstrating the technical or financial feasibility of installing services to address the project's flow needs. Therefore this issue is waived.

8. Similarly, the parties stipulated that Lunenburg has not met the thresholds or criteria in 760 CMR 56.03(1)(b), (1)(c), (6) or (7). Pre-Hearing Order, § II, ¶ 9.

V. REGIONAL NEED FOR AFFORDABLE HOUSING

In determining whether the local requirements or regulations relied on in the Board's decision are "consistent with local needs," the Committee must determine whether "they are reasonable in view of *the regional need for low and moderate income housing."* G.L. c. 40B, § 20. (Emphasis added.) The Board argues that the existence of a regional need for low or moderate income housing should not be measured solely with regard to the statutory thresholds of G.L. c. 40B, § 20, including, most particularly, the proportion of homes in Lunenburg identified on the Subsidized Housing Inventory (SHI), the list maintained by DHCD to identify low or moderate income housing units in a municipality. 760 CMR 56.02. It argues that the Committee must also consider whether market-rate housing in the region is available to meet the actual demand for affordable housing. To that end, the Board introduced testimony and evidence regarding the existence of market-rate housing offered for sale or sold at the level considered affordable to persons at 70, 80 and 100 percent of area median income (AMI), as well as tax assessment data, in Lunenburg and neighboring communities. Exh. 180. Based on the evidence the Board submitted, it claims that there is no significant unmet regional need for affordable housing. Hollis Hills and the *amici* argue that, as a matter of law, inexpensive market-rate housing cannot be regarded as meeting the need for low and moderate income housing under G.L. c. 40B, § 20. See 760 CMR 56.02.

A. The Legal Standard for Low or Moderate Income Housing

The consideration of the need for "low and moderate income housing" must start with the legal definition of this term and its critical elements: a subsidy, a restriction in use to income eligible persons, an affirmative fair marketing plan, and compliance with housing standards. Such housing fulfills the goals of the Comprehensive Permit Law in ensuring a stable inventory of decent, affordable housing over the long term.

1. The Statutory and Regulatory Requirements

The standard for low and moderate income housing is based on Chapter 40B and DHCD regulations. "Low or moderate income housing" is:

> ...any *housing subsidized by the federal or state government under any program to assist the construction of low or moderate income housing as defined in the applicable federal or state statute*, whether built or operated by any public agency or any nonprofit or limited dividend organization. (Emphasis added.)

G.L. c. 40B, § 20. Thus Chapter 40B requires low and moderate income housing to be subsidized by the federal or state government in connection with construction.

Under DHCD's regulations, if a subsidizing agency does not define low or moderate income housing, "it shall be defined as units of housing whose occupancy is restricted to an Income Eligible Household" -- a household whose income does not exceed 80 percent of AMI, adjusted for household size. 760 CMR 56.02. This provision requires that the housing be set aside solely for households meeting income eligibility standards. In addition, housing units may be included on the SHI if they meet the following criteria:

> ... SHI Eligible Housing units developed under MG.L. chs. 40A, c. 40R and other statutes, regulations, and programs, *so long as such units are subject to a Use Restriction and an Affirmative Fair Marketing Plan*, and they satisfy the requirements of guidelines issued by [DHCD]. (Emphasis added.)

760 CMR 56.03(2)(a).[9] See *Town of Hingham v. Department of Housing and Community Dev.,* 451 Mass. 501, 408 (2008). The required "use restriction" is a "deed restriction or other legally binding instrument" running with the land that restricts occupancy of a low or moderate income housing unit to an income eligible household, and sets a maximum permissible resale price (or rent for rental units) during a term of affordability. 760 CMR 56.02. The mandated affirmative fair marketing plan is "a plan for the marketing of SHI Eligibile Housing, including provisions for a lottery or other selection process consistent with guidelines developed by [DHCD]." *Id.* These requirements together establish the framework for furthering the stated purpose of Chapter 40B.

Chapter 40B was enacted to address "the acute shortage of decent, safe, low and moderate cost housing throughout the commonwealth." *Hanover,* 363 Mass. 339, 351 and "to provide relief from exclusionary zoning practices which prevented the construction of

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9. The SHI is thus not limited to housing units developed only through issuance of a Comprehensive Permit.

badly needed low and moderate income housing." *Id.* at 354; *Standerwick v. Zoning Board of Appeals of Andover,* 447 Mass. 20, 29 (2006). It was also intended to override local opposition to low income housing. *Standerwick, supra,* 447 Mass. 20, 28, citing *Zoning Board of Appeals of Wellesley v. Ardemore Apartments Ltd. Partnership,* 436 Mass. 811, 822 (2002). The "Legislature was concerned not only with facilitating the construction of affordable housing ... but with ensuring that every city and town in the Commonwealth has available a certain minimum amount of affordable housing stock." *Ardemore,* 436 Mass. 811, 822. The intent of Chapter 40B is not to provide a "short-term fix" of the problem of insufficient affordable housing – temporary affordability would not achieve long-term statutory goals. *Id.* at 824.

To further these goals, the Legislature requires a state or federal subsidy for construction to makes the housing subject to enforceable controls on the quality of the housing, sales price or rental rate, the manner of marketing and the income of the occupants, factors which are essential to the long-term stability of affordable housing. The subsidy also provides a means to ensure uniformity in the standards used for projects to meet the statutory goals.

The requirement for use restrictions in 760 CMR 56.03(2) specifically furthers the legislative goal of Chapter 40B to create a "long-term solution to the shortage of affordable housing throughout the Commonwealth." *Ardemore, supra,* 436 Mass. 811, 814. Also see *Hanover, supra,* 363 Mass. 339, 355; 760 CMR 56.02. The record here reflects that use restrictions have ranged from 15 to 40 years. Exh. 152, p. 6. However, if a comprehensive permit does not specify for how long housing units must remain below market, Chapter 40B "requires an owner to maintain units as affordable for as long as housing is not in compliance with local zoning requirements." *Ardemore, supra,* 436 Mass. 811, 813.

In addition, the goal of a long-term stable inventory of affordable housing necessarily requires housing to meet standards of decency and quality, in order to last without the burden of undue expense on the owner or occupant. Low and moderate income households are less likely to have the means to perform the renovations or replacement for substandard housing,

or to obtain alternate housing during renovations.[10] Finally, the requirement of an affirmative fair marketing plan conforms to Chapter 40B's purpose to address zoning discrimination, by providing a plan for marketing SHI eligible housing, "including provisions for a lottery or other resident selection process... and providing effective outreach to protected groups underrepresented in the municipality." 760 CMR 56.02. Cf. *Ardemore, supra,* 436 Mass. 811, 822 and n.21. The statute's legislative history indicates that the Legislature was "concerned with the [municipalities'] possible use of their zoning powers to exclude low and moderate income groups." *Hanover, supra,* 363 Mass. 339, 347, 348. Chapter 40B's "avowed purpose" was "to facilitate the construction of low and moderate income housing in areas which have exclusionary zoning practices." *Id.* at 354.

2. Market-Rate Housing Cannot Support Chapter 40B's Purpose

Market-rate housing, by definition, fails to meet the subsidy, use restriction and affirmative fair marketing plan requirements. Moreover, it cannot provide uniformity and controls by a subsidizing agency or guarantee minimum standards of quality necessary for long-term affordability. As the developer and the *amici* point out, the inexpensive market rate housing in Lunenburg identified by the Board's witness included housing that was renovated and expanded, or torn down and replaced with more expensive housing, as well as units that were simply substandard. The purchase of inexpensive housing for the purpose of expansion or replacement with more expensive homes demonstrates why the use restrictions are critical to the maintenance of affordable housing. Without the use restriction, there is no guarantee that housing currently priced within the range targeted to income eligible families will be ultimately occupied by them, or that it will remain affordable. Similarly, market-rate housing is not subject to quality standards, other requirements of subsidizing agencies or to the lottery and outreach requirements for fair marketing, and thus does not guarantee access to low and moderate income families or long-term affordability. For this reason, the

10. Hollis Hills also argues that under the DHCD Comprehensive Permit Guidelines, SHI eligible units must meet minimum size and quality requirements as well. Both the developer and the *amici* make arguments based on the Guidelines and other factual documents not admitted as evidence in the record. Those documents are not considered in this decision.

existence of inexpensive housing cannot be factored into determining the extent of the need for low and moderate income housing.

The Board's suggestion that the exclusion of market-rate housing is based on a preference for new construction is wrong. Neither Chapter 40B, nor the required use restriction, precludes the inclusion of older homes on the SHI, which is used in assessing the regional need for low or moderate income housing. Although "Low or Moderate Income Housing" is defined as "the construction or substantial rehabilitation" of housing under 760 CMR 56.02,[11] housing eligible for the SHI need not meet the Chapter 40B standard; it may qualify under another program. 760 CMR 56.03(2)(a). Moreover, even buildings that are new when constructed age and remain on the SHI during their period of affordability. See, e.g., Exh. 152, p. 5. However, to fulfill a long-term goal of affordability, housing must meet quality standards to ensure that it lasts without excessive repair expenses. The age of the market-rate housing is not the reason for excluding that housing, rather it is the inability of market-rate housing to conform to the criteria essential for inclusion on the SHI.[12]

Finally, the Board also argues that looking only at housing inventoried on the SHI is inconsistent with 760 CMR 56.07(3)(b)3. That regulation states that to rebut the presumption that a substantial housing need outweighs local concerns, "a stronger showing shall be required on the Local Concern side of the balance where the Housing Need is relatively great than where the Housing Need is not as great." The Board posits that the housing need cannot be simply set at the fixed value based on the municipality's housing percentage on the SHI, but that another factor necessarily must be part of the inquiry. Therefore, it argues that market rate housing must be considered. The Board is mistaken. Although the Committee need not decide all the factors relevant to assessing the strength of

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11. This requirement is to ensure that the buildings placed on the SHI meet minimum standards of construction and building codes. This requirement, together with the use restriction, ensures that affordable housing is decent, and does not place undue economic burdens on occupants.

12. Hollis Hills also argues that under the DHCD Comprehensive Permit Guidelines, SHI eligible units must meet minimum size and quality requirements as well. Both the developer and the *amici* make arguments based on the Guidelines and other factual documents not admitted as evidence in the record. Those documents are not considered in this decision.

the housing need, they certainly would include how close the town is to reaching the 10 percent threshold, as well as the SHI inventory for the towns in the same region as the community in question. The SHI for the community only reflects the affordable housing in that community. To determine the *regional* housing need, the Board would have recourse to the SHI statistics for the other communities in the relevant region, such as the seven-town study area selected by Mr. Ling.[13] The Board's reliance on *Bagley v. Illyrian Gardens, Inc.*, 28 Mass. App. Ct. 127, 132-133 (1989) does not further its argument. There the Appeals court ruled that a finding of a regional need for housing could be based on evidence regarding individuals on waiting lists for elderly public housing. The housing involved in *Bagley* was *public* housing, not market-rate homes.

Finally, as both the developer and *amici* argue, including market-rate housing in the definition of low and moderate income housing would likely dissuade developers from pursuing Chapter 40B projects. If communities relied on the existence of inexpensive market-rate housing to determine whether there was a regional need for affordable housing, the potential for fluctuation in the amount of affordable housing would leave the status of the market unpredictable. Such unpredictability is contrary to the goal of Chapter 40B to create a stable inventory of affordable housing. See *Ardemore, supra,* 436 Mass. 811, 822-824. 760 CMR 56.02, 56.03(2)(a).[14]

Housing available on the open market cannot meet the statutory and regulatory standards, and cannot further the statutory goals of long-term decent, affordable housing

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13. Another potential region would be based upon the Metropolitan Statistical Areas (MSAs) established by the U. S. Department of Housing and Urban Development (HUD), on which DHCD relies. In this instance, the Fitchburg-Leominster Metropolitan Area, which is part of the Worcester MSA, defines the region for the purposes of median income for Lunenburg. Exh. 180, ¶¶ 5-7; Exhs. 87, 88, 153.

14. Further, if market housing could be considered, developers would need to prepare a market study to analyze the extent of inexpensive housing in a town it is considering for development. Given the issues presented here regarding the quality of housing offered, and the possibility of properties being purchased for teardown and building expensive houses on the sites, the hearings before zoning boards and the Committee would likely be protracted, particularly if a town prepared its own study as well. The *amici* further argue that market housing can be priced on many factors that are not related to the characteristics of the unit.

available to income eligible households. Therefore the Board's evidence of low cost market-rate housing cannot be factored into the consideration of the regional need for affordable housing. With regard to units on the SHI, Lunenburg has 70 of 3605 total units, or only 1.9% of its housing stock, listed on the SHI. For Mr. Ling's seven-town study area, 7.6% of the total year round housing stock is listed on the SHI. Exh. 155; Exh. 180, ¶ 21; Exh. 154, Table 3.[15] Here, the Board has not shown that the housing existing on the SHI for this region addresses the regional need for affordable housing. See Exh. 155. Accordingly, the Board has not rebutted the significance of the regional need for affordable housing under *Hanover*.

B. Board's Evidence of Market-Rate Housing

Although the Board's evidence of market-rate housing is consequently irrelevant to the consideration of the regional need for low and moderate income housing, the Board submitted extensive evidence on this issue, and the developer submitted its own rebuttal evidence. To ensure that the record is complete for the purposes of any appeal, findings of fact regarding this evidence are provided below and included in this decision.[16] As shown below, even if market-rate housing were relevant to the need for affordable housing, the Board's evidence is not credible evidence that the need for affordable housing is reduced.

The Board submitted a study prepared by its witness using federal Department of Housing and Urban Development (HUD) statistics for AMI for the Fitchburg-Leominster Metropolitan Area, of which Lunenburg is a member. Exhs. 180, 154. Also see Exhs. 87, 88, 152-153. He evaluated sales prices and assessed values from January 1, 2006 through December 31, 2007. Exh. 154, p. 1. The Board's witness, Mr. Ling, an independent community development consultant, stated that most, if not all, Chapter 40B homeownership programs define low or moderate income housing as that which is affordable to persons earning no more than 80 percent of AMI. Exh. 180, ¶ 13. That is consistent with 760 CMR

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15. Although the SHI is dated September 9, 2008, the Town's planner acknowledged that as of the hearing no housing had been included in the SHI since February 2006, when Hollis Hills submitted its application to the Board. Exh. 155; Tr. II, 92.

16. The Board submitted the data files relied upon by its witness in preparation of his study. See Exhs. 156-158.

56.02, which provides that use restrictions may be limited to households at or below 80 percent of AMI.

Hollis Hills contested the relevance of housing listed at rates affordable to households earning as much as 80 and 100 percent of AMI.[17] Mr. Ling acknowledged that subsidy program regulations that apply to Hollis Hills would require that its affordable units be sold at a price affordable to someone making 70 percent of the AMI because of the "window of affordability," a 10% window DHCD applies to sales prices and rents. Tr. II, 163-166. For ownership units, DHCD "encourages communities to set prices below the 80% of AMI to ensure a 'window' of affordability for prospective buyers." Exh. 153, p. 2. It sets affordable rents at 30% of 70% of AMI. Exh. 153, p. 1.

Based on the HUD statistics, Mr. Ling determined that the maximum affordable sales prices for a family earning 70 and 80 percent of AMI were, respectively, $140,000 and $160,000. Exh. 180, ¶¶ 8-11. He then compared those prices with actual home sales and assessed values in a seven-town region including Lunenburg, Ashby, Fitchburg, Lancaster, Leominster, Shirley and Townsend between 2006 and 2007. Exh. 154.

Comparing sales prices for homes sold in 2006 and 2007, Mr. Ling concluded that 15% of the regional home sales in those years were at or below $160,000, 9% were at or below $140,000 and in Lunenburg, specifically, 11.5% of the homes sold at or below $160,000, and 8.2% of the homes sold at or below $140,000. Exh. 180, ¶¶ 25-28, 35-36. These numbers are relied upon by the Board to show that inexpensive housing is addressing the affordable housing need.[18] However, these percentages offer no indication of the proportion of houses sold at low prices compared to the total housing stock in Lunenburg.

The Board's data of assessed values does relate to the total housing stock. Mr. Ling's study found that in 2007, 3.5% of the homes in Lunenburg were assessed at or below

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17. Mr. Ling stated that the housing priced at the 100 percent range was included only for comparison purposes. Tr. II, 166.

18. The Board compared these sales to the minimum housing production standard in DHCD regulations. Tr. IV, 135. Since the housing production provision relates solely to increasing SHI eligible housing units, the regulation's housing production standard is not relevant. See 760 CMR 56.03(4)(f).

$140,000 and 5.2% were assessed at or below $160,000. Exh. 180, ¶ 22; Exh. 154, Table 12. For the other five towns for which he obtained comparable data, fewer than 10% of the housing units were assessed at or below $140,000; only Fitchburg (with 18.3%) had more than 10% of its units assessed at or below $160,000. Exh. 154, Table 12; see Tr. II, 178-179. However, even including the market rate homes, the assessed values for the homes in Lunenburg and the five neighboring municipalities relied upon by the Board did not demonstrate a sufficient level of inexpensive homes to reach 10% of the housing stock overall.

Stating that the length of time homes are advertised is a generally accepted indicator of housing demand, the Board's witness examined the Multiple Listing Service (MLS) to determine the length of time homes in Lunenburg were on the market in 2007. He stated that homes offered for less than $160,000 generally stayed on the market for 106 days on average in 2006 and 189 days on average in 2007 in Lunenburg. Exh. 180, ¶ 31; Exh. 154, Table 15. He suggested that a two to eight month wait for a buyer indicates a weak demand for the housing. Exh. 180, ¶ 32. The developer disputed the implications of Mr. Ling's evidence, arguing that for one of the two years, houses priced at or below $140,000 sold faster than average, showing that the strongest demand in Lunenburg was for houses priced at this level. Tr. II, 185; Exh. 154, Table 15.

Although these reported data may be accurate, the conclusion drawn from those statistics is not credible. The evidence does not show a cause-effect relationship between the number of days on the market and the sales price of a house, particularly in light of the evidence of the condition of some of the lower priced units, as discussed below. Therefore, those statistics are not credible evidence regarding the need for inexpensive housing. Exh. 154, pp. 9-10; Exh. 180, ¶ 34.[19]

Hollis Hills argues that the inexpensive market rate housing is of inferior quality and inadequate to serve the need for affordable housing because some of the housing appeared to have required repairs that significantly increased the cost of the housing. Exh. 185, ¶¶ 23-29;

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19. Similarly the conclusion that "it is evident that there is a good selection of rental housing at various price levels to suit different needs" is not credible based on the data of rental rates. Exh. 154, p. 2.

see Tr. II, 187-188; and some housing was uninhabitable, thus requiring an owner to pay for other housing while repairing the building. Exh. 185, ¶¶ 11-22. The Board's witness did not visually examine the houses he included in his study as meeting the affordability requirements for low and moderate income housing. Tr. II, 188.

Hollis Hills' witness, a realtor, examined MLS listings for the sales in the selected communities identified by the Board, and visually examined from the exterior some of the units in Lunenburg. He testified that all of the homes in Lunenburg that sold for less than $160,000 were "aging units" and "in a condition of deferred maintenance," and would require expense to maintain because of their age. Exh. 185, ¶ 44; Exh. 167. Some of them failed to meet building or sanitary codes, and most were smaller than the Hollis Hills affordable units. Exh. 185, ¶¶ 44-47, 51; Exh. 169. See 760 CMR 56.07(3)(d).

Hollis Hills' witness also testified that since the market rate housing is not use-restricted, market rate homes that sell for prices affordable to those of moderate income are often significantly enlarged and renovated, or even torn down and replaced, so they can no longer be expected to sell for affordable prices. He testified that some of the low priced units were uninhabitable when sold, were "fixer-uppers," were significantly enlarged or renovated after sale and no longer likely to be affordable, or were torn down and replaced with new, more expensive housing. Exh. 185, ¶¶ 10, 30-43. Although Hollis Hills' witness agreed that the condition of some of these units was addressed by repairs that kept the sales price within the affordable range, a number of units were listed in "as is" condition or other indicators of extremely poor quality. For example one residence sold as "an antique farmhouse" in need of "extreme makeover" was torn down and replaced with a new, much more expensive house. Exh. 168-10; Exh. 185, ¶ 41-44.

The conditions of some of these houses, and their history of sale and makeover, preclude their providing credible examples of affordable housing serving the needs of low and moderate income households. As the developer and the *amici* pointed out, low and moderate income families are less likely to have the means to perform the renovations for substandard housing, or to obtain alternate housing during renovations. Moreover, if this housing is purchased and replaced with more expensive housing, it never served as

affordable housing. This potential for houses to be upsized, renovated or replaced with larger more expensive homes is a reason why the lack of a use restriction should prevent inclusion of these homes as meeting the need of affordable housing. See Tr. II, 197-198. Additionally, without a use restriction, nothing prevents non-income eligible households from occupying these homes

Finally, Hollis Hills argues that the Town's Affordable Housing Strategy dated February 2006 stated that Lunenburg residents earning 80 percent of AMI or less are "hard-pressed" to afford the housing available in Lunenburg, thus contradicting the Board's position that market-rate housing fills the housing need. Exh. 69, pp. 14, 18; Tr. II, 61-63. On this record, the Board's evidence that the market-rate housing identified was appropriate for income eligible households is not credible. Therefore the Board's evidence does not demonstrate that the identified market-rate housing is appropriate for income eligible households, or that appropriate housing makes up a sufficient percentage of housing in Lunenburg and towns in a relevant region to satisfy the regional need for low and moderate income housing.

VI. LOCAL CONCERNS

A. Town of Lunenburg Master Planning

1. Standard for Evaluating Town Planning

In its decisions, the Committee has given careful consideration to a municipality's comprehensive planning efforts in determining consistency with local needs under G.L. c. 40B, §§ 20-23. See *Harbor Glen Associates v. Hingham*, No. 80-06, slip op. at 6-16 (Mass. Housing Appeals Committee Aug. 20, 1982); *KSM Trust v. Pembroke*, No. 91-02, slip op. at 5-8 (Mass. Housing Appeals Committee Nov. 18, 1991); *Stuborn Ltd. Partnership v. Barnstable*, No. 98-01 (Mass. Housing Appeals Committee Sept. 18, 2002); also see 760 CMR 56.07(3)(g). In *Pembroke,* the Committee held that a municipality'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. *Pembroke, supra* at 5-8. Also see *Stuborn, supra* at 5-6. See

760 CMR 56.07(3)(g). In *Stuborn*, the Committee determined that the Barnstable planning needs to protect the limited number of parcels suitable for marine activities focused on the commercial harbor area outweighed the need for affordable housing to be built on the harbor. *Id.* at. 10-14.

The Committee evaluates the master plan in effect at the time of the developer's application to the Board. 760 CMR 56.02 (Local Requirements and Regulations); *Weston Development Group v. Hopkinton,* No. 00-05, slip op. at 8-11 (Mass. Housing Appeals Committee May 26, 2004); *Northern Middlesex Housing Associates v. Billerica,* No. 89-48, slip op. at 8-12 (Mass. Housing Appeals Committee Dec. 3, 1992). See *Paragon Residential Properties, LLC v. Brookline*, No. 04-16, slip op. at 45 (Mass. Housing Appeals Committee Mar. 26, 2007); *Meadowbrook Estates Ventures, LLC v. Amesbury, supra,* slip op. at 12. Also see *Castle Estates, Inc. v. Park and Planning Bd. of Medfield,* 344 Mass. 329, 334 (1962); *Zoning Board of Appeals of Greenfield v. Housing Appeals Committee,* 15 Mass. App. Ct. 553 (1983). The Board must present sufficient evidence concerning its master planning to meet a three-part test: 1) Is the plan bona fide? (Was it legitimately adopted, and, more importantly, does it continue to function as a viable planning tool in the town?); 2) Does the plan promote affordable housing? and 3) Has the plan been implemented in the area of the site?

If any of these questions is answered in the negative, the Committee will not consider the plan in reaching its decision. *Stuborn Ltd. Partnership v. Barnstable, supra,* slip op. at 5-6. If, however, a plan passes these tests, its requirements or recommendations will not automatically determine the outcome of the issue. The Committee then must analyze the master plan and its relationship to the proposed affordable housing. First, the answers to the three questions determine the amount of weight accorded the plan. *Id.* at 6. Of particular importance in determining how much weight should be given to the plan are the second and third questions, and specifically whether the housing element of the master plan (or a subsidiary affordable housing plan) has actually shown results – resulting in the construction of a substantial amount of affordable housing. 760 CMR 56.07(3)(g); *28 Clay Street*

Middleborough LLC v. Middleborough, No. 08-06, slip op. at 12 (Mass. Housing Appeals Committee Sept. 28, 2009); *Stuborn, supra* at 6 n.5.

Then in evaluating whether the "provisions of the plan are unnecessarily restrictive as applied specifically to the proposed project," the Committee examines whether the proposed housing actually would undermine the plan to a significant degree. *Stuborn, supra* at 6. Thus, if the project is inconsistent with the plan's goals, the Committee is still required to balance the weight to be given to the plan's goals against the regional need for affordable housing:

> [W]e consider the totality of the [municipality's] planning interests, and determine whether those interests are sufficient to outweigh the regional need for affordable housing. The comprehensive plan is added to the [municipality's] side of the scale, and the strength of the plan itself, the extent to which it has actually been implemented, and the extent to which it encourages affordable housing all lend weight to the [municipality's] argument that local planning concerns with regard to a particular proposal outweigh the regional need for housing.

Stuborn, supra at 6. This analysis is very similar, if not identical, to the normal balancing of local concerns against the regional need for housing.

2. Lunenburg's Planning Documents

The Town of Lunenburg has undertaken review and planning regarding its growth for several decades, since at least 1961. The Board argues that the Town has engaged in serious and aggressive management of growth related to an expansion of the public sewer system, and including a housing production component focused on the redevelopment of disturbed underutilized parcels in "smart growth" locations. The Board relies on three planning documents: the 2002 Master Plan, the Comprehensive Wastewater Management Plan (CWMP) Phase I Sewer Plan, and the Affordable Housing Strategy approved by DHCD. It argues that these represent *bona fide* planning documents entitled to be given considerable weight to determine consistency with local needs. *KSM Trust v. Pembroke, supra,* slip op. at 6; *Harbor Glen Associates v. Hingham, supra*, slip op. at 12-14. The Board argues that the proposed project is inconsistent with the town's "serious and professional" master planning which, by the late 1990s, focused on managing growth from a major expansion of the Town's public sewer system. Hollis Hills argues that the Town's master planning documents should

not be credited on the ground that 1) the CWMP does not provide for affordable housing, but does provide for sewers where Hollis Hills plans to connect them; 2) the affordable housing plan chose an undesirable location for the Chapter 40R district; and 3) the Town has not implemented the plans.

In 1989, a "Growth Management Plan" prepared for the Town recommended that development be restricted to locations supported by adequate infrastructure, or where it could be economically established and to preserve rural areas. Exh. 179, ¶¶ 8-10. In 1997, the Planning Board initiated a study, which resulted in the report "Lunenburg in 2007- Master Planning Envision 2007 Report." Exh. 53; Exh. 179, ¶ 18. Finally, in 2002, the Board's planner, Ms. Thomas, prepared a Master Plan which, she said, "call[ed] for increasing setbacks and lot sizes in the more rural areas of town, encouraging cluster developments, developing a Town Center plan to encourage responsible growth in that area, and preserving groundwater, hilltops, meadows and vistas. Exh. 179, ¶ 19; Exh. 54, *Land Use Element*, pp. 28-32. Also see Master Plan Review Report May 2005, Exh. 58, pp. 1, 5-6; Exh. 179, ¶ 25-26.

The Master Plan states the following primary goals: 1) to preserve the rural residential characteristics of the town; 2) to promote more efficient land use; 3) to encourage economic development in the town; 4) to protect natural resources; and 5) to provide quality municipal services for the residents of the town. The Master Plan contains a Housing Element, which identifies as its primary goal: "To provide appropriate housing for Residents of the Town of Lunenburg." Exh. 54, *Housing Element,* p. 1; *Introduction Element,* p. 4. The plan continues with a discussion of the importance of affordable housing and identifies thirteen housing recommendations: 1) coordinate activities of town planning and housing in the Planning Board office; apply for grants; develop a housing education program; establish a clearinghouse for affordable housing listings; inform developers of opportunities; extend set asides; assist non-profits to encourage shared housing; adopt ZBA rules for 40B applications; encourage planned development; establish stronger code enforcement; provide sewers or alternative systems to areas in need (continuation of Town programs); promote starter homes to developers; and inventory vacant developable land and town-owned land. *Id.,* p. 17.

The Master Plan includes as criteria for the location of future multi-family housing: zoning that permits the use; access from a major or secondary road; access that is not through a single family area, business area, or industrial area; available municipal water and sewer; buildable soils; locations near public facilities if possible; and location convenient to daily shopping. The plan states: "[i]n reaching a decision about recommending zoning changes permitting multi-family use, the Board will need to consider the factors listed above, the political acceptance, and site development criteria." Exh. 54, *Housing Element*, p. 9; see Exh. 179, ¶ 20.

The Affordable Housing Strategy provides that "[b]uilding locations must be selected carefully as excessive development not only threatens the Town's open character, but can also be a negative impact on natural resources such as wetlands, streams and wooded areas." Exh. 69, p. 15; see Exh. 179, ¶ 30. The plan identified four locations in the Town for affordable housing development, which the planner said were all consistent with the Town's smart growth and growth management objectives, Exh. 69, pp. 17-22; Exh. 179, ¶¶ 31-32. Those locations included:

- A 10.49 acre site of a proposed mixed income multifamily development on Massachusetts Avenue near the town center for Lunenburg Estates;
- The former primary school, owned by the Town and located in the town center;
- The 9.9-acre site of the former Tri-Town Drive-In Theater;
- The former Whalom Drive-In Theater site located on Electric Avenue.

The Affordable Housing Strategy goals include developing twenty-two units of affordable housing each year for the next five years; meeting the needs and income levels of diverse individuals and families by providing adequate housing units at affordable prices; permitting mixed use development to create more opportunities for affordable rental housing units; encouraging the development of two drive-in theaters and the re-use of the school site building for 40R regulation in order to maintain the affordable housing inventory; and to continue to provide that three percent of new housing be earmarked for the disabled. Exh. 69, p. 17. The Town's Affordable Housing Strategy suggested a bylaw amendment to

provide density bonuses for starter homes in certain areas of the Town it considered best suited to handle increased density. Exh. 69, p. 20.

Wastewater planning began in the 1970s. Before 1994, the cities of Fitchburg and Leominster originally provided limited sewer service in Lunenburg. Exh. 179, ¶ 12; Exh. 175, ¶ 2; Exh. 61, p. 2. Lunenburg's first sewer line was installed in 1994 and the Lunenburg Sewer Commission was established in that year. Exhs. 179, ¶¶ 11-12; 175, ¶¶ 2-3; 141. In 1995, the Town prepared a sewer impact study of the southwest section of the town. Exh. 179, ¶ 13; Exh. 175, ¶ 7; Exh. 61. In 1998, the Town contracted with an engineering company to develop the CWMP, which proposed a series of recommendations for expanding sewers into specific areas. Exh. 175, ¶ 8; Exh. 64. On April 13, 1999, the Lunenburg Planning Board voted to endorse the CWMP (Exh. 63) and on May 8, 1999, Lunenburg Town Meeting approved appropriations for Phase I of the CWMP. Exh. 175, ¶¶ 11-12; Exhs. 46, 47, 65, 66. Since the Town does not have its own wastewater treatment plant, it has entered into intermunicipal agreements with Fitchburg and Leominster; which allow up to 80,000 gpd to Fitchburg and 500,000 gpd to Leominster. Exhs. 175, ¶¶ 5, 13; Exh. 48.

The 1995 Sewer Impact Study of the Southwest Section of the Town of Lunenburg noted the Town contemplated directing growth in a coordinated manner. While it stated that sewers are a stimulus to growth it also noted that an "impact of sewers on spin-off growth is the ability for the Town to control "leap-frog" development by encouraging more compact development. Exh. 61, pp. 1, 14. It recommended that new development be evaluated for its proximity to existing municipal services. *Id.,* p. 17. According to Sewer Commissioner Paula Bertram, the CWMP determined areas of need based on development density, soil conditions, environmental factors and smart growth principles. Exh. 175, ¶ 9. However, the Town's various planning documents state different views regarding the role of sewers in influencing growth. See, e.g., Exh. 179, ¶ 16; Exh. 61, pp. 1, 14, 16-17; Exh. 121, p. 3-23. Sewer expansion was proposed in three phases. The CWMP prioritized for Phase I sewer infrastructure expansion in the Town center and the area near Whalom Lake. Exh. 121; 175, ¶ 9-10.

3. Analysis of Town Planning

The analysis of the foregoing plans starts with the questions articulated by *Pembroke* and *Stuborn*: *First, Is the Town's plan bona fide?* There is no dispute that the planning documents on which the Board relies were developed and adopted before Hollis Hills submitted its comprehensive permit application to the Board. The Master Plan and Sewer Plan were adopted some years before Hollis Hills applied for a comprehensive permit. The Town's Affordable Housing Strategy, dated February 2006, was approved by DHCD on February 22, 2006, and deemed in effect as of February 8, 2006, five days before Hollis Hills' February 13, 2006 submission of its application to the Board. Exhs. 69, 70. A second part of this inquiry is whether the Town's plans continue to function as planning tools. As of the developer's comprehensive permit application date, all of the three plans were adopted and operational, although only the Master Plan and Sewer Plan had been in effect long enough to have actually functioned. The question of the housing planning's functioning is addressed in the discussion of implementation below. However, we find that the plans are *bona fide*.

Second, Does the plan promote affordable housing? The Affordable Housing Strategy promotes affordable housing by identifying areas proposed for affordable housing development. Of those areas, only one was town-owned, which limited the Town's ability to direct development on all the parcels. Lunenburg Estates, one of the four identified sites, had already received a comprehensive permit for a 64-unit multifamily development from the Town in May 2005, before the Affordable Housing Strategy was adopted; therefore it cannot be considered to have "promoted" that development. Exh. 179, ¶ 32; Exhs. 69, 72. For the 9.9-acre site of the former Tri-Town Drive-In Theater, the Town adopted a Chapter 40R district. The site is located on the edge of Town adjacent to the town landfill, abutting an excavation company. Even though the Board's planner agreed on cross-examination that housing was probably not an ideal choice for the site, Tr. II, 79, it was granted approval as a Chapter 40R district and thus does encourage mixed-income housing production.[20] Both the

20. The Housing Element of the Master Plan identifies as its primary goal providing "appropriate housing for Residents of the Town of Lunenburg." Exh. 54, *Housing Element,* p. 1. The goal of providing housing for town residents, rather than nonresidents, may run afoul of federal, state and

45 ("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, supra,* slip op. at 8-11; G.L. c. 40B, § 20; 760 CMR 56.05(2), (7) and (8)(d). In *Northern Middlesex Housing Associates v. Billerica, supra,* slip op. at 8-12, we noted that "if local boards could promulgate and enforce new regulations after the filing of an application, some towns might be motivated to use this as a means by which to defeat the purpose of the statute, which is to ensure that local rules and regulations are not promulgated in an effort to exclude the construction of low and moderate income housing." For this reason, it makes sense to use the application date to measure implementation.

The Board argues that it would be unfair to require it to have demonstrated implementation when it had little time to follow the Affordable Housing Strategy. That argument must be accorded little weight, in light of the long existence of Chapter 40B, which was enacted some 40 years ago. St. 1969, c. 774. The Town could have chosen to implement affordable housing planning much earlier, and if it had done so, it would have had the time to show actual results from its planning by the time it received Hollis Hills' comprehensive permit application. Rather, the goal of Chapter 40B for the past four decades has been to encourage municipalities to promote and implement affordable housing.

Although the Town approved Lunenburg Estates before the Affordable Housing Strategy was adopted, most of the remaining steps toward implementation demonstrated by the Board occurred after Hollis Hills filed its application. Exh. 179, ¶ 33; Exh. 72. The Tri-Town Chapter 40R District, approved by DHCD in May 2006, was adopted by the Town in January 2007. Exh. 175, ¶ 34; Exhs. 77, 79-83. The Town also approved a 200-unit residential rental development on that site and issued building permits in May 2007 for this project. Exhs. 80-83; Exh. 1; Exh. 179, ¶ 34.[21] Finally, the Town issued a request for proposal for development for affordable housing on the site of the former primary school in August 2008, after the Board denied the Hollis Hills comprehensive permit. Tr. II, 58. Two

21. In November 2007, DHCD reported that the developer of Tri-Town had a significant financing gap. Exh. 83. It is unclear whether that project will go forward, due to a dispute between the developer and the town regarding sewer privilege fees, which the developer says make the project too costly to construct Tr. 1, 54-55.

Master Plan's Housing Element and the Affordable Housing Strategy identify actions the Town should take to increase affordable housing. Finally the fact that DHCD approved the Affordability Housing Strategy supports its credibility as a plan intended to promote affordable housing. We conclude that the Town's planning in its Affordable Housing Strategy and Master Plan promotes affordable housing.

The Sewer Study notes that the phased growth bylaw limits the number of building permits and dwelling units per year with exceptions for, among other uses, affordable housing. Exh. 121, p. 2-19. However, and most importantly, the CWMP focuses on maintaining lot size restrictions in the zoning bylaw to control growth during the three phases of the sewer plan. Exh. 64, p. 3-4. The Sewer Commissioner noted that the CWMP does not "account for spikes in demand generated by developments under Chapter 40B, which are not confined by existing zoning." Exh. 175, ¶ 30. See *Oceanside Village, LLC v. Scituate*, No. 05-03, slip op. at 20 (Mass. Housing Appeals Committee July 17, 2007) citing *Hilltop Preserve LTD Partnership v. Walpole*, *supra,* 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"). The Affordable Housing Strategy states that "[s]ewers are being extended to the residential area in southwest Lunenburg that will enable a variety of housing types." Exh. 69, p. 17. Therefore, while the Affordable Housing Strategy and elements of the Master Plan promote affordable housing, the CWMP has the potential to impede it. On balance, however, we find that the Town's planning promotes affordable housing.

Third, Has the plan been implemented in the area of the site? The critical date for assessing implementation of the Town's master plan is the date of the developer's application to the Board. See, e.g., 760 CMR 56.03(1), 56.03(5). The Affordable Housing Strategy could not have been implemented by that date since it became effective only days before Hollis Hills filed its comprehensive permit application. As of the date that application, the developer could not know what affordable housing implementation would occur subsequently. See, e.g., *Paragon Residential Properties, LLC v. Brookline, supra,* slip op. at

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local fair housing laws, and therefore cannot be considered to promote affordable housing, although many of the recommendations listed in the Housing Element would do so. See, e.g., G.L. c. 40R, § 6.

days before the Committee's hearing on the project, the Town Meeting voted to accept a developer's proposal for elderly housing on the site. Tr. II, 60. Although the Board has, as of the evidentiary hearing on this appeal, approved affordable housing efforts at three of the sites identified in the Affordable Housing Strategy, for these latter two projects, the Town's implementation of affordable housing occurred *after* the filing the developer's application to the Board. With regard to the Town's implementation of affordable housing strategies following Hollis Hills' application, the evidence shows implementation of the plans, although no housing has been constructed in the Town since 2006 that is eligible for inclusion on the SHI. Tr. II, 92; Exh. 69, p. 17.

As to implementation of affordable housing specifically in the area of the site, the Town's record is less favorable. Lunenburg Town Meeting adopted a smart growth overlay district in the area of Whalom Lake at the location of the former Whalom Amusement Park, where the Planning Board approved the 240-unit Emerald Place market-rate development on in June, 2006. Exh. 179, ¶ 28; Exh. 136. However, Emerald Place, in the neighborhood of the Hollis Hills project, does not provide for affordable housing. Tr. II, 52-53. The fourth site identified by the Affordable Housing Strategy, the former Whalom Drive-In Theater site on Electric Avenue, which abuts the Hollis Hills site, has been permitted for another use, as a self-storage facility. While a permissible use, this demonstrates why identifying particular private properties for affordable housing cannot be a sufficient reason to deny housing elsewhere. That approval of a non-residential use for the site leaves the potential for future affordable housing sites more limited. Exhs. 69, pp. 18, 22; 120; Exh. 134, 108-109. Exh. 179, ¶ 32. Therefore, while the Town's affordable housing planning has resulted in implementation, most occurred after the submission of Hollis Hills' application.

Regarding the implementation of sewer planning, the Phase I sewers were completed in June 2006. Exh. 175, ¶ 15. See Exh. 64. As originally proposed, the CWMP did not include a sewer along the length of Electric Avenue. Exh. 175, ¶¶ 15-17. However, the Town decided to extend a sewer line up Electric Avenue when it could economize by combining it with a Massachusetts Highway Department funded Public Works Economic Development Grant reconstruction project on Electric Avenue. In 2002 the CWMP was

amended to add a 5,000-foot spur from Whalom Road up Electric Avenue past West Street. Exh. 175, ¶¶ 15-16; Exh. 64, June 28, 2002 letter. The extension was expected to add commercial and residential properties to the Phase I program. The Electric Avenue sewer extension included the installation of a connection plug directly opposite the developer's Electric Avenue Parcel. Therefore, although Phase I of the sewer plan was implemented, it was not implemented as originally planned, at least in the area of the project site. The Town has been conducting activities to implement portions of the Master Plan, although largely aspects of the plan unrelated to housing, with the exception of the 40R progress discussed above. See Exh. 48, pp. 4-6, 9-14.

On balance, although the Town has implemented its general master planning sufficiently to be credited for those efforts, as noted above, its affordable housing implementation occurred after Hollis Hills' application. However, as will be shown below, even assuming that the Town implementation of its housing planning were sufficient, the proposed project is not inconsistent with the Town planning.

4. Consistency of Hollis Hills' Proposal with Town Planning

The Board has not demonstrated that the proposal is inconsistent with or would undermine the Town's master planning. Unlike *28 Clay Street Middleborough LLC v. Middleborough, supra,* and *Harbor Glen Associates v. Hingham, supra,* the Town has not set aside the area of the site for a particular purpose inconsistent with the project. Indeed, the Master Plan's goal of redeveloping used sites and preserving open space is reinforced with respect to most of the site. With regard to the wetlands on the site, the Conservation Commission has granted an order of conditions governing the installation of the sewer connection from Electric Avenue; thus the wetlands area has been addressed. Exh. 38; Tr. III, 140-142. The project would satisfy the affordable housing goals of providing starter homes. Exh. 69, p. 20. The Board's argument that the project would compete with the Emerald Place project is without merit.

The Board argues that the project is inconsistent with and contravenes the CWMP because is not within the Town's sewer district and would unilaterally expand its geographical boundaries. It argues that the Town's growth management strategy requires

strict enforcement of the controls within the zoning bylaw, and that unfettered expansion of the sewer service area would lead to uncontrolled growth. This argument highlights that the Sewer Plan may act to impede multifamily housing. Moreover, the Sewer Plan has not been set in stone, since the Town has on already modified it to expand sewer access with a spur on Electric Avenue. When the Town decided to expand sewer service on Electric Avenue, it must have contemplated the expansion would increase the number of residences with legal access to sewer, and the Town has allowed market rate homes to connect to the Electric Avenue sewer spur. Tr. II, 47; Exh. 175, ¶ 16; Exh. 64; Exh. 121, p. 2-21, 3-23-25; also see G.L. c. 83, § 3. The Town's installation of the sewer connection directly in front of the Electric Avenue Parcel indicates that sewer service for the lot was anticipated. See, e.g., Exh. 175, ¶ 16; Exh. 64. Indeed, the site of the Whalom Drive-In, identified as an affordable housing site by the Town, obtained its sewer connection from the sewer spur on Electric Avenue. Exh. 120. The Board's concern that the number of units relying on the connection opposite the Electric Avenue Parcel is greater than originally contemplated by the CWMP does not make this project inconsistent with the Town's planning.

The other sewer connection contemplated by Hollis Hills involves a sewer line along Carr Avenue to Whalom Road. The CWMP identified a future sewer expansion along Carr Avenue to the Whalom Road intersection and the Town's sewer line which was installed as part of Phase I. Exh. 64, p. 7-6, Fig. 2; Tr. II, 39-41. Thus, installation of the sewer line by Hollis Hills is consistent with the Town's contemplated future sewer expansion, even though it was not part of an already adopted Phase I. Moreover, the Carr Avenue extension to be constructed by Hollis Hills would connect to a sewer connection already in place on Whalom Road. The Town's Director of Public Works asked Hollis Hills to size and design the sewer line there to allow for abutters on Crest Avenue to hook into the Carr Avenue line Hollis Hills would construct. Exh. 182, ¶ 27.[22]

Finally, the project site abuts the Whalom Drive-In site, one of the sites identified in the Affordable Housing Strategy as appropriate for affordable housing. Hollis Hills' witness

22. As with other Carr Avenue issues of legal access, the determination of the developer's legal right to install a sewer line in Carr Avenue will be addressed by a condition in this decision.

testified that the Town planner had asked whether Hollis Hills would agree to be included in a Chapter 40R overlay district with the that property. Exh. 182, ¶ 6. Thus, the Hollis Hills project, located next to the Town's designated site for multifamily affordable housing, is not precluded by the Town's planning. Indeed, since the neighboring former drive-in site has been approved for another use, constructing affordable housing on the Hollis Hills property would bring affordable housing to this area of the Town, consistent with, and in fulfillment of, that part of the plan.

Therefore, the Hollis Hills project is not inconsistent with the Town's master plan, sewer plan and affordable housing plan. It certainly does not undermine those plans, and does not infringe upon the local concerns expressed by the CWMP, the Master Plan and the Affordable Housing Strategy. Therefore the Town's planning does not constitute a valid local concern that outweighs the need for affordable housing.

B. Infectious Invalidity

The Board's argument regarding "infectious invalidity" arises from transactions involving two adjacent parcels on Electric Avenue: the Electric Avenue Parcel and the abutting lot on 321 Electric Avenue. Until June 29, 2007, Fred Laberge owned 321 Electric Avenue and operated an auto salvage business there in the name of Sky Cycle, Inc. Exhs. 177, ¶ 2; 130. In 1994, Sky Cycle acquired the Electric Avenue Parcel. In 2002, Mr. Laberge applied for and received Development Plan Review approval pursuant to Section 8.4 of the Lunenburg Zoning Bylaw to construct an addition to an existing warehouse on 321 Electric Avenue for Sky Cycle's salvage business. Exh. 177, ¶¶ 4, 5, 8; Exh. 128. The decision directed the applicant to follow the approved site plan with all approved revisions. Exhs. 128, 128A. As a result of this approval, a warehouse was constructed on the lot line of both parcels. Exh. 177, ¶ 9; Exh. 127. The Town building inspector testified that the two parcels were "combined" as a result of the Planning Board approval, and that the current use of the 321 Electric Avenue parcel alone would not conform to the zoning bylaw's requirements for lot area and width, or for 20 feet of side yard between buildings and side lot lines. Exhs. 127, 128; Exh. 177, ¶¶ 6-7.

Sky Cycle, Inc. subsequently sold the Electric Avenue Parcel to the Hollis Hills Realty Trust.[23] Exh. 177, ¶ 10; Exh. 129. The Board argues that the purchase of the Electric Avenue Parcel by Hollis Hills Realty Trust violated the condition of the Development Plan Review, which required the lots to conform to the plans filed with the Planning Board. Exh. 128. The Board argues that under the "merger doctrine" the lots are to be considered joined. It claims that the conveyance separated the lots and left 321 Electric Avenue nonconforming, and that the nonconforming status of 321 Electric Avenue "infects" the Electric Avenue Parcel. To bring this issue as a matter of local concern, the Board argues that the Town has a local concern in the compliance with and enforcement of its local rules and requirements, and that the conveyance of one of the joined lots in violation of the Planning Board decision constitutes "zoning misbehavior." The Board complains that the developer, by purchasing the parcel, has been complicit in the alleged "zoning misbehavior" and cannot be rewarded with a comprehensive permit. The Board relies upon *Alley v. Building Inspector of Danvers,* 354 Mass. 6 (1968); *Asack v. Board of Appeals of Westwood,* 47 Mass. App. Ct. 735, 736 (1999); *Planning Board of Nantucket v. Board of Appeals of Nantucket,* 15 Mass. App. Ct. 733, 737 (1983), *further appellate review denied*, 389 Mass. 1104 (1983); *DiCicco v. Berwick,* 27 Mass App. Ct. 312, 314 (1989); *Wells v. Zoning Board of Appeals of Billerica,* 68 Mass. App. Ct. 726, 735-737 (2007); *Planning Board of Norwell v. Serena,* 27 Mass. App. Ct. 689 (1989) (in examining question of unrelated ownership, court looked beyond names of record owners of adjoining parcels to determine who had "control").

It is not necessary to address all of the title issues and legal disputes regarding the concepts of infectious invalidity and the merger doctrine. The developer urges the Committee to assume, for the purposes of this proceeding, that the Board has proved infectious invalidity. As we have stated previously, adjudication of complex title disputes or similar matters between private parties is best left to the expertise of the courts. *Bay Watch Realty Tr. v. Marion, supra,* slip op. at 5. This is particularly important as the Committee does not have the authority to adjudicate the legal status of the off-site parcel at 321 Electric

23. Hollis Hills is related to Hollis Hills Realty Trust.

Avenue.[24] However, with regard to the status of the project site, the question of whether the violation of a local rule raises a protected local concern that outweighs the need for affordable housing is an appropriate question for consideration by the Committee. Therefore for the purposes of this proceeding, we assume, without deciding, that the Planning Board Development Plan Review was violated.

During the pendency of the Board proceeding, Hollis Hills communicated with the Town building inspector regarding suggested remedies to address the zoning nonconformity concerns, including a conveyance back of a portion of the Electric Avenue Parcel. Tr. IV, 17-28; Exhs. 102, 135. The building inspector notified Hollis Hills that "the proposed changes would correct the zoning and site conditions necessary for compliance." Exh. 103. The local concerns or related requirements arising from any zoning violations or violations of Planning Board requirements in connection with the transfer of the Electric Avenue Parcel are insufficient to outweigh the need for affordable housing. In any event, those concerns are more than satisfied by the developer's actions. Since it is within the power of the Planning Board to modify its previous condition affecting the Electric Avenue parcels, it is within the power of the Board or the Committee to determine that the Development Plan Review does not constrain the development of this project. See *Mahoney v. Board of Appeals of Winchester*, 366 Mass. 288, 232-233 (1974) (power to override local requirements and regulations is "equally applicable to the requirements of the subdivision control law"); also see *Woodridge Realty Tr. v. Ipswich*, No. 00-04, slip op. at 23 (Mass. Housing Appeals Committee June 28, 2001); *Taylor Cove Development, LLC v. Andover,* No. 09-01, slip op. at 4 (Mass. Housing Appeals Committee July 7, 2009 Ruling on Motion for Summary Decision) ("infectious invalidity" is "a concept that has not been defined comprehensively by the courts, but is generally understood as occurring 'when property is divided without regard [to] local zoning requirements,'" quoting from M. Bobrowski, Massachusetts Land Use and Planning Law § 12.07(E) (2d ed. 2002)). Finally, as described in detail in *Taylor Cove*

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24. The non-conforming status of the adjoining parcel, 321 Electric Avenue, was subject to an order to remove the non-conforming building as a result of the conveyance of the Electric Avenue Parcel by Sky Cycle. Exh. 131. That order was upheld by court. It is presently subject to an agreed-to non-enforcement order until the earlier of the conclusion of this proceeding and all appeals therefrom, or December 31, 2011. Exhs. 131, 132, 132A, Tr. IV, 28.

Development, LLC v. Andover, supra, the public policy embodied in Chapter 40B suggests that an affordable housing developer should be permitted to assemble a parcel by requesting a modification of a planning board determination. *Id.* at 6. It should be noted that the action of which the Board complains is not the establishment of an affordable housing site, but the previous conveyance of the Electric Avenue Parcel. The design of the project includes no construction that impedes zoning compliance on the abutting parcel, 321 Electric Avenue.

As a remedial statute, the Comprehensive Permit Law should be construed broadly to realize its purposes. See *Town of Middleborough v. Housing Appeals Committee*, 449 Mass. 514, 530 (2007). All of the legal impediments argued by the Board are local requirements and restrictions that may be waived to facilitate the construction of affordable housing. See *Mahoney, supra*, 366 Mass. 288, 232-233. To the extent that a concern arises about the status of the adjoining lot, the owner of that lot, having the beneficial interest in the parcel sold to Hollis Hills, was well aware of the circumstances and had the means to address the nonconformity, whether by tearing down the offending building, or arranging the purchase of sufficient land from the developer, which had indicated its willingness to do so, to eradicate the nonconformity.[25] Therefore, any local requirements arising from any zoning violations or violations of Planning Board requirements in connection with the transfer of the Electric Avenue Parcel are waived, solely with respect to the project site for the purposes of the proposed development.

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25. The Committee, of course, cannot address the impact of a zoning nonconformity on the status of the adjoining parcel, 321 Electric Avenue. See, e.g., Exhs. 127, 128, 131, 132, 132A. This decision leaves open to the developer to decide whether to convey so much of the Electric Avenue Parcel as would resolve the zoning nonconformities on 321 Electric Avenue. Should such a conveyance result in zoning nonconformities on the Electric Avenue Parcel, they shall be waived.

C. Traffic Safety

In the Pre-Hearing Order, the Board raised the issue of traffic safety at the intersection of Carr Avenue and the other four roadways that meet at Whalom Circle. The Board, however, presented no argument at all on this issue in the "Arguments" portion of its brief. Its only reference to traffic was contained in the "Summary of the Evidence" portion of its brief. Reciting facts in a summary of evidence does not constitute sufficient argument, and an issue not adequately briefed is waived. See *An-Co, Inc. v. Haverhill,* No. 90-11, slip op. at 19 (Mass. Housing Appeals Committee June 28, 1994), citing *Lolos v. Berlin*, 338 Mass. 10, 13-14 (1958). Also see *Board of Appeals of Woburn v. Housing Appeals Committee,* 451 Mass. 581, 595 n.25 (2008); *Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85 (1995) and cases cited. Nevertheless, even considering the Board's factual assertions in its summary, the Board does not prevail on this issue.

The Board argues that the project will not adequately address safety concerns regarding the intersection at the end of Carr Avenue, where it enters a five-way intersection with Pond Street to the northeast, Prospect Street to the east, Lake Front Avenue to the south and Whalom Road to the west. It cites the opinion of its engineering consultant, Mr. Houston, that the intersection is unsafe under current conditions, and that the project should not be constructed unless and until this intersection is improved. Exh. 178, ¶¶ 22-23. Mr. Houston stated that in its current layout, the intersection does not function properly as a roundabout because the center island is not properly located and properly designed splitter islands are not provided, and thus vehicles approaching from Pond Street, Prospect Street and Lakefront Avenue do not deflect properly around the island. He testified that a vehicle conflict point occurs for vehicles approaching from Lakefront Avenue and Prospect Street. Exh. 178, ¶ 22-23. See Exh. 13, p. 11. Although he testified that the project will significantly increase traffic volumes, the developer's evidence to the contrary is more credible. Exh. 178, ¶ 22; Exh. 174, ¶¶ 23-24.

The developer's traffic study reported that this intersection "is designed as a circle or rotary with less than desirable definition and geometry at the current time [and] the physical condition of the existing layout encourages higher than desired through speeds and may also

be confusing to a motorist new to the area," and that there is currently insufficient geometric definition at the intersection of Carr Avenue and Whalom Road. Exh. 11, pp. 6, 7; see Exh. 174, ¶ 13. That study noted that one option to improve the intersection is to convert the existing rotary to a modern roundabout. Exh. 11, p. 4; Exh. 174, ¶ 14. While Hollis Hills' application was pending before the Board, the developer's traffic expert, Mr. Scully, was retained to design such a roundabout in connection with Emerald Place, the proposed market-rate 240-unit townhouse condominium complex on the site of the former Whalom Amusement Park on the opposite side of this intersection. That roundabout was approved by the Lunenburg Planning Board when it approved the Emerald Place project. Exh. 174, ¶¶ 15-16; Exh. 137. Although that roundabout did not show a connection to Carr Avenue, it was designed to allow for such a connection. Exh. 174, ¶ 19.

Mr. Scully testified that the intersection operates adequately in its current condition because of the low traffic volumes passing through the intersection. He noted that the intersection has not had a significant crash history in the recent past, or when Whalom Amusement Park was operating. He stated that the project will cause a relatively small increase in traffic on Carr Avenue, adding less than 1 vehicle per minute during peak morning and evening hours. He testified that the additional traffic from the Hollis Hills project would not adversely affect the levels of service or the safety of the intersection to a material extent. Exh. 174, ¶¶ 23-24.

The proposal for Hollis Hills' project does not include the improvements to the intersection proposed and approved by the Board for the Whalom project. Tr. III, pp. 63-64. However, Mr. Scully proposed modifications to the intersection, regardless of whether the Emerald Place project is built and the roundabout constructed: realigning and improving the terminus of Carr Avenue to better define the turning radius on either side of that roadway; constructing the driveway within the Carr Avenue right of way as shown on the plan he prepared (Exh. 139); installing traffic control signs at or near the end of Carr Avenue directing right turning traffic only; installing a "Keep Right" sign on the existing island; and pavement markings on approaches to the intersection to guide motorists. Exh. 174, ¶ 26-27; Exh. 139.

Mr. Houston testified that the developer's proposed improvements are insufficient to ensure safe vehicular and pedestrian access to and from the project site off Carr Avenue. Exh. 178, ¶ 25. However, he did not explain why Mr. Scully's proposal would be inadequate to address the function of vehicles passing through the intersection, given the limited amount of traffic Hollis Hills would contribute to the intersection.

Based on the evidence, the testimony of the Mr. Scully regarding the current and expected function of the intersection following implementation of his recommended improvements is more credible on this issue than that of the Board's witness. Exh. 178, ¶ 22, Exh. 174, ¶¶ 22-33; Exh. 139; see Exhs. 11, 13, 14.[26] Therefore, the Board has not demonstrated a local concern with regard to traffic that outweighs the need for affordable housing.

D. Drainage and Flooding on Intervener's Property

The Intervener argues that the proposed reconstruction of Carr Avenue will significantly increase storm water runoff, causing flooding on the side of the road onto his property, where his golf driving range and mini golf business are located.[27] Hollis Hills

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26. The concern raised by the Board about the developer's legal right to improve Carr Avenue is an issue left for the courts. See the discussion above at Section III.B. The resolution of this issue will be addressed by a condition in this decision. See Section VIII.2(c) below.

27. In his post-hearing brief, Mr. Testa only addressed the drainage and flooding issue. The potential local concerns regarding the tree buffer and the Carr Avenue pedestrian and equipment safety issues, identified in the Pre-Hearing Order, were not briefed by him and are therefore waived. Pre-Hearing Order, § IV.E. See *An-Co, Inc. v. Haverhill, supra,* slip op. at 19; *Woburn, supra,* 451 Mass. 581, 595 n.25; *Cameron v. Carelli, supra,* 39 Mass. App. Ct. 81, 85. In any event, the developer's witnesses provided ample credible evidence that no large trees would be removed from along Carr Avenue, and therefore the buffer would not be significantly disturbed; and that the design improvements to Carr Avenue would address the concerns for pedestrian and vehicle safety. Exhs. 140; 173, ¶¶ 43-49. In his closing argument, counsel for Mr. Testa noted that many, but not all, of Mr. Testa's concerns had been addressed. Tr. IV, 127. He stated that Carr Avenue improvements identified in Exhibit 140 and Mr. McCarty's testimony should be incorporated into the decision and made enforceable by Mr. Testa if the permit were granted. Tr. IV, 128-130. He did raise as specific concerns the testimony of Mr. Houston that required improvements would encroach beyond Carr Avenue onto his property, noting that the resolution of that issue was a separate "property" issue. Tr. IV, 128. He specifically requested that the condominium association have liability insurance coverage that extends to Carr Avenue and that easement rights be identified as common areas vis a vis the master deed and condominium documents. Tr. IV, 130-131. Although the failure to include these points in his brief constitutes a waiver of those arguments, the improvements identified in

argues that its construction of the project site will improve the drainage on Mr. Testa's property.

Carr Avenue is currently a partially improved, largely gravel roadway. It is a pervious surface, and is presently passable from the intersection with Whalom Road to the Ruiz house. Mr. Testa's family has been maintaining Carr Avenue for a number of years, up to the Ruiz house. The upper portion beyond the Ruiz house leading toward the Lodge on the project site is covered with overgrown brush and trees. It was open about 20 years ago as a shortcut to the Lodge. According to Mr. Testa, Carr Avenue has never been paved, but he has used regrind on the lower portions near the parking areas. Exh. 181, ¶¶ 18-20; Exh. 173, ¶ 31; Exhs. 108, 109.

Both parties agree that two cross-culverts under Carr Avenue transport water from one side of Mr. Testa's property to the other. In addition Mr. Testa and his father had installed drainage trenches, which currently exist in the driving range and along Carr Avenue. Exh. 181, ¶ 24-26; Exh. 173, ¶ 32. In his written testimony, Mr. Testa stated that "[a] paved road, with crown and camber, along the entire length of Carr Avenue, will flood my mini golf course and affect my existing drainage systems." Exh. 181, ¶ 25. He also stated that "[r]unoff from the field on the northeast side onto Carr Avenue is collected in a trench running along Carr Avenue, under Carr Avenue, and onto my property on the left side of Carr Avenue. That trench, according to the Hollis Hills plan, is within Carr Avenue." Exh. 181, ¶ 26. He stated that currently surface water runoff from the driving range and from Carr Avenue is well controlled and the hydrologics of the site are balanced. He stated that the material on the road, a pervious surface, currently absorbs the water that runs down Carr Avenue, but that when a rainstorm of 1 inch an hour occurs, sheet runoff from Carr Avenue puddles on the lower half of his property in the parking area behind the bar. When Carr Avenue "rivers," it forms gullies making it necessary to regrade the surface. Exh. 181, ¶¶ 26-29.

Exhibit 140 are included as conditions in this decision. Moreover, the condition requiring the condominium documents to address responsibility for maintenance of Carr Avenue, agreed to by the developer, is included as well.

Mr. Patrick McCarty, the project site engineer, testified that the current culverts are undersized, and that when Hollis Hills paves Carr Avenue, it will construct drainage improvements on its site and within the Carr Avenue right of way that will reduce the flooding on Mr. Testa's property. Exh. 173, ¶¶ 32-40; Exh. 183, ¶¶ 5-8. Hollis Hills' witness testified that these improvements will comply with the Massachusetts Department of Environmental Protection (DEP) stormwater guidelines, and will reduce both peak and total volumes of stormwater runoff coming onto Carr Avenue and onto Mr. Testa's property.

Mr. McCarty stated that the stormwater improvements will intercept a large amount of runoff from upper Carr Avenue and Crest Avenue and divert it to new catch basins and a new detention basin; the remainder of Carr Avenue's runoff will be collected at the gutter line and diverted to improved Town-owned catch basins at the intersection of Carr Avenue and Whalom Road. Hollis Hills will replace the existing undersized culverts with new larger culverts that allow for a larger increase of water underneath Carr Avenue. Exh. 183, ¶ 8.

The detailed testimony of Mr. McCarty, an experienced engineer, is more credible than that of Mr. Testa. Mr. Houston's testimony that proposed improvements to Carr Avenue are too limited, and do not include sidewalks or curbing and a storm drain system to address stormwater runoff was contradicted by Mr. McCarty's testimony and is not credible. Exh. 178, ¶ 26; Exh. 183, ¶¶ 2-4. The proposed improvements to the stormwater management system are likely to improve the drainage onto Mr. Testa's property. Therefore, the Board and Intervener have not demonstrated a local concern that outweighs the need for affordable housing with regard to these issues. Installation of the developer's proposed improvements is a condition of this decision. In addition, Hollis Hills represented that it would accept a condition that the project's condominium association would take responsibility for maintenance of Carr Avenue on an ongoing basis. Tr. IV, 8. That condition shall also apply to the owner of the project site from the time that work on Carr Avenue commences, including the obligation to obtain liability insurance and the responsibility for maintenance and repair, and it will be incorporated into this decision.

VII. OTHER ISSUES

A. Sewer Privilege and Betterment Fees

Hollis Hills requests that a condition be included in the decision prohibiting the Town from assessing a sewer privilege or betterment fee for access to the Lunenburg sewer system by the development. When Lunenburg assessed sewer betterment fees for Electric Avenue lots obtaining connections, it did not include the Electric Avenue Parcel. Exh. 175, ¶ 23; Tr. I, 49-53.

Hollis Hills argues that the Town cannot now assess a fee upon it because the Board has not shown any local rule in effect at the time of its comprehensive permit application that would authorize the Town to impose a sewer privilege fee on the developer. The version of the sewer assessment bylaw included in the record indicates several modification dates occurring after February 13, 2006, the date of Hollis Hills' comprehensive permit application to the Board, leaving the record unclear regarding whether that version of the bylaw was in effect at the critical time. See Exh. 51; Tr. I, 43-44. Two days before the Committee's hearing in this matter, the Lunenburg Town Meeting adopted a provision authorizing the selectmen to petition the Legislature to authorize Lunenburg to charge sewer assessments to landowners who had not been charged a betterment fee. Exh. 170; Tr. I, 46-49. The Board did not respond to this issue in its brief.

The Town may only impose upon the Appellant non-waived local requirements and regulations that were in effect at the time of its application to the Board. See, e.g., G.L. c. 40B, § 20; 760 CMR 56.05(2), (7) and (8)(d); *Paragon Residential Properties, LLC v. Brookline, supra,* slip op. at 45 ("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"), quoting from *Weston Development Group v. Hopkinton, supra,* slip op. at 8-11. Also see *Northern Middlesex Housing Associates v. Billerica, supra*, slip op. at 8-12. The developer's construction consultant, Mr. Daniel McCarty, testified that Hollis Hills was willing to pay "the sewer connection fee, if any, that is required pursuant to a duly adopted by-law and has been lawfully imposed on developers of market-rate housing." Exh. 172, ¶ 62. Therefore,

barring any change in state law requirements, no sewer privilege fee or sewer betterment fee may be applied to Hollis Hills if it is based on a local rule adopted subsequent to February 13, 2006, the date Hollis Hills' comprehensive permit application was submitted to the Board. 760 CMR 56.02.

B. Payment of Fees to Attorneys Edith Netter and Daniel Hill

Hollis Hills seeks the refund of $25,470 paid to the Town during the local Board hearing and used for payment for services to the Board by attorneys Edith Netter and Daniel Hill. Hollis Hills alleges that the fees represent payment for legal advice, rather than peer review, and thus were not appropriately chargeable to it during the Board review process. See 760 CMR 56.05(5)(a); Pre-Hearing Order § 5, ¶ 14; Exhs. 97, 97A, 98; Exh. 172, ¶ 39. The Appellant cites *Pyburn Realty Trust v. Lynnfield,* No. 02-23, slip op. at 22 n.15 (Mass. Housing Appeals Committee Mar 22, 2004) as precedent supporting a determination that Ms. Netter's services were legal, and not simply as "a Chapter 40B expert." Although the developer notes the Committee has stated that Chapter 40B does not prohibit a developer from voluntarily agreeing to pay legal fees, it argues that to the extent Hollis Hills agreed to pay legal fees, its agreement was coerced and should not be enforced. Exh. 172, ¶¶ 31, 50; Tr. III, 97-99; Exh. 149, p. 2; Tr. I, 84-85. Finally the developer argues that the services provided by Ms. Netter duplicated those of another attorney, and it had stated it would not pay for redundant or unnecessary peer review services. Exh. 90; Exh. 172, ¶ 46.

The Board does not dispute that the Committee has ruled that developers may not be required to pay for boards' legal fees. Rather it argues, first, that the fees were legitimate peer review fees, and second, that even if they were legal fees, the developer agreed to pay them. The Board received a grant for $5,000 from the Massachusetts Housing Partnership (MHP) under its 40B Technical Assistance Program to fund the services of a Chapter 40B consultant to assist it in processing Hollis Hills' comprehensive permit application. Edith Netter was assigned to be the consultant to the Town. Exh. 89; Exh. 172, ¶¶ 28-29; Exh. 176, ¶ 6. When the MHP grant funds were exhausted, the Board notified Hollis Hills that it intended to use peer review funds to pay Ms. Netter. By letter of counsel dated December 18, 2006, Hollis Hills agreed to pay the cost of Ms. Netter's continuing consultant

services, including time spent advising the Board on Chapter 40B issues and attending the public hearings. The letter stated however, that the developer would not pay for "redundant or unnecessary peer review; or for the fees of town counsel, since legal advice is not peer review." Counsel for Hollis Hills also stated "[g]oing forward the Applicant will pay peer review costs only if it has received and approved a scope of work and budget for the work." Exh. 90. See Exh. 172, ¶¶ 30-32; Exh. 176, ¶¶ 12-13. According to the Board's chairman, the developer's representative approved most of the subsequent invoices for services by Ms. Netter. Exh. 176, ¶¶ 13-26.

Although both Hollis Hills and the Board acknowledge that the developer agreed to further payments to Ms. Netter, they disagree regarding the scope of the permission granted, the nature of Ms. Netter's services and whether Hollis Hills' permission was coerced. Exh. 172, ¶¶ 30-47; Exh. 176, ¶¶ 7-8, 11-27. With regard to payment of Ms. Netter's fees for working on legal issues surrounding Carr Avenue, the letter from counsel constitutes agreement for those services. Exh. 90. The testimony of developer's witnesses that the agreement was coerced is not credible under the circumstances. Hollis Hills had counsel to provide advice concerning the legal rights and obligations of the parties with regard to the Board hearing. According, Hollis Hills' request for the return of monies paid for Ms. Netter's services is denied.

Mr. McCarty also agreed to the payment of $900 for legal services performed by attorney Daniel Hill to prepare the Sewer Commission's response to the Board's letter request to the Commission. He testified that his approval for this payment was coerced. Exh. 91; Exh. 172, ¶¶ 48-50. Under the circumstances, his testimony regarding coercion in this instance is not credible. Therefore, the Appellant's request for the return of the monies paid for these services is denied as well.

VIII. CONCLUSION AND ORDER

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 Lunenburg Board of Appeals is not consistent with local needs. The decision of the Board is vacated and the

Board is directed to issue a comprehensive permit as provided in the text of this decision and the conditions below:

1. The comprehensive permit shall conform to the application Hollis Hills submitted to the Board, except as provided in this decision, including those conditions required to be added.

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

(a) The development shall be constructed as shown on drawings by McCarty Engineering, Inc., dated October 11, 2006. Exhs. 5-6. Improvements to Carr Avenue shall be implemented as shown on the "Hollis Hills, LLC, Hollis Road, Lunenburg, MA, Carr Avenue Improvements Plan (Sheet NO. 18)," prepared by McCarty Engineering, Inc., dated January 20, 2006, as most recently revised on January 14, 2009 (Exh. 140). Prior to opening Carr Avenue to vehicular traffic, Hollis Hills shall have constructed the interim traffic improvements shown on the plan entitled "Lunenburg, Massachusetts Carr Avenue Improvement Plan" prepared by MS Transportation Systems, Inc, dated January 9, 2009 (Exh. 139). The Board shall take whatever steps are necessary to provide Hollis Hills with access to the public layout as necessary to undertake and complete such improvements.

(b) Design and construction shall be in compliance with the Massachusetts Department of Environmental Protection stormwater management requirements.

(c) No construction on the site shall commence until the developer has completed the construction of the improvements to Carr Avenue, and has installed the stormwater controls and the sewer extension described in the above drawings.

(d) Upon the commencement of improvements to Carr Avenue in connection with this project, the owner of the project site shall be responsible for the maintenance and repair of Carr Avenue and shall obtain liability insurance with respect to its obligations to Carr Avenue until such time as a the project site is converted to the condominium form of ownership. If and when the project site is converted to the condominium form of ownership, the condominium documents shall provide that regular maintenance of, and liability insurance coverage for, Carr Avenue shall be by and at the expense of the condominium association.

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

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

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

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

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

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

(e) This Comprehensive Permit is subject to 760 CMR 56.00 and DHCD Guidelines issued pursuant thereto with respect to cost certification.

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

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

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

Housing Appeals Committee

Issued: December 4, 2009

Werner Lohe

Joseph P. Henefield

Marion V. McEttrick

James G. Stockard, Jr.

Shelagh A. Ellman-Pearl, Presiding Officer