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October 10, 2023

Town of Walpole
Zoning Board of Appeals ("ZBA")
135 School Street #110
Walpole, MA 02081

RE: 55 SS LLC – Fairfield Summer Street LLC
Summer Street
Change from Ownership to Rental

Dear Members of the Board:

The following is respectfully submitted as to whether the change in the 56 units of ownership to rental is a relevant or proper consideration for the ZBA in connection with the requested modifications of the Comprehensive Permit.

Where statutory minima have not been met, to support denial, the ZBA bears "the burden of proving, first, that there is a valid health, safety, environmental, design, open space, or other Local Concern which supports such denial, and then, that such Local Concern outweighs the Housing Need." 760 Code Mass. Regs. § 56.07(2)(b)(2) (2008). *Zoning Bd. v. Housing Appeals Comm.*, 464 Mass. 38, 42 (2013).

Where municipality has not met the goal of ten percent affordable housing stock, municipality cannot distinguish between ownership and rental housing in determining "housing need." *Zoning Bd. of Appeals v. Housing Appeals Comm.*, 80 Mass. App. Ct. 406, 422 (2011) [dismissing argument that ownership project did not provide the most needed type of affordable housing, i.e. rentals.]:

> "Housing need. Although the board concedes that the town has not achieved the goal of ten percent affordable housing stock, it argues that in balancing its local concerns as to site contamination, wetlands alteration, and stormwater management with the regional need for housing, its failure to reach the ten percent goal should be given little weight because the need for the type of housing that the project will provide is low. We disagree. The Act broadly defines "low or moderate income housing" as "any housing subsidized by the federal or state government." G. L. c. 40B, § 20, added by St. 1969, c. 403, § 5. The Act and associated regulations encourage the development of a mix of types of housing, including "rental [and] homeownership . . . for families, individuals, persons with special needs, and the elderly." 760 Code Mass. Regs. § 56.03(4) (2008). Although only fifty of the 200 proposed units here will qualify as affordable housing units, "[a]ll affordable

housing projects are treated in the same manner regardless whether they include units to be made available at fair market value." *Board of Appeals of Wellesley v. Ardemore Apartments Ltd. Partnership*, 436 Mass. at 824-825 n.25."

HAC regulations do not discriminate between ownership and rental projects. The only distinction under 40B arguably favors rentals by making all units, not just restricted units, eligible for SHI.

A waiver from the provisions of the Walpole Zoning Bylaw is not required as restrictions are not contained in the Walpole Zoning Bylaw distinguishing between owners and renters. Section 14(2) defines "family" as a single housekeeping unit related by blood, marriage or adoption or, if unrelated, up to four persons living as a single housekeeping unit. Table 5.B.1.3 then permits one, two, three and four plus family dwellings without regard to ownership or form of tenure.

In summary, it is respectfully submitted the conversion from ownership to rental is not a relevant or proper consideration for the ZBA.

Copies of the above cases are attached.

Very truly yours,

D'AGOSTINE, LEVINE, PARRA & NETBURN, P.C.

By: *Louis N. Levine*
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LNL/amc
Enclosures

Zoning Bd. v. Hous. Appeals Comm.

Supreme Judicial Court of Massachusetts

September 5, 2012, Argued; January 8, 2013, Decided

SJC-11102

Reporter
464 Mass. 38 *; 981 N.E.2d 157 **; 2013 Mass. LEXIS 2 ***

ZONING BOARD OF APPEALS OF LUNENBURG vs. HOUSING APPEALS COMMITTEE & another.[1]

Subsequent History: Related proceeding at Zoning Bd. of Appeals of Lunenburg v. Hollis Hills, LLC, 2016 Mass. App. Unpub. LEXIS 227 (Mass. App. Ct., Mar. 3, 2016)

Prior History: [***1] Worcester. Civil action commenced in the Superior Court Department on January 4, 2010. The case was heard by John S. McCann, J., on a motion for judgment on the pleadings. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Core Terms

housing, parcel, affordable housing, zoning, site, regional, sewer, master plan, moderate income housing, local concern, percent, subsidized, planning, regulations, market-rate, appeals, outweigh, substantial evidence, proposed project, local needs, infectious, invalidity, nonconforming, households, housing needs, housing unit, sewer line, weighing, grounds, prices

Case Summary

Procedural Posture
An applicant sought a permit under the Massachusetts Comprehensive Permit Act, Mass. Gen. Laws ch. 40B, §§ 20-23. The zoning board of appeals denied the application, and the housing appeals committee (HAC) directed the board to issue a permit. The Worcester Superior Court (Massachusetts) affirmed the HAC's decision. The board appealed.

Overview
The court first held that the HAC did not err in excluding housing that was not "subsidized by the federal or state government" in weighing the regional need for affordable housing. The plain text of § 20 and 760 Mass. Code Regs. § 56.02 (2008) required the HAC to exclude from consideration any affordable housing that was not subsidized under a qualifying government-sponsored program. There was substantial evidence to support the HAC's finding that the existing subsidized housing in the region did not adequately address the regional need for housing. Next, the findings adequately supported the HAC's conclusion that the proposed project was not inconsistent with the town's master planning and would not undermine those plans. In deciding the weight to be given to a deviation from a town's master plans, the HAC was entitled to look beyond the letter of the plan and consider its spirit and underlying purpose, recognizing that long-term plans often needed to be adapted to changes in circumstances. Finally, the HAC did not err in concluding that the balance of interests favored the regional need for affordable housing rather than the local concern of a zoning nonconformity.

Outcome
The court affirmed the judgment which upheld the order of the HAC.

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Public Health & Welfare Law > Housing & Public Buildings > Accessibility, Construction & Design

Real Property Law > Zoning > General Overview

HN1[] **Housing & Public Buildings, Accessibility,**

[1] Hollis Hills, LLC (Hollis Hills).

Construction & Design

The legislature's intent in enacting the Massachusetts Comprehensive Permit Act, Mass. Gen. Laws ch. 40B, §§ 20-23, is to provide relief from exclusionary zoning practices which prevented the construction of badly needed low and moderate income housing in the Commonwealth. The structure of the act itself reflects a careful balance between leaving to local authorities their well-recognized autonomy generally to establish local zoning requirements while foreclosing municipalities from obstructing the building of a minimum level of housing affordable to persons of low income.

Business & Corporate Compliance > ... > Public Health & Welfare Law > Housing & Public Buildings > Accessibility, Construction & Design

Business & Corporate Compliance > ... > Real Property Law > Zoning > Administrative Procedure

HN2 **Housing & Public Buildings, Accessibility, Construction & Design**

The Massachusetts Comprehensive Permit Act, Mass. Gen. Laws ch. 40B, §§ 20-23, allows a public agency, or a limited dividend or nonprofit organization, that wishes to construct low or moderate income housing to circumvent the often arduous process of applying to multiple local boards for individual permits and, instead, to apply to the local board of appeals for issuance of a single comprehensive permit. Under *Mass. Gen. Laws ch. 40B, § 21*, an organization may submit to the board of appeals a single application to build such housing in lieu of separate applications to the applicable local boards. The zoning board has the same power to issue permits or approvals as any local board or official who would otherwise act with respect to such application. *§ 21*. If the board denies an application for a comprehensive permit, the developer may appeal to the housing appeals committee (HAC). *Mass. Gen. Laws ch. 40B, § 22*. When the HAC reviews the decision of a local zoning board of appeals to deny a comprehensive permit, the hearing shall be limited to the issue of whether the decision of the board of appeals was reasonable and consistent with local needs. *Mass. Gen. Laws ch. 40B, § 23*.

Business & Corporate Compliance > ... > Public Health & Welfare Law > Housing & Public Buildings > Accessibility, Construction & Design

Business & Corporate Compliance > ... > Real Property Law > Zoning > Administrative Procedure

HN3 **Housing & Public Buildings, Accessibility, Construction & Design**

See *760 Mass. Code Regs. 56.07(1)(b)* (2008).

Business & Corporate Compliance > ... > Public Health & Welfare Law > Housing & Public Buildings > Accessibility, Construction & Design

Real Property Law > Zoning > General Overview

HN4 **Housing & Public Buildings, Accessibility, Construction & Design**

"Consistent with local needs" is a term of art under *Mass. Gen. Laws ch. 40B, § 20*, defined as follows: Requirements and regulations shall be considered consistent with local needs if they are reasonable in view of the regional need for low and moderate income housing considered with the number of low income persons in the city or town affected and the need to protect the health or safety of the occupants of the proposed housing or of the residents of the city or town, to promote better site and building design in relation to the surroundings, or to preserve open spaces, and if such requirements and regulations are applied as equally as possible to both subsidized and unsubsidized housing. The statute further provides that such requirements and regulations shall be consistent with local needs where low or moderate income housing exists which is in excess of ten per cent of the housing units reported in the latest federal decennial census of the city or town or on sites comprising one and one half per cent or more of the total land area zoned for residential, commercial or industrial use.

Business & Corporate Compliance > ... > Public Health & Welfare Law > Housing & Public Buildings > Accessibility, Construction & Design

Evidence > Inferences & Presumptions > Presumptions > Rebuttal of Presumptions

Real Property Law > Zoning > General Overview

Business & Corporate Compliance > ... > Real Property Law > Zoning > Administrative Procedure

HN5[] Housing & Public Buildings, Accessibility, Construction & Design

Under the regulations issued by the Department of Housing and Community Development to administer the Massachusetts Comprehensive Permit Act, Mass. Gen. Laws ch. 40B, §§ 20-23, there is an irrebuttable presumption that a board's decision to deny an application for a comprehensive permit is consistent with local needs where the board determines that one or more of the grounds set forth in 760 Mass. Code Regs. § 56.03(1) (2008) has been satisfied. 760 Mass. Code Regs. § 56.07(3)(a) (2008). 760 Mass. Code Regs. § 56.07(2)(b)(1) (2008). One of these grounds is that the town's subsidized housing inventory exceeds ten per cent of the town's total housing units. 760 Mass. Code Regs. § 56.03(3)(a) (2008). Where this or any of the other grounds in 760 Mass. Code Regs. § 56.03(1) is established, the housing appeals committee is without authority to order that board to grant a comprehensive permit or to modify or remove conditions, and the board's denial of an application must be affirmed. If a municipality has reached the ten per cent threshold, and its zoning board of appeals denies a developer's application, then the application process is effectively terminated. 760 Mass. Code Regs. § 56.07(3)(a).

Business & Corporate Compliance > ... > Public Health & Welfare Law > Housing & Public Buildings > Accessibility, Construction & Design

Evidence > Inferences & Presumptions > Presumptions > Rebuttal of Presumptions

Business & Corporate Compliance > ... > Real Property Law > Zoning > Administrative Procedure

HN6[] Housing & Public Buildings, Accessibility, Construction & Design

Where none of the grounds that would trigger a conclusive presumption is present, the regulations and the cases under the Massachusetts Comprehensive Permit Act, Mass. Gen. Laws ch. 40B, §§ 20-23, provide that there is a rebuttable presumption that there is a substantial Housing Need which outweighs Local Concerns. Where a town attempts to rebut this presumption, the board bears the burden of proving, first, that there is a valid health, safety, environmental, design, open space, or other Local Concern which supports such denial, and then, that such Local Concern outweighs the Housing Need. 760 Mass. Code Regs. § 56.07(2)(b)(2) (2008).

Business & Corporate Compliance > ... > Public Health & Welfare Law > Housing & Public Buildings > Accessibility, Construction & Design

HN7[] Housing & Public Buildings, Accessibility, Construction & Design

760 Mass. Code Regs. § 56.07(3)(b) (2008).

Business & Corporate Compliance > ... > Public Health & Welfare Law > Housing & Public Buildings > Accessibility, Construction & Design

Real Property Law > Zoning > Judicial Review

HN8[] Housing & Public Buildings, Accessibility, Construction & Design

Under the Massachusetts Comprehensive Permit Act, Mass. Gen. Laws ch. 40B, §§ 20-23, the decision of the housing appeals committee (HAC) may be reviewed in the Superior Court under Mass. Gen. Laws ch. 30A, which in turn provides that the court may set aside the decision of the agency if it determines that the substantial rights of any party may have been prejudiced because the agency decision is unsupported by substantial evidence; or otherwise not in accordance with law. Mass. Gen. Laws ch. 30A, § 14(7). Substantial evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion. In this analysis, the court gives due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it, § 14(7), and it applies all rational presumptions in favor of the validity of the administrative action.

Administrative Law > Judicial Review > Standards of Review > De Novo Standard of Review

HN9[] Standards of Review, De Novo Standard of Review

A court may not displace an administrative board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.

Public Health & Welfare Law > Housing & Public Buildings > Low Income Housing

HN10 **Housing & Public Buildings, Low Income Housing**

Under Mass. Gen. Laws. ch. 40B, § 20, "housing need" is effectively defined as the regional need for low and moderate income housing considered with the number of low income persons in the city or town affected because that is the factor that is to be considered in determining whether local requirements or regulations are consistent with local needs. This definition is made explicit in the Department of Housing and Community Development's regulations, where "housing need" is defined using almost the exact same language. 760 Mass. Code Regs. § 56.02 (2008). The Massachusetts Comprehensive Permit Act, Mass. Gen. Laws ch. 40B, §§ 20-23, defines "low or moderate income housing" to mean "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." Mass. Gen. Laws ch. 40B, § 20. Therefore, the plain text of the act and the governing regulations requires the housing appeals committee, in weighing the housing need, to exclude from consideration any affordable housing that is not subsidized under a qualifying government-sponsored program.

Public Health & Welfare Law > Housing & Public Buildings > Low Income Housing

HN11 **Housing & Public Buildings, Low Income Housing**

The only difference between the statutory and regulatory definitions is that Mass. Gen. Laws ch. 40B, § 20, refers to the "number of low income persons in the city or town affected," and the regulation refers to the "number of Low Income Persons in a municipality affected." 760 Mass. Code Regs. § 56.02 (2008).

Public Health & Welfare Law > Housing & Public Buildings > Low Income Housing

HN12 **Housing & Public Buildings, Low Income Housing**

Housing developed under a state or federal subsidy program only addresses the relevant housing need if the program assists the construction of low or moderate income housing as defined in the applicable federal or state statute. Mass. Gen. Laws ch. 40B, § 20. If the applicable statute or regulation of the subsidizing agency does not define low or moderate income housing, the regulations of the Department of Housing and Community Development provide that it shall be defined as units of housing whose occupancy is restricted to a household of one or more persons whose maximum income does not exceed 80 percent of the area median income, adjusted for household size, or as otherwise established by the Department in the guidelines. 760 Mass. Code Regs. 56.02.

Public Health & Welfare Law > Housing & Public Buildings > Low Income Housing

HN13 **Housing & Public Buildings, Low Income Housing**

The Massachusetts Comprehensive Permit Act, Mass. Gen. Laws ch. 40B, §§ 20-23, was originally drafted to address an acute shortage of decent, safe, low and moderate cost housing throughout the commonwealth. Some market rate housing may be affordable because the units are neither decent nor safe. Other affordable market rate housing units may be both decent and safe, but may be affordable only temporarily because of a weak housing market. Even where inexpensive market rate housing is decent and safe, and not being renovated or demolished, there is no way to ensure as the housing market strengthens that sale prices will not rise to levels that would be unaffordable to low or moderate income households. Nor is there any way to ensure that affordable market rate homes will be limited in availability to low or moderate income households.

Business & Corporate Compliance > ... > Public Health & Welfare Law > Housing & Public Buildings > Accessibility, Construction & Design

HN14[] **Housing & Public Buildings, Accessibility, Construction & Design**

Precisely because such housing is subsidized by a federal or state government or agency under a program to assist the construction of affordable housing, housing that would address the regional need for low and moderate income housing under *Mass. Gen. Laws ch. 40B, § 20* typically must satisfy minimum requirements designed to ensure the quality of the housing and the reasonableness of the sale and resale price. Furthermore, unless the statute or regulation applying to the subsidizing agency in question provides otherwise, occupancy of subsidized affordable low or moderate income housing units under the department's comprehensive permit regulations is restricted to "income eligible households," defined as households whose maximum income does not exceed 80 percent of the area median income, adjusted for household size. *760 Mass. Code Regs. § 56.02*.

Business & Corporate Compliance > ... > Public Health & Welfare Law > Housing & Public Buildings > Accessibility, Construction & Design

Public Health & Welfare Law > Housing & Public Buildings > Low Income Housing

HN15[] **Housing & Public Buildings, Accessibility, Construction & Design**

Use restrictions are accomplished through deed restrictions or other legally binding instruments that run with the land. They are recorded at the registry of deeds, and they limit occupancy during the term of affordability established in a construction subsidy agreement. *760 Mass. Code Regs. § 56.05(13)* (2008). Also, in order to be included on the subsidized housing inventory, subsidized affordable housing units must be sold under an "affirmative fair marketing plan" that provides for a lottery or other resident selection process and effective outreach to protected groups underrepresented in the municipality. *760 Mass. Code Regs. § 56.02* (defining "Affirmative Fair Marketing Plan" and providing that it shall be the responsibility of the Subsidizing Agency to enforce compliance with provisions of *760 Mass. Code Regs. § 56.00* and applicable Department of Housing and Community Development guidelines relating to matters including Affirmative Fair Marketing Plans and Use Restrictions"); Department of Housing and Community Development Comprehensive Permit Guidelines § II.A.1 (2012) (comprehensive permit guidelines) ("affordable housing units shall be subject to an Affirmative Fair Marketing and Resident Selection Plan that, at a minimum, meets the requirements set out in the following Section III, Affirmative Fair Housing Marketing Plan").

Business & Corporate Compliance > ... > Public Health & Welfare Law > Housing & Public Buildings > Accessibility, Construction & Design

Public Health & Welfare Law > Housing & Public Buildings > Low Income Housing

Real Property Law > Zoning > General Overview

HN16[] **Housing & Public Buildings, Accessibility, Construction & Design**

Where low or moderate income housing is built under a comprehensive permit obtained in accordance with Mass. Gen. Laws ch. 40B, §§ 20-23, and where a comprehensive permit itself does not specify for how long housing units must remain below market, the Massachusetts Comprehensive Permit Act, Mass. Gen. Laws ch. 40B, §§ 20-23, requires an owner to maintain the units as affordable for as long as the housing is not in compliance with local zoning requirements, regardless of the terms of any attendant construction subsidy agreements. Under *760 Mass. Code Regs. § 56.04(7)* (2008), following the issuance of a comprehensive permit, the subsidizing agency shall issue its final written approval of the project to the applicant, and such approval shall, at a minimum confirm that the proposed use restriction is in a form consistent with department guidelines").

Public Health & Welfare Law > Housing & Public Buildings > Low Income Housing

HN17[] **Housing & Public Buildings, Low Income Housing**

Under the Department of Housing and Community Development Comprehensive Permit Guidelines § II.A.1 (2012) (comprehensive permit guidelines), for housing to be included in the subsidized housing inventory (SHI): All use restrictions must meet the following minimum standards: applies for a term that shall be not less than 15 years for rehabilitated units and not less than 30

years for newly created units; effectively restricts occupancy of low and moderate income housing to income eligible households; contains terms and conditions for the resale of a homeownership unit, including definition of the maximum permissible resale price, and for the subsequent rental of a rental unit, including definition of the maximum permissible rent.

Public Health & Welfare Law > Housing & Public Buildings > Low Income Housing

HN18 **Housing & Public Buildings, Low Income Housing**

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. 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. In light of these differences between subsidized affordable housing units and unsubsidized market-rate units, evidence of low cost market-rate housing cannot be factored into the consideration of the regional need for affordable housing under the Massachusetts Comprehensive Permit Act, Mass. Gen. Laws ch. 40B, §§ 20-23.

Business & Corporate Compliance > ... > Public Health & Welfare Law > Housing & Public Buildings > Accessibility, Construction & Design

Public Health & Welfare Law > Housing & Public Buildings > Low Income Housing

HN19 **Housing & Public Buildings, Accessibility, Construction & Design**

See *760 Mass. Code Regs. § 56.02*.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Administrative Procedure

Public Health & Welfare Law > Housing & Public Buildings > Low Income Housing

HN20 **Zoning, Administrative Procedure**

In a case under the Massachusetts Comprehensive Permit Act, Mass. Gen. Laws ch. 40B, §§ 20-23, in deciding the weight to be given to a deviation from a town's master plans, the housing appeals committee is entitled to look beyond the letter of the plan and consider its spirit and underlying purpose, recognizing that long-term plans often need to be adapted to changes in circumstances.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Nonconforming Uses

HN21 **Zoning, Nonconforming Uses**

The common-law principle of infectious invalidity provides that a property owner may not create a valid building lot by dividing it from another parcel rendered nonconforming by such division.

Real Property Law > Zoning > General Overview

HN22 **Real Property Law, Zoning**

Under *760 Mass. Code Regs. § 56.08(3)(c)* (2008), either a preliminary determination by the subsidizing agency that the applicant has sufficient interest in the site or a showing that the applicant owns the proposed site is conclusive evidence of site control. 760 Mass. Code Regs. § 31.01(3) (2004).

Real Property Law > Zoning > General Overview

HN23 **Real Property Law, Zoning**

Infectious invalidity may affect the owner's ability to build on an infected parcel, but it does not affect ownership of the parcel.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Administrative Procedure

Public Health & Welfare Law > Housing & Public Buildings > Low Income Housing

HN24 **Zoning, Administrative Procedure**

Under the Massachusetts Comprehensive Permit Act, Mass. Gen. Laws ch. 40B, §§ 20-23, a zoning or planning board violation is a local concern, not a violation of state law that the housing appeals committee has no authority to override.

Civil Procedure > Appeals > Appellate Briefs

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN25[] **Appeals, Appellate Briefs**

An appellate court need not pass upon questions or issues not argued in the brief.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Administrative Procedure

HN26[] **Zoning, Administrative Procedure**

Three members of the housing appeals committee may decide an appeal.

Headnotes/Summary

Headnotes

Housing. *Zoning*, Housing appeals committee, Low and moderate income housing, Comprehensive permit.

Counsel: *Daniel C. Hill* for the plaintiff.

Annapurna Balakrishna, Assistant Attorney General, for Housing Appeals Committee.

Nicholas C. Cramb for Hollis Hills, LLC.

J. Raymond Miyares, *Christopher H. Heep*, *Jonathan D. Witten*, & *Barbara Huggins*, for town of Hopkinton & others, amici curiae, submitted a brief.

Jeffrey W. Sacks, *Kurt M. Mullen*, & *Troy K. Lieberman*, for Citizens' Housing and Planning Association, amicus curiae, submitted a brief.

Judges: Present: Ireland, C.J., Spina, Cordy, Botsford, Gants, Duffly, & Lenk, JJ.

Opinion by: GANTS

Opinion

[*39] [**160] GANTS, J. Hollis Hills, LLC (Hollis Hills), filed an application for a comprehensive permit with the zoning board of appeals of Lunenburg (board) under G. L. c. 40B, §§ 20-23, to build 146 condominium units in attached townhouses (project). The board denied the application, and Hollis Hills appealed the denial to the Massachusetts housing appeals committee (HAC), which set aside the board's decision and directed the board [***2] to issue a comprehensive permit.[2] The board appealed, under *G. L. c. 30A, § 14*, to the Superior Court, which affirmed the HAC's decision. We transferred the board's appeal to this court on our own motion.

On appeal, the board claims that the HAC made four errors. First, it claims that the HAC erred in concluding that the availability of affordable, market-rate homes in the town of Lunenburg (town) should not be considered in determining the regional need for low and moderate income housing. Second, it argues that the HAC's finding that the board's local concerns, specifically the project's alleged incompatibility with the town's master plans, did not outweigh the regional need for low and moderate income housing was not supported by substantial evidence. Third, the board contends that the HAC erred in failing to recognize that, under the doctrine of "infectious invalidity," Hollis Hills did not have the requisite site control over a parcel of land in the project where a necessary sewer connection would be located and that the HAC could not waive infectious [***3] invalidity because it is matter of State law, not a local concern. Fourth, the board claims that the HAC erred in not staying the proceedings until the Governor had appointed a fifth member to the HAC. We address each claim in turn and affirm the judgment of the Superior Court affirming the HAC's decision.[3]

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[2] The housing appeals committee (HAC) made the comprehensive permit subject to four conditions, none of which is relevant to this appeal.

[3] We acknowledge the amicus brief of the towns of Hopkinton, Boxborough, Norton, Townsend, and Tyngsborough; and the amicus brief of the Citizens' Housing and Planning Association.

Legal background and standard of review. Before addressing [*40] the particular legal and factual issues before us in this case, we describe briefly the history, [**161] purpose, and operation of the Massachusetts Comprehensive Permit Act, sometimes referred to as the anti-snob zoning act, G. L. c. 40B, §§ 20-23 (act). Zoning Bd. of Appeals of Wellesley v. Ardemore Apartments Ltd. Partnership, 436 Mass. 811, 814, 767 N.E.2d 584 (2002) (Wellesley II). "We have long recognized that HN1[] the Legislature's intent in enacting [the act] is 'to provide relief from exclusionary zoning practices which prevented the construction of badly needed low and moderate income housing' in the Commonwealth." Standerwick v. Zoning Bd. of Appeals of Andover, 447 Mass. 20, 28-29, 849 N.E.2d 197 (2006), [***4] quoting Board of Appeals of Hanover v. Housing Appeals Comm., 363 Mass. 339, 354, 294 N.E.2d 393 (1973). "The structure of the act itself reflects a 'careful balance between leaving to local authorities their well-recognized autonomy generally to establish local zoning requirements . . . while foreclosing municipalities from obstructing the building of a minimum level of housing affordable to persons of low income.'" Zoning Bd. of Appeals of Amesbury v. Housing Appeals Comm., 457 Mass. 748, 763-764, 933 N.E.2d 74 (2010), quoting Board of Appeals of Woburn v. Housing Appeals Comm., 451 Mass. 581, 584, 887 N.E.2d 1051 (2008).

HN2[] The act allows a public agency, or a limited dividend or nonprofit organization, that wishes to construct low or moderate income housing "to circumvent the often arduous process of applying to multiple local boards for individual permits and, instead, to apply to the local board of appeals for issuance of a single comprehensive permit." Board of Appeals of Woburn v. Housing Appeals Comm., supra at 583, quoting Middleborough v. Housing Appeals Comm., 449 Mass. 514, 516, 870 N.E.2d 67 (2007). See G. L. c. 40B, § 21 (organization "may submit to the board of appeals . . . a single application to build such housing in lieu of separate [***5] applications to the applicable local boards"). The zoning board has "the same power to issue permits or approvals as any local board or official who would otherwise act with respect to such application." Id.

"If the board denies an application for a comprehensive permit, the developer may appeal to HAC." [*41] Zoning Bd. of Appeals of Wellesley v. Housing Appeals Comm., 385 Mass. 651, 656, 433 N.E.2d 873 (1982) (Wellesley I), citing G. L. c. 40B, § 22. When the HAC reviews the decision of a local zoning board of appeals to deny a comprehensive permit, "[t]he hearing . . . shall be limited to the issue of whether . . . the decision of the board of appeals was reasonable and consistent with local needs." G. L. c. 40B, § 23.[4] See 760 Code Mass. Regs. § 56.07(1)(b) (2008) (HN3[] "In the case of the denial of a Comprehensive Permit, the issue shall be whether the decision of the Board was Consistent with Local Needs").

HN4[] "Consistent with local needs" is a term of art under G. L. c. 40B, § 20, [***6] defined as follows:

> "[R]equirements and regulations shall be considered consistent with local needs if they are reasonable in view of the regional need for low and moderate income housing considered with the number of low income persons in the city or town affected and the need to protect the health or safety of the occupants of the proposed housing or of the residents of the city or town, to promote better site and building design in relation [**162] to the surroundings, or to preserve open spaces, and if such requirements and regulations are applied as equally as possible to both subsidized and unsubsidized housing."

The statute further provides that such requirements and regulations "shall be consistent with local needs . . . where . . . low or moderate income housing exists which is in excess of ten per cent of the housing units reported in the latest federal decennial census of the city or town or on sites comprising one and one half per cent or more of the total land area zoned for residential, commercial or industrial use." Id.

HN5[] Under the regulations issued by the Department of Housing and Community Development (department) to administer the act, there is an "irrebuttable presumption" that [***7] a board's decision to deny an application for a comprehensive permit is "consistent with local needs" where the board determines that one or more [*42] of the grounds set forth in 760 Code Mass. Regs. § 56.03(1) (2008) has been satisfied. 760 Code Mass. Regs. § 56.07(3)(a) (2008). See 760 Code Mass. Regs. § 56.07(2)(b)(1) (2008). One of these grounds is that the town's subsidized housing inventory (SHI) exceeds ten per cent of the town's total housing units. 760 Code Mass.

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[4] "[T]he term 'reasonable' is surplus verbiage which does not add any substance to the 'consistent with local needs' standard." Board of Appeals of Hanover v. Housing Appeals Comm., 363 Mass. 339, 366 n.17, 294 N.E.2d 393 (1973).

Regs. § 56.03(3)(a) (2008). Where this or any of the other grounds in 760 Code Mass. Regs. § 56.03(1) is established, the "HAC is without authority to order that board to grant a comprehensive permit or to modify or remove conditions," and the board's denial of an application must be affirmed. Taylor v. Housing Appeals Comm., 451 Mass. 149, 151-152, 883 N.E.2d 1222 (2008) ("if a municipality has reached the ten per cent threshold, and its zoning board of appeals denies a developer's application, then the application process is effectively terminated"). 760 Code Mass. Regs. § 56.07(3)(a). Here, the parties have stipulated that the town has not proved any of these grounds.[5]

HN6[↑] Where, as here, none of the grounds that would trigger a conclusive presumption is present, the regulations and our cases provide that there is "a rebuttable presumption that there is a substantial Housing Need which outweighs Local Concerns." Id. See Boothroyd v. Zoning Bd. of Appeals of Amherst, 449 Mass. 333, 340, 868 N.E.2d 83 (2007), quoting Board of Appeals of Hanover v. Housing Appeals Comm., supra at 367 ("municipality's failure to meet its minimum [affordable] housing obligations, as defined in § 20, will provide compelling evidence that the regional need for housing does in fact outweigh the objections to the proposal"). Where a town attempts to rebut this presumption, the board bears "the burden of proving, first, that there is a valid health, safety, environmental, design, open space, or other Local Concern which supports such denial, and then, that such Local Concern outweighs the Housing Need." 760 Code Mass. Regs. § 56.07(2)(b)(2) (2008). See Board of Appeals of Hanover v. Housing Appeals Comm., supra ("In cases where the locality has not met its minimum housing obligations, the board must rest its decision on whether the required need for low and moderate [***9] income housing outweighs the valid planning objections [*43] to the details of the proposal such as health, site design, and open spaces").[6]

[**163] HN8[↑] Under the act, the HAC's decision may be reviewed [***10] in the Superior Court under G. L. c. 30A, which in turn provides that the court may set aside the decision of the agency "if it determines that the substantial rights of any party may have been prejudiced because the agency decision is . . . [u]nsupported by substantial evidence; or . . . otherwise not in accordance with law." G. L. c. 30A, § 14 (7). See Wellesley I, supra at 657 ("decision of HAC must be upheld if it is supported by substantial evidence," which is "such evidence as a reasonable mind might accept as adequate to support a conclusion"). In this analysis, we give "due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it," G. L. c. 30A, § 14 (7), and we "apply all rational presumptions in favor of the validity of the administrative action.'" Middleborough v. Housing Appeals Comm., 449 Mass 514, 524, 870 N.E.2d 67 (2007), quoting Wellesley I, supra at 654. HN9[↑] "A court may not displace an administrative board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." Wellesley I, supra at 657, quoting [***11] [*44] Labor Relations Comm'n v. University Hosp., Inc., 359 Mass. 516, 521, 269 N.E.2d 682 (1971).

Discussion. 1. Calculating the regional need for low and moderate income housing. The board contends that the HAC erred in failing to consider the availability of low-cost, market-rate, unsubsidized housing in the town in weighing the housing need. The town points to testimony from its expert, Douglas Ling, that most c. 40B homeownership programs define low or moderate income housing as that which is affordable to households earning no more than eighty per cent of

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[5] Only 1.9 per cent of Lunenburg's housing units are included in its [***8] subsidized housing inventory.

[6] The regulations provide guidance as to how these considerations should be weighed in the balance:

> HN7[↑] "1. the weight of the Housing Need will be commensurate with the regional need for Low or Moderate Income Housing, considered with the proportion of the municipality's population that consists of Low Income Persons;
>
> "2. the weight of the Local Concern will be commensurate with the degree to which the health and safety of occupants or municipal residents is imperiled, the degree to which the natural environment is endangered, the degree to which the design of the site and the proposed housing is seriously deficient, the degree to which additional Open Spaces are critically needed in the municipality, and the degree to which the Local Requirements and Regulations bear a direct and substantial relationship to the protection of such Local Concerns; and
>
> "3. a stronger showing shall be required on the Local Concern side of the balance where the Housing Need is relatively great."
>
> 760 Code Mass. Regs. § 56.07(3)(b) (2008).

area median income. Based on United States Department of Housing and Urban Development statistics, Ling determined that, within the Lunenburg region, the maximum affordable sales prices for a household earning seventy and eighty per cent of area median income were $140,000 and $160,000, respectively. Ling reported that 11.5 per cent of the homes sold in the town in 2006 and 2007 were purchased for $160,000 or less, and that 8.2 per cent of the homes were purchased at prices at or below $140,000. Ling also analyzed home sales in a seven-community region, which included Lunenburg, and testified that 7.6 per cent of homes in the region were included [***12] in the SHI, 14.6 per cent of homes sold for $160,000 or less, and 8.8 per cent of homes sold for $140,000 or less.[7] Ling also opined that demand for "Chapter 40B housing" in the town was weak in 2007 because housing priced under $160,000, "when sold on the open market and listed [**164] commercially, typically stayed on the market for over six months." We conclude that the HAC did not err in excluding housing that is not "subsidized by the federal or state government" in weighing the regional need for affordable housing.

The board's argument fails because it conflicts with the plain meaning of the Act's language. ***HN10***[↑] Under G. L. c. 40B, § 20, "housing need" is effectively defined as "the regional need for low and moderate income housing considered with the number of low income persons in the city or town affected" because that is the factor that is to be considered in determining whether local requirements or regulations are "[c]onsistent with local needs." This definition is made explicit in the department's regulations, [*45] where "[h]ousing [n]eed" is defined using almost the exact same language. 760 Code Mass. Regs. § 56.02 [***13] (2008).[8] The act defines "[l]ow or moderate income housing" to mean "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. Therefore, the plain text of the act and the governing regulations requires the HAC, in weighing the housing need, to exclude from consideration any affordable housing that is not subsidized under a qualifying government-sponsored program. See Wellesley I, supra at 654.[9]

This interpretation is in harmony with the purpose of the act. ***HN13***[↑] It was originally drafted to address "an acute shortage of decent, safe, low and moderate cost housing throughout the commonwealth" (emphasis added). Board of Appeals of Hanover v. Housing Appeals Comm., supra at 351, quoting report of Committee on Urban Affairs (explaining 1967 House Doc. No. 5429). Some market-rate housing may be affordable because the units are neither decent nor safe. Other affordable market rate housing units may be both decent and safe, but may be affordable only temporarily because of a weak housing market. The HAC here found that "the inexpensive [***15] 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 [*46] expensive housing, as well as units that were simply substandard." Even where inexpensive market-rate housing is decent and safe, and not being renovated or demolished, there is no way to ensure as the housing market strengthens that sale prices will not rise to levels that would be unaffordable to low or moderate income households. Nor is there any way to ensure that affordable [**165] market-rate homes will be limited in availability to low or moderate income households.

In contrast, ***HN14***[↑] precisely because such housing is subsidized by a Federal or State government or agency under a program to assist the construction of affordable housing, see note 9, supra, housing that would address

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[7] The region also included Ashby, Fitchburg, Lancaster, Leominster, Shirley, and Townsend.

[8] ***HN11***[↑] The only difference between the statutory and regulatory definitions is that G. L. c. 40B, § 20, refers to the "number of low income persons in the city or town affected" (emphasis added), and the regulation refers to the "number of Low Income Persons in a municipality affected" (emphasis added). 760 Code Mass. Regs. § 56.02 (2008).

[9] ***HN12***[↑] Housing developed under a State or Federal subsidy program only addresses the relevant housing need if the program "assist[s] the construction of low or moderate income housing as defined in the applicable [***14] federal or state statute." G. L. c. 40B, § 20. If the applicable statute or regulation of the subsidizing agency does not define low or moderate income housing, the regulations of the Department of Housing and Community Development (department) provide that "it shall be defined as units of housing whose occupancy is restricted to" "a household of one or more persons whose maximum income does not exceed 80% of the area median income, adjusted for household size, or as otherwise established by the Department in the guidelines." 760 Code Mass. Regs. § 56.02.

the "regional need for low and moderate income housing" under G. L. c. 40B, § 20, typically must satisfy minimum requirements designed to ensure the quality of the housing and the reasonableness of the sale and resale price.[10] Furthermore, unless the statute or regulation applying to the subsidizing agency in question provides otherwise, occupancy of subsidized affordable [***16] low or moderate income housing units under the department's comprehensive permit regulations is restricted to "[i]ncome [e]ligible [h]ouseholds," defined as households "whose maximum income does not exceed 80% of the area median income, adjusted for household size." 760 Code Mass. Regs. § 56.02. **HN15**[↑] "Use [r]estriction[s]" are accomplished through deed restrictions or other legally binding instruments that run with the land. Id. They are recorded at the registry of deeds, and they limit occupancy "during the term of affordability" established in a construction subsidy agreement. Id. 760 Code Mass. Regs. § 56.05(13) (2008).[11] Also, in order to be included on the SHI, subsidized affordable housing units [*47] must be sold under an "[a]ffirmative [f]air [m]arketing [p]lan" that provides for a lottery or other resident selection process and "effective outreach to protected groups underrepresented in the municipality." 760 Code Mass. Regs. § 56.02 (defining "Affirmative Fair Marketing [**166] Plan" and providing that "[i]t shall be the responsibility of the Subsidizing Agency to enforce compliance with provisions of 760 [Code Mass. Regs. §§] 56.00 and applicable Department guidelines relating to matters including [***17] Affirmative Fair Marketing Plans [and] Use Restrictions"); Department of Housing and Community Development Comprehensive Permit Guidelines § II.A.1 (2012) (comprehensive permit guidelines) ("affordable housing units shall be subject to an Affirmative Fair Marketing and Resident Selection Plan that, at a minimum, meets the requirements set out in the following Section III, Affirmative Fair Housing Marketing Plan").[12]

[*48] We agree with the HAC that:

> **HN18**[↑] "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. . . . Without the use restriction, there is no guarantee that housing currently priced within

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[10] The project's eligibility letter issued to Hollis Hills by Massachusetts Housing Finance Agency (MassHousing) required the affordable units to be governed by a deed rider that ensured the units remained affordable to future buyers for a minimum of thirty years. See MassHousing, Housing Starts Program Affordable Housing Restriction (Deed Rider) (2012). See also United States Department of Housing and Urban Development, Housing Choice Voucher Homeownership Program Guidebook 25-26 (units assisted under Federal homeownership voucher program must meet housing quality standards set out in ***24 C.F.R. § 982.401*** [2012] and must pass two home inspections).

[11] Furthermore, we note that **HN16**[↑] where low or moderate income housing is built under a comprehensive permit obtained in accordance [***18] with G. L. c. 40B, §§ 20-23 (act), and "where a comprehensive permit itself does not specify for how long housing units must remain below market, the Act requires an owner to maintain the units as affordable for as long as the housing is not in compliance with local zoning requirements, regardless of the terms of any attendant construction subsidy agreements." Zoning Bd. of Appeals of Wellesley v. Ardemore Apartments Ltd. Partnership, 436 Mass. 811, 813, 767 N.E.2d 584 (2002). See 760 Code Mass. Regs. § 56.04(7) (2008) ("[f]ollowing the issuance of a Comprehensive Permit, the Subsidizing Agency shall issue its final written approval of the Project to the Applicant," and "[s]uch approval shall, at a minimum: . . . confirm that the proposed Use Restriction is in a form consistent with Department guidelines").

Additionally, **HN17**[↑] under the Department of Housing and Community Development Comprehensive Permit Guidelines § II.A.1 (2012) (comprehensive permit guidelines), for housing to be included in the subsidized housing inventory (SHI):

> "All Use Restrictions must meet the following minimum standards: . . .
>
> "[Applies] for a term . . . that shall be not less than 15 years for rehabilitated units and not less than [***19] 30 years for newly created units. . . .
>
> "Effectively restricts occupancy of Low and Moderate Income Housing to Income Eligible Households. . . .
>
> "Contains terms and conditions for the resale of a homeownership unit, including definition of the maximum permissible resale price, and for the subsequent rental of a rental unit, including definition of the maximum permissible rent."

[12] Although the comprehensive permit guidelines were not introduced in evidence before the HAC, they are directly relevant to understanding the department's regulations, because subsidizing agencies have "the responsibility . . . to enforce compliance with provisions of 760 [Code Mass. Regs. §§] 56.00 and applicable Department guidelines." 760 Code Mass. Regs. § 56.02.

> the range targeted to income eligible families [***20] will be ultimately occupied by them, or that it will remain affordable."

In light of these differences between subsidized affordable housing units and unsubsidized market-rate units, we also agree with the HAC that "evidence of low cost market-rate housing cannot be factored into the consideration of the regional need for affordable housing."

There was substantial evidence to support the HAC's finding that the existing subsidized housing in the region did not adequately address the regional need for housing. Only 1.9 per cent of the town's housing units and only 7.6 per cent of the "year round housing units" in the seven-town region were counted in the SHI.[13]

2. Weighing the town's master planning. The HAC recognized that a town's long-term comprehensive planning efforts, "when [*49] expressed in a bona fide, effective master plan or comprehensive plan," may be so substantial a local concern as to outweigh the regional need for affordable housing. The HAC conducted a two-part analysis in evaluating master planning as a local concern. First, it determined whether the master plan was a legitimate local concern by asking three questions, all of which had to be answered in the affirmative for the master plan to be [**167] weighed as a local concern: "(1) Is the plan bona fide? (Was it legitimately [***22] 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?" After finding that the town's master plan met this test, the HAC turned to the second part of the analysis: the weight to be given to the master plan as a local concern. The HAC declared that two factors are particularly important in determining how much weight to give the master plan: first, whether the affordable housing plan aspect of the master plan "has actually shown results" in terms of the construction of affordable housing, and second, whether the proposed project is inconsistent with and would undermine the plan to a significant degree.

The board does not challenge this analytical framework. Instead, it argues that substantial evidence does not support the HAC's finding that the board failed to meet its burden of proving that the proposed project is inconsistent with the master plan and would undermine the town's master planning. To evaluate this claim of error, we must take a careful look at the town's master plan at the time Hollis Hills applied to the board for [***23] a comprehensive permit. See *760 Code Mass. Regs. § 56.02* (defining ***HN19***[↑] "[l]ocal [r]equirements and [r]egulations" as those "in effect on the date of the [p]roject's application to the [b]oard").

The town relied on three planning documents to support its argument that the project was inconsistent with local concerns: the April, 2002, Lunenburg, Massachusetts Updated Master Plan for the New Millennium (master plan), the affordable housing plan approved by the department, and the 1999 Lunenburg comprehensive wastewater facilities plan (sewer plan). The master plan contains a "Housing Element" with its primary goal "[t]o provide appropriate housing for Residents of the [*50] Town of Lunenburg." It notes that the town is "vulnerable to applications under Chapter 40B" because, at the time, the town only had fifty-four units, representing approximately 1.37 per cent of the town's 3,950 units that qualified as affordable housing under the act.

The affordable housing plan became effective five days before Hollis Hills submitted its comprehensive permit application on February 13, 2006, with a goal "[t]o develop 22 affordable housing units each year over the next five year[s]." It identified four sites [***24] for the location of affordable housing units: Lunenburg Estates, the Tri-Town Drive-in Theater, the Electric Avenue Drive-in Theater, and the Old Primary School building. But when the HAC issued its decision on December 4, 2009, no affordable housing eligible for inclusion in the SHI had yet been built on any of these designated

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[13] Although the HAC declined to consider market-rate housing in determining the housing need, it nonetheless found that, even if it were to consider market-rate affordable housing, the regional need for low and moderate income housing still outweighed the local concerns. This finding, too, was supported by substantial evidence. The town's 2006 affordable housing plan stated that low income persons are "hard-pressed" to afford housing in town and that it is "difficult[] for families below the median to live in Lunenburg." Additionally, [***21] in the two-year period surveyed by the board's expert, Douglas Ling, only eighteen homes in the town sold at or below $160,000, only 5.2 per cent of the housing units in the town were assessed below $160,000, and only 3.1 per cent of the housing units in the seven-town region were assessed below $140,000. Although Ling's report states that ten per cent of housing units in the seven-town region were valued at less than $160,000, the table that he cites to support this conclusion indicates that only 5.2 per cent of homes in the region were assessed below $160,000.

sites.[14]

[**168] The sewer plan prioritized three phases of sewer expansion. The phase I sewer expansion that was approved by the town included the town center and the southwest area of town; it originally did not include a sewer along Electric Avenue that could be tied into a sewer line on the proposed project. However, in 2002, the town decided to extend a sewer line up Electric Avenue to take advantage of a State-funded economic development grant for a reconstruction project on Electric Avenue, and the sewer plan was amended to add a 5,000-foot spur from Whalom Road up Electric Avenue, which included the installation of a connection plug directly opposite the proposed project's parcel on Electric Avenue.

In concluding that the project is not inconsistent with and [*51] would not undermine the town's master planning, the HAC found that the master plan had not set aside the area of the site for a particular purpose inconsistent with the project, and that the project adequately protects open space and wetlands on the site.[15] [***26] It also noted that the project abuts one of the sites identified in the affordable housing plan as appropriate for affordable housing -- the Electric Avenue Drive-in Theater site that had been approved for use as a self-storage facility -- and would bring affordable housing to an area of the town designated for such housing.[16]

The HAC recognized that the project site was not within the geographical boundaries of the original sewer district under phase I of the sewer plan, but noted that the town had already modified the sewer plan by expanding sewer access through the spur on Electric Avenue. The HAC found that the town must have contemplated that the expansion would increase the number of residences [***27] with legal access to sewer, and had allowed market-rate homes to connect to the Electric Avenue sewer spur. It also found that the town must have anticipated that the project's parcel on Electric Avenue would have access to sewer service because it installed a sewer connection directly in front of the parcel. It also noted that the Electric Avenue Drive-in Theater site, which had been designated for affordable housing but was instead approved for use as a self-storage facility, obtained its sewer connection through the Electric Avenue spur.[17] Finally, the board does not claim that the project would stress the capacity of its wastewater treatment facilities.[18]

[*52] [**169] We conclude that these findings are supported by substantial evidence and adequately support the HAC's conclusion that the proposed project

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[14] Even though the developers of Lunenburg Estates had received a comprehensive permit from the board ten months before the town adopted its affordable housing plan, no units had yet been constructed on the site. For the Tri-Town Drive-in Theater site, the town approved a 204-unit residential rental development, twenty-five per cent of which were affordable rental units, and issued building permits in May, 2007, but at the time of the HAC decision, it was unclear whether the project would go forward due to a dispute between the Tri-Town developer and the town regarding sewer privilege fees, which the developer claimed made the project too costly to construct. In September, 2007, the town planning board approved the Electric Avenue Drive-in Theater site for use as a self-storage facility. Finally, even though the town owned the Old Primary School building, [***25] it did not request affordable housing proposals for the site until 2008. Two days before the HAC hearing, the town voted to accept a developer's proposal for elderly housing on the site.

[15] To ensure wetlands protection, the town's conservation commission had granted an order of conditions governing the installation of the sewer connection from Electric Avenue.

[16] The HAC also found that the town planner had asked Hollis Hills whether it would agree to include the site in a smart growth zoning district under *G. L. c. 40R*, which requires that not less than twenty per cent of the residential units constructed in projects of more than twelve units be affordable. *G. L. c. 40R, § 6(a)(4)*.

[17] The project's other sewer line, along Carr Avenue to Whalom Road, was not part of phase I of the sewer plan but was identified in the phase I plan as a future sewer expansion. The town's director of public works asked Hollis Hills to design the sewer line to allow abutters on Crest Avenue to hook into the Carr Avenue sewer line Hollis Hills would build.

[18] The town recently gave a sewer connection to a 240-unit market-rate housing development that is only 500 feet from the project site. The board argues that the proposed project [***28] is inconsistent with this development because it will introduce a "competing project" in a weak housing market. The HAC properly found that this claim of competition is "without merit." A local concern of a board may be considered only where "applied as equally as possible to both subsidized and unsubsidized housing." *G. L. c. 40B, § 20*. In evaluating a comprehensive permit application, a local board may not consider whether the proposed subsidized housing will compete with market-rate housing built or scheduled to be built in the town.

is not inconsistent with the town's master planning and would not undermine those plans. ***HN20***[↑] In deciding the weight to be given to a deviation from a town's master plans, the HAC is entitled to look beyond the letter of the plan and consider its spirit and underlying purpose, recognizing that long-term plans often need to be adapted to changes in circumstances. Where, as here, the town's affordable housing plan failed to produce any affordable housing that would qualify for the SHI and where the proposed project is not [***29] inconsistent with, and would not undermine, the town's master plans, the HAC's conclusion that this local concern did not outweigh the regional need for low and moderate income housing was supported by substantial evidence.

3. Infectious invalidity. One of the parcels of land that comprise the project site is the parcel on Electric Avenue that abuts the sewer line (Electric Avenue parcel). In 2002, Fred Laberge owned an adjoining parcel at 321 Electric Avenue, where he operated an automobile salvage business in the name of Sky Cycle, Inc. (Sky Cycle); Sky Cycle owned the Electric Avenue parcel.[19] That year, Laberge applied for and received development plan review approval from the town planning board under a town zoning bylaw to construct an addition to an existing warehouse that would straddle the lot line between 321 Electric Avenue and the Electric Avenue parcel, and built the addition.[20] On June 2, 2005, Sky Cycle sold the Electric Avenue parcel to a realty trust related to Hollis Hills, which transferred it to Hollis Hills on August 25, 2005.

[*53] Once the Electric Avenue parcel was sold, the two parcels were no longer merged, and the 321 Electric Avenue parcel did not conform to the zoning bylaw's setback requirements because the warehouse straddled the lot line. On January 3, 2007, eighteen months after Sky Cycle sold the Electric Avenue parcel to the realty trust, but only five months after Hollis Hills confirmed with the town that it would connect to the public sewer through the Electric Avenue parcel, the town ordered Laberge to remove the building. Hollis Hills offered to cure the zoning violation by reconveying enough land from the Electric Avenue parcel to provide adequate setback, while still retaining the frontage it needed to connect to the sewer line on Electric Avenue. The town's building inspector informed Hollis Hills that the proposed reconveyance would "correct the zoning and site conditions necessary for compliance," but the town never replied to Hollis Hills's reconveyance proposal. Instead, the town defended the tear-down order in the Housing Court, where the order was affirmed on December 12, 2007. On June 19, 2008, the town entered into a [***31] settlement agreement to resolve the tear-down litigation. Under the terms of the settlement agreement, the town could enforce the tear-down order after the earlier of either (a) one year after the exhaustion of all appeals from Hollis Hills's comprehensive permit application or (b) December 31, 2011, unless the new owner of 321 Electric Avenue reacquired the entire Electric Avenue parcel, which would have [**170] left Hollis Hills with no access to the sewer line on Electric Avenue.

The board claims that Sky Cycle's sale of the Electric Avenue parcel to the realty trust violated ***HN21***[↑] the common-law principle of infectious invalidity, which provides that "a property owner may not create a valid building lot by dividing it from another parcel rendered nonconforming by such division." *81 Spooner Rd., LLC v. Zoning Bd. of Appeals of Brookline, 461 Mass. 692, 694 n.6, 964 N.E.2d 318 (2012)*. The HAC, in reaching its decision, assumed, without deciding, that the conveyance of the Electric Avenue parcel to the realty trust violated the planning board's development plan review, and that the Electric Avenue parcel was in zoning nonconformity as a result of the violation.

We find no error in the HAC's denial of the board's [***32] motion to dismiss the developer's appeal, which claimed that, because [*54] the sale of the Electric Avenue parcel rendered 321 Electric Avenue a nonconforming lot, Hollis Hills did not control the Electric Avenue portion of the site and, therefore, was not eligible to apply for a comprehensive permit. See *760 Code Mass. Regs. § 56.04(1)(c)* (2008). ***HN22***[↑] Under the regulations in effect at the time of the application to the board, see *760 Code Mass. Regs. § 56.08(3)(c)* (2008), either a preliminary determination by the subsidizing agency that the applicant has "sufficient interest in the site" or "a showing" that the applicant owns the proposed site is "conclusive evidence" of site control. 760 Code Mass. Regs. § 31.01(3) (2004). Here, Hollis Hills provided three purchase and sale agreements, along with subsequent extensions of those agreements, which established colorable title to the Electric Avenue parcel at the time the application was filed. ***HN23***[↑] Infectious invalidity may affect the

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[19] Fred Laberge was the sole officer and director of Sky Cycle, Inc.

[20] The board treated the two parcels as merged, even though one was owned [***30] individually by Laberge and the other was owned by Sky Cycle, Inc.

owner's ability to build on an infected parcel, but it does not affect ownership of the parcel. See *Alley v. Building Inspector of Danvers, 354 Mass. 6, 6-7, 234 N.E.2d 879 (1968)* (building inspector properly denied building permit [***33] on lot created by making adjacent lots nonconforming). See also *Somerset Sav. Bank v. Chicago Title Ins. Co., 420 Mass. 422, 428, 649 N.E.2d 1123 (1995)* (restrictions on use of property do not affect owner's title to property).

The HAC correctly recognized that ***HN24***[↑] a zoning or planning board violation is a local concern, not a violation of State law that the HAC has no authority to override, noting that, because "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 [zoning board of appeals] or [the HAC] to determine that the Development Plan Review does not constrain the development of this project." The HAC concluded that this local concern was insufficient to outweigh the regional need for affordable housing, and waived any zoning and planning board violations on the Electric Avenue parcel so that the proposed project may proceed.[21]

We conclude that the HAC's factual findings were supported by substantial evidence and that the HAC did not abuse its discretion in concluding [***34] that the balance of interests in these [*55] circumstances favored the regional need for affordable housing rather than the local concern of a zoning nonconformity. Here, Hollis Hills offered to cure the infectious invalidity but the town rejected the offer and entered into a settlement agreement that was designed to scuttle the proposed [**171] project rather than cure the zoning nonconformity. Under the settlement, the town may still cure the infectious invalidity by enforcing the agreement to tear down the building that was the source of the zoning violation.

4. Denial of stay. In a single sentence in its appellate brief that references arguments made to the HAC and included in the record, the board claims that the HAC erred in refusing to stay the proceedings until the Governor had named a fifth member to the HAC. See *G. L. c. 23B, § 5A* (three members of HAC are appointed by department director and remaining two by Governor). Because the board did not argue this issue in its appellate brief, we need not reach it. *Mass. R. A. P. 16 (a) (4)*, as amended, 367 Mass. 921 (1975) (***HN25***[↑] "The appellate court need not pass upon questions or issues not argued in the brief"). We nonetheless choose to decide it [***35] and find it meritless. ***HN26***[↑] Three members of the HAC may decide an appeal. See *Board of Appeals of Maynard v. Housing Appeals Comm., 370 Mass. 64, 66, 345 N.E.2d 382 (1976)*. Here, the appeal was decided by four members.

Conclusion. The judgment affirming the order of the HAC is affirmed.

So ordered.

End of Document

[21] The HAC was careful to clarify that it did not have the power to waive any zoning nonconformity with respect to the 321 Electric Avenue parcel.

Zoning Bd. of Appeals v. Hous. Appeals Comm.

Appeals Court of Massachusetts

May 9, 2011, Argued; September 16, 2011, Decided

No. 10-P-1964.

Reporter
80 Mass. App. Ct. 406 *; 953 N.E.2d 721 **; 2011 Mass. App. LEXIS 1191 ***

ZONING BOARD OF APPEALS OF HOLLISTON vs. HOUSING APPEALS COMMITTEE & another.[1]

Subsequent History: Appeal denied by *Zoning Bd. of Appeals v. Hous. Appeals Comm., 460 Mass. 1116, 957 N.E.2d 242, 2011 Mass. LEXIS 1074 (2011)*

Prior History: [***1] Suffolk. Civil action commenced in the Land Court Department on February 11, 2009. The case was heard by Keith C. Long, J., on a motion for judgment on the pleadings.

Zoning Bd. of Appeals of Holliston v. Hous. Appeals Comm. & Green View Realty, LLC, 2010 Mass. LCR LEXIS 55 (2010)

Core Terms

wetland, regulations, locus, by-law, plans, site, remediation, affordable housing, compliance, local concern, contaminated, environmental, regional, basin, zone, moderate income housing, stormwater, outweigh, proposes, housing, storm water, groundwater, conservation commission, conditions, disturb, significant risk, habitats, cleanup, hazardous material, prima facie case

Case Summary

Procedural Posture
The Zoning Board of Appeals denied a developer's application for a comprehensive permit pursuant to Mass. Gen. Laws Ann. ch. 40B, §§ 20-23. On appeal, the Housing Appeals Committee (HAC) ordered the Board to issue a comprehensive permit. The Suffolk Land Court Department (Massachusetts) affirmed the HAC's decision. The Board appealed.

Overview
The developer sought to develop land that had been contaminated, agreeing to finish cleanup and comply with all statutory and regulatory restrictions and conditions to protect, inter alia, drainage and wetlands. The developer proposed the construction of 200 condominiums, 25 % of which would be affordable housing. The Board had overriding concerns relative to heath, wetlands preservation, storm water management, traffic, and waste disposal. The Board's principal argument on appeal was that the plans submitted were too indefinite to allow the Board to determine whether the plans complied iwht state statutes and regulations with regard to remediation of the contamination, wetland preservation, and stormwater management. The appellate court concluded that it was not unreasonable for the HAC and judge to conclude that the develop made a prima facie case, noting that the developer proposed to make all modifications to the preliminary plans necessary to achieve compliance with state regulations. The appellate court also noted that the need for affordable housing was great, as such made up less than 10% of the town, and that the project would enhance the wetlands area.

Outcome
The land court's decision was affirmed.

LexisNexis® Headnotes

Environmental Law > Hazardous Wastes & Toxic Substances > Cleanup

HN1[] **Hazardous Wastes & Toxic Substances, Cleanup**

[1] Green View Realty, LLC.

The purpose of the Massachusetts Contingency Plan is, among other things, to provide for the protection of health, safety, public welfare and the environment by encouraging persons responsible for releases of hazardous material to undertake necessary and appropriate response actions in a timely way.

Public Health & Welfare Law > Housing & Public Buildings > General Overview

Real Property Law > Subdivisions > State Regulations

HN2 **Public Health & Welfare Law, Housing & Public Buildings**

The Comprehensive Permit Act, Mass. Gen. Laws Ann. ch. 40B, §§ 20-23, is designed to facilitate the development of low and moderate income housing in communities throughout the Commonwealth. The Act is intended to remove various obstacles to the development of affordable housing, including regulatory requirements that had been utilized by local opponents as a means of thwarting such development in their towns.

Public Health & Welfare Law > Housing & Public Buildings > General Overview

Real Property Law > Subdivisions > State Regulations

HN3 **Public Health & Welfare Law, Housing & Public Buildings**

Rather than proceed before multiple town or city boards, a qualified developer may submit to the local board of appeals a single application, and the board of appeals, with input from other local boards, is empowered to issue all necessary permits or approvals. In considering an application, the board has the power to override local regulations but not State regulations. Where the board denies a permit application, the applicant may appeal to the Housing Appeals Committee. *Mass. Gen. Laws Ann. ch. 40B, § 22*.

Evidence > Inferences & Presumptions > Presumptions

Public Health & Welfare Law > Housing & Public Buildings > General Overview

Real Property Law > Subdivisions > State Regulations

HN4 **Inferences & Presumptions, Presumptions**

The Housing Appeals Committee's review is limited to the issue of whether the decision of the board of appeals was reasonable and consistent with local needs. *Mass. Gen. Laws Ann. ch. 40B, § 23* (as amended by 1998 Mass. Acts ch. 161, § 261). Requirements and regulations shall be considered consistent with local needs if they are reasonable in view of the regional need for low and moderate income housing considered with the number of low income persons in the city or town affected and the need to protect the health or safety of the occupants of the proposed housing or of the residents of the city or town, to promote better site and building design in relation to the surroundings, or to preserve open spaces. *Mass. Gen. Laws Ann. ch. 40B, § 20* (as amended by 2003 Mass. Acts ch. 26, § 181). There exists a rebuttable presumption that the regional affordable housing need outweighs local concerns where the town's stock of low and moderate income housing is less than ten percent.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Local Planning

Public Health & Welfare Law > Housing & Public Buildings > Low Income Housing

HN5 **Zoning, Local Planning**

Even where a municipality has failed to meet its statutory minimum, the Housing Appeals Committee may still uphold denial of a comprehensive permit as reasonable and consistent with local needs if the community's need for low or moderate income housing is outweighed by valid planning objections to the proposal based on considerations such as health, site, design, and the need to preserve open space.

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

Public Health & Welfare Law > Housing & Public Buildings > General Overview

Real Property Law > Zoning > Judicial Review

Real Property Law > Subdivisions > State Regulations

HN6[] Standards of Review, Substantial Evidence

Parties aggrieved by the Housing Appeals Committee's (HAC) decision may appeal to a superior or land court pursuant to Mass. Gen. Laws Ann. ch. 30A, § 14. Mass. Gen. Laws Ann. ch. 40B, § 22. The courts apply a substantial evidence standard of review of the administrative record in light of the heavy burden borne by a local board that denies a comprehensive permit application to prove a specific health or safety concern of sufficient gravity to outweigh the regional housing need. The HAC's decision must be upheld if supported by substantial evidence and we must indulge all rational presumptions in favor of the validity of the HAC's determinations, including its choice between two fairly conflicting views, giving due weight to its experience, technical competence, and specialized knowledge.

Administrative Law > Agency Adjudication > Review of Initial Decisions

Public Health & Welfare Law > Housing & Public Buildings > General Overview

Real Property Law > Subdivisions > State Regulations

HN7[] Agency Adjudication, Review of Initial Decisions

Before the Housing Appeals Committee, a developer whose comprehensive permit has been denied may establish a prima facie case by proving that its proposal complies with federal or state statutes or regulations, or with generally recognized standards as to matters of health, safety, the environment, design, open space, or other matters of Local Concern. 760 Mass. Code Regs. § 56.07(2)(a)(2) (2008). It is only after the developer meets this standard that the burden shifts to the board to show that there is an overriding local concern that exceeds the regional need for affordable housing.

Public Health & Welfare Law > Housing & Public Buildings > General Overview

Real Property Law > Subdivisions > State Regulations

HN8[] Public Health & Welfare Law, Housing & Public Buildings

The regulatory scheme governing applications for comprehensive permits requires only preliminary plans, including preliminary site development plans, a report on existing site conditions and a summary of conditions in the surrounding areas, preliminary, scaled, architectural drawings, a preliminary subdivision plan, and a preliminary utilities plan showing the proposed location and types of sewage, drainage, and water facilities. 760 Mass. Code Regs. § 56.05(2) (2008).

Public Health & Welfare Law > Housing & Public Buildings > General Overview

Real Property Law > Subdivisions > State Regulations

HN9[] Public Health & Welfare Law, Housing & Public Buildings

It is unreasonable for a board to withhold approval of an application for a comprehensive permit when it could condition approval on the tendering of a suitable plan that would comply with State standards.

Business & Corporate Compliance > ... > Public Health & Welfare Law > Housing & Public Buildings > Fair Housing

Evidence > Inferences & Presumptions > Presumptions

Public Health & Welfare Law > Housing & Public Buildings > Low Income Housing

HN10[] Housing & Public Buildings, Fair Housing

There is a rebuttable presumption that there exists a substantial regional housing need that outweighs local concerns where a town has not achieved the ten percent minimum stock of affordable housing.

Public Health & Welfare Law > Housing & Public Buildings > Low Income Housing

Real Property Law > Zoning > General Overview

HN11[] **Housing & Public Buildings, Low Income Housing**

To the extent that a city or town does not have an adequate supply of affordable housing (measured in the Comprehensive Permit Act, Mass. Gen. Laws Ann. ch. 40B, §§ 20-23, as a percentage of existing housing or of land in each town) its local autonomy in zoning matters is curtailed.

Business & Corporate Compliance > ... > Public Health & Welfare Law > Housing & Public Buildings > Fair Housing

Public Health & Welfare Law > Housing & Public Buildings > Low Income Housing

Real Property Law > Subdivisions > State Regulations

HN12[] **Housing & Public Buildings, Fair Housing**

The Comprehensive Permit Act, Mass. Gen. Laws Ann. ch. 40B, §§ 20-23, broadly defines "low or moderate income housing" as any housing subsidized by the federal or state government. *Mass. Gen. Laws Ann. ch. 40B, § 20*. The Act and associated regulations encourage the development of a mix of types of housing, including rental and homeownership for families, individuals, persons with special needs, and the elderly. *760 Mass. Code Regs. § 56.03(4)* (2008).

Headnotes/Summary

Headnotes

Zoning, Comprehensive permit, Housing appeals committee, Low and moderate income housing, Conditions. *Housing*. *Administrative Law*, Substantial evidence, Substantial evidence.

Counsel: *Mark Bobrowski* for the plaintiff.

Robert A. Fasanella for Green View Realty, LLC.

David A. Guberman, Assistant Attorney General, for Housing Appeals Committee.

Judges: Present: Kantrowitz, Kafker, & Graham, JJ.

Opinion by: KAFKER

Opinion

[*406] [**724] KAFKER, J. The zoning board of appeals of Holliston (board) denied Green View Realty, LLC's (GVR), application for a comprehensive permit pursuant to *G. L. c. 40B, §§ 20-23*, to [*407] develop a nearly fifty-three acre parcel of land (locus or site) in the town of Holliston (town) into residential condominiums that include affordable housing. The locus served as an illegal disposal site for hazardous materials in the 1970s and 1980s and despite substantial cleanup efforts, portions of the locus remain contaminated, including the groundwater in some areas. GVR proposes to clean up the locus such that it poses no significant risk to residents. The locus also contains some sixteen acres of wetlands and presents challenges for storm water management and waste disposal as well.

The board denied GVR's application, identifying what it [***2] concluded were overriding local concerns relative to health, wetlands preservation, storm water management, traffic, and waste disposal.[2] On appeal to the Housing Appeals Committee (HAC), the HAC ordered the board to issue a comprehensive permit. A Land Court judge affirmed the HAC's decision and the board now appeals. We affirm.

Background. 1. Environmental history of the locus. Beginning in the 1960s, long before GVR developed any interest in the locus, construction materials, tar, tires, and other hazardous materials were dumped on the locus. Because the prior owner did not respond to notices of response action issued pursuant to *G. L. c. 21E* by the Department of Environmental Protection (DEP), between 1987 and 2002, the DEP and the Environmental Protection Agency (EPA) directed the removal of some 340 drums of tar and other contaminants, 210,000 tires, construction debris, and over seventy tons of contaminated soil. The DEP incurred response action costs amounting to $1.75 million. [***3] Nonetheless, the cleanup is not complete and in addition to remaining hazardous materials, some

[2] On appeal to this court, the board has abandoned any issues regarding traffic and waste disposal. In addition, the board makes no arguments related to site design in terms of building placement or density.

of [**725] the groundwater contains trychloroethylene (TCE), a known carcinogen. TCE has also migrated to abutters' wells.[3]

2. GVR's proposal. In 2002, in an effort to recoup the cleanup costs they had incurred, the DEP and the town solicited proposals to attract a developer to purchase and develop the site. [*408] In response to the solicitation, GVR, a limited dividend organization,[4] proposes to construct 200 condominiums, twenty-five percent of which will be "affordably priced housing units enabling families with a gross annual income of 80% of the area median income to qualify to purchase [a] unit under generally accepted mortgage loan underwriting standards." GVR has in place purchase and sale agreements to purchase the locus and has negotiated with the DEP an amount to compensate it for its costs.[5]

On August 27, 2004, the Massachusetts Housing Finance Agency (MassHousing) issued GVR a project eligibility (site approval) letter with certain conditions, including that any comprehensive permit ultimately issued by the board include a condition that GVR provide evidence of "[c]ompliance with all statutory and regulatory restrictions and conditions relating to protection of drainage, [***5] wetlands, vernal pools and wildlife habitats and nearby conservation areas," as well as Title V regulations, prior to issuance of a building permit for the project.

a. Environmental cleanup. As part of a settlement agreement[6] with DEP, GVR is obligated to sign and comply with an administrative consent order (ACO) which will set forth deadlines for response actions required pursuant to G. L. c. 21E and the Massachusetts Contingency Plan (MCP). "Simply put, G. L. c. 21E was drafted in a comprehensive fashion to compel the [*409] prompt and efficient cleanup of hazardous material and to ensure that costs and damages are borne by the appropriate responsible parties. To that end, the department has promulgated extensive regulations, known collectively as the [MCP] . . . for purposes of implementing, administering, and enforcing G. L. c. 21E." Bank v. Thermo Elemental, Inc., 451 Mass. 638, 653, 888 N.E.2d 897 (2008), quoting from Taygeta Corp. v. Varian Assocs., 436 Mass. 217, 223, 763 N.E.2d 1053 (2002). HN1[] "The purpose of the MCP is, among other things, to 'provide for the protection of health, safety, public welfare [**726] and the environment' by encouraging 'persons responsible for releases . . . of . . . hazardous material to undertake [***6] necessary and appropriate response actions in a timely way.'" Ibid., quoting from 310 Code Mass. Regs. § 40.0002 (1995).

The specifics of GVR's obligations, including the extent to which the property must be remediated, however, are not contained in the settlement agreement. Nonetheless, the conceptual plan submitted with GVR's application for the comprehensive permit was created by a licensed site professional (LSP) and proposes to clean the property, prior to development, to a condition of "no significant risk" as that term is used in the MCP. The phrase, no significant risk "means a level of control of each identified substance of concern at a site or in the surrounding environment such that no such substance of concern shall present a significant risk of harm to health, safety, public welfare [***7] or the environment during any foreseeable period of time." 310 Code Mass. Regs. § 40.0006 (2006).

More specifically, GVR's conceptual plan proposes to transport the remaining hazardous materials and any recyclables off site; consolidate nonhazardous materials into a smaller sealed and capped area on the western portion of the site; and treat and monitor the

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[3] Conversion to town water has alleviated at least some of the dangers to abutters from the migrated contamination.

[4] After briefs were submitted and oral argument was held in this court, the board filed papers suggesting GVR had been dissolved by the Secretary of State and arguing that because its status as [***4] a limited dividend organization is a jurisdictional prerequisite to submitting an application for a comprehensive permit pursuant to G. L. c. § 40B, § 21, and 760 Code Mass. Regs. § 56.04(1) (2008), GVR lacks standing to proceed with this appeal. GVR responded with a certificate of good standing from the Commonwealth. While it is likely that what the board views as a "'jurisdictional requirement' is more properly viewed as a substantive aspect of the successful applicant's prima facie case for entitlement to a particular government benefit, in this case, a comprehensive permit," given the unrebutted evidence of GVR's intact corporate status, we need not reach the issue. Middleborough v. Housing Appeals Comm., 449 Mass. 514, 520-521, 870 N.E.2d 67 (2007).

[5] GVR has agreed to pay DEP between $1.25 million and $1.75 million.

[6] R&C Realty Trust and C&R Realty Trust, the current owners of the locus, and GVR, under agreement to purchase the locus, brought an action in the Superior Court challenging the Commonwealth's c. 21E liens on the property. The parties entered into a settlement agreement on or about June 3, 2008. It is this settlement agreement that outlines GVR's payment obligations to DEP. See note 5, supra.

groundwater as necessary. Current plans call for treating the contaminated groundwater with hydrogen release compound (HRC), which facilitates degradation of TCE. GVR concedes, however, that additional testing is necessary, and remediation plans may change depending on the outcome of the testing. In addition, GVR concedes that treatment of TCE with HCR can sometimes produce vinyl chloride (VC), a compound that is even more toxic than TCE. GVR proposes to monitor the remediation efforts for that contingency, however, and use [*410] alternative methods should pilot testing indicate they are warranted. GVR points out that HCR has been used successfully in many locations, including another location in town. Moreover, the record supports the judge's conclusion that long-term testing will be conducted to monitor soil, gas, and groundwater to [***8] ensure continuous compliance.

Based on our review of the testimony and documentary evidence, it is our understanding that GVR's plan is to do whatever it takes to achieve a condition of "no significant risk." GVR accepts that this status must be achieved in order to proceed with the project and its experts are confident it can be achieved. Even one of the board's experts concedes that the plan is feasible based on the information that is currently available. All of the parties agree, however, that additional testing is necessary, which may result in different approaches to remediating the locus. While it is our understanding that GVR is committed to making any necessary changes, the additional testing necessary to create a final remediation plan is quite costly. Until GVR completes the purchase of the locus, it has no obligation to clean up the property. As explained by GVR's principal, although GVR is prepared to accept responsibility for the cleanup and bring the property into compliance with the MCP, GVR "cannot and will not enter into [a] binding ACO without first knowing that development at the property can go forward."

The HAC concluded with regard to environmental considerations [***9] that consolidation of the onsite landfill, remediation, and the related issue of groundwater protection are not regulated under the town's zoning by-law and, therefore, are not properly before the HAC. The HAC further concluded that because environmental authorities will review these issues, there is [**727] no reason for the HAC to make an exception to its general rule of not considering unregulated matters. The Land Court judge concluded that the DEP will oversee the remediation process and will ensure compliance with all applicable environmental statutes and regulations. As such, the judge concluded that the board had not shown that local environmental concerns outweigh the regional need for housing.

b. The wetlands. The site contains five separate wetland areas. In the northeastern corner of the locus is a man-made pond with [*411] a narrow wetland area along its banks. GVR proposes to construct a large storm water basin adjacent to this wetland and to revegetate the basin with indigenous hydric species, which will increase the over-all wetland area of the locus. The existing wetland will not be disturbed but much of the fifty-foot do not disturb zone contained in the local by-law will be incorporated [***10] into the storm water basin.

The two largest wetland areas are located on the western one-third of the locus, and are referred to as "Wetland Series A/D" and include a vernal pool. The two wetland areas are separated from one another by an existing roadway and are part of an extensive swamp area that extends well beyond the borders of the locus. The one hundred foot buffer zone surrounding the locus consists largely of a forested area and a denuded former landfill slope leading to an old, disturbed field and shrub habitat. GVR proposes to leave the forested wetland areas intact and to excavate the denuded slope to create a very large storm water basin, "basin 7P." Again basin 7P will be revegetated with indigenous species and will become a wetland itself.

Finally, the locus contains two isolated wetland areas, "wetland B" and "wetland C," which are protected by the local by-law only. Wetland B will not be altered. Wetland C, however, served as a dump site for old stumps and GVR proposes to excavate the wetland, remove the stumps, and incorporate the wetland into basin 7P to increase flood storage capacity. As noted above, according to GVR's experts, the basin will be revegetated with [***11] indigenous species, will become a wetland itself, and will enhance the function of the degraded wetland.

Work in and near the wetlands is regulated by the WPA and the town's locally adopted Wetlands Administration Bylaw Regulations (local wetland regulations). As compared to the Massachusetts Wetlands Protection Act (WPA), the local wetland regulations contain a stricter "no disturbance" zone, larger buffers, and regulates small isolated wetlands that are not regulated by the WPA. GVR has requested a waiver of all of the local wetland regulations to the extent they exceed the requirements of the WPA, but asserts it will comply with the requirements of the WPA and associated State

regulations.

Because the local conservation commission performs the initial review under the WPA, GVR must submit a notice of [*412] intent to the conservation commission before any work in or near the wetlands may begin.[7] Should the conservation commission determine that the proposal does not comply with State regulations and issue [**728] a denial of the notice of intent, GVR may proceed to the DEP for a superseding order of conditions. In denying the plan, the board pointed to GVR's requested waivers of the local by-law [***12] requirements. In addition, the board contends that the plan as proposed does not comply with current requirements of the WPA and its associated regulations.

With regard to the wetlands, the HAC concluded that GVR's wetlands expert's reasonably specific description of the design elements that may affect the five wetland areas, GVR's commitment to comply with the WPA, and GVR's expert's testimony that the project "will result in no significant adverse impacts to wetland resource areas both under the WPA and the [town's] Bylaw," are sufficient to establish GVR's prima facie case of compliance with Federal and State statutes or regulations or with generally recognized standards as required by *760 Code Mass. Regs. § 56.07(2)(a)(2)* (2008).[8] The HAC further [***13] concluded that the wetlands function actually will be enhanced and that the board had failed to demonstrate that compliance with the local by-law is necessary to adequately protect a local concern that exceeds the need for low and moderate income housing. The judge essentially agreed.

c. Stormwater management. As noted in the wetlands description, GVR proposes to manage stormwater by creating large wetland retention basins. GVR concedes that while its stormwater management system complied with the DEP's Best Management Practices and Guidelines as well as the DEP's 1997 Storm Water Management Guidelines, the DEP amended those standards in January of 2008. GVR has committed to revising its plans to meet the 2008 standards. The board's expert contends revisions [*413] to comply with the 2008 standards are not physically feasible. For example, the board contends there is inadequate space to achieve the length of separation between the wetlands and the storm basins required. While the HAC generally accepted GVR's expert's testimony and agreed the plan to meet State standards is feasible, it ensured that any problems [***14] noted by the board's expert would be remedied by adding a condition that the plan comply with current State standards and noted that the DEP will review the storm water management plan to ensure compliance with State standards. The judge agreed and further noted that the board had failed to demonstrate any harm that would result from lack of compliance with local regulations.

Discussion. 1. Review under G. L. c. 40B. ***HN2***[↑] The Comprehensive Permit Act, *G. L. c. 40B, §§ 20-23 (Act)*, is designed to facilitate the development of low and moderate income housing in communities throughout the Commonwealth. The "act was intended to remove various obstacles to the development of affordable housing, including regulatory requirements that had been utilized by local opponents as a means of thwarting such development in their towns." *Dennis Hous. Corp. v. Zoning Bd. of Appeals of Dennis, 439 Mass. 71, 76, 785 N.E.2d 682 (2003)*. The procedural path and applicable standards of review have been "thoroughly canvassed in earlier opinions." *Board of Appeals of Woburn v. Housing Appeals Comm., 451 Mass. 581, 582, 887 N.E.2d 1051 (2008)*, quoting from *Middleborough v. Housing Appeals Comm., 449 Mass. 514, 516, 870 N.E.2d 67 (2007)*. We summarize only the relevant [***15] portions of the Act and supplement as needed for specific issues.

HN3[↑] Rather than proceed before multiple town or city boards, a qualified developer [**729] may submit to the local board of appeals a single application, and the board of appeals, with input from other local boards, is empowered to issue all necessary permits or approvals. See *Dennis Hous. Corp., 439 Mass. at 76-77*. In considering an application, the board has the power to override local regulations but not State regulations. *Id. at 80* ("comprehensive permit scheme was designed to override local ordinances, bylaws, and regulations that impeded the development of affordable housing, not Statewide requirements set by the Legislature and State agencies"). See *Board of Appeals of Hanover v.*

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[7] The conservation commission makes the initial review of a project that is governed by the WPA "for the familiar purposes of bringing local knowledge to bear on local conditions and reducing the administrative burden on a Statewide agency." *Department of Envtl. Quality Engr. v. Cumberland Farms of Connecticut, Inc., 18 Mass. App. Ct. 672, 676, 469 N.E.2d 1286 (1984)*, quoting from *Hamilton v. Conservation Commn. of Orleans, 12 Mass. App. Ct. 359, 368, 425 N.E.2d 358 (1981)*.

[8] For a more extensive discussion of the prima facie case requirements, see infra.

Housing Appeals Comm., 363 Mass. 339, 354-355, 294 N.E.2d 393 (1973) [*414] (board has same power as HAC to override local requirements). Where, as here, the board denies a permit application, the applicant may appeal to the HAC. G. L. c. 40B, § 22.

HN4[] The HAC's review is limited to the issue of whether "the decision of the board of appeals was reasonable and consistent with local needs." G. L. c. 40B, § 23, amended by St. 1998, c. 161, § 261. "[R]equirements and regulations [***16] shall be considered consistent with local needs if they are reasonable in view of the regional need for low and moderate income housing considered with the number of low income persons in the city or town affected and the need to protect the health or safety of the occupants of the proposed housing or of the residents of the city or town, to promote better site and building design in relation to the surroundings, or to preserve open spaces." G. L. c. 40B, § 20, amended by St. 2003, c. 26, § 181. There exists a rebuttable presumption that the regional affordable housing need outweighs local concerns where the town's stock of low and moderate income housing is less than ten percent. Zoning Bd. of Appeals of Canton v. Housing Appeals Comm., 76 Mass. App. Ct. 467, 469-470, 923 N.E.2d 114 (2010). Here, it is undisputed that the town's stock of low or moderate income housing is less than ten percent. In fact, the town has only 3.15 percent low or moderate income housing. But HN5[] even where "a municipality has failed to meet its statutory minimum[,] the HAC may still uphold denial of the permit as 'reasonable and consistent with local needs' if the community's need for low or moderate income housing is outweighed [***17] by valid planning objections to the proposal based on considerations such as health, site, design, and the need to preserve open space.'" Hingham v. Department of Hous. & Community Dev., 451 Mass. 501, 504 n.6, 887 N.E.2d 231 (2008), quoting from Zoning Bd. of Appeals of Greenfield v. Housing Appeals Comm., 15 Mass. App. Ct. 553, 557, 446 N.E.2d 748 (1983).

HN6[] Parties aggrieved by the HAC's decision may appeal to the Superior or Land Court pursuant to G. L. c. 30A, § 14. See G. L. c. 40B, § 22. The courts apply a substantial evidence standard of review of the administrative record "in light of the heavy burden borne by a local board that denies a comprehensive permit application" to prove "a specific health or safety concern of sufficient gravity to outweigh the regional housing [*415] need." Zoning Bd. of Appeals of Canton, 76 Mass. App. Ct. at 473. The HAC's decision must be upheld if supported by substantial evidence and we must indulge all rational presumptions in favor of the validity of the HAC's determinations, including its choice between two fairly conflicting views, giving due weight to its experience, technical competence, and specialized knowledge. See Middleborough v. Housing Appeals Comm., 449 Mass. at 523-524, 528-529, 870 N.E.2d 67.

[**730] 2. [***18] Prima facie case. HN7[] Before the HAC, a developer whose comprehensive permit has been denied may establish a prima facie case by proving "that its proposal complies with federal or state statutes or regulations, or with generally recognized standards as to matters of health, safety, the environment, design, open space, or other matters of Local Concern." 760 Code Mass. Regs. § 56.07(2)(a)(2) (2008). It is only after the developer meets this standard that the burden shifts to the board to show that there is an overriding local concern that exceeds the regional need for affordable housing. Here, the board's principal argument on appeal is that the plans submitted are too indefinite to allow the board to determine whether the plans comply with State statutes and regulations with regard to remediation of the contamination on the locus, wetland preservation, and stormwater management. Given the deficiencies in the plans, the board contends, granting a comprehensive permit on plans that require modification deprives the board of a fair opportunity to challenge the proposal. As such, the board argues that GVR did not carry its burden of proving a prima facie case.

HN8[] The regulatory scheme governing [***19] applications for comprehensive permits, however, requires only preliminary plans, including "preliminary site development plans," "a report on existing site conditions and a summary of conditions in the surrounding areas," "preliminary, scaled, architectural drawings," a "preliminary subdivision plan," and a "preliminary utilities plan showing the proposed location and types of sewage, drainage, and water facilities." 760 Code Mass. Regs. § 56.05(2) (2008). To the extent the preliminary plans submitted by GVR are lacking or in fact admittedly do not comply with current State regulations or standards, GVR's proposal does not end with the plans. GVR proposes to make all modifications necessary to achieve [*416] compliance with State regulations. In fact, compliance with all statutory and regulatory restrictions and conditions relating to protection of drainage, wetlands, vernal pools, wildlife habitats, nearby conservation areas, and "Title V regulations" is a condition of GVR's site approval by MassHousing. In addition, the HAC's

decision requires that the comprehensive permit include a condition that "[a]ll design features shall comply with the state [WPA], including all DEP Stormwater Management [***20] Guidelines, subject to review by the Holliston Conservation Commission and the [DEP]."

It has long been held that ***HN9***[↑] it is unreasonable for a board to withhold approval of an application for a comprehensive permit when it could condition approval on the tendering of a suitable plan that would comply with State standards. *Board of Appeals of Hanover, 363 Mass. at 381* ("Since the board could have issued a permit subject to the condition of tendering a suitable disposal plan and since these plans had to comply with State standards, whatever their particular design, the [HAC's] decision that the board had unreasonably rejected the applicant's original plans was warranted"). See *Zoning Bd. of Appeals of Amesbury v. Housing Appeals Comm., 457 Mass. 748, 765, 933 N.E.2d 74 & n.21 (2010)* (board does not exceed authority by imposing condition of compliance with stormwater management requirements). Given GVR's proposal to (i) remediate the property under the direction of the DEP to a condition of no significant risk in compliance with the MCP and DEP regulations; (ii) modify its plans for the areas protected by the WPA to comply with the WPA and associated regulations with review by the conservation commission [***21] and the DEP to ensure compliance; and (iii) modify its stormwater [**731] management system to meet the revised DEP guidelines with review by the conservation commission and the DEP to ensure compliance, it was not unreasonable for the HAC and the judge to conclude that GVR had established a prima facie case.[9]

3. Local concerns. Having concluded that GVR met its burden [*417] to present a prima facie case, we consider whether, assuming compliance with State requirements, the board nonetheless identified "a valid health, safety, environmental, design, open space, or other Local Concern which supports [the] denial" and "outweighs the regional Housing Need." *760 Code Mass. Regs. § 56.07(2)(b)(2)* (2008). We turn to each issue raised by the board, keeping in mind the heavy burden borne by the board and the ***HN10***[↑] rebuttable presumption that there exists a substantial regional housing need that outweighs local concerns where, as here, the town has not achieved the ten percent minimum stock of affordable housing. *Zoning Bd. of Appeals of Canton, 76 Mass. App. Ct. at 470*.

a. Environmental contamination. State law prohibits development [***23] of the locus for construction of residential units in its current contaminated condition. Neither party argues that the judge erred in finding that the locus must achieve the condition of no significant risk under the MCP before development may begin. The MCP's requirements cannot be waived under the Act and the MCP is designed to protect the health and safety of the public. While the board's concern for the health of the future occupants of the locus and its abutters cannot be doubted, the board does not point to a local by-law that requires more stringent cleanup than the DEP. In fact, the board does not point to any local by-law or regulation that controls either the remediation or development of contaminated property. The board's power to disapprove a comprehensive permit, like its power to impose conditions in issuing a comprehensive permit, *Zoning Bd. of Appeals of Amesbury v. Housing Appeals Comm., 457 Mass. at 755-756*, is limited to the scope of concern of the various local [*418] boards in whose stead the local zoning board acts. We agree with the HAC, therefore, that the board exceeded its authority in relying on environmental issues to deny the comprehensive permit.

In an effort [***24] to bring the environmental issues within its scope of concern, the board points to two use regulations of the town's zoning by-laws, §§ I-D(1)[10] and

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[9] While we appreciate the board's reluctance to sign off on plans that require further modification in order to comply with State law and regulations, the three issues the board pursues on appeal -- cleanup of the site, protection of the wetlands, and stormwater management -- are each subject to State review to ensure compliance with State regulations. It may well be that with regard to other issues, which will not undergo State review, the board's function would be thwarted without more definite plans, but that is not the case here. We note further that the board is not without recourse should State review result in substantial changes to the plans. The board will have an opportunity to review any "substantial changes" to the plans. *760 Code Mass. Regs. § 56.05(11)(a)* (2008) ("If after a Comprehensive Permit is granted by the Board, including by order of the Committee pursuant to *760 Code Mass. Regs. § 56.07(5)*, [***22] an Applicant desires to change the details of its Project as approved by the Board or the Committee, it shall promptly notify the Board in writing, describing such change"). Should the board determine that a change is substantial, the board must hold a public hearing and determine anew whether the project may be approved with the change. *760 Code Mass. Regs. § 56.05(11)(c)* (2008).

[10] Section I-D(1) of the town's zoning by-law provides that "[i]n any district no use will be permitted which will produce a nuisance or hazard from fire or explosion, toxic or corrosive fume, gas, smoke, odors, obnoxious dust or vapor, harmful

V-N,[11] [**732] as set forth in the margin. Section I-D(1) prohibits uses that will, among other things, discharge into the soil or water any "petroleum products, chemicals or pollutants unless the same are so treated before discharge as to render them harmless to life or vegetation of any kind." Similarly, § V-N(2) prohibits discharge into the ground or water of substances that may combine with others to create offensive elements unless the discharge is "in accordance with applicable federal, state and local health and water pollution control laws and regulations." Both the HAC and the judge correctly rejected the board's argument that these use regulations were intended to apply to the remediation of the locus in this case. The clear import of these restrictions is to prevent uses that will produce or allow the disposal of products that will contaminate the soil and water; they do not prevent efforts to clean up existing contamination. We note in addition that nothing in GVR's submittals suggest that it plans to discharge HCR into the groundwater [***25] "except in accordance with applicable federal, state and local health and water pollution control laws and regulations."

[*419] To the extent that these sections of the town's zoning by-law may be interpreted to control the introduction of HRC into the property for purposes of remediating the site, GVR's expert's testimony indicates that "remedial activities that could potentially generate [vinyl chloride] [by the combination of TCE and HRC] will be routinely assessed, managed, and fully regulated under the MCP and other regulations to ensure that impact[s] [on] adjacent and future on-site residents, nearby surface water and other sensitive receptors will not occur." Moreover, GVR's expert testified that HCR has been used elsewhere in the town without objection. Given assurances that the impacts will be monitored and remediation activities will be regulated under the MCP by the DEP, along with the town's history of allowing the use of HCR elsewhere, the board has not shown that it has raised an issue of local concern that exceeds the need for affordable housing. It is not enough to identify a local by-law that arguably applies to the [***27] project; the board must show that the local concern outweighs the regional need for affordable housing. In addition, where the DEP is charged with providing for the protection of health, safety, public welfare, and the environment by ensuring that responsible owners take appropriate remediation action, the board must be able to demonstrate that its local concerns will not be met by the State standards enforced by the DEP. The board does not argue that the DEP will be unable to provide adequate protection to current and future residents.

b. Wetlands. To the extent the board argues that it reasonably denied the [**733] comprehensive permit because the plans do not comply with the WPA, the argument is unavailing. GVR's proposal commits to comply with the WPA and the final plans are subject to conservation commission and DEP review prior to commencing any work in the areas protected by the WPA.[12] Moreover, as the judge correctly concluded, there was substantial evidence in the record to "sufficiently demonstrate that once the project is complete, the wetland resources on the property will be enhanced."

[*420] The town, however, has adopted a wetlands by-law that is stricter than the WPA in that it has a strict fifty-yard no disturb buffer zone and regulates small, isolated wetlands. GVR has requested a waiver from all of the provisions of the local wetlands by-law to the extent they are stricter than the WPA. It was incumbent on the board, therefore, to identify a local interest protected by those aspects of the by-law that are stricter than the WPA and demonstrate that such interest outweighs the regional need for low and moderate income housing.

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radioactivity, offensive noise or vibration, flashes, objectionable effluent or electrical interference which may affect or impair the normal use and peaceful enjoyment of any property, structure, or dwelling in the neighborhood. Neither shall there be permitted any use which discharges into the air, soil, or water any industrial, commercial or other kinds of wastes, petroleum products, chemicals or pollutants unless the same are so treated before discharge as to render them harmless to life or vegetation of any kind."

[11] Section V-N(2) of the town's zoning by-law provides that "[n]o discharge at any point into any public sewer, private sewerage disposal system, stream, water body, or into the ground, of any materials of such nature or temperature as can contaminate such water body or water supply, or cause emission of dangerous [***26] offensive elements in reaction thereto, shall be permitted except in accordance with applicable federal, state and local health and water pollution control laws and regulations."

[12] The comprehensive permit statute does not exempt GVR from complying with the wetlands protection [***28] standards contained in the WPA and does not remove the conservation commission's jurisdiction to review the plans for compliance with the WPA. If the conservation commission determines that the plans do not comply with State standards, GVR has the option of pursuing a superseding order of conditions from the DEP.

The board has done nothing more than point out that the proposal violates the town's stricter by-laws. It has failed to demonstrate that the safeguards the local by-law provides to wetlands interests over and above the protections afforded by the WPA outweigh the community's need for low or moderate income housing. Wetland C, protected [***29] only by the local by-law and not by the WPA, will be made deeper and larger and in doing so, the wetland vegetation will be removed and then replanted. Although the board objects to what it describes as the "complete destruction" of this locally protected isolated wetland, it ignores the fact that wetland C served as a dumping ground for old tree stumps and is currently degraded. There is substantial evidence in the record to support the conclusion that wetland C's function will be enhanced by the project.

The board insists nonetheless that it or the conservation commission is charged with determining whether a resource area is "worthy" of protection, not GVR. The board's response is inadequate. ***HN11***[↑] "To the extent that a city or town does not have an adequate supply of affordable housing (measured in the Act as a percentage of existing housing or of land in each town) its local autonomy in zoning matters is curtailed." *Zoning Bd. of Appeals of Wellesley v. Ardemore Apartments Ltd. Partnership, 436 Mass. 811, 824, 767 N.E.2d 584 (2002)*. It is not enough to simply point out a lack of compliance with local regulations or complain that the local board's power has been taken away. The board must show that the [***30] impacts on the local wetlands outweigh the local need for affordable housing and it quite simply made no effort to do so.

Similarly, the board failed to articulate specific harms from the violation of the fifty-foot no disturb zone, particularly where the area will be disturbed only to create storm water basins that will be converted to additional wetlands. The board's expert [*421] does suggest that by excavating the denuded slope adjacent to wetland area A/D and constructing a large storm basin in its place, animals may not be able to reach the wetland. The testimony on this point was vague, without identification of specific species that would [**734] be affected. Further, the plan calls for restoring a significant area of the buffer zone along the eastern edge of wetland area A/D and there is no plan to disturb the forested area adjacent to the wetlands, likely a significant animal habitat. Moreover, the HCA credited testimony that the improved wetlands system will provide additional habitat for wildlife. Most importantly, a stated purpose of the WPA is to protect animal habitats. There has been no showing that to the extent the board has identified a legitimate concern, the WPA will provide insufficient [***31] protection of local wild animal habitats, including that of those animals who need to reach the wetlands.

Finally, the board ignores that at least portions of the wetlands are currently contaminated and so far as the record reveals, will remain so if the project is not approved. The HAC's conclusion that the over-all effectiveness and cleanliness of the wetlands will be improved by the project as proposed is supported by substantial evidence. It is difficult to escape the conclusion that the benefits to the wetlands from the proposed project greatly outweigh the proposed deviation from the stricter local by-law.

c. Stormwater management. The comprehensive permit is conditioned on submission of a stormwater management plan that complies with State requirements. The town has adopted local stormwater and runoff regulations which exceed the DEP requirements in that they require that the total volume and rate of runoff discharged offsite may not increase from predevelopment amounts. In addition, the regulations require retention pond slopes "be no steeper than 4 horizontal to 1 vertical." We agree with the HAC that the board has failed to demonstrate any harm from GVR's request for waivers [***32] from the local drainage regulations. Once again the board simply points out that the local regulations will be violated. The board's concerns that discharging rainwater into the large pond may cause contaminated groundwater to spread ignores that remediation of the locus, including the groundwater, must occur before development may begin and that the site will continue to be monitored. As a result, [*422] it cannot be said on this record that the board has demonstrated that a local concern with regard to storm water management exceeds the need for low or moderate income housing.

d. Housing need. Although the board concedes that the town has not achieved the goal of ten percent affordable housing stock, it argues that in balancing its local concerns as to site contamination, wetlands alteration, and stormwater management with the regional need for housing, its failure to reach the ten percent goal should be given little weight because the need for the type of housing that the project will provide is low. We disagree.

HN12[↑] The Act broadly defines "low or moderate income housing" as "any housing subsidized by the federal or state government." *G. L. c. 40B, § 20*, added by St. 1969, c. 403, § 5. The [***33] Act and associated

regulations encourage the development of a mix of types of housing, including "rental [and] homeownership . . . for families, individuals, persons with special needs, and the elderly." *760 Code Mass. Regs. § 56.03(4)* (2008). Although only fifty of the 200 proposed units here will qualify as affordable housing units, "[a]ll affordable housing projects are treated in the same manner regardless whether they include units to be made available at fair market value." *Board of Appeals of Wellesley v. Ardemore Apartments Ltd. Partnership, 436 Mass. at 824-825 n.25*. [***34] Moreover, although the board presented evidence to support the conclusion [**735] that the region's greatest need is rental housing for very low income families, those that have incomes below thirty percent of the area median income, the board's witness did not go so far as to say that there is not a need for the owner owned and occupied type of affordable housing that will be provided by this project or even that the need for such housing is low. Indeed, with a subsidized housing stock of only 3.15 percent, the board's suggestion that the project will not contribute to the regional need for affordable housing is unavailing.

Conclusion. The record establishes that the decision of the HAC is supported by substantial evidence. The judgment upholding the HAC's decision is therefore affirmed.

So ordered.

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