COMMONWEALTH OF MASSACHUSETTS

FRANKLIN, ss

SUPERIOR COURT DEPARTMENT
CASE NO. _____

SUNDERLAND ZONING BOARD OF APPEALS,

Plaintiff

v.

SUGARBUSH MEADOW, LLC and
THE MASSACHUSETTS HOUSING APPEALS COMMITTEE,

Defendants

COMPLAINT

I. Introduction

1. This matter is an appeal, brought pursuant to G.L. c. 30A, §14, of certain decisions and orders of the Defendant Housing Appeals Committee ("HAC"). The HAC's final decision (the "Decision") is attached to hereto as Exhibit A. The HAC's decision vacates the decision of the Plaintiff Sunderland Zoning Board of Appeals (the "Board") to deny the comprehensive permit application of the Defendant Sugarbush Meadow, LLC ("Sugarbush").

II. Parties

2. The Board is a duly constituted zoning board of appeals, with offices at Sunderland Town Hall, 12 School Street, Sunderland, Massachusetts. The Board is empowered to hear applications for so-called comprehensive permits, submitted under the provisions of G.L. c. 40B, §§20-23 and the regulations promulgated thereunder. Under c. 40B,

applicants may seek waivers of local by-laws and regulations in exchange for a small number of affordable housing units.

3. The HAC is an administrative entity created under G.L. c. 23B, §5A. The HAC, which operates under the auspices of the Massachusetts Department of Housing and Community Development ("DHCD"), has the sole purpose of hearing applicants' appeals from decisions by zoning boards of appeals under G.L. c. 40B, §§20-23.

4. Sugarbush is, upon information and belief, a Massachusetts Limited Liability Corporation with a principal address of 171 Gray Street, Amherst, Massachusetts.

5. On or about September 19, 2006, HBM submitted a comprehensive permit application to the Board, seeking approval for a 150 unit apartment complex (the "Project") on an approximately 57 acre parcel located Route 116 in Sunderland (the "Property").

6. During the Board's public hearing, the Board, as well as other municipal boards and departments raised a variety of concerns including, but not limited to, vehicular safety, pedestrian safety, fire protection, wetlands impacts, housing need, water supply, and consistency with accepted planning principals.

7. The Board also raised concerns about Sugarbush's failure to cooperate or provide adequate information.

8. Due to the above-stated concerns and Sugarbush's failure to provide necessary information, the Board denied the comprehensive permit application. The Board's decision was filed with the Sunderland Town Clerk on January 10, 2008.

9. Sugarbush appealed the Board's decision to the HAC. A number of procedural motions were filed and decided subsequent to the filing of the appeal.

10. A two day evidentiary hearing was held but only one member of the HAC attended the hearing. During the hearing, competing testimony was received by various witnesses, including several competing expert witnesses. The credibility of many of the witnesses was attacked by the parties' respective attorneys.

11. By a final decision dated June 21, 2010, the HAC overturned the Board's decision and ordered the issuance of a comprehensive permit for the Project proposed by Sugarbush.

12. In issuing its decision, the HAC completely erred in applying statutes, regulations, bylaws and accepted standards for assessing a variety of issues, including but not limited to, housing need, fire protection, vehicular safety, pedestrian safety, wetlands issues, legal fees and planning concerns.

COUNT ONE – APPEAL UNDER G.L. C. 30A, §14

13. The Board hereby restates each and every preceding paragraph of this Complaint.

14. The HAC's Decision and Orders are in excess of said agency's statutory authority.

15. The HAC's Decision and Orders are based upon multiple errors of law.

16. The HAC's Decision and Orders were made upon an unlawful procedure.

17. The HAC's Decision and Orders are unsupported by substantial evidence and are unwarranted by the facts in the record.

18. The HAC's Decision and Orders are arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law.

WHEREFORE, the Board respectfully request that this Court:

a. Stay the HAC's Decision while these proceedings are pending;

b. Remand this matter and/or take additional evidence evidence so as to review and correct errors committed by the HAC;

c. Enter judgment in the Board's favor, annulling the HAC's decision and upholding the underlying decision of the Board;

d. Award the Board its costs and attorneys fees in the prosecution of this matter; and

e. Award the Board such other relief as is deemed just and equitable.

The Plaintiff,
SUNDERLAND ZONING BOARD
OF APPEALS
By its attorneys,

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July 19, 2010

EXHIBIT A

COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

SUGARBUSH MEADOW, LLC Appellant v. SUNDERLAND BOARD OF APPEALS Appellee	)	No. 08-02

DECISION

I. PROCEDURAL HISTORY

On September 19, 2006, Sugarbush Meadow, LLC submitted an application to the Sunderland Board of Appeals for a comprehensive permit pursuant to G.L. c. 40B, §§ 20-23 to build 150 affordable, mixed-income, rental apartments in five buildings on a nearly 57-acre site on Route 116 in the southeast corner of Sunderland. The housing is to be financed under the Expanding Rental Affordability (ERA) program of the Massachusetts Housing Finance Agency (MassHousing).

The Board denied the comprehensive permit by decision filed with the town clerk on January 10, 2008, and on January 22, the developer appealed to this Committee. The parties filed cross-motions for summary decision with regard to a large number of issues. On July 1, 2008, the presiding officer issued a ruling granting those motions with regard to some issues, and denying it with regard to others. With the issues thus narrowed, the presiding officer convened a Pre-Hearing Conference, and pursuant to 760 CMR 56.06(7)(d)(3) the parties negotiated a Pre-Hearing Order, which was issued October 22, 2008. Prefiled testimony was received from nineteen witnesses, a site visit and two days

of hearings to permit cross-examination of witnesses were conducted, and post-hearing briefs were filed.[1]

II. FACTUAL OVERVIEW

The subject of this appeal is a large, nearly 57-acre, irregularly shaped lot in the area southwest of the intersection of Route 116, which is the major north-south, two-lane highway in Sunderland, and Plumtree Road, a somewhat smaller, but still well-traveled road. Exh. 3-A; 22, p. 10. The site is in the southern part of Sunderland, and, in fact, it abuts the town of Amherst. See Exh. 22, p. 9. It is an interior lot, that is, the site has less than 100 feet of frontage on both Route 116 and Plumtree Road, and vehicular access is available from those roads only via two narrow strips of land between wider lots not controlled by the developer. Exh. 3; 22, p. 10. The site is fairly level, and contains open fields, wetlands, forested wetlands, and several small natural and artificial ponds that were once used for fish farming. See Exh. 22, p. 10. In the neighborhood are a number of single-family homes, primarily along Plumtree Road, and there is a limited amount of commercial development along Route 116. See Exh. 22, p. 10.

The 150 proposed apartments would be in five thirty-unit, wood-frame buildings spread across the site in locations where there are no wetlands. Exh. 3; 4, sheet 6; 78, ¶ 8. The land on which the housing will be located is within the town's Rural Residence zoning district, which permits single-family homes as of right on lots of 32,000 square feet or larger, and, by special permit only, two-family homes or multi-family housing in Planned Unit Developments (PUDs) or "Major Residential Developments."[2] Exh. 2, § II-14; 14, §§ 125-3(A)(1), 125-4(D), 125-5(E).

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1. The Board requested oral argument before the full Committee. Board's Brief, p. 1. As it has done in previous cases, the denies the request. See *LeBlanc v. Amesbury*, No. 06-08, slip op. at 2 (Mass. Housing Appeals Committee May 12, 2008); *Tiffany Hill, Inc. v. Norwell*, No. 04-15. slip op. at 4 (Mass. Housing Appeals Committee Sep. 18, 2007). Concerning practical considerations which limit the full Committee's ability to hear evidence and argument, see *Wilmington Arboretum Apts. Assoc. Ltd. Partnership v. Wilmington*, No. 87-17, slip op. at 3, n.2 (Mass. Housing Appeals Committee Order Sep. 28, 1992), *aff'd*, 39 Mass. App. Ct. 1106 (1995)(rescript).

2. Multi-family housing is not permitted as of right anywhere in town. Exh. 14, § 125-4(D).

III. PRELIMINARY ISSUES

As noted above, the presiding officer narrowed the issues in this case by issuing a summary decision pursuant to 760 CMR 56.06(5)(d). We reaffirm that decision, as indicated below.

A. Project Eligibility Determination

For the reasons stated in the presiding officer's ruling, including the deference we have traditionally shown toward the subsidizing agency in issuing a Project Eligibility determination and the Board's failure to challenge the determination in a timely manner by preliminary motion, we conclude that the Project Eligibility determination is legally sufficient. *Farmview Affordable Homes, Inc. v. Sandwich*, No. 02-32, slip op. at 4-5 (Mass. Housing Appeals Committee Ruling on Motion to Quash May 21, 2004); *Bay Watch Realty Trust v. Marion*, No. 02-08, slip op. at 2 (Mass. Housing Appeals Committee Order Concerning Jurisdiction Nov. 22, 2004); *Attitash Views, LLC v. Amesbury*, No. 06-17 (Mass. Housing Appeals Committee Oct. 15, 2007), *aff'd*, No. 2007-5046 (Suffolk Super. Ct. Jan. 7, 2009) , *sua sponte transfer*, No. SJC-10637 (S.J.C. Dec. 28, 2009); 760 CMR 56.04(6), 760 CMR 56.06(5)(b); see Exh. 1.

B. Traffic and Pedestrian Safety

There are legitimate factual disputes with regard to safety, and summary decision was therefore properly denied. See Pre-Hearing Order, §§ IV-3(a), IV-6(a); also see § IV-C, below.

C. Parking Requirements

Concerns about the adequacy of parking raise questions of fact, and therefore summary judgment was properly denied. See Pre-Hearing Order, §§ IV-3(b), IV-6(b). The Board, however, did not brief this issue, and it is therefore waived. *An-Co, Inc. v. Haverhill*, No. 90-11, slip op. at 19 (Mass. Housing Appeals Committee Jun. 28, 1994), citing *Lolos v. Berlin*, 338 Mass. 10, 13-14 (1958).

D. Smart-Growth Principles

Although at the preliminary stages of this hearing, the Board had not pointed to any local regulations or requirements that specifically address "smart growth," the

presiding officer did not abuse his discretion in granting the Board leeway to establish during the hearing that there are existing town regulations or requirements that address smart grown concerns that are applied generally to housing development in Sunderland. As directed by the presiding officer, the Board alleged in the Pre-Hearing Order that the Sunderland Zoning Bylaw, §§ 125-13, 125-17, and 125-19 had been applied to housing development in Sunderland in such a manner that certain smart-growth standards have been established. We will consider this argument in detail below. See Pre-Hearing Order, § IV-6(f); also see § IV-E, below.

E. Burden on Municipal Services and Infrastructure

Because the Board had not identified any specific municipal services or infrastructure on which the proposed development might impose undue burden, the presiding officer granted summary decision in favor of the developer on this issue. This question was reconsidered, however, and an allegation that acquisition of a large fire truck—a ladder truck—is not financially feasible for the town and that there is evidence of unusual topographical, environmental, or other physical circumstances that makes such acquisition prohibitively costly was included in the Pre-Hearing Order. See Pre-Hearing Order, § IV-6(d). As will be seen below, we need not reach the issue of whether the purchase of a ladder truck is financially feasible. See § IV-B, below. Other, more general claims related to "fiscal impact," additional school children, wear and tear on roads and sidewalks, and other basic services are not cognizable under G.L. c. 40B. 760 CMR 56.07(2)(b)(4); see Board's Brief, pp. 26-27.

F. Purpose Clause of the Zoning Bylaw.

As noted in the presiding officer's ruling, the Sunderland zoning bylaw was "enacted to promote the health, safety and welfare of the inhabitants of the Town..., to conserve the value of land and buildings, to encourage the most appropriate use of land throughout the town and to preserve and increase its amenities...." Although such a purpose clause may "suggest standards for the exercise of discretion where such discretion is otherwise provided, [it is not itself] a source of discretion." *McCaffrey v. Board of Appeals of Ipswich*, 4 Mass. App. Ct. 109, 112 (1976). We agree that the purpose clause in this case, in and of itself, establishes no local regulation or requirement

sufficient to constitute a local concern that would support the denial of a comprehensive permit, and therefore the summary decision in favor of the developer on this issue was properly granted.

G. Wetlands and Stormwater Management

We agree that wetlands and stormwater concerns raise questions of fact, and therefore summary judgment was properly denied. See Pre-Hearing Order, §§ IV-3(c), IV-6(c); also see § IV-D, below.

H. Wildlife Habitat

The Board made no claim that there are local regulations with regard to wildlife habitat distinct from the local wetlands bylaw. It also waived this issue by failing to brief it.

I. Firefighting Access

There are clearly facts in dispute with regard to fire access and fire safety, and therefore summary decision in favor of the developer was properly denied.[3] See Pre-Hearing Order, §§ IV-3(d), IV-6(d); also see § IV-B, below.

IV. LOCAL CONCERNS

When the Board has denied a comprehensive permit, the ultimate question before the Committee is whether the decision of the Board is consistent with local needs. Under the Committee's regulations, the developer may establish a *prima facie* case by showing that its proposal complies with state or federal requirements or other generally recognized design standards.[4] 760 CMR 56.07(2)(a)(2). The burden then shifts to the Board to prove first, that there is a valid health, safety, environmental, or other local concern that supports the denial, and second, that the concern outweighs the regional need for housing. 760 CMR 56.07(2)(b)(2); also see *Hanover v. Housing Appeals Committee*, 363 Mass.

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3. Additional issues concerning water pressure and capacity were resolved immediately prior to the evidentiary portion of the hearing. Tr. I, 28.

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

339, 365 (1973); *Hamilton Housing Authority v. Hamilton*, No. 86-21, slip op. at 11 (Mass. Housing Appeals Committee Dec. 15, 1988).

A. Regional Need for Affordable Housing

At the outset, we must address the regional affordable housing need—a term that is not clearly defined in Chapter 40B, § 20 or our regulations and yet which is critical since it is the need that is to be balanced against local concerns in determining whether the proposed housing in consistent with local needs. See 760 CMR 56.02 ("Housing Need"), 56.07(3)(b)(1). One indication of the housing need in this case, however, is that only 0.4 % of the total housing in Sunderland is low and moderate income housing. Exh. 88, ¶ 26. This fact alone is not only indicative of a substantial regional housing need, but also is "compelling evidence that the regional need for housing does in fact outweigh the objections to the proposal." *Board of Appeals of Hanover v. Housing Appeals Committee*, 363 Mass. 339, 367 (1973); also see 760 CMR 56.07(3)(a).

To counter this presumption, the Board makes two arguments. See Board's Brief, pp. 49-54. First, it argues that there are a considerable number of market-rate rental housing units in Sunderland (some of which rent at rates similar to or below the regulated rates for subsidized rental housing), and that this case should be distinguished from our recent holding in *Hollis Hills, LLC v. Lunenburg*, No. 07-13, slip op. at 9-19 (Mass. Housing Appeals Committee, Dec. 4, 2009). In *Hollis Hills*, with regard to homeownership housing, the Board argued that in determining regional need, the Committee should consider not only affordable housing as defined in the statute, that is, low or moderate income housing—housing subsidized and regulated by the state or federal government—but also inexpensive market-rate housing in the region that was available to meet the actual demand for affordable housing. After noting that the clear language of statue and regulations requires that we consider only subsidized housing as affordable housing, we observed that Chapter 40B was enacted to address "the acute shortage of decent, safe, low and moderate cost housing throughout the commonwealth." *Hanover v. Housing Appeals Committee*, 363 Mass. 339, 351 (1973). Thus, the legislature required a state or federal subsidy in order to ensure that housing constructed under the law would be subject to enforceable controls on quality, sales price or rental

rate, manner of marketing, and income of the occupants—all factors essential to the long-term stability of affordable housing. Also see *Zoning Board of Appeals of Wellesley v. Ardemore Apartments Ltd. Partnership*, 436 Mass. 811, 814 (2002) (goal of achieving a long-term solution to the shortage of affordable housing throughout the Commonwealth). We indicated that market-rate housing, by definition, fails to meet these requirements, and we concluded that "the Board's evidence of low cost market-rate housing cannot be factored into the consideration of the regional need for affordable housing." *Hollis Hills*, *supra*, slip op. at 14-15.

In the current case, the Board argues that rental housing is different from ownership housing because it is counted differently by the Department of Housing and Community Development (DHCD) on the Subsidized Housing Inventory, which is used in determining whether the town has reached the statutory threshold which offers it safe harbor from appeals of its decisions under the Comprehensive Permit Law. See 760 CMR 56.03(2). Specifically, when a homeownership mixed income affordable housing development is completed, the affordable units count toward the 10% threshold, but the market-rate units do not. But for a rental development, all of the units count.[5]

We reject the Board's argument. The fact that as a matter of administrative discretion towns receive credit for market-rate rental units in affordable housing developments—a credit that arguably goes beyond what is required by the statute—does not alter the clear statutory requirement that in making our decision we balance the regional need for only low and moderate income housing against local concerns. See

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5. The Department of Housing and Community Development is required by 760 CMR 56.03(2) to maintain a Subsidized Housing Inventory. Also see 760 CMR 56.03(3). The counting policy has been in effect for at least twenty years. Its history is obscure since it does not appear in the Comprehensive Permit Law itself and has rarely been stated clearly in the Housing Appeals Committee regulations, but rather has existed primarily as policy or at times in housing subsidy program regulations. See *Town of Hingham v. Department of Housing And Community Development*, 451 Mass. 501 (2008); *Zoning Board of Appeals of Wellesley v. Housing Appeal Committee*, 385 Mass. 651, 659, n.7, (1982); *Cedar Street Assoc. v. Wellesley*, No. 79-05, slip op. at 21-24 (Mass Housing Appeals Committee Mar. 4 1981); also see *Arbor Hill Holdings Ltd. Partnership v. Weymouth*, No. 02-09, slip op. at 5, n.7 (Mass. Housing Appeals Committee Order of Dismissal Sep. 24, 2003); *Capital Site Management Assoc. v. Wellesley*, No. 89-15, slip op. at 15-19 (Mass. Housing Appeals Committee Sep. 24, 1992). The policy is currently stated in the Comprehensive Permit Guidelines, § II-A(2) (Department of Housing and Community Development, Jul. 30, 2008), which the Board did not introduce into evidence.

G.L. c. 40B, § 20. Nor do the policy considerations with regard to ownership housing apply any differently to rental housing. If anything, the requirement that we consider only units subject to enforceable controls on quality, rental rate, manner of marketing, and income of the occupants—the factors essential to the long-term stability of affordable housing—is more important in the rental sphere to ensure that "the acute shortage of decent, safe, low and moderate cost housing throughout the commonwealth" is addressed. See *Hanover v. Housing Appeals Committee*, 363 Mass. 339, 351 (1973).

In addition, the Board has argued in its brief that in a 55-municipality region arbitrarily determined by drawing a circle with a radius of twenty miles around the proposed site, 10.7 % of all housing is affordable housing. Board's Brief, p. 53; Board's Brief, Attachments A, B.[6] Such a region would include not only the cities of Northampton, Holyoke, and Chicopee, but also Springfield, twenty miles south of Sunderland. Board's Brief, Attachments A. This argument is based only upon a contrived interpretation of the testimony of one of the *developer's* witnesses. Board's Brief, p. 53. The developer's expert planner testified that the most appropriate region to be considered is a six-town region. Exh. 88, ¶¶ 25-39. She established this region using national standards "for examining supply and demand for the need for housing." Tr. II, 42. But on redirect examination, she referred to the six-town region as "covering about a 20-mile radius, which is a very generous area." Tr. II, 42. From her other testimony and from its context, it is clear that she used the term "radius" loosely, and she did not intend to replace the six-town region she described—which *does* approach twenty miles across in its greatest dimension—with a much larger one. See Exh. 88-F. We find that this expert's delineation of a six-town region in this case was acceptable, and that it indicates that there is a substantial regional housing need.[7]

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6. The developer challenges the admissibility of these exhibits, which were filed with the briefs at the very end of the hearing. We agree; they were not timely filed, and they have not been admitted into evidence, nor should they be. The Boards' Motion to Admit Two Additional Exhibits, filed January 22, 2010, is hereby denied. Nevertheless, we refer to them briefly since the Board's argument Based on them is easily disposed of.

7. There are a number of other indications of a substantial regional housing need in this witness' testimony. These are summarized in the Developer's Brief, pp. 7-8.

B. Firefighting Access

Sunderland is a small town; its population is slightly less than 4,000 people. Exh. 75, p. 19. It has no three-story multi-family buildings, nor does its fire department have a ladder truck. Exh. 78, ¶¶ 6, 8. The Board argues that because of the height of the proposed three-story buildings, firefighters, without such a truck, will not be able to gain access to the roof of the proposed buildings to vent a fire, and that the danger that this represents outweighs the regional need for affordable housing. Board's Brief, p. 46.

In addition, the Board appears to argue by implication that this Committee does not have the power to override the judgment of the Sunderland fire chief. It states that the adequacy of emergency access to the buildings "is ultimately and firmly within the discretion of [Fire] Chief Ahern," and that fire protection documents must be approved under the state building Code, "which is beyond the waiver power afforded under c. 40B." Board's Brief, pp. 4, 45-46; also see Exh. 72, ¶¶ 29-30. But it is precisely because the State Building Code grants the fire chief broad discretion that his recommendation here is subject to review. The developer is not seeking waiver of any specific provision of the uniform state building code. Rather, it challenges the judgment of the fire chief, who is a "local official," that is, an official "having supervision of the construction of buildings...." G.L. c. 40B, § 20. As such, his approval, as one "who would otherwise act with respect to [the comprehensive permit] application," is within the jurisdiction, initially, of the Board and, on appeal, of this Committee. G.L. c. 40B, § 21.

The developer introduced testimony of a fire protection engineer that "[s]ince the proposed buildings will be provided with fire sprinkler protection throughout in accordance with NFPA [National Fire Prevention Association standard] 13,... the proposed structures do not represent an unusual fire or life safety hazard which would require a ladder truck...." Exh. 69, ¶ 4. Such expert testimony directly addressing the matter in issue is more than sufficient to establish the developer's *prima facie* case. See, e.g., *100 Burrill Street, LLC v. Swampscott*, No. 05-21, slip op. at 7 (Mass. Housing Appeals Committee Jun. 9, 2008) (citations omitted).

At first glance, the argument offered in response by the Board to meet its burden of proof appears compelling. That is, there is no dispute with regard to its basic premise

that Sunderland firefighters, using only ground ladders, will not be able to gain access to the roof of the three-story, wood-frame buildings in the proposed development, nor with regard to the fire chief's view that "it is a universally accepted practice.... [to] obtain quick and efficient access to all portions of the roof so as to create the necessary ventilation to allow for the escape of heat and smoke." See Developer's Brief, pp. 20-22; Exh.78, ¶ 9; also see Exh. 72, ¶ 13, 21-25, 33-35. But the fire chief is resorting to hyperbole when he states that the fire department will "be compelled to sit and watch an occupied multi-unit apartment building burn while hope that the sprinklers would do the job that the SFD is trained to do?" Exh. 78, ¶ 16. It is common knowledge that upon occasion (particularly in cities with high-rise buildings) firefighters must enter sprinklered buildings when their ladders cannot reach upper floors.[8] See Exh. 69, ¶ 5. As discussed below, we cannot conclude, as the chief does, that access to the roof of this building is "absolutely essential."[9] See Exh. 78, ¶ 9.

As a factual matter, the Board's position is undercut by the availability of at least one ladder truck in neighboring Amherst. We accept the Board's assertion that regional "mutual aid" is not normally relied upon to make specialized equipment available. Exh. 72, ¶37. For that reason, it is unlikely that an Amherst ladder truck can be counted upon

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8. The developer's expert testified that the "State Building Code does not even require that exterior windows be sized to allow for emergency escape in a building protected throughout [by an NFPA 13] fire sprinkler system." Exh. 69, ¶ 4.

9. This Committee has experience with the contribution that sprinklers make to fire safety, although it has never been faced with the particular factual circumstances presented here. See, e.g., *Hilltop Preserve Ltd. Partnership v. Walpole*, No. 00-11, slip op. at 21 (Mass. Housing Appeals Committee Apr. 10, 2002) ("[sprinkler] systems are designed to suppress fires quickly and control or limit the spread of the fire while firefighters are en route") *Lexington Woods v. Waltham*, No. 02-36, slip op. at 16 (Mass. Housing Appeals Committee Feb. 1, 2005) ("sprinklers are not a substitute for [roadway] access to the site"); *Capital Site Management Associates Ltd. Partnership v. Wellesley*, No. 89-15, slip op. at 28 (Mass. Housing Appeals Committee Sep. 24, 1992) (sprinklers "enhance" safety); *Wrentham Housing Auth. v. Wrentham*, No. 87-21, slip op. at 5-11 (Mass Housing Appeals Committee Aug. 25, 1988) (sprinklers not required even though they reduce the concern about safety on three-story side of the building).

It is also important to note that nearly all of our previous cases involved buildings with NFPA 13R sprinkler systems. NFPA 13R systems are designed primarily to protect the lives of the building's occupants, whereas NFPA 13 systems such as the one proposed here are more extensive, including sprinkler heads in attics and other concealed spaces, thus providing greater protection for the building itself. Exh. 69, ¶3; also see *Hilltop Preserve Ltd. Partnership v. Walpole, supra* at 21 (Mass. Housing Appeals Committee Apr. 10, 2002).

to be a first responder to a fire at the site. Exh. 72, ¶ 38. But, although there is no evidence of how many trucks the Sunderland Fire Department has, it appears that a serious fire at the site would result in a multi-alarm, mutual-aid response, which would include firefighters from Amherst. That is, the fire chief has indicated that he "call[s] for assistance... [for] any large fire." Exh. 68-F. It is uncontested that the site, which abuts the Amherst town line, has been designed so that an Amherst ladder truck would have full access to all of the buildings, and thus, though the testimony of the Board's witnesses leaves considerable ambiguity, it appears that an Amherst ladder truck would respond at some point in an emergency. See Exh. 72, ¶ 38; 78, ¶ 20-21; Exh. 68-F; also see Exh. 68, ¶ 27.

But more significant than the factual circumstances is the policy of the town of Sunderland as expressed in its zoning bylaw. The proposed buildings are about 42 feet tall (as measured to the average roof height). Exh. 78, ¶ 8; also see Exh. 14, § 125-2. This exceeds the maximum height of 35 feet normally permitted in both of the town's residential zoning districts. Exh. 14, § 125-5(E). But in both of those residential districts and in one of the town's two commercial districts, Sunderland allows—by special permit issued by the planning board—multifamily buildings in Planned Unit Developments. Exh. 14, § 125-4(D). The purpose of these is to allow "certain desirable departures form the strict provisions of specific zoning classifications," to "[e]ncourage flexibility in design," and to "[p]romote the use of multiple-story buildings and campus-like clustering...." Exh. 14, § 125-5.1(A). More specifically, "A building height of 45 feet is permitted." Exh. 14, § 125-5.1(E)(4).

Such a provision allowing waiver of the normal height limitation by special permit is clearly permissible. *Woods v. City of Newton*, 351 Mass. 98, 102-103 (1966). And, of course, that waiver by the issuance of a special permit is normally discretionary. *MacGibbon v. Board of Appeals of Duxbury*, 356 Mass. 635, 638 (1970); *ACW Realty Management, Inc. v. Planning Board of Westfield*, 40 Mass.App.Ct. 242, 246 (1996). But such discretion is not unbridled. "Special permits...shall be subject to general or specific provisions set forth [in the town's zoning bylaw]...." G.L. c. 40A, § 9. And "[t]he degree of certainty with which standards for the exercise of discretion are set up must

necessarily depend on the subject matter and the circumstances." *Burnham v. Board of Appeals of Gloucester*, 333 Mass. 114, 118 (1955), cited with approval in *Fordham v. Butera*, 450 Mass. 42, 45 (2007); also see *Lorden v. Town of Pepperell*, Misc. Case No. 276791, slip op. at 18 (Land Ct. Jun. 30, 2003)("non-discretionary special permit"). Nevertheless, if the housing development proposed here were seeking a special permit, the Planning Board would have the power impose strict dimensional requirements, even requirements stricter than those permitted by the zoning bylaw. *Muldoon v. Planning Board of Marblehead*, 72 Mass. 372 (2008). Or, in its discretion, it might well deny this development a special permit.

But at the same time, we believe that the conclusion is inescapable that the policy expressed in the bylaw of allowing for some multiple-story buildings up to a height of 45 feet is an acknowledgement that some such buildings are safe—even though the fire department has no ladder truck. The Board has argued, by implication at least, that no new three-story building that exceeds the reach of its ground ladders is safe. It has not pointed to specific characteristics of the proposed buildings that make them unsafe at a height of 42 feet. Therefore, after evaluating the testimony and credibility of the witnesses in the context of both the Sunderland zoning bylaw and the state Building Code—with which the developer must comply in any case—we conclude the Board has failed to meet its burden of establishing that there is a specific local fire-safety concern with regard to the proposed buildings that outweighs the regional need for housing.[10]

Despite this conclusion, we remain concerned that the parties have not delved as deeply into this issue as they might have. Because of the nature of the adversary process in which the parties have been engaged, it appears that all of the practical options for increasing fire safety at the site have not been explored. We must assume that the town of Sunderland, particularly its Planning Board, when it enacted the Planned Unit Development provisions allowing for three-story buildings, recognized the dilemma that

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10. While the focus of our analysis is on evidence presented by the Board under balancing test established by the Comprehensive Permit Law, application of a restrictive height limitation to the affordable housing proposed here—when heights of 45 feet are specifically permitted for PUDs—also calls into question whether the requirement is being "applied as equally as possible to both subsidized and unsubsidized housing." See G.L. c. 40B, § 20.

would be faced by the fire department. If the Planning Board, which is the special permit granting authority for PUDs and thus may well have greater expertise concerning large developments than the Zoning Board of Appeals, had had suggestions for improving safety in this comprehensive permit development, the time to have made such suggestions was during the local hearing. See G.L. c. 40B, § 21. But given the multitude of issues raised during the local hearing, it is possible that that opportunity was simply overlooked. Therefore, if, after consultation with the Planning Board, the Zoning Board of Appeals becomes aware of additional reasonable conditions that might be imposed on this development to assist the fire department in fighting a major fire in one of the buildings,[11] it may bring those conditions to this Committee's attention by filing a motion to modify this decision. Any such motion shall be filed within thirty days of the date of this decision.[12]

C. Traffic and Pedestrian Safety

The Board also raises issues concerning traffic and pedestrian safety, which are local concerns that have been regulated in Sunderland both explicitly and under longstanding land use approval practices. See, e.g., Exh. 14, § 125-19(C)(2). The question is whether there is a significant local concern under the facts presented here, and if so, whether that concern outweighs the regional need for housing.

The developer presented testimony from an experienced professional traffic engineer. He addressed traffic and pedestrian safety at the three locations: the eastern entrance (that is, the intersection of the development's access driveway and Route 116),

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11. For example, the plans show two common stairwells in each building. It may be possible to provide access to the roof from these. We encourage the town and the developer to enter into a dialogue which may result in a creative solution acceptable to both.

12. Pursuant to 760 CMR 56.06(7)(e), the presiding officer may exercise all the powers conferred on the Committee for the conduct of a hearing except that he or she shall not make any decision that would finally determine the proceedings. Since we rule in this case that the Board has not met its burden with regard to fire safety, any additional condition proposed by the Board and ordered by the Committee to assist the fire department will not "determine the proceeding." For clarity, we explicitly state that the presiding officer has the authority to hear and rule with finality upon a motion that may be filed by the Board requesting the sort of minor modification we have described. We expect that any such ruling would be made on an expedited basis upon the record already created in this case, although the presiding officer may, in his discretion, require additional presentation of evidence or oral argument, only if appropriate or necessary.

the northern entrance (that is, the intersection of the access driveway and Plumtree Road), and the intersection of Route 116 and Plumtree Road. See Exh. 66, ¶ 2. He did extensive studies, and met with the Board's peer-review consultant and with the Massachusetts Highway Department (MassHighway).[13] See Exh. 66, ¶ 4; 66-A to 66-H; also see Exh. 12.

The only significant concerns related to the eastern entrance to the site. But even at that location, the study showed more than adequate sight distances, and projected levels of service (LOS) during peak hours varying from LOS A to LOS D. Exh. 66, ¶¶ 8, 9. Although these results appear relatively unexceptional, the developer agreed to include improvements to this intersection as part of its development proposal—a left-turn lane, bus stops and turnouts, sidewalks, a crosswalk, and a speed limit reduction. Exh. 66, ¶¶ 10-11; 66-H; 28. These will result, in the expert's opinion, in an intersection that is safe for vehicles and pedestrians. Exh. 66, ¶ 13-14. Study of the northern entrance, where existing traffic is relatively light and no improvements are planned, showed adequate sight distances, and projected levels of service during peak hours of LOS A. Exh. 66, ¶ 15-17. In the expert's opinion, this intersection, too, will be safe. Exh. 66, ¶¶ 18-19. And, at the intersection of Route 116 and Plumtree Road, the traffic generated by the proposed development will have "minimal impact."[14] Exh. 66, ¶ 20. Some of this expert's testimony was supported by that of the developer's civil engineer, who testified independently that various design elements of the proposed development comply with national standards. Exh 68, ¶¶ 5-9. The testimony of these two engineers is sufficient to establish the developer's *prima facie* case.

The Board responds by describing a number of existing problems on Route 116. See, e.g., Board's Brief, p. 18. It argues that "route 116, which is the busiest road in town,... serves as a major thoroughfare and exhibits high speeds. There is an unfortunate and troubling history of accidents involving vehicle and pedestrians...." "[V]ehicle

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13. Whether MassHighway has yet approved the developer's proposal is irrelevant to our inquiry.

14. A "traffic-signal-warrant analysis" of the intersection of Route 116 and Plumtree Road found that a traffic signal would in all likelihood be warranted in that location in 2011 whether the development proceeds or not. Exh. 66, ¶ 21. Such an improvement, which would further increase safety, is not part of the development proposal, however, and we will not speculate as to whether it will be undertaken by the town. See Exh. 66, ¶¶ 22-23.

movements into and out of the project site will present a variety of conflicts which could result in serious accidents.... Pedestrians will fare no better than vehicles as they will be forced to navigate this difficult intersection when crossing Route 116 to access bus stops and the nearby convenience store and restaurant." Board's Brief pp. 54-55. The Board notes that it "denied the [comprehensive permit] application because it found that the [developer's] design for traffic improvements at the project entrance and Route 116 were insufficient." Board's Brief, p. 58. It does not, however, present detailed evidence with regard to specific dangers presented by that design.

Its witnesses were not much more specific. The Board's traffic engineer reported that since 2007, along the entire length of Route 116—from the southern border of the town to the northern border—there were 32 reported motor-vehicle crashes, but drew no conclusion from this. Exh. 74, ¶ 11. He testified that during rush hour, vehicles "*may* not be able to see the entire crosswalk" due to other vehicles in the left-turn lane, and "*may* not have ample time or distance to come to a complete stop for a pedestrian," and therefore "the location of the crosswalk *could* compromise the safety of pedestrians." Exh. 74, ¶ 12 (emphasis added). He continues with testimony concerning other possible crash scenarios—all using conditional constructions—including a discussion of the obvious risks related to snow and ice, and concludes that the developer's design "presents concerns for motor vehicle/pedestrian accidents." Exh. 74, ¶¶ 13-19. Such speculative testimony is not sufficient to establish a local safety concern that outweighs the regional need for housing.[15]

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15. The equivocal nature of this testimony is reinforced by the report that the witness prepared two years earlier, which appears to indicate that it is possible to mitigate safety concerns. In that report, under "public hearing comments," the expert "recommended that the [developer] continue to work... to limit potential vehicle and pedestrian conflicts by improving pedestrian accommodations, relocating bus stops, reducing vehicle speeds by posted speed limits, or posting advance warning signs." His conclusion was that the developer should "continue to collaborate with the town .... to ensure that Route 116 is enhanced...." Exh. 8, p. 4.

A much shorter internal memorandum prepared by the Office of Transportation Planning of the Massachusetts Executive Office of Transportation and Public Works is similarly equivocal. After noting that "the traffic associated with the project will have a minimal impact on the state highway," and that the developer "has included a comprehensive mitigation package," it says that "[a]n area of critical concern... is pedestrian safety," and concludes that the developer "should continue discussions with MassHighway regarding safety measures that will be implemented to ensure a safe crossing of Route 116." Exh. 21, p. 3.

The Sunderland chief of police testified in a similar vein, concluding that he has "very serious concerns about the design...." Exh. 77, ¶ 5. He described a busy highway on which traffic, including truck traffic, often exceeds the 50-mile-per-hour speed limit. Exh. 77, ¶ 8. He, too discussed "no less than 32 significant motor vehicle accidents,... many of [which] occurred at apartment complex intersections,"[16] as well as other conditions described by the Board's traffic expert. Exh. 77, ¶12. He focused particularly on his expectation that a majority of the residents of the new development will be college students, who "present an enhanced degree of concern due to youthful behavior that includes drinking and/or driving fast, along with narcotics use." Exh. 77, ¶ 6, 10, 11, 18; also see Exh. 35; 38.

Testimony was also received from a transportation planner who lives in Sunderland and works for the Pioneer Valley Planning Commission. Though he focused mostly on general planning concerns, with regard to traffic he too commented on the likelihood of students living in the proposed development, and the risks they would encounter crossing Route 116 on foot, either to use the public buses that travel that route or to reach a restaurant and a convenience store on the opposite side of the highway. Exh. 80, ¶ 17. During oral testimony, he also noted that there are many bicyclists on Route 116. Tr. I, 67-68. He concluded that the proposal is "simply not consistent with good planning practices," but he stopped short of concluding that it is unsafe. Exh. 80, ¶ 17.

We have reviewed the testimony and credibility of all of the experts presented by both parties. We recognize that, as the Board's transportation planner testified, the proposal is "the antithesis of pedestrian friendly development." Exh. 80 ¶ 17. In fact,

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16. Documentation presented by the chief shows that of these 32 incidents, eight took place in the vicinity of a student-populated apartment complex somewhat similar to the proposed development—four at its driveway, two at a nearby crosswalk, and two at a nearby bus stop. Exh. 77, ¶ 10; 77-A; 84, ¶ 4. Five of the 32 crashes involved personal injury, but of the eight near the apartment complex, only one at the bus stop involved injury. Exh. 77-A; 84, ¶ 4. The developer' s expert suggests that these statistics disprove the chief's hypothesis that student behavior poses extraordinary risks. Exh. 84, ¶ 2. These two experts also disagree about whether there was a fatal crash at one of the crosswalks. See Exh. 77, ¶ 12; 84, ¶ 4. In addition, the developer's expert studied a longer, three-year period during which there were 70 crashes on a shorter segment of Route 116, although the focus of this study was the Plumtree Road intersection. See Exh. 12, p. 7. We believe that the crash statistics presented in the record are too general to either support or refute the chief's claim.

from all of the plans and testimony it is clear that—like other such complexes on Route 116 in Sunderland—it is an absolutely conventional, automobile-oriented apartment complex in an entirely typical location on a major state highway. But there is nothing to indicate that its design or location makes it unusually dangerous. We conclude that although the Board has established that there is a legitimate safety concern at the northern entrance to the proposed development, the evidence that it has presented, which is largely general and speculative, particularly viewed in light of the mitigation measures that will be taken by the developer, is insufficient to meet its burden of proving that the situation is so dangerous that it outweighs the regional need for housing.

D. Wetlands

Issues concerning wetlands protection and stormwater management are regulated by the Sunderland Wetlands Bylaw and regulations.[17] See Exh. 15; 44.

The developer has established a *prima facie* case by means of testimony by its civil engineer and wetlands scientist concerning the work to be done in conjunction with the development under a Superseding Order of Resource Area Delineation issued by the state Department of Environmental Protection. Exh. 67, ¶¶ 4-24; 68, ¶¶ 11-26; 82. Particular attention was placed on work within wetlands buffer zones, and the testimony was that such work "complies with both local and state wetland regulations" and "has been designed to meet all performance standards." Exh. 67, ¶¶ 17, 19, 24; 68, ¶ 25; also see Exh. 67-B to 67-H.

In response, the Board focuses much of its argument on a claim that the developer failed to submit sufficient information concerning wetlands issues at the local hearing. Board's Brief, pp. 61-62; Exh. 71, ¶¶ 9-10; 73, ¶ 15. But such a claim regarding the sufficiency of the application must be raised at the beginning of the Committee's hearing, and it is therefore waived. 760 CMR 56.06(5)(b)(3).

Next, the Board argues vociferously that the local by law is stricter than state law since, it claims, its hundred-foot buffer zone is itself a resource area. See, e.g., Exh. 71, ¶

17. Although the Pre-Hearing Order includes stormwater management as well as wetlands issues, testimony from the Board's witnesses addresses only state requirements, and refers to no local regulation of stormwater. Exh. 73, ¶¶ 9-12. More important, stormwater is not argued in the Board's Brief, and therefore the issue is waived. See Board's Brief, pp. 28-32, 60-62.

7; 42, ¶ (1); 43. We disagree. The local bylaw states that without approval, "no person shall remove, fill, dredge, alter, or build upon or within one hundred feet of the following resource areas:..." Exh. 15, § 122-2. Grammatically, it is clear that resource areas are described by the words that follow the colon and not by an adverbial phrase that proceeds it. Equally important, state law provides for jurisdiction that is nearly identical to that under the bylaw. That is, first, the state Wetlands Protection Act provides that without approval, "No person shall remove, fill, dredge or alter" certain similar (though not identical) resource areas, and then by regulation, activity within one hundred feet of a resource area is placed within the jurisdiction of the law. G.L. c. 131, § 40; 310 CMR 10.02(2)(b) and commentary. Since jurisdiction under the two laws is identical for all practical purposes, unless the Board can point to certain types of construction or other substantive activities that are permitted under state law, but forbidden under local law, the local law is not more strict. The Board has pointed to no such activity. Further the clear implication of the testimony of one of the Board's own witnesses is that buffer zones are distinct from resource areas: "The plans... require construction well within the buffer zone; close to the actual resource area." Exh. 73, ¶ 14. We agree with the developer's expert that with regard to the issues presented in this case, the bylaw is not stricter than state law. See Exh. 67, ¶ 11; 82, ¶ 3; 13, ¶ (1).

But most important, even if the local bylaw were more strict than state law, the Board has not presented substantive evidence to show that local wetlands concerns outweigh the regional need for housing. That is, the developer concedes that considerable construction will take place within the 100-foot buffer zone. But, just as under the state law, the local bylaw permits such construction with proper review and approval. Exh. 15, § 122-2. The testimony submitted by the Board simply reiterates that there will be construction in the buffer zone, and argues that more information should be provided. Exh. 71, ¶ 8-10; 73; ¶ 14-15. It does not affirmatively even state that damage to wetlands will occur or describe that damage, much less prove that it will happen. Thus, the Board has failed to sustain its burden of proof.

E. Smart Growth

Throughout the hearing the Board has also asserted that its denial of a comprehensive permit can be justified because the proposed development violates "smart-growth" principles. The developer has resolutely contested this, arguing that Sunderland has not enacted distinct smart-growth provisions in its bylaws, much less implemented them "in a community that is notable for its decentralized apartment developments at scattered locations along Route 116." Developer's Brief, p. 25. The developer first made this argument in its motion for summary decision. Because the Board appeared to rely only upon generalized principles and state policy, the presiding officer largely accepted the developer's argument, and granted the motion, noting that the Board "has not pointed to any local regulations or requirements that specifically address 'smart growth.'"[18] Ruling on Cross-Motions for Summary Decision, p. 5 (July 1, 2008); also see *Green View Realty, LLC v. Holliston*, No. 06-16, slip op. at 14-15 (Mass Housing Appeals Committee Jan. 12, 2009) (matters not regulated locally may not be asserted by the Board); *O.I.B. Corp. v. Braintree*, No. 03-15, slip op. at 7 (Mass Housing Appeals Committee Mar. 27, 2006), *aff'd* No. 2006-1704 (Suffolk Super. Ct. Jul. 16, 2007); *Bay Watch Realty Trust v. Marion*, 02-28, slip op. at 24 (Mass Housing Appeals Committee Dec. 5, 2005), *aff'd* No. 07-P-1372 (Mass. App. Ct. Oct. 10, 2008). However, he gave the Board an opportunity to pursue the question further during the hearing if it could "establish that there are existing town regulations or requirements that address smart growth concerns that are applied generally to housing development in Sunderland." *Ibid.* During the hearing, the Board presented evidence on this issue,[19] but we now conclude, as

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18. We agree that the Board must rely on local regulations or requirements, not general principles or state requirements. The state's Sustainable Development Principles came up at several points in the hearing. See Exh. 76-B. It is by no means clear that these have the force of law, rather than simply being general guidelines or goals, but in any case there is nothing in the Comprehensive Permit Law that authorizes this Committee to enforce requirements promulgated by another state agency. Also see *Herring Brook Meadow, LLC v. Scituate*, No. 07-14, slip op. at 6, n.4 (Mass. Housing Appeals Committee May 26, 2010) (Massachusetts Sustainable Development Principles are not local or state requirements, although compliance with them would satisfy a developer's *prima facie* burden if the town had enacted local smart-growth requirements.)

19. The developer's Motion *in Limine* to Strike Testimony of the Dana Roscoe and Angus Jennings concerning Smart Growth (filed Nov. 12, 2009) is denied.

the presiding officer did in a preliminary manner, that smart-growth issues are not properly before us since there are no local requirements that can legitimately be construed as smart-growth requirements.

As directed by the presiding officer, in the Pre-Hearing Order, the Board enumerated the provisions of the Sunderland Zoning Bylaw upon which it relies: §§ 125-13, 125-17, and 125-19. It alleges that these are applied generally to housing development in Sunderland in such a manner that smart-growth standards have been established relating to "visual impact; building scale; social, economic, or community needs; neighborhood character; and fiscal impact." Pre-Hearing Order, § IV-6(f).

We note first that it is not sufficient for the Board to establish that the town has enacted provisions in its zoning that encourage certain types of development that are different from what the developer proposes, e.g., relatively dense housing in existing village areas. See generally Exh. 80, ¶ 6. That is, the denial of the comprehensive permit in this case, just like the denial of any permit, must be based on local regulations or requirements that the proposal fails to meet—not upon incentives that it failed to take advantage of. Therefore, we will review the zoning provisions raised by the Board to determine what, if any, requirements they impose.

Section 125-13(A) permits Major Residential Developments, which are developments of more than six lots. It has no substantive requirements that the proposal in this case fails to meet.

Section 125-13(B), entitled "Procedures," describes the documents that must be filed in conjunction with a Major Residential Development application. Not only is this a procedural requirement rather than a substantive requirement, but in addition, application requirements for comprehensive permits are specifically provided for in our regulations. 760 CMR 56.05(2).

Section 125-13(C) permits "flexible development;" it has no substantive requirements.

Section 125-13(D) describes the number of dwelling units permitted. This cannot reasonably be construed as a smart-growth requirement.

Section 125-13(E) prohibits parking in front yards and more than four dwelling units in a single structure. Arguably, the proposed development violates these provisions, but they are typical zoning requirements, presumably also applying in the underlying residential district in which the development is proposed. They are not distinct smart-growth requirements, and if the Board were concerned about parking design or the number of units per structure in the proposed development, it could have litigated these issues by explicitly including them in the Pre-Hearing Order in this case. Therefore, we do not construe § 125-13(E) as a smart-growth requirement.

Section 125-13(F), "Decision," is procedural, and has no substantive requirements.

Section 125-13(G) is "reserved" (nonexistent).

Section 125-13(H), in order to preserve the "visual, economic, and ecological" benefits of agricultural land, provides an incentive by creating a "transfer of development rights procedure." While this is certainly a desirable smart-growth incentive, it is permissive, and contains no substantive requirements that the proposal in this case fails to meet.

Section 125-17 is entitled "Administration; violations and penalties," and the only relevant subsection is § 125-17(B), "Site plan review." As with § 125-13(E), above, this section mentions a number of issues that can be regulated by zoning, such as drainage, plantings, fire access, tree removal, traffic safety, obstruction of views, lighting, scale and design of buildings, design of sidewalks, snow storage, and non-residential off-street loading space. These are not distinct smart-growth requirements, and any concern that the Board had with regard to any of them could have been (and in some cases was) litigated in this case by including them in the Pre-Hearing Order.

Section 125-19 is entitled "Special permits." In granting of special permits, it requires consideration of the following:

(1) social, economic or community needs...,
(2) traffic flow and safety,
(3) adequacy of utilities and other public services,
(4) neighborhood character and social structures,
(5) qualities of the natural environment,
(6) potential fiscal impact.

While some of these concerns are broader than those typically regulated by zoning, it is, of course, typical for communities throughout the state to provide in this way for discretionary special permits. We cannot conclude that Sunderland, simply by providing for special permits like most other Massachusetts towns, and including the general standards listed above, has established generally applicable smart-growth standards that this housing proposal must comply with or seek waiver of.

In conclusion, we are sympathetic to the view of the Board's witnesses that the intent of some of the provisions of Sunderland's zoning bylaw is to create *incentives* for smart-growth development, and that what is proposed in this case is a quite conventional development.[20] See Exh. 76, ¶¶ 20-31; 80, ¶¶ 14-17. But neither this testimony nor the zoning bylaw itself offers any proof that the bylaw embodies smart-growth *requirements*.

V. LEGAL FEES

At the beginning of the hearing, the developer filed a motion for refund of $10,000 that it paid to the Board, which was used to compensate the Board's counsel. Appellant's Motion for Partial Summary Decision and Request for Hearing (filed Jan. 28, 2003); also see Pre-Hearing Order, § IV-5.

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20. If we had found that the zoning bylaw had in fact established smart-growth requirements, then under our regulations it would normally have been incumbent upon the developer to first establish a *prima facie* case by showing that its proposal conforms to generally recognized smart-growth standards. 760 CMR 56.07(2)(a)(2). But because of the unusual posture of this case—that is, because summary decision had been granted on this issue in favor of the developer—the parties drafted and the presiding officer issued the Pre-Hearing Order in such a way that no burden was placed on the developer with regard to smart growth. Pre-Hearing Order, § IV-3. While unusual, we believe there was nothing improper in the Board waiving such proof by the developer and the presiding officer sanctioning that waiver. Nevertheless, during the hearing, once the Board presented evidence concerning smart growth in its direct prefiled testimony, the developer, as a precaution, filed rebuttal testimony from a housing consultant with extensive experience with affordable housing and planning. Exh. 88, ¶¶ 2-7. She testified that her firm reviewed a "Sustainable Growth Self-Assessment ("Smart Growth Evaluation Criteria") completed by the developer as part of the process of obtaining a project eligibility determination from MassHousing (Massachusetts Housing Finance Agency), and agreed that the proposal met each of the ten criteria for development in rural areas of the state. Exh. 88, ¶ 15-24; 88-A. Though this flatly contradicts the testimony of the Board's witnesses (e.g., "the project... fails miserably to embrace smart-growth principles." Exh. 80, ¶ 16), and thus might well ultimately, on balance, have been rejected by this Committee, it would have been sufficient to establish the developer's *prima facie* case.

Our regulations authorize local boards to assess certain fees during the comprehensive permit review process. First, the Board may require the payment of a "reasonable filing fee"—if it is consistent with other permitting fees assessed in the town—"to defray the direct costs of processing applications...." 760 CMR 56.05(2). Second, the board may assess "review fees" to hire peer consultants to review technical aspects of a proposal. 760 CMR 56.05(5). These typically involve engineering, traffic, environmental, and similar issues, although they also sometimes concern financial aspects of the proposal, technical questions of housing policy, or even legal issues such as title problems. They may not include "[l]egal fees for general representation of the Board...." 760 CMR 56.05(5)(a).

In Sunderland, the Board's Comprehensive Permit Rules provide for quite extensive fees during the local process. The developer's application must be accompanied by a filing fee that has three components: the primary filing fee of $1,000 plus $50 per housing unit (that is, $8,500 in this case); a $5,000 fee to retain a financial consultant; and, in a case such as this where the proposal exceeds 75 units, $10,000 "to pay for the services of legal counsel for assistance.... This [last] cost is a reasonable estimate of the administrative costs of counsel retained to assist the Board with the multitude of legal issues that must be explored in the c. 40B process." Exh. 18, § 3.02(c). In addition, the Board may assess review fees, as described above. Exh. 18, § 4.01.

Of these, the only fee challenged by the developer is the legal fee of $10,000 included within the filing fee. This was used to pay for "counsel services" of the Board's special counsel, who attended all local hearings, and has represented the Board on appeal to this Committee. Board's Brief, pp. 41, 64; also see Exh. 45, pp. 5, 6; 46. The developer concedes that $10,000 is fair payment for the work done during that local hearings, and that none of this amount was allocated toward costs of the appeal. It argues, however, that under our regulations and precedents, the Board may not require a developer to pay such a fee. We agree.

The Board concedes that this fee is not a review fee under either its rules or our regulations; it argues that it is a proper filing fee for the "administrative costs for counsel" necessitated by the "novelty and complexity" of the proposal. Board's Brief, pp. 41, 65.

But we find that this fee for legal services, distinct from the general filing fee of $8,500, is not a "reasonable filing fee... to defray the direct costs of processing applications...," as provided in our regulations. 760 CMR 56-05(2). Rather, it is a fee for general legal representation that is prohibited under our regulations and precedents. 760 CMR 56.05(5)(a) ("Legal fees for general representation of the Board or other Local Boards shall not be imposed on the Applicant."); *28 Clay Street Middleborough, LLC v. Middleborough*, No. 08-06, slip op. at 22 (Mass. Housing Appeals Committee Sep 28, 2009), *appeal docketed* No. 09-01377-B (Plymouth Super. Ct. Oct. 28, 2009); *Attitash Views, LLC v. Amesbury*, No. 06-17 (Mass. Housing Appeals Committee Oct. 15, 2007), *aff'd*, No. 2007-5046 (Suffolk Super. Ct. Jan. 7, 2009) , *sua sponte transfer*, No. SJC-10637 (S.J.C. Dec. 28, 2009); *Oceanside Village, LLC v. Scituate*, No. 05-03, slip op. at 39-40 (Mass. Housing Appeals Committee Jul. 17, 2007); *Page Place Apts., LLC v. Stoughton*, No. 04-08, slip op. at 18-20 (Mass. Housing Appeals Committee Feb. 1, 2005); *Pyburn Realty Tr. v. Lynnfield*, No. 02-23, slip op. at 21-24 (Mass. Housing Appeals Committee Mar. 22, 2004); cf. *Autumnwood, LLC v. Sandwich*, No. 05-06, slip op. at 16 (Mass. Housing Appeals Committee Jun. 25, 2007) (fee may be assessed for lawyer's peer review of complex real estate issues). Therefore, we order the Board to refund the $10,000 legal fee.

VI. CONCLUSION

Based upon review of the entire record and upon the findings of fact and discussion above, the Housing Appeals Committee concludes that the decision of the Sunderland Board of Appeals is not consistent with local needs. The decision of the Board is vacated and the Board is directed to issue a comprehensive permit as provided in the text of this decision and the conditions below.

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

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

(a) The development, consisting of 150 total units, shall be constructed substantially as shown on site plans by the Berkshire Design Group, Inc. (Sugarbush Meadows, May 30, 20075, rev'd 8/10/07)(Exhibit 3), architectural plans by The Martin Architectural Group, P.C. (Sugarbush Meadow, 9/5/06)(Exhibit 4), and as described in this decision.

(b) All design features shall comply with the state Wetlands Protection Act, including all DEP Stormwater Management Guidelines, subject to review by the Sunderland Conservation Commission and the Massachusetts Department of Environmental Protection.

(c) If, after consultation with the Planning Board, the Zoning Board of Appeals becomes aware of additional reasonable conditions that might be imposed on this development to assist the fire department in fighting a major fire in one of the buildings, it may bring those conditions to this Committee's attention by filing a motion to modify this decision. Any such motion shall be filed within thirty days of the date of this decision.

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

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

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

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

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

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

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

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

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

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

Housing Appeals Committee

Date: June 21, 2010

Werner Lohe, Chairman

Theodore M. Hess-Mahan

Marion V. McEttrick

James G. Stockard, Jr.

LPc\s

Certificate of Service

I, Lorraine Nessar, Clerk to the Housing Appeals Committee, certify that this day I caused to be mailed, first class, postage prepaid, a copy of the within Decision in the case of Sugarbush Meadow, LLC v. Sunderland Zoning Board of Appeals, No. 2008-02, to:

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Dated: 06/22/10

Lorraine Nessar, Clerk
Housing Appeals Committee