HILL LAW

December 14, 2015

BY HAND

Shrewsbury Zoning Board of Appeals
Richard D. Carney Municipal Office Building
100 Maple Avenue
Shrewsbury, MA 01545-5398

Re: Application for Comprehensive Permit – 440 and 526 Route 20, Shrewsbury

Dear Members of the Board:

This firm represents neighbors and abutters to the proposed 280-unit residential development located at 440 and 526 Route 20, Shrewsbury (the "Project" and the "Project Site"), which is the subject of a pending application for a comprehensive permit under General Laws Chapter 40B, Sections 20-23 proposed by Smart Growth Design, LLC (the "Developer"). The purpose of this letter is to raise the Neighbor's initial concerns with the proposed Project and the completeness of the Application.

I. The Legal Framework

By way of introduction, I have served as counsel to local zoning boards across the state on numerous Chapter 40B permitting and litigation matters over the last 15 years. I have litigated dozens of Chapter 40B appeals before the Housing Appeals Committee ("HAC"), the state trial courts, the Appeals Court and the Supreme Judicial Court, including the Reynolds v. Stow Zoning Bd. of Appeals case decided September 15, 2015 by the Appeals Court, overturning the issuance of a Chapter 40B permit.

As you likely know, Chapter 40B developers may seek a "comprehensive" permit from the local zoning board of appeals in lieu of separate approvals from all of the other town boards, commissions and officials that would otherwise have jurisdiction over the project. A significant function of the statute is to empower the zoning board to waive any local bylaw, regulation, policy or procedure that would render the construction of the project "uneconomic." In certain circumstances, the zoning board may be justified in denying a comprehensive permit, or just denying specific waivers, where the project presents unacceptable public safety, health or environmental risks, or is completely abhorrent to the town's rationally-conceived master planning interests. The role of the local zoning board, therefore, is to determine (a) whether such risks exist to justify a denial, and if not, (b) whether the applicant's requested waivers from local

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bylaws and regulations are justified to make the project economic, and if so (c) whether the granting of any such waivers would, themselves, present any public safety, health or environmental risks.

The primary responsibility of the zoning board under Chapter 40B is to consider whether and to what extent local bylaws and regulations should be applied to a proposed project. In doing so, it must weigh the need for affordable housing against the need to protect the environmental, public health, safety, and planning interests. In the recently-decided case of Reynolds v. Stow Zoning Bd. of Appeals, Appeals Court No. 14-P-663 (Sept. 15, 2015) (copy attached as Exhibit A), the Court ruled that it was "unreasonable" for the zoning board to grant waivers from local bylaws that were more restrictive than state requirements governing septic systems in environmentally-sensitive areas. Specifically, the Court found that the bylaws should have been preserved where it was established that the project would contaminate the private wells of abutters, and the local bylaws were adopted to prevent such contamination by limiting the discharge of wastewater. The Court held that such concerns outweighed the regional need for housing under Chapter 40B, and revoked the comprehensive permit. As discussed below, there are local bylaws in Shrewsbury that are more restrictive than state law, which were legitimately adopted to protect important local planning and environmental concerns, and from which the Developer is seeking waivers through this permitting process.

The state Housing Appeals Committee ("HAC") has held that "[t]he legislative intent of the entire statute is to permit affordable housing without undue intrusion on local prerogatives." *Cooperative Alliance of Mass. v. Taunton Zoning Bd. of Appeals*, HAC No. 90-05, at 8, n.12 (April 2, 1992). The SJC has similarly held that the legislature intentionally struck a 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." Bd. of Appeals of Woburn v. Hous. Appeals Comm., 451 Mass. 581 (2008), citing, Zoning Bd. of Appeals of Wellesley v. Ardemore Apartments Ltd. Partnership, 436 Mass. 811, 822 (2002).

We respectfully suggest that the Board exercise its authority consistent with this framework, starting with a complete evaluation of how the proposed Project conforms, or doesn't conform, to the town's local bylaws and regulations, and an assessment of whether the requested or required waivers threaten legitimate local concerns, or if not, are necessary to make the project economically viable.

II. The Requested Waivers

As noted above, the most important task the Zoning Board has in conducting a comprehensive permit application hearing is to evaluate the developer's requested waivers from the local bylaws and regulations, and to determine whether the concerns those waivers may present outweigh the regional need for housing. The importance of this exercise was illustrated in the Appeals Court's ruling in Reynolds. In order to understand whether there are local regulations that are necessary to protect the public health, safety and the environment, and to

which the Project should be made subject, it is essential to have a complete itemization of bylaws and regulations that the Project does not comply with. Even if preserving a local bylaw or regulation is not so essential so as to outweigh the need for housing, the Zoning Board can still determine that the requirement is important, and place the burden on the Developer to prove that the waiver is necessary to make the Project "economic." The Zoning Board can, and should, consider this economic defense in its decisionmaking, including checking the veracity of any "uneconomic" claim through an independent peer review of the developer's development budget, or *pro forma*.

The first step is for the Zoning Board to ask its peer reviewers to check to make sure all of the nonconformities evident on the site plans are addressed in the waiver requests. Then, the Zoning Board can intelligently solicit opinions from the Town's land use boards and officials, as well as its peer review experts, as to whether the waivers present any significant health, safety, environmental or planning concerns. Only then can the Board make an informed decision whether to grant these waivers, and put the burden on the Developer to justify the waivers from an economic perspective.

> **Recommendation No. 1** – Retain a civil peer review consultant to review the Developer's waiver request list (at the back of the Application) for thoroughness, and to provide professional opinions as to the wisdom of granting the waivers.

III. Jurisdictional Issues

Under Chapter 40B, there are three basic jurisdictional pre-requisites. First, the developer must either be a public agency, nonprofit organization or a "limited dividend organization." The state Department of Housing and Community Development ("DHCD") which has regulatory authority under the statute, has generously defined what it means to be a limited dividend organization, and for apartment projects (rental) the profit limitation threshold is set so high that it is essentially meaningless.

Second, the Developer's project must be "fundable" under a low or moderate income housing subsidy program. The Developer has offered proof that it will obtain funding from Marlborough Savings Bank under the Federal Home Loan Bank of Boston's New England Fund (NEF) program. This program has been recognized as a legitimate subsidy program under Chapter 40B, but is more commonly used in the for-sale housing context, not rental housing. The bank's letter of interest states that the interest rate on the construction loan will be the FHLBB's "advance rate plus 300 basis points" with a minimum rate of 5%. The Board may want to inquire whether this actually constitutes a "subsidy" in the current lending environment.

Third, the developer must establish "site control." This is typically done through proof of a binding purchase and sale agreement, as is the case here. The P&S Agreement in this case was redacted, hiding the price terms among other things. The P&S Agreement expires in March, 2016, likely to be well before the Board would issue a comprehensive permit.

Also under the "jurisdictional" heading, municipalities have the right to invoke certain defenses to Chapter 40B projects, including if the town has reached one of the statutory benchmarks. Here, the Town does not have at least 10% of its housing as "subsidized," (the "housing unit minimum") and it is very unlikely that subsidized housing already exists on at least 1.5% of the Town's developable land area (the "land area minimum"). Another defense under the regulation is "planned production." If the town has recently created subsidized housing equal to at least .5% of its total housing stock, the town can achieve a one-year safe harbor (moratorium) from hostile Chapter 40B proposals, if it has an approved housing production plan. Shrewsbury has such a plan, but the threshold here would be 70 units. I understand the Town recently approved 30 new units at the Lakeway Commons development. The Board should ensure that there are no other projects that could make the Town eligible for this defense.

IV. Substantive Issues

One of the most common problems with "unfriendly" Chapter 40B proposals is their impact on environmental and natural resources. Both parcels that comprise the Project have significant wetland areas, and construction is proposed very close to them.

As a preliminary matter, the Board should inquire as to whether the wetland delineation shown on the site plans has been approved by the Conservation Commission within the last three years. A delineation on the Phase Two parcel was approved in 2007 as part of the sewer line construction, but that may have expired (unless it was extended by the Commission). There is a stream on Phase Two which has been classified as "intermittent." The Board should inquire whether the stream could be classified as "perennial," in which case stricter performance standards and setbacks would apply under state law. In this regard, the Board should retain a wetlands scientist peer reviewer to review the Application, visit the site, and analyze the Project's impacts on these wetland resource areas. I note that the Developer's project eligibility application stated that there are no documented hazardous waste sites within a half mile of the Project Site. This is incorrect. There was a waste site at 537 Hartford Turnpike Road, approximately 400 feet east of the Project Site.

The Project proposes to manage all stormwater runoff on-site. I note that a municipal storm sewer is located in Stoney Hill Road adjacent to Phase Two, and appears to outlet in the wetland behind Phase Two, however it does not appear that the Project will utilize this existing infrastructure. Several subsurface infiltration systems are proposed underneath parking lots on Phase 1. Given the presence of wetlands, the water table on the Site is likely to be high. State law requires separation between the bottom of the basins and seasonal high groundwater elevations, to ensure that the basins function as designed. There are massive, open detention basins proposed for Phase 2, right up against BVW. We recommend that the Board retain a civil peer review engineer to thoroughly scrutinize the Project's compliance with the Town's and the State's environmental standards, as well as other design standards generally.

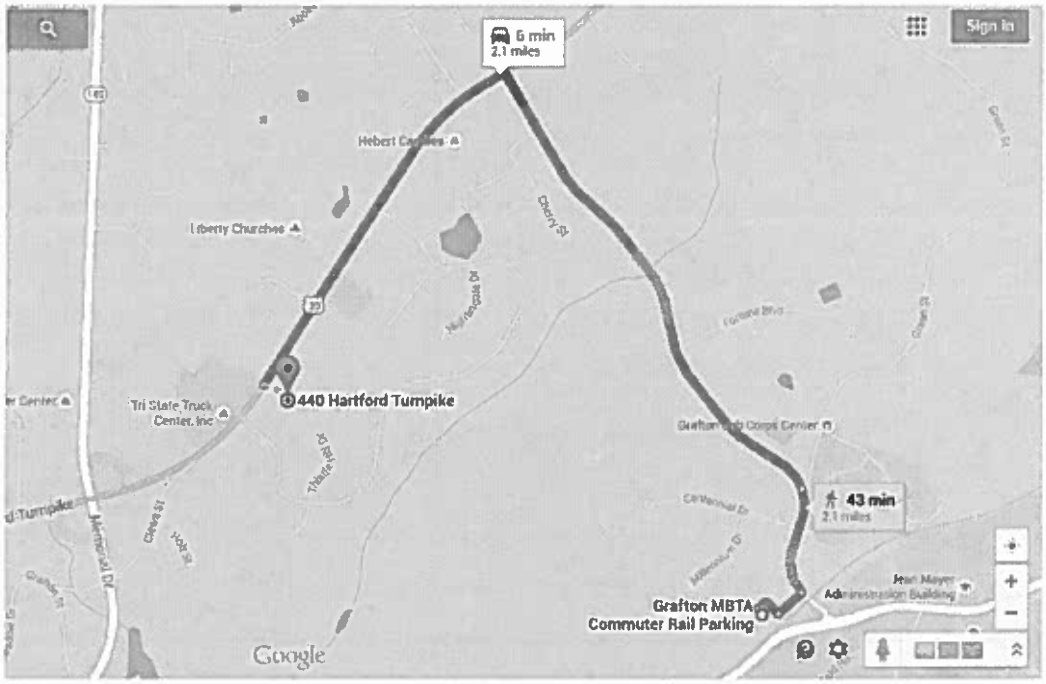
Recommendation No. 2 – Retain a civil peer review consultant to review the Developer's site plans and supporting documentation for compliance with local and state environmental standards and generally-accepted industry standards.

V. Planning and Other Design Issues

The Town's comment letter dated April 15, 2015 did an extraordinary job of characterizing the numerous planning and design concerns with the application. Notably, Shrewsbury is one of the few communities in the state that allows high density multi-family housing, including apartment buildings up to 8 stories tall. The Town also has a track record of supporting affordable housing development. Unfortunately, MassHousing did not give these efforts any weight in its decision to issue project eligibility here.

In addition to the concerns already raised by Town staff, we would like to offer the following additional preliminary concerns. First, we note that the Project Site is not accessible to public transportation, and the closest train station is 2.1 miles away by car or by foot (the project eligibility application incorrectly measured the distance as 1.6 miles away). It would take 43 minutes to walk from the Project Site to the train station, and it would be a treacherous route as Hartford Turnpike is a state highway with no sidewalks and no shoulder. Biking to the train station would also be dangerous. See Figure 2 below.

Figure 2
Route from Project Site to Grafton Train Station



The Town's letter is correct in noting that the PE Application characterized the Phase Two building as 4 stories rather than 5 stories. The 40B Application compares the Project's dimensions with the dimensional requirements applicable to both the underlying "Limited Industrial" zoning district, and the more applicable "Apartment" district, which is appropriate. Still, the Application contains several inaccuracies. The Application suggests that the Zoning Bylaw requires 50' side yards in the LI district. The Bylaw actually requires 100' yards when abutting residential districts, which this property does. As such, a waiver would be required for both parcels. Also, the Application is incorrect in stating the yards required in the Apartment zoning district – 50 feet is required, not 10 feet. The Application claims that 54% of the Phase 1 parcel will be "open space," but under the Zoning Bylaw's definition, open space cannot include paved areas. A minimum of 50% open space is required in the Apartment district. The Board should scrutinize the Developer's assertion of open space, as it appears exaggerated. The Application admits that it does not comply with the maximum 8% lot coverage requirement of the Bylaw.

We note that there are steep grades proposed along the Phase One Site property boundaries, which is not ideal – retaining walls will inevitably be required to stabilize these artificial slopes. I also note that the Phase One parking lot will be about 50 feet to the closest residence on Thistle Hill Road. The Application states that the southern portion of each phase is designed to "retain and enhance the vegetated buffer" between the lots and the open space associated with the Stoney Hill Road subdivision. This may be true for Phase Two, but not Phase One, which proposes pavement right up against the property line, where feasible. The wetlands on Phase One preclude development in the southern corner of that parcel, so it is inappropriate to claim credit for providing a buffer in that location.

Finally, we are concerned with the apparent disregard of "low impact development" guidelines and practices. Under the current Chapter 40B regulations and guidelines, projects are supposed to conform to "sustainable development" principles. The subsidizing agency (in this case, MassHousing) is supposed to make a finding that that "the conceptual project design is generally appropriate for the site ... taking into consideration ... the proposed use, building massing, topography, environmental resources, and integration into existing development patterns." 760 CMR 56.04(c). Specifically, under the Chapter 40B project design guidelines:

- The massing of the Project should be modulated and/or stepped in perceived height, bulk and scale to create an appropriate transition to adjoining sites.

- Where possible, the site plan should take advantage of the natural topography and site features, or the addition of landscaping, to help buffer massing; and

- Design may use architectural details, color and materials taken from the existing context as a means of addressing the perception of mass and height.

DHCD 40B Guidelines, §IV(A)(3).

The Housing Appeals Committee has recognized that a project can be so abhorrent to generally-accepted residential design principles to warrant a denial. Dennis Housing Corp. v. Dennis Board of Appeals, HAC No. 01-02 (May 7, 2002) (zoning board's denial of a 50-unit apartment building on a 3.2-acre site was consistent with local needs because "the proposed design over-utilizes the site"). Here, many factors contribute to an overall judgment that the Project over-utilizes the site and presents unacceptable risks to the public health, safety, and environment as discussed above.

Significantly, the Project leaves little area for recreational opportunities or "back-yard" spaces for residents. In an apparent effort to maximize the profit from this development, the Developer has maximized the build-out on these parcels for buildings, driveways, parking lots, drainage infrastructure and other utilities. This over-utilization of this Site is excessive, and should be reconsidered.

VI. Conclusion

I expect that the Neighbors will have more comments to share on the merits of this comprehensive permit application as the hearing progresses. In the meantime, we appreciate the Board's diligence in deploying the best available resources to study this application and the significant impacts the proposed Project will have on the neighborhood and the Town generally.

Very truly yours,

Daniel C. Hill

Enc.
cc: Peter Freeman, Esq.
Shrewsbury Board of Selectmen

14-P-663 Appeals Court

GREGORY REYNOLDS vs. ZONING BOARD OF APPEALS OF STOW & another.[1]

No. 14-P-663.

Middlesex. January 13, 2015. - September 15, 2015.

Present: Trainor, Vuono, Hanlon, JJ.

Housing. Zoning, Board of appeals: decision; Low and moderate income housing; Comprehensive permit. Practice, Civil, Standing.

Civil action commenced in the Superior Court Department on November 23, 2010.

The case was heard by Kenneth W. Salinger, J.

Dennis A. Murphy (Daniel C. Hill with him) for the plaintiff.

David S. Weiss (Elizabeth Levine with him) for Stow Elderly Housing Corporation.

Barbara Huggins for zoning board of appeals of Stow.

TRAINOR, J. The plaintiff appeals from a Superior Court judgment affirming a comprehensive permit issued pursuant to the Comprehensive Permit Act, G. L. c. 40B, §§ 20-23 (Act), by the

[1] Stow Elderly Housing Corporation.

zoning board of appeals (board) of Stow (town) to the Stow Elderly Housing Corporation (SEHC) for the construction of a low and moderate income elderly housing project. The plaintiff, a southeast abutter of the locus, contended, among other things, that the private wells on his and his neighbors' properties will have elevated nitrogen levels due to the discharge into the waste disposal system designed for the locus and, therefore, it was unreasonable for the board to waive certain waste disposal limitations contained in the town bylaw. Stow, Mass., Zoning Bylaw (including amendments through May 3, 2010) (bylaw). For the reasons set forth below, we reverse.

1. Background. a. Stow Elderly Housing Corporation and Plantation I. SEHC is a nonprofit corporation founded in 1981 for the primary purpose of developing, owning, and operating affordable housing. In 1983, SEHC obtained a comprehensive permit under the Act to construct Plantation Apartments I (Plantation I), a fifty-unit low-income senior apartment complex on a lot that is adjacent to the locus. Plantation I is served by a private well and a private septic system on the property. Although SEHC was the original owner and developer of Plantation I, in 2004, it transferred ownership of the buildings and granted a long-term lease of the land to Plantation Apartments Limited Partnership, while retaining the fee in the land. SEHC

owns and controls the limited partnership's general partner, and was the initial limited partner.[2]

b. Plan for the locus. SEHC is under agreement to purchase an approximately two and one-half acre lot (locus) improved by a single-family home and barn located adjacent to Plantation I. SEHC plans to subdivide the property creating an approximately one-half acre parcel including the existing single-family home and barn (lot 1), an approximately two acre lot on which it proposes to construct "Plantation II," consisting of one three-story building containing thirty-seven one-bedroom units of elderly housing, a fifty-seat function hall, and administrative offices (lot 2). The application for the comprehensive permit requested numerous waivers of the bylaw along with amendments to the comprehensive permit for Plantation I.

The locus is situated in the town's residential district and eighty percent of the locus is also situated in the town's water resource protection district (WRPD), an overlay district. A multi-unit dwelling containing thirty-seven units is not permitted in the residential district.[3] Following the

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[2] Shortly after creation of the limited partnership, Massachusetts Housing Equity Fund XLLC was substituted as limited partner.

[3] Single-family residences are allowed as of right in the residential district. Multi-family dwellings are permitted in

subdivision of the locus, lot 2 will have no frontage on a public way. SEHC proposes to access the property over an undersized driveway located on Plantation I. The board granted bylaw waivers including, for example, as to use, lot size, frontage, and access requirements.

Notwithstanding that regulations require preliminary plans submitted with a comprehensive permit application to identify the water supply that will serve the project, SEHC has not identified its water source. Its application suggests several possibilities, including private wells from other nearby developments or a private water company. The comprehensive permit issued by the board includes condition 4.4, which provides that "[p]rior to the issuance of a building permit for the Elderly Housing, Applicant shall have obtained a permit or approval(s) to connect the Elderly Housing to a public water supply approved in accordance with then effective regulations

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the residential district with a special permit but, by definition, they are limited to no more than four units. Bylaw § 1.3. "Independent Adult Residences," described in § 8.7 of the bylaw as "provid[ing] the opportunity for the development of housing most beneficial for the Senior and Elder population of Stow at greater density than would normally be allowed," are allowed only in the business district by special permit. Even duplexes, which are allowed in the residential district by special permit, "[u]nder no circumstances" will be permitted for projects sited in whole or in part in the WRPD. Bylaw § 8.2.2. As § 3.10.1 of the bylaw excludes any use not expressly permitted in the table of uses, the proposed development is not a permitted use in the residential district.

promulgated by the Massachusetts Department of Environmental Protection [(DEP)]."

The record reflects that there is no public water or sewer system that serves the locus or its neighboring properties. The locus will be serviced by a private, on-site sewage disposal system. The sewage disposal system will be located in the WRPD. Indeed, the project's engineer testified at trial that all of the areas to be developed are located in the WRPD. The intent of the WRPD is "to protect, preserve and maintain the existing and potential GROUND WATER supply and GROUND WATER RECHARGE AREAS within the town; to preserve and protect present and potential sources of GROUND WATER supply for the public health and safety; and to conserve the natural resources of the town." Bylaw § 5.2.

The town adopted sewage disposal system regulations for the WRPD that are more protective than State standards.[4] In addition to dimensional zoning waivers, SEHC sought and was granted waivers from the WRPD regulations, including the prohibition of uses generating "on-site sewage disposal exceeding 110 gallons

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[4] There is an argument to be made that certain Department of Environmental Protection regulations are equivalent to the bylaw, but as discussed below, the judge found that those particular regulations do not apply to the locus.

per day per 10,000 square feet of LOT area."[5] Bylaw § 5.2.1.1(2). The judge found that the proposed project will generate approximately 5,500 gallons of sewage and other wastewater per day. According to the judge, that translates to approximately 700 gallons per day per 10,000 square feet of lot area, which exceeds WRPD's restriction by over six times.

The plaintiff introduced evidence that his well and those of his neighbors would have elevated nitrogen levels due to the proposed development. The judge rejected the evidence that elevated nitrogen would reach the plaintiff's well, but specifically found "it is more likely than not that the Project will cause nitrogen levels to exceed 10 [parts per million] at the drinking water well serving 37 DeVincent Drive [the plaintiff's neighbor]."[6] The groundwater quality standard is 10mg/l total nitrogen and 10mg/l nitrate-nitrogen at the boundary or nearest downgradient sensitive receptor.[7] The board's consultant recommended that "the applicant provide

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[5] Additional amounts may be permitted by special permit for uses permitted in the underlying district. Bylaw § 5.2.2.3.

[6] The judge's findings do not address the harm arising from elevated nitrogen levels. There was uncontroverted evidence, however, that elevated levels of nitrogen in the water, alone, are a public health threat and possibly indicative of other pollutants.

[7] See 310 Code Mass. Regs. § 22.06(2)(h), (i) (2008); Guidelines for Title 5, Aggregation of Flows and Nitrogen Loading, Department of Environmental Protection (revised 6/3/09).

documentation that the groundwater will meet drinking water standards at the property lines as the abutters are served by on-site wells unless it is the intent to tie them into a public drinking water supply." This recommendation was not adopted by the board. The judge concluded, however, that the comprehensive permit properly was granted because the sewage disposal system, as designed, will meet all applicable State regulations, which do not, in these circumstances, require proof that adjacent wells will not have elevated nitrogen levels as a result.

The board also waived that section of the bylaw that prohibits development in the WRPD that renders more than ten percent of a site impervious. Bylaw § 5.2.1.1(8). As proposed and approved, the project will render impervious approximately forty-two percent of the property located in the WRPD. The judge found, however, that the stormwater management system will direct precipitation falling on impervious areas to underground infiltration beds from which it will percolate into the ground and be available to recharge the groundwater. In fact, the judge found that there will be a slight increase of groundwater recharge compared to predevelopment conditions and concluded that the local concern underlying § 5.2.1.1(8) will be met. Although the board's consultant recommended pretreatment for the reduction of total suspended solids prior to discharge into the

recharge area and an oil and grease separator chamber, these recommendations were not adopted by the board.[8]

Finally, the board waived the board of health regulation requiring septic systems to be designed to handle 150 percent of the estimated daily flow. As designed, the system serving Plantation II can handle only 100 percent of the estimated daily flow.

c. Need for low income elderly housing. One hundred percent of the proposed units will qualify as "low or moderate income housing." There is no doubt that the town and the region in general have a need for affordable elderly housing. Indeed, the application suggests the town's subsidized housing stock comprises only six and one-half percent of its total housing stock, and the parties stipulated that at the time of the application, the town's G. L. c. 40B subsidized housing

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[8] Condition 4.7 of the comprehensive permit requires compliance with DEP regulations and standards governing the management of stormwater runoff. Notwithstanding this express condition, SEHC's expert took the position at trial that because there is to be no development within 100 feet of wetlands, compliance with DEP regulations is not required. The judge agreed and concluded that whether the project complies with DEP stormwater rules or polices is not relevant. The plaintiff does not pursue this argument on appeal. We note, however, that boards may impose conditions that do not render a project uneconomic. See G. L. c. 40B, §§ 21-23; Board of Appeals of Hanover v. Housing Appeals Comm., 363 Mass. 339, 373 (1973). Particularly where the board is waiving local, more restrictive components of its bylaw, it may well have concluded that compliance with DEP stormwater regulations is necessary to protect the groundwater.

inventory was less than ten percent. In appeals before the Housing Appeals Committee, there exists a rebuttable presumption that there is a substantial housing need that outweighs local concerns upon proof that a municipality has failed to satisfy affordable housing goals. 760 Code Mass. Regs. § 56.07(3)(a) (2008).

d. Neighborhood properties. The plaintiff's home abuts the locus to the southeast. His property and those of his neighbors are served by private wells and private septic systems located on their properties. As the plaintiff and his neighbors rely on these wells for their drinking water, the record supports the inference that the area at issue, including the locus and the neighboring residential homes, is dependent on clean groundwater.

2. Discussion. a. The Comprehensive Permit Act and standing. Several cases have described the provisions of the Act, G. L. c. 40B, §§ 20-23, sometimes referred to as the anti-snob zoning act. See Zoning Bd. of Appeals of Lunenburg v. Housing Appeals Comm., 464 Mass. 38, 39-40 (2013). See also Board of Appeals of Hanover v. Housing Appeals Comm., 363 Mass. 339, 345-355 (1973); Zoning Bd. of Appeals of Greenfield v. Housing Appeals Comm., 15 Mass. App. Ct. 553, 555-557 (1983). For present purposes, we note that "[w]e have long recognized that 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." Zoning Bd. of Appeals of Lunenburg v. Housing Appeals Comm., supra at 40, quoting from Standerwick v. Zoning Bd. of Appeals of Andover, 447 Mass. 20, 28-29 (2006). Thus, the Legislature has provided a streamlined application process to a single local board which is authorized to waive local requirements and regulations, including zoning ordinances or by-laws, which are not "consistent with local needs." Board of Appeals of Hanover v. Housing Appeals Comm., supra at 355. "'Consistent with local needs' is a term of art under G. L. c. 40B, § 20, 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 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 subsidized and unsubsidized housing.'" Zoning Bd. of Appeals of Lunenburg v. Housing Appeals Comm., supra at 41. On an abutter's appeal from a local board's grant of a comprehensive permit, the board's decision

"cannot be disturbed unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary." Jepson v. Zoning Bd. of Appeals of Ipswich, 450 Mass. 81, 96 (2007) (quotation omitted).[9]

Pursuant to G. L. c. 40B, § 21, a person aggrieved by the board's decision may appeal pursuant to G. L. c. 40A, § 17, to the Superior Court.[10] Many of the oft-cited parameters for "aggrieved-person" status applicable in zoning appeals apply to appeals from a comprehensive permit. Abutters have the benefit of a presumption of aggrievement, but if challenged by evidence warranting a contrary finding, the plaintiff must prove standing by introducing credible evidence of an injury special and different from the concerns of the rest of the community.

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[9] Where a local board of appeals denies an application for a comprehensive permit, the appellate route is to the Housing Appeals Committee (HAC) for a de novo review to determine whether the board's decision is "reasonable and consistent with local needs." G. L. c. 40B, § 23, inserted by St. 1969, c. 774, § 1. Even where a municipality, as here, "has not met its minimum housing obligation, 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 by valid planning objections to the proposal based on considerations such as health, site, design, and the need to preserve open space. However, a municipality's failure to meet its minimum housing obligation provide[s] compelling evidence that the regional need for housing does in fact outweigh the objections to the proposal." Zoning Bd. of Appeals of Greenfield v. Housing Appeals Comm., supra at 557 (quotations and citations omitted).

[10] Persons aggrieved may also appeal to the Land Court or the Housing Court. G. L. c. 40A, § 17.

Jepson v. Zoning Bd. of Appeals of Ipswich, supra at 88-89. "Once a defendant challenges the plaintiff's standing and offers evidence to support the challenge . . . the jurisdictional issue is to be decided on the basis of the evidence with no benefit to the plaintiff from the presumption." Id. at 89 (quotations omitted). "[A] review of standing based on 'all the evidence' does not require that the factfinder ultimately find a plaintiff's allegations meritorious. To do so would be to deny standing, after the fact, to any unsuccessful plaintiff." Id. at 91, quoting from Marashlian v. Zoning Bd. of Appeals of Newburyport, 421 Mass. 719, 721 (1996). Thus, "[t]he 'findings of fact' a judge is required to make when standing is at issue . . . differ from the 'findings of fact' the judge must make in connection with a trial on the merits. Standing is the gateway through which one must pass en route to an inquiry on the merits. When the factual inquiry focuses on standing, therefore, a plaintiff is not required to prove by a preponderance of the evidence that his or her claims of particularized or special injury are true. 'Rather, the plaintiff must put forth credible evidence to substantiate his allegations. [It is] in this context [that] standing [is] essentially a question of fact for the trial judge.'" Butler v. Waltham, 63 Mass. App. Ct. 435, 440-441 (2005), quoting from Marashlian v. Zoning Bd. of Appeals of Newburyport, supra.

SEHC argues that although the plaintiff supported his claim of standing with expert testimony, because the judge ultimately rejected the evidence that the plaintiff's well would have elevated nitrogen levels, while adopting evidence that an abutter's well will have elevated nitrogen levels, the plaintiff lacks standing to pursue this appeal. The Supreme Judicial Court has rejected similar arguments in Marashlian v. Board of Appeals of Newburyport, supra at 721-723, and Jepson v. Zoning Bd. of Appeals of Ipswich, supra at 89-91. Having presented credible evidence of injury to legal rights of the type intended to be protected by the Act, that the judge ultimately found that the elevated nitrogen would not reach the plaintiff's well goes to his success on the merits and not his ability to challenge the acts of the board. See id. at 91. See also Butler v. Waltham, supra at 440-442.

b. Waste disposal system. On appeal, the plaintiff does not attack the obvious density issues of the project, which might readily call into play the anti-snobbery goals of the Act. Rather, his arguments focus on the impact on the groundwater serving his and his neighbors' property. Leaving aside the plaintiff's arguments related to SEHC's failure to identify its water source,[11] we turn directly to the board's decision to waive

[11] SEHC contends that its failure to identify its water source is a minor omission and the board's condition that it

its limitation on the amount of sewage that may be introduced into a waste disposal system in the WRPD.

The gist of the judge's decision is that because the system is designed to comply with applicable DEP regulations, the board did not err in granting the comprehensive permit. Generally, DEP does not limit discharge into waste disposal systems servicing less than 10,000 gallons per day,[12] unless the system is in certain "nitrogen sensitive" areas. 310 Code Mass. Regs. §§ 15.214-15.216 (2006). The defendants insist, and the judge agreed, that the State standard for "nitrogen sensitive areas,"

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connect the development to an appropriate public water source adequately addresses its omission. While we cannot say failing to identify a project's water source in a comprehensive permit application may never be a minor omission, we are skeptical that in the circumstances of this case it constitutes a minor admission. SEHC could not be unaware that the water supply for this particular project would be a major concern for the town and abutters. The appropriate waste disposal requirements in this case turn, in part, on the source of the project's water supply. It is difficult to conceive that the town boards are utterly unconcerned as to the source of the water or the mechanism of delivery to the locus, which will be accessed by an undersized driveway. In its brief, SEHC continues to assert that it may acquire its water from a local private company, private wells on adjacent property, or private wells some distance from the locus. It has not eliminated circumstances where the water source reasonably could be considered to be drawn from the locus, particularly where SEHC owns the property on which Plantation I exists. Moreover, the board's condition that the locus be connected to a "public" water supply does not appear to have eliminated private wells from consideration.

[12] Pursuant to 314 Code Mass. Regs. §§ 5.00 (2009), a groundwater discharge permit is generally required for a wastewater disposal system discharging greater than 10,000 gallons per day.

which would provide roughly equivalent flow limitations as provided in the local regulation for the WRPD, does not apply in these circumstances because SEHC does not propose both an on-site well and on-site waste disposal system and the locus is not located in any of the sites identified in the regulations.[13] It is not so clear to us that the stricter DEP requirements do not apply here where the area abutting the locus has both on-site wells and on-site waste disposal systems, the actual source of the locus's water supply has not been identified, and SEHC owns an abutting property that contains a fifty-unit apartment complex serviced by an on-site well and on-site waste disposal system.[14] DEP has not yet had the opportunity to weigh in on the

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[13] The regulation provides that "[n]o system serving new construction in areas where the use of both on-site systems and drinking water supply wells is proposed to serve the facility shall be designed to receive or shall receive more than 440 gallons of design flow per day per acre from residential uses except as set forth at 310 [Code Mass. Regs. §] 15.216 (aggregate flows) or [§] 15.217 (enhanced nitrogen removal)" (emphasis supplied). 310 Code Mass. Regs. § 15.214(2) (2006). The loading restrictions also apply to "Interim Wellhead Protection Areas and Department approved Zone IIs of public water supplies" and designated nitrogen-sensitive embayments. 310 Code Mass. Regs. § 15.215 (2006).

[14] Under principles of merger existing even prior to our current zoning enabling act, "[a]djacent lots in common ownership will normally be treated as a single lot for zoning purposes so as to minimize nonconformities." Preston v. Board of Appeals of Hull, 51 Mass. App. Ct. 236, 238 (2001), quoting from Seltzer v. Board of Appeals of Orleans, 24 Mass. App. Ct. 521, 522 (1987). Whether the common-law merger doctrine would apply here has not been raised, but DEP's regulations incorporate a similar theory. The regulations define "facility"

issue, but at least one of the board's consultants, as well as the plaintiff's expert, opined that the more restrictive, "nitrogen sensitive," DEP requirements would have to be met. Nonetheless, for purposes of this appeal, we accept the judge's conclusion that the more restrictive DEP requirements do not apply to the locus and the State regulations do not limit discharge for systems, such as that proposed, that handle less than 10,000 gallons per day. Thus, the question is whether, in these circumstances, presuming the system meets other applicable State standards, it was reasonable for the board to waive the local, more restrictive, provisions of the bylaw.

The judge relied on Zoning Bd. of Appeals of Holliston v. Housing Appeals Comm., 80 Mass. App. Ct. 406, 416 & n.9 (2011) (Holliston), for the proposition that because the waste disposal

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as "[a]ny real property (including any abutting real property) and any buildings thereon, which is served, is proposed to be served, or could in the future be served, by a system or systems, where: (a) legal title is held or controlled by the same owner or owners; or (b) the local Approving Authority or the Department otherwise determines such real property is in single ownership or control pursuant to 310 [Code Mass. Regs. §] 15.011 (aggregation)." 310 Code Mass. Regs. § 15.002 (2006). In addition, 310 Code Mass. Regs. § 15.011 (2006) provides further guidance for making the determination whether facilities are in separate ownership or control for purposes of 310 Code Mass. Regs. §§ 15.000 (2006). That SEHC owns the land on which Plantation I has been constructed and is under agreement to purchase the land for Plantation II, may well be enough for DEP to conclude that Plantation I and Plantation II should be treated as a single facility for the purposes of §§ 15.000, notwithstanding that there may be some organizational differences between the two entities.

system will comply with DEP regulations, it was lawful to issue the comprehensive permit. It is true that our appellate courts have upheld permits issued where wastewater disposal or stormwater discharge plans were not finalized but approval was conditioned on meeting State requirements. See Board of Appeals of Hanover v. Housing Appeals Comm., 363 Mass. at 381; Holliston, supra at 416. We have little doubt that, in many instances, a condition that requires the developer to meet State waste removal system standards is sufficient to protect local concerns. Compliance with State standards, however, is not necessarily the end of the inquiry.

In Holliston, we made clear that it was open to the board to justify denying an application for a comprehensive permit by identifying a health or other local concern that (i) supports the denial, (ii) is not adequately addressed by compliance with State standards, and (iii) outweighs the regional housing need. See id. at 417-419. In Holliston, we concluded, however, that with regard to environmental contamination, there was no local by-law or regulation that was more protective than the State regulations. See id. at 417. And, although the local by-law did have a stricter wetlands buffer zone and stricter stormwater management guidelines, we concluded the board had failed to identify a local interest protected by the stricter regulations that outweighed the local need for affordable housing,

particularly where the substantial evidence showed that the proposed project, as designed, would enhance the wetlands at issue and eliminate existing contamination. Id. at 420-422. We concluded that the local board did nothing more than point out that the project violated their more onerous regulations and failed to show that DEP would "be unable to provide adequate protection to current and future residents." Id. at 419.

Here, the plaintiff's initial complaints about waiving the limit of impervious coverage, which he does not pursue on appeal, are similar to the issues presented in Holliston. The plaintiff does not refute SEHC's showing that the goals of the bylaw's restriction would be met by the systems put in place to direct all runoff into the ground, thereby actually increasing the level of groundwater recharge from predevelopment levels. Thus, the plaintiff could not show that the project was inconsistent with local needs in this regard.

With regard to the proposed waste disposal system, on the other hand, the plaintiff does more than simply point at the fact that the proposed development violates the bylaw. He has presented evidence to support the judge's finding that, as designed and approved, "it is more likely than not" that the project will cause excessive nitrogen levels at the plaintiff's neighbor's well. The calculations introduced, which support the judge's finding, are in part based on the amount of discharge

the project will introduce on the undersized locus. SEHC's expert testified that he found no fault with the accuracy of the calculations. Rather, SEHC's expert testified that he simply made no effort to demonstrate that the system as planned would not result in elevated nitrogen in the groundwater reaching abutting wells because the board did not ask him to do so. He relied on a presumption, which he contends the State applies, that provides that if a system is designed in conformance with State standards, the facility is presumed to protect public health, safety, and the environment.

What SEHC and its expert continue to ignore is that the plaintiff presented evidence, adopted by the judge, rebutting any such presumption. The judge's finding that the system would contaminate the groundwater such that unacceptable levels of nitrogen would reach an abutter's well demonstrates that compliance with the State standards, which SEHC contends are applicable and the judge found to be applicable, are insufficient to protect the groundwater from being contaminated by the proposed project. We conclude that the plaintiff has identified an important local health issue, maintaining clean groundwater servicing local private wells, that is not adequately protected by compliance with applicable State standards. Cf. Holliston, supra at 417-419. Enforcement of the bylaw, however, would restrict the amount of sewage disposal

that may be introduced into the WRPD and thereby protect the adjacent wells.

We next weigh the local concern, the elevated nitrogen levels in the groundwater at the lot line and, in fact, reaching an abutter's well, with the local need for affordable housing. To be sure, the need for affordable elderly housing in the town is real. In weighing the need for affordable housing against local health concerns, however, we are aware of no instance where approval was given to a project that would cause nitrogen levels or other contaminants in a neighboring private well to exceed DEP recommendations. The record does not reflect that the abutters have an alternative water supply. Nor do we mean to suggest that abutters may be forced to connect to an alternative water source, if one were available, so that low income housing may be developed. The Act has no taking component within it. Cf. Zoning Bd. of Appeals of Groton v. Housing Appeals Comm., 451 Mass. 35, 40 (2008) ("The Act does not authorize the committee, directly or indirectly, to order the conveyance of an easement over land abutting the project site of a proposed affordable housing development"). When faced with evidence that one or more adjacent private wells will have elevated nitrogen levels and there is no public water source in the area and no proposal to provide the abutter with clean water, it is unreasonable to conclude that the local need for

affordable housing outweighs the health concerns of existing abutters. In these circumstances, the board's waiver of the bylaw provision limiting the flow into waste disposal systems within the WRPD was unreasonable.

3. Conclusion. The Superior Court judgment affirming the comprehensive permit is reversed. The case is remanded for entry of a judgment revoking the comprehensive permit.

So ordered.