C O M M O N W E A L T H O F M A S S A C H U S E T T S

H O U S I N G A P P E A L S C O M M I T T E E

ROBERT W. RECCHIA

v.

DOVER ZONING BOARD OF APPEALS

No. 2024-04

SUMMARY DECISION

April 24, 2025

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ROBERT W. RECCHIA, Appellant, v. DOVER ZONING BOARD OF APPEALS Appellee.	)	No. 2024-04

SUMMARY DECISION

I. INTRODUCTION AND PROCEDURAL HISTORY

This is an appeal, pursuant to G.L. c. 40B, § 22, and 760 CMR 56.00, *et seq*, brought by Robert W. Recchia (developer), from a decision of the Dover Zoning Board of Appeals (Board) denying a comprehensive permit application with respect to property located in Dover.

On July 10, 2023, the developer submitted an application to the Board for a comprehensive permit pursuant to G.L. c. 40B, §§ 20-23, to construct four single-family, for-sale houses on four separate parcels located on Trout Brook Road, Edgewater Drive, and Chickering Drive in Dover, Massachusetts. One house would be reserved for sale to a low or moderate income household. On August 3, 2023, the Board opened a public hearing on the developer's application. The hearing continued for an additional seven sessions and was closed on February 14, 2024. The Board voted to deny the comprehensive permit on March 25, 2024, and filed its decision that same day with the Dover Town clerk.[1] Initial Pleading, Exh. A.

[1] The Board's decision included what it characterized as an "alternative," which identified conditions on the project that it stated would take effect upon a decision by the Committee to overturn the Board's denial of the Project. Initial Pleading, ¶ 38; Answer, ¶ 38. Chapter 40B provides no specific mechanism to

On April 8, 2024, the developer filed an appeal with the Housing Appeals Committee seeking the Committee's reversal of the Board's denial decision and an order for issuance of a comprehensive permit. The Board filed an answer admitting that it voted to deny the permit based on the Project being a scattered-site development on otherwise "unbuildable lots," on which the developer proposed to build four single family homes of which three were to be market rate and one affordable. Answer, ¶ 35; *see* Initial Pleading, Exh. A. On June 20, 2024, the developer moved for summary decision, asserting, "[t]he sole reason for the Board's denial is the fact that the Project is to be located on noncontiguous parcels." Memorandum of Law … in Support of Motion for Summary Decision (Developer memorandum), p. 1. On July 24, 2024, the Board filed its opposition to the developer's motion, and the developer filed its reply on August 16, 2024.

Counsel for the parties agree this matter involves only one issue of asserted local concern: whether the Board's decision to deny the comprehensive permit because the proposal is for a scattered-site project is reasonable and consistent with local needs. May 20, 2024, Scheduling Order.

II. MOTION TO SUBMIT ADDITIONAL EVIDENCE

On September 19, 2024, the Board moved to submit additional evidence in support of its motion for summary decision: an affidavit of Attorney Kristen Gagalis and email exchange between Attorney Gagalis and Kat Miller, a MassHousing Senior Planning and Programs Analyst. By email dated September 11, 2024, Attorney Gagalis asked two questions:

1. Does MassHousing have a position about whether scattered, otherwise non-buildable sites, only one of which contains affordable housing, are eligible for a comprehensive permit?
2. Does MassHousing have a position about whether the PEL [Project Eligibility Letter] is determinative with respect to that question?

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litigate appeals that are both denials and conditional grants of permits. G.L. c. 40B, § 23. The parties requested the opportunity to brief this issue during this appeal and requested by joint motion on August 14, 2024, to delay any submissions regarding this until after the Committee reached a decision on the appeal. They reported that the parties "are confident that, if the Committee grants the Applicant's Motion for Summary Decision and a Report therefore becomes necessary, they could agree upon and submit to the Committee a set [of] conditions within three weeks of such determination." *Id.* However, at the March 18, 2025, conference with counsel, they acknowledged that this decision overturning the Board's denial would be a final decision, from which an appeal could be taken, or, if desired, a motion for reconsideration with regard to conditions could be filed with the Committee.

Board Motion to Submit Additional Evidence (Board motion), Exh. A. On September 12, 2024, Kat Miller responded:

> MassHousing's position is that there is nothing in the Comprehensive Permit Rules prohibiting the issuance of a Project Eligibility Letter for a scattered site proposal. However, the PEL is not determinative with respect to the issuance of a Comprehensive Permit and ultimately is [sic] a matter for the town to decide.

Id. The Board asserts that this email exchange may be instructive on the issue of "whether the [PEL] issued by MassHousing is determinative on the issue of whether scattered, otherwise non-buildable sites must be rendered buildable by development under G.L. c. 40B." Board motion, p. 1.

In opposition, the developer argues the motion is untimely, pursuant to 760 CMR 56.06(5)(d),[2] and prejudicial because "[b]y waiting until after the [summary decision motion] was fully briefed, the Board has deprived the Appellant of the opportunity to seek [] discovery." Developer opposition, pp. 2-3. Additionally, it argues the proffered evidence is neither competent nor probative because MassHousing's interpretation of the comprehensive permit regulations is not entitled to deference and because the Board provided no evidence that Kat Miller is "authorized to issue an official or authoritative interpretation of any regulation on behalf of MassHousing." *Id.*, pp. 4-5. Thus, it argues the email exchange is not competent evidence of MassHousing's official interpretation and any such interpretation would be irrelevant and owed no deference; therefore, the exchange is not probative of any questions before the Committee. *Id.*, p. 6.

In its reply, the Board notes that Kat Miller is the MassHousing employee named in the PEL as the official tasked with answering such questions. Board reply, p. 3. It argues the evidence is probative because Kat Miller's view that the PEL is not determinative of the issue of scattered-site development "casts doubt on the Appellant's vociferous claims that the PEL answers the question at the heart of this case and necessitates a reversal of the Board's decision. At least according to MassHousing, the PEL is not intended to do so." *Id.*, p. 2.

Although the new evidence may have limited probative value, it is not prejudicial or untimely. The emails have some relevance, although they may have little weight. We note the

[2] 760 CMR 56.06(5)(d) provides that "[a]n opposition and opposing affidavits may be filed by the opposing party within 30 days of the filing of the motion." It does not address a motion to submit additional evidence which, here, was submitted one week after the evidence was obtained.

developer has relied on email communications with MassHousing staff in support of its motion for summary decision. Developer memorandum, Exhs. 1-2. In our discretion, we grant the Board's motion to submit additional evidence, and the affidavit and email exchange are included in our consideration of the motion for summary decision.[3]

III. STANDARD OF REVIEW

Summary decision is appropriate on one or more issues that are the subject of an appeal before the Committee if "the record before the Committee, together with the affidavits (if any) shows that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor as a matter of law." 760 CMR 56.06(5)(d); *see Catlin v. Board of Registration of Architects*, 414 Mass. 1, 7 (1992); *Warren Place, LLC v. Quincy,* No. 2017-10, slip op. at 4 (Mass. Housing Appeals Comm. Aug. 17, 2018); *Delphic Assocs., LLC v. Duxbury,* No. 2003-08, slip op. at 6 (Mass. Housing Appeals Comm. Sept. 14, 2010); *Grandview Realty, Inc. v. Lexington,* No. 2005-11, slip op. at 4 (Mass. Housing Appeals Comm. July 10, 2006).

If all the material evidence is undisputed, it is considered in the light most favorable to the nonmoving party (here, the Board), to determine if it is legally sufficient to support a decision in favor of the moving party. *See Matter of Oxford and 722 Main Street, LLC*, No. 2021-11, slip op. at 3-4 (Mass. Housing Appeals Comm. Nov. 16, 2022); *Warren Place, supra,* slip op. at 12; *Litchfield Heights, LLC v. Peabody,* No. 2004-20, slip op at 4 (Mass. Housing Appeals Comm. Jan. 23, 2006), citing *Donaldson v. Farrakhan,* 436 Mass. 94, 96 (2002) (comparing standard to summary judgment standard). "The mere existence of a scintilla of evidence" to support the nonmoving party's position is insufficient. *Donaldson, supra* at 96, quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). "[T]he evidence must contain facts from which reasonable inferences based on probabilities rather than possibilities may be drawn …. And the evidence must be sufficiently concrete to remove any inference which the [fact finder] might draw from it from the realm of mere speculation and conjecture." *Litchfield Heights, supra,* No. 2004-20, slip op. at 4*,* quoting *Alholm v. Wareham,* 371 Mass. 621, 627 (1976) (citations omitted). The motion should be denied "[i]f, upon any reasonable view of the evidence, there is found a combination of facts from which a rational inference may

[3] Even if we were to exclude this evidence, it would not change our ruling on the motion for summary decision.

be drawn in favor of the [nonmoving party]." *Litchfield Heights*, *supra* at 5*,* quoting *Chase v. Roy*, 363 Mass. 402, 404 (1973).

IV. UNDISPUTED FACTS

According to the current Subsidized Housing Inventory (SHI), only 2.82% of housing units in the Town are affordable. Initial Pleading, ¶ 3; Answer ¶ 3. The Town's 2022 housing production plan acknowledged that since 2009, the Town added approximately 5 units to its SHI. Initial Pleading, ¶ 4; Answer, ¶ 4.

On August 14, 2023, MassHousing issued a PEL, which acknowledged that the project is a scattered-site development (*i.e.*, not all of the lots comprising the project are contiguous). Initial Pleading, ¶¶ 6-7; Answer, ¶¶ 6-7. In the PEL, MassHousing explicitly acknowledged multiple times that the property consists of four scattered, vacant lots and determined that the "project design is generally appropriate for the site on which it is located." Initial Pleading, ¶ 51; Answer, ¶ 51.

On September 12, 2023, at a public hearing session, the Board stated that it intended to require the developer to fund peer reviews for civil engineering, stormwater and architectural design. Initial Pleading, ¶ 10; Answer, ¶ 10. Single-family projects for lots fronting on existing public ways are generally not required to fund peer reviews in the Town. Initial Pleading, ¶ 11; Answer, ¶ 11. The developer acceded to the Board's direction that it fund a civil engineering and stormwater peer review, but it objected to the Board's request to fund an architectural peer review. Initial Pleading, ¶¶ 11-12; Answer, ¶¶ 11-12. The developer submitted architectural plans for the project. Initial Pleading, ¶ 14; Answer, ¶ 14. On January 18, 2024, Sean Reardon, P.E., of Tetra Tech, the civil engineering peer reviewer retained by the Board, issued a letter to the board reporting that "[t]he revised submittals address all our substantive technical concerns and comments, and we require no additional or revised documentation. The design provided is thorough and demonstrates the Projects can be built as shown in compliance with applicable state wetlands and wastewater regulations." Initial Pleading, ¶ 27; Answer, ¶ 27. Mr. Reardon's report further provided that "[t]he responses and documentation provided by [the developer] … satisfactorily address our comments and we require no further information" and "[w]e appreciate the thoughtfulness of the responses and the clarity of the documentation provided and find it suitably complete to serve as Preliminary Plans for a Comprehensive Permit decision." Initial Pleading, ¶ 28; Answer, ¶ 28. On January 23, 2024, the Board's architectural peer reviewer,

Clifford Boehmer of Davis Square Architects, Inc., issued a letter that stated: "[f]rom an architectural perspective, this is a modest project for the Town of Dover. However, for the benefit of future new home owners, as well as the existing neighbors, a meaningful commitment to landscape buffering will help to ensure that the proposed project is a welcome addition to the Town." Initial Pleading, ¶ 29; Answer, ¶ 29.

V. DISCUSSION

Where, as here, a board denies a comprehensive permit application, the Committee's review on appeal is limited to the issue of whether the board's decision was reasonable and consistent with local needs. G.L. c. 40B, § 23. "Consistent with local needs" means "requirements and regulations … are reasonable in view of the regional need for low and moderate income housing considered with the number of low income persons in the city or town affected and the need to protect the health or safety of the occupants of the proposed housing or of the residents of the city or town, to promote better site and building design in relation to the surroundings, or to preserve open spaces." G.L. c. 40B, § 20.

"There exists a rebuttable presumption that the regional affordable housing need outweighs local concerns where the town's stock of low and moderate income housing is less than ten percent." *Zoning Bd. of Appeals of Holliston v. Housing Appeals Comm.* 80 Mass. App. Ct. 406, 414 (2011), citing *Zoning Bd. of Appeals of Canton v. Housing Appeals Comm.*, 76 Mass. App. Ct. 467, 469–470 (2010). Moreover, a "municipality's failure to meet its minimum affordable housing obligations … will provide compelling evidence that the regional need for housing does in fact outweigh the objections to the proposal." *Boothroyd v. Zoning Bd. of Appeals of Amherst*, 449 Mass. 333, 340 (2007), quoting *Board of Appeals of Hanover v. Housing Appeals Comm.*, 363 Mass. 339, 367 (1973). It is undisputed that the Town's SHI is 2.82%—far less than the statutory minimum of 10%. Therefore, the presumption applies, and the burden is on the Board to rebut it by demonstrating local concerns that outweigh the regional need for affordable housing.

A. Developer's Argument in Support of Allowing Scattered-Site Development

The developer argues that because there are no genuine issues of material fact in dispute, and because the Board's sole basis for denial was legally erroneous, it is entitled to summary decision in its favor. Developer memorandum, p. 7. It argues that the Board did not find a legitimate local concern that outweighs the regional need for housing, nor one that overcomes

the presumption that the need for regional affordable housing outweighs local concerns in light of the Town having not met the 10% affordable housing minimum at the time of its application. *Id.*, pp. 7-8, citing G.L. c. 40B, § 20; *Zoning Bd. of Appeals of Canton v. Housing Appeals Comm.*, 76 Mass. App. Ct. 467, 469-470 (2010).

The developer argues the Committee may only uphold the Board's denial of the comprehensive permit if it finds the community's need for such 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." Developer memorandum, p. 8, citing *Town of Hingham v. Department of Hous. & Community Dev.*, 451 Mass. 501, 504, n.6 (2008), quoting *Zoning Bd. of Appeals of Greenfield v. Housing Appeals Comm.*, 15 Mass. App. Ct. 553, 557 (1983). Here, it argues, the Board did not even attempt to justify its denial upon any particularized concern regarding the impact of the project; rather, the Board relied on the Committee's decision in *Farm Street Trust v. Dover*, No. 2001-01 (Mass. Housing Appeals Comm. June 28, 2001) (upholding Dover denial of scattered-site project). It notes the Board's decision asserted that approving the project would "defy the expectations of the citizens of Dover without providing the commensurate public benefit contemplated under chapter 40B." Developer memorandum, p. 9, quoting Developer memorandum, Exh. 8, p. 3, ¶ 11. The developer points out that neither the Board's peer review engineer nor its architectural review engineer "identified any adverse impacts of the Project, let alone any impacts so great as to rebut the presumption that they are outweighed by the regional need for affordable housing." *Id.*, p. 9. Accordingly, it concludes that "since the Board failed to make any findings or provide any evidence to rebut the regulatory presumption that legitimate local concerns are outweighed by the regional need for affordable housing, the Decision is facially invalid, and the Appellant is entitled to a summary decision in its favor." *Id.*

Further, the developer argues that the "Committee's decades-old *Farm Street* decision does not relieve the Board of its burden to demonstrate legitimate local concerns that outweigh the [housing need]." Developer memorandum, p. 10. It notes the Committee in *Farm Street* "only deferred to the Board because the subsidizing agency had not considered or addressed the propriety of a scattered-site project" and at that time, most comprehensive permit projects were subsidized under the New England Fund program, under which no determination was required regarding the appropriateness of a proposed development site. *Id.* It argues that six years after

Farm Street, revised comprehensive permit regulations were promulgated that now require the subsidizing agency to make specific findings in evaluating project eligibility, including findings regarding the appropriateness of the project site and project design. *Id.*, p. 11, citing 760 CMR 56.04(1) ("compliance with project eligibility requirements shall be established by issuance of a written determination of project eligibility by the subsidizing agency") and 760 CMR 56.04(4) (requiring subsidizing agency to make specific findings "that the project site is generally appropriate for residential development" and "that the conceptual project design is generally appropriate for the site…."). Here, it argues that MassHousing's PEL "explicitly acknowledged multiple times that the Project consists of four scattered vacant lots in the context of making its determination that 'the project design is generally appropriate for the site on which it is located.'" Developer memorandum, p. 13. In addition, MassHousing considered the relationship to adjacent streets, integration into existing development patterns, relationship to adjacent building typology (including building massing, site arrangement, and architectural details), and the conceptual site plan and topography. *Id.*, pp. 13-14. "This is precisely the type of particularized analysis by the subsidizing agency that the Committee lamented had not taken place under the regulations in effect 23 years ago when it issued its decision in *Farm Street Trust*."[4] *Id.,* pp.14-15.

B. Board's Argument Pursuant to *Farm Street*

To support its denial, the Board relies almost exclusively on *Farm Street, supra,* No. 2001-01, stating the reason was:

> on the grounds that allowing the applicant to build on noncontiguous, unbuildable lots would violate the expectation that those lots would remain unbuildable, without providing any tangible public benefit from building on the three lots where the houses would not be affordable, but instead would be the type of market-rate houses that are otherwise prohibited, and contrary to the local need for affordable housing.

Initial Pleading, ¶ 40 and Exh. A; Answer, ¶ 40. *See Farm Street, supra,* No. 2001-01, slip op. at 5.

The Board argues that "[o]ne local need that zoning bylaws are intended to protect … is the ability to 'provide stability and establish reasonable expectations about development in

[4] While stating it is not necessary to revisit whether *Farm Street* was correctly decided, the developer contends that it was inconsistent with the statutory and regulatory standard under c. 40B. Developer memorandum, p. 15 and n.3.

neighborhoods.'" Board opposition, p. 20, citing *Farm Street*, *supra,* No. 2001-01, slip op. at 4. It further contends that:

> …throwing out *Farm Street* and making projects like this one eligible for c. 40B permitting would throw open the floodgates to a whole new method of development without any limiting principle as to what parcels can be cobbled together to create a supposed 'affordable housing' project. If the Developer here is right, then, logically, one could obtain a comprehensive permit for a project that is 12 parcels, all non-contiguous, or 24 parcels, or 48.

Board opposition, p. 19. While acknowledging "it may be true that 'the shortage of buildable land in many towns was one of the ills that the statute was intended to address,'" quoting *Farm Street*, slip op. at 3, the Board suggests the Committee's decision "reflected an understanding that there is a difference between buildable lots that should be developed more densely than the applicable zoning bylaw permits, and land that was never understood to be buildable at all." Board opposition, p. 18.

The Board also claims that this project "represents an increase [of] less than [a] 0.02% of the Town's affordable housing" which means it "could be forced to approve dozens more of these projects—adding over 100 more large market-rate single-family homes on unbuildable lots, before it reaches the 10% threshold. This sort of onslaught may not be a typical matter of local concern … but it certainly is a valid one." *Id.*, p. 21.

The Board also argues that the promulgation of regulatory changes since *Farm Street* does not affect the subsidizing agency's control regarding projects, citing *100 Burrill Street, LLC v. Swampscott,* No. 2005-21, slip op. at 3-4 (Mass. Housing Appeals Comm. June 9, 2008). Board opposition, pp. 24-25. In any event, it argues that 760 CMR 56.04(4) does not address the eligibility of scattered "unbuildable" sites under Chapter 40B. It also disputes that the PEL shows the subsidizing agency has approved a scattered-site development. While noting that the PEL states the project is a scattered-site, and one that "consists of four single-family homes in a neighborhood of single-family homes," it contends this does not address the suitability of the Project's scattered nature or prove the Board cannot disqualify the Project based on the non-abutting, "unbuildable sites" without affordable units on all parcels. Board opposition, pp. 23-24.

C. Committee Conclusion Regarding Scattered-Site 40B Projects

In *Farm Street*, the developer had sought a comprehensive permit to build two three-bedroom houses on two lots more than a mile apart, with one home to be market-rate and the other to be affordable. *Farm Street, supra,* No. 2001-01, slip op. at 2. In affirming the board's

decision to deny the permit, the Committee stated that "approval of a comprehensive permit on two non-contiguous lots where one contains no affordable units is an impermissible intrusion upon the expectations established under existing zoning" in that the expectation was the parcels would never be built on, ruling "we cannot find that its decision is inconsistent with local needs where the developer has not demonstrated that the [b]oard's decision conflicts with existing state housing policy or is otherwise arbitrary or improper." *Id.*, slip op. at 4, 6. In so ruling, the Committee noted two earlier cases in which it had approved permits on non-contiguous sites: *Abington Housing Auth. v. Abington*, No. 1989-38 (Mass. Housing Appeals Comm. June 20, 1990) (granting comprehensive permit to construct 77 units of public housing on four separate lots, finding board's denial was not consistent with local needs) and *Southbridge Housing Auth. v. Southbridge*, No. 1991-09 (Mass. Housing Appeals Comm. Feb. 16, 1994) (granting comprehensive permit to construct 12 units of public housing on two "nearly adjacent" sites, finding board's denial was not consistent with local needs). The *Farm Street* decision distinguished those cases on the basis that "all of the units were affordable public housing units, and therefore each of the sites contained affordable units." *Id.*, slip op. at 6.

In both *Abington* and *Southbridge*, the Committee considered whether the board's decision was reasonable and consistent with local needs—but in neither case did it consider the appropriateness of scattered sites *per se* because that issue was not raised.[5] In *Farm Street*, however, the Committee stated that the "sole issue presented [was] the Board's contention that 'the Project is not permissible under Chapter 40B because it requires the construction of houses on two separate, non-contiguous properties, only one of which contains low or moderate income housing.'" *Farm Street, supra,* No. 2001-01, slip op. at 3.

The Committee in *Farm Street* decided, as a matter of policy, whether scattered-site developments should be allowed under Chapter 40B. It stated that "[t]he possibility of private developers building mixed-income housing by assembling non-contiguous parcels of land would not have been envisioned by the legislature, and there is nothing in the statutory language to

[5] In *Southbridge*, the Committee noted it "resolved only those issues placed before it by the parties" as a reason for including its set of standard conditions. *Southbridge, supra*, No. 1991-09, slip op. at 21. In *Abington*, the Committee stated, "our view of the issues here does not require us to decide whether this application should be dealt with as a single application for four sites, or four separate applications, [because] we base our decision solely on whether or not the denial … was 'consistent with local needs.'" *Abington*, *supra*, No. 1989-38, slip op. at 2-3.

assist in inferring legislative intent … nor was this issue considered in the drafting of [the comprehensive permit] regulations." *Farm Street, supra,* No. 2001-01, slip op. at 4. The Committee looked to the general purposes of Chapter 40B and zoning laws and stated that the most commonly cited purposes of zoning requirements are "the protection of the public health, safety, and welfare, and of neighborhoods against deleterious uses, [and] they also provide stability and establish reasonable expectations about developments in neighborhoods." *Id.*, slip op. at 4, citing *Everpure Ice Mfg. Co., Inc. v. Board of Appeals of Lawrence*, 324 Mass. 433, 435 (1949), and *Moore v. Cataldo*, 356 Mass. 325, 327 (1969).

The *Farm Street* decision stated the project violated expectations to a greater degree than the typical comprehensive permit proposal "since the expectation that the Farm Street lot would remain vacant would be violated with no immediately tangible public benefit—the house built would not be affordable, but rather the type of market rate house that was assumed to be prohibited." *Farm Street, supra,* No. 2001-01, slip op. at 5. It continued, stating the "violation of the neighbors' and town residents' expectations, together with the concern that approving this proposal would open many lots previously considered unbuildable[6] to development, create[d] a

[6] While *Farm Street* appears to have accepted without discussion the Board's characterization that the noncontiguous lots were "unbuildable," we believe the term "unbuildable" is a factual or legal conclusion that has been inappropriately conflated with the term "nonconforming," in that the lots do not conform to existing zoning (and would therefore require waivers under Chapter 40B). *See Matter of Weston and 518 South Ave., LLC*, No. 2019-12, slip op. at 10-12 (Mass. Housing Appeals Comm. Decision on Interlocutory Appeal Mar. 15, 2021) (rejecting board's argument that perpetually deed-restricted conservation land owned by private non-profit organization should be excluded from general land area minimum calculation because it is "basically unbuildable"); *River Marsh, LLC v. Pembroke*, No. 2019-04, slip op. at 27-28 (Mass. Housing Appeals Comm. Apr. 11, 2024) (rejecting board's local concerns case where it argued "more than half of the project site consists of unbuildable wetlands" which "poses a major unresolved challenge to develop[ment]" because it failed to raise any local requirement or regulation to support asserted local concerns); *DIV Fellsway, LLC v. Medford*, No. 2020-07, slip op. at 11-12 (Mass. Housing Appeals Comm. Decision on Interlocutory Appeal Oct. 10, 2023) (rejecting board's argument that land within recreation open space zoning district was "unbuildable" and therefore properly excluded from denominator of general land area minimum calculation because district did not completely prohibit all residential, commercial, and industrial uses)*; compare Farm Street*, *supra*, No. 2001-01, slip op. at 1, n.1 (noting that "[i]t appears that because of the need for a wetlands crossing for access on each parcel, which would not be permitted under the Dover Wetlands Bylaw, these lots would not be developable without a comprehensive permit"). *Farm Street* noted "the Board has acknowledged that 'the potential environmental detriment [from the crossings] does not outweigh the Town's statutorily determined need for affordable housing.'" *Id*. Therefore, *Farm Street* rejected a potential local environmental concern as outweighing the housing need but nevertheless upheld the permit denial in part because of the concern with building on nonconforming lots, not unbuildable ones.

question that blends the factual circumstances in Dover with public policy in a way that ideally would be resolved by the state or federal housing program that is subsidizing the development" and decided "this is a programmatic policy decision to be addressed in the first instance by the local board of appeals." *Id.*, slip op. at 5-6. *Farm Street* went on to state, "[t]hough the Board could have chosen as a matter of policy to permit this sort of scattered site housing, we cannot find that its decision is inconsistent with local needs where the developer has not demonstrated that the Board's decision conflicts with existing state housing policy or is otherwise arbitrary or improper." *Id*., slip op. at 6.

Now, thirteen years later—with a Town SHI of just 2.82% and having added only approximately 5 units of affordable housing since 2009—the Board again asks the Committee to uphold a denial solely on that basis. We decline to do so for several reasons.

First, in *Farm Street,* the Committee deferred to the board on an issue that was one of state law or programmatic policy. Relying on principles the Committee had enunciated in an earlier decision, *Stuborn Ltd. P'ship v. Barnstable*, No. 1998-01, slip op. at 18-19, 21-23, 27-28 (Mass. Housing Appeals Comm. Mar. 5, 1999), *Farm Street* decided it was for the board to determine as a matter of policy whether to allow a scattered-site affordable housing development in the first instance, but this is always the case because a board holds the initial hearing. On appeal its denial is reviewed to determine whether it is consistent with local needs. *Barnstable* listed a number of matters upon which a board could take control, matters that are now routinely exercised by subsidizing agencies: programmatic details, including minimum Chapter 40B standards and compliance; finances, including profit limitations and financial feasibility; allowed sales prices or rents; long-term monitoring; placement and dispersal of affordable units; exteriors of market and affordable units being indistinguishable; fair housing marketing and occupant selection; and income and eligibility criteria. *Barnstable*, *supra*, No. 1998-01, slip op. at 18-27, 34. Both *Barnstable* and *Farm Street* were decided in the context of a subsidizing mechanism, the New England Fund, which "has been designed so that neither the Federal Home Loan Bank of Boston nor the lending member bank will address [a] question of public policy." *Farm Street, supra,* No. 2001-01, slip op. at 5. They were decided long before the Supreme Judicial Court, in *Zoning Bd. of Appeals of Amesbury v. Housing Appeals Comm.,* 457 Mass. 748, 763-766 (2010), held that local boards should not encroach on matters within the area of responsibility of subsidizing agencies, including "whether a developer had met the requirements of a limited

dividend organization eligible to receive State or Federal subsidy 'is properly left to the appropriate State or Federal funding agency.'" *Id.* (upholding Committee's decision to strike board-imposed conditions relating to regulatory documents, affordable housing restrictions, profit limitation, marketing, board-approval of project monitoring agent, and requirement that affordable units be constructed and sold coincident with development of market-rate units). Thus, the deference referenced in *Farm Street* is now inapplicable, and it is for us to evaluate whether scattered-site developments are consistent with Chapter 40B.

Chapter 40B, by its terms, does not prohibit scattered-site developments, *per se,* even if some resulting lots do not contain affordable units.[7] Moreover, the developer correctly points out that six years after *Farm Street* was decided, the comprehensive permit regulations were amended to now require the subsidizing agency to make specific findings in evaluating project eligibility, including findings regarding the appropriateness of the project site and project design. Developer memorandum, p. 11. In *Farm Street*, the project would have been funded by the New England Fund (NEF), and while the NEF was deemed a subsidizing agency for purposes of Chapter 40B, it was not required to make a determination as to the appropriateness of the proposed development site. *Farm Street,* No. 2001-01, slip op. at 5; s*ee Barnstable, supra,* No. 1998-01, slip op. at 34 (stating "[f]inancial projections, the developer's credentials, market conditions, and the like have traditionally been left to the scrutiny of the subsidizing agency, and in most cases they are not proper areas of inquiry for the Board" … "[b]ut the review by the bank [under NEF] will not be of exactly the sort done by a governmental agency, and it will not be subject to public scrutiny. Therefore, limited review of these issues by the Board is necessary"). Now, under 760 CMR 56.02 *Subsidizing Agency*, "[i]t shall be the responsibility of the Subsidizing Agency to enforce compliance with provisions of 760 CMR 56.00 and applicable Department guidelines relating to matters including … Project Eligibility…." The comprehensive permit regulations require subsidizing agencies to "make findings, based upon its review of the application, and taking into account information received during the site visit and

[7] The Courts have long upheld the proposition that comprehensive permits may (and almost always do) include development of market rate lots in addition to affordable housing. *See, e.g., Zoning Bd. of Appeals of Wellesley v. Housing Appeals Comm.*, 385 Mass. 651, 659 (1982) (stating "[w]henever HAC reviews the denial of a comprehensive permit, it must apply this statutory standard [of weighing local needs for affordable housing against local concerns] *even if the project includes units rented at fair market rates*") (emphasis added).

from written comments." 760 CMR 56.04(4). Those required findings include, among others, a determination "that the site of the proposed Project is generally appropriate for residential development, taking into consideration information provided by the municipality" and "that the conceptual project design is generally appropriate for the site on which it is located, taking into consideration factors that may include proposed use, conceptual site plan and building massing, topography, environmental resources, and integration into existing development patterns (such finding, with supporting reasoning, to be set forth in reasonable detail)…." 760 CMR 56.04(4)(b) and (c). Here, MassHousing issued a PEL specifically finding the proposed project site is generally appropriate for residential development and the conceptual project design is generally appropriate for the site on which it is located. Developer memorandum, Exh. 3 (noting MassHousing performed on-site inspection of the project site; reviewed the information submitted by the applicant, municipality, and others in accordance with the comprehensive permit rules and concluded the project appears generally eligible under the requirements of the program). Therefore, the policy considerations discussed in *Farm Street* no longer apply. The PEL was granted for a scattered-site development, and therefore under the obligations of the subsidizing agency, programmatic concerns could not be said to preclude such projects. It included specific statements regarding the scattered nature of the proposal, noting:

- The Site itself consists of four scattered vacant lots, 2 adjacent to one another on Troutbrook Road, one at the corner of Troutbrook Road and Chickering Drive, and one on Edgewater Drive. The neighborhood is quiet and rural in nature, primarily consisting of single- family homes and undeveloped woodland/conservation land. The proposed Project is consistent with surrounding development patterns.
- The proposed site layout includes four scattered lots, each containing one single-family home. The homes are in close keeping with frontage, setback, and height requirements for the surrounding R4 zoning. Facades will include exterior materials and detailing consisting of a mix of horizontal clapboard and shake shingles with shutters, covered front porches with craftsmen-style entry doors, carriage-style garage doors, and the use of classic New England colors in keeping with the style of homes in the surrounding area.
- The Applicant proposes to build four (4) homeownership units on approximately 4.77 acres, 3.08 of which are buildable. The resulting density is 1.3 units per buildable acre, which is acceptable given the proposed housing type.
- The proposed site layout includes four scattered house lots, each containing one single-family home. Each lot is served by its own individual driveway which leads to a front- or side-facing two-car garage. The four homes will be served by private wells and septic systems, also on each individual property. To comply with wastewater and wetland requirements, the two adjacent lots on Troutbrook Road are proposed to be

reconfigured such that one lot will form a u-shape around the other to accommodate the location of one of the septic systems.

- There are 1.69 acres of unbuildable wetland on the Site, distributed across the rear of all four parcels. The areas have been delineated and confirmed by ANRAD, and the Applicant has indicated they will need to obtain an Order of Conditions from the Conservation Commission. Proposed site layouts are organized in such a way to locate improvements away from the wetland areas.

Developer memorandum, Exh. 3. Pursuant to 760 CMR 56.04(5), the PEL is conclusive as to the matters of project eligibility. Moreover, regardless of whether all market-rate lots share a property line with affordable lots, all lots developed under a comprehensive permit are subject to the conditions of the comprehensive permit.[8]

In addition, a nonconforming lot is simply one that is unlikely to be developed due to local zoning restrictions. Characterizing it as "unbuildable," and granting it heightened protection over parcels with other types of zoning restrictions, is inconsistent with Chapter 40B, which was enacted specifically to address zoning restrictions that prevented the building of much needed affordable housing. *Hanover*, 363 Mass. 339, 353-354 (concluding "Legislature's intent in passing [Chapter 40B] was to provide relief from exclusionary zoning practices which prevented the construction of badly needed low and moderate income housing"). "[C]entral to the legislative scheme is the requirement that an override of a local zoning authority's decision to deny an application to build affordable housing is available only to the extent that a city or town has not met its [10%] share of affordable housing units as delineated in [Chapter 40B]…. To the extent that a city or town does not have an adequate supply of affordable housing (measured in [Chapter 40B] as a percentage of existing housing or of land in each town) its local autonomy in zoning matters is curtailed. Once its obligation is met, the override power delegated to HAC is extinguished." *Zoning Bd. of Appeals of Wellesley v. Ardemore,* 436 Mass. 811, 822-824 (2002)

[8] Changes to market rate units built as part of a comprehensive permit remain subject to the post permit modification process, including determination whether post-permit modifications are deemed "substantial." *See* 760 CMR 56.05(11) (post permit modification procedure); 760 CMR 56.07(4)(a)-(c) (standards for determination of substantiality); *see also Rugged Scott, LLC v. Nantucket*, No. 2018-01 (Mass. Housing Appeals Comm. Ruling on Second Motion for Summary Decision May 10, 2024) (ruling proposed change was substantial and remanding to board to consider developer's post-permit modification request to construct garage on undersized affordable lot for exclusive use of abutting market-rate lot); *cf. Patricia A. Klauer v. Falmouth*, No. 2022-02 (Mass. Housing Appeals Comm. Summary Decision Oct. 10, 2023) (granting post-permit modification as insubstantial change to allow small shed on market-rate lot that would have been allowed as-of-right but for comprehensive permit condition prohibiting alterations).

(internal citations omitted). As *Farm Street* itself stated, "residents cannot expect land use patterns to be permanent" and "[a]t the most fundamental level, they are always subject to the possibility of dramatic change if the local zoning bylaw itself is amended … [b]ut more commonly, residents must cope with variances and other exceptions (*including comprehensive permits*) …." *Farm Street, supra,* No. 2001-01, slip op. at 4 (emphasis added).[9]

Finally, the Board's suggestion is unfounded that there would be no limiting principle unless scattered-site developments are prohibited, since a board's decision regarding a scattered-site project must be consistent with local needs. G.L. c. 40B, § 20. This inquiry, which is at the heart of comprehensive permit appeals before the Committee, addresses, to the extent relevant to a particular project, matters of health or safety, protection of the natural environment, promotion of better site and building design in relation to the surroundings and municipal and regional planning, or preservation of open spaces; these are balanced against the regional need for affordable housing. *See* 760 CMR 56.02: *Local Concern*. This balancing occurs only if a municipality's stock of low and moderate income housing is below the statutory minimum, as is the case here. G.L. c. 40B, § 20; *Holliston,* 80 Mass. App. Ct. 406, 414, citing *Canton*, 76 Mass. App. Ct. 467, 469–470. Nearly two decades ago, this Committee observed that "[a]s land available for new housing becomes more limited in Massachusetts, more developers are proposing projects on parcels that present topographical challenges. It is important that legitimate local concerns be respected, mindful of the balance against the regional need for affordable housing." *Lexington Woods, LLC v. Waltham*, No. 2002-36, slip op. at 19 (Mass. Housing Appeals Comm. Feb. 1, 2005).

Accordingly, we rule that *Farm Street* is not applicable; we hold that Chapter 40B does not prohibit scattered-site developments, *per se,* even if some resulting lots do not contain

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[9] *Farm Street*'s suggestion that the expectation regarding "unbuildable" lots is greater than for other zoning requirements was made years ago but was actually focused on zoning restrictions against building residential housing on particular lots. This was before it was clear that finding locations for the development of affordable housing was becoming more difficult, with engineering, environmental, or health matters that impeded residential construction. *See Lexington Woods, LLC v. Waltham*, No. 2002-36, slip op. at 19 (Mass. Housing Appeals Comm. Feb. 1, 2005) (noting increase of proposed developments on parcels with topographical challenges as optimal land for development is less available). In addition, the standard applied in *Farm Street* shifted the burden from the statutory requirement that the board prove local concerns that outweigh the need for affordable housing to a new, higher burden on the developer to either demonstrate that the board's decision conflicts with existing state housing policy or prove arbitrary or improper action by the board.

affordable units. Instead, consideration of scattered-site projects shall be made on review of the facts of the specific project, and with a determination on a case-by-case basis of whether the Board has demonstrated a local concern that outweighs the regional need for affordable housing, without summarily foreclosing the possibility of non-contiguous (scattered-site) developments. The comprehensive permit law confers on the Committee "the power to override local 'requirements and regulations,' including zoning ordinances or by-laws, which are not 'consistent with local needs.'" *Hanover*, 363 Mass. 339, 355. The very act of overriding municipal requirements and regulations intrudes upon municipalities' zoning expectations. Thus, this intrusion-upon-expectations standard could be used to deny any comprehensive permit application that seeks waiver of local requirements because municipalities generally have the expectation that their zoning requirements will apply. Here, the Board contends that the lots are "unbuildable" because they do not meet the Town's minimum lot size, frontage and setback requirements, which are the exact types of exclusionary zoning practices that the Legislature intended to circumvent because they have a negative impact on the construction of low and moderate income housing. *See id.* at 348-352. Further, a prohibition on scattered-site developments undermines the "statute's objective of providing for the critical regional need for low and moderate income housing," and "[t]he statute must be construed in a manner that effectuates its intent."[10] *Id*. at 354, 360.

D. Board's Local Concerns Regarding the Project's Scattered-Site Development Do Not Outweigh the Housing Need.

It is undisputed that the Board denied the comprehensive permit "solely based upon the fact that it is a scattered site development on lots that, though each is over an acre, would not otherwise be buildable under the town's zoning bylaws." Board Opposition, ¶ 30. The Board argues that it denied the comprehensive permit "due to the concern about turning 4 unbuildable parcels into 3 [market-rate] cookie-cutter large houses, with no meaningful contribution to affordable housing in Dover, and thus putting every single unbuildable lot in Dover in jeopardy

[10] Contrary to the Board's argument, the local concerns analysis provides the protection to municipalities afforded by the comprehensive permit law. *See* Board opposition, p. 21. We see no reason to allow lot contiguity, without more, to be a requirement to preclude the development of affordable housing.

of being part of such a scattered site development."[11] *Id.* In its opposition, the Board expands upon why the lots are "unbuildable," stating:

> The residential zone in which the Lots are located requires 30' side and rear setbacks, 40' front setbacks, and perfect-square lots. Lot 1A has a 17.2' side setback and a 29.1' rear setback and is not a perfect square. Lots 2A and 4 have 32' front setbacks, and Lot 45 has a 21' front setback. In short, none of these lots are buildable.

Id., ¶ 39.[12] The Board further states that "all four undersized Lots contain woods, floodplains, and wetlands that would normally restrict development."[13] *Id.*, ¶ 40.

The Board does not argue that the scattered-site development must be prohibited to protect the health or safety of the occupants or the residents of Dover, or to protect the natural environment, promote better site design or preserve open spaces. *See* 760 CMR 56.02: *Local Concern*. It only speculates as to the "onslaught" of comprehensive permits that will be approved in the Town if is required to consider these types of developments. *See* Board opposition, p. 21. Without evidence of harm, the purported concerns of non-contiguous lots that do not meet the Town's zoning requirements as to lot size, shape, and setbacks, are insufficient to outweigh the need for affordable housing. *See 104 Stony Brook, LLC v. Weston,* No. 2017-14, slip op. at 17 (Mass. Housing Appeals Comm. June 22, 2023) (where board "has not articulated the local concern … nor demonstrated the relevant harm [] from the proposed development, the Board has failed to demonstrate a valid local concern applicable to the project, much less that such a concern outweighs the need for affordable housing"), citing *Holliston*, 80 Mass. App. Ct. 405, 417, 420 and *Herring Brook Meadow, LLC v. Scituate*, No. 2007-15, slip op. at 23-26 (Mass. Housing Appeals Comm. May 26, 2010); *c.f. Reynolds v. Zoning Bd. of Appeals of Stow*, 88 Mass. App. Ct. 339, 349-350 (2015) (holding "it is unreasonable to conclude that the local need for affordable housing outweighs the health concerns of existing abutters" in the face of evidence that "'it is more likely than not' that project will cause excessive nitrogen levels at plaintiff

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[11] The fact that the addition of one affordable unit is a modest increase to the Town's SHI is not a valid reason to deny a comprehensive permit.

[12] It is undisputed that the Board accepted its peer review consultants' findings that the Project, as designed, did not present any architectural or engineering concerns. Board opposition, ¶ 52.

[13] It is undisputed that, according to the Board's own peer reviewer, the Project as designed can be built in compliance with applicable state wetlands and wastewater regulations. Board opposition, ¶ 23.

neighbor's well"). The Board's asserted concern with conforming to zoning, by itself, does not overcome the compelling evidence that the regional need for housing does in fact outweigh the objections to the proposal. *See Boothroyd*, 449 Mass. 333, 340; *Hanover*, 363 Mass. 339, 367.

VI. CONCLUSION

Based upon review of the entire record and upon the undisputed facts and discussion above, the Housing Appeals Committee concludes that the decision of the Board is unreasonable and not consistent with local needs. The developer's motion for summary decision is granted. The decision of the Board is vacated, and the Board is directed to issue a comprehensive permit that conforms to this decision as provided in the text of this decision and subject to the following conditions.

a) Any specific reference to the submission of materials to Town officials or offices for their review or approval shall mean submission to the appropriate municipal official with relevant expertise to determine whether the submission is consistent with the final comprehensive permit, such determination not to be unreasonably withheld. Such officials may consult with other officials or offices with relevant expertise as they deem necessary or appropriate. In addition, such review shall be made in a reasonably expeditious manner, consistent with the timing for review of comparable submissions for unsubsidized projects. *See* 760 CMR 56.07(6).

b) The comprehensive permit shall conform to the application submitted to the Board, as modified by the following conditions.

   i) The Development shall be constructed as shown on the site plans set out in and prepared by Legacy Engineering, dated June 7, 2023. Initial Pleading, Exh. B.

   ii) The developer shall comply with all applicable non-waived local requirements and regulations in effect on the date of the developer's submission of its comprehensive permit application to the Board, consistent with this decision pursuant to 760 CMR 56.02: *Local Requirements and Regulations*.

   iii) The developer shall submit final construction plans for all buildings, roadways, stormwater management systems, and other infrastructure to the Town of Dover's entities, staff or officials for final comprehensive permit review and approval pursuant to 760 CMR 56.05(10)(b).

iv) All Town of Dover staff, officials and boards shall promptly take whatever steps are necessary to permit construction of the proposed housing in conformity with the standard permitting practices applied to unsubsidized housing in Dover.

c) 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.

d) 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:

i) Construction in all particulars shall be in accordance with all applicable local zoning and other bylaws, regulations and other local requirements in effect on the date of the developer's submission of its comprehensive permit application to the Board, except those waived by this decision or in prior proceedings in this case.

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

iii) 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.

iv) 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.

v) The Board and all other Town of Dover staff, officials and boards shall take whatever steps are necessary to ensure that a building permit and other permits are issued to the developer, without undue delay, upon presentation of construction plans, pursuant to 760 CMR 56.05(10)(b), that conform to the comprehensive permit and the Massachusetts Uniform Building Code.

vi) Design, construction and marketing in all particulars shall be in accordance with all presently applicable state and federal requirements, including without limitation, fair housing requirements.

vii) This comprehensive permit is subject to the cost certification requirements of 760 CMR 56.04(8) and EOHLC guidelines issued pursuant thereto.

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

April 24, 2025

Shelagh A. Ellman-Pearl, Chair

Cobi Frongillo

Lionel G. Romain

James G. Stockard, Jr.

Oliver L. Stark, Counsel