**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**

**SURFSIDE CROSSING, LLC**

v.

**NANTUCKET ZONING BOARD OF APPEALS**

No. 2019-07

PROPOSED DECISION AFTER REMAND

March 11, 2026

# TABLE OF CONTENTS

I. INTRODUCTION ..... 1
II. PROCEDURAL HISTORY ..... 2
III. FACTUAL BACKGROUND ..... 7
IV. STANDARD OF REVIEW AND BURDENS OF PROOF ..... 8
V. LOCAL CONCERNS ..... 9
A. Overview of Issues on Remand ..... 9
B. Drinking Water Protections for Public Wells ..... 11
1. Regulation of Zone II Wellhead Protection Areas ..... 12
2. The Developer' Prima Facie Case Regarding Stormwater Management ..... 14
3. Response by NLWC, the Board, and the Residents ..... 16
C. Private Wells ..... 26
1. The developer has established a prima facie case. ..... 26
2. The Residents' Local Concerns Case ..... 27
D. Historic Design ..... 28
1. The Committee's Jurisdiction ..... 28
2. The developer has established a prima facie case. ..... 29
3. The Residents' Local Concerns Case ..... 30
4. Discussion ..... 31
E. Public Safety Services and Infrastructure and Emergency Access and Egress ..... 32
1. Arguments Presented at the Initial Housing Appeals Committee Hearing ..... 32
2. The Developer's Prima Facie Case ..... 33
3. The Residents' Local Concerns Case ..... 35
F. Adequacy of Pedestrian Access ..... 42
G. Claims about Changed Conditions and Undisclosed Changes ..... 43
H. Affordable Housing Needs ..... 44
**VI. CONCLUSION** ..... 48

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**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**

| | | |
|---|---|---|
| SURFSIDE CROSSING, LLC,<br>Appellant | ) | |
| v. | ) | No. 2019-07 |
| NANTUCKET ZONING BOARD OF APPEALS,<br>Appellee | ) | |

# PROPOSED DECISION AFTER REMAND

## I. INTRODUCTION

In April 2018, Surfside Crossing, LLC applied to the Nantucket Zoning Board of Appeals (Board) for a comprehensive permit pursuant to G.L. c. 40B, §§ 20-23 to build a 156-unit affordable housing condominium development on an undeveloped suburban site in Nantucket. The procedural history, recited below, is long and complicated—both before this Committee and in the courts. From the outset, the Board and the interveners, that is, the Nantucket Land and Water Council and Residents of the surrounding area, raised many different concerns, ranging from protection of endangered bats to adequacy of municipal sewers. Ultimately the permit to build the housing was denied. The Housing Appeals Committee has reviewed the concerns of the Board and the opponents in detail, and concludes that the denial of a permit to this well designed development, which will address critical housing needs in Nantucket, was not based on substantial local needs that outweigh the regional need for affordable housing, that is, that the development will not compromise the health, safety, or other interests of nearby residents, of the occupants of the housing, or of the Town generally.

## II. PROCEDURAL HISTORY

On April 12, 2018, Surfside Crossing, LLC applied to the Board for a comprehensive permit to build affordable housing on a 13-acre site at 9 South Shore Road in Nantucket. The housing would be built under the New England Fund of the Federal Home Loan Bank of Boston, and would consist of 156 units of housing, of which 25% would be affordable. There were to be 96 condominium units in six large multi-family buildings and 60 single-family, fee-simple "cottages" on small lots. During the local hearing, the Board and the developer explored alternative proposals for 92 and 100 units, with varying design elements, but no agreement was reached, and Surfside Crossing continued to pursue the 156-unit proposal. In June 2019, after many hearing sessions, the Board granted a comprehensive permit, reducing the development to 60 housing units (40 single-family homes and 20 condominium units), and imposing over 150 conditions. On July 3, 2019, the developer appealed the Board's decision, and on July 23, 2019, this Committee opened its hearing with a conference of counsel pursuant to 760 CMR 56.06(7)(d)(1).

At the time of the conference of counsel, motions to intervene were filed by the Nantucket Land and Water Council, Inc. (NLWC),[2] a non-profit environmental organization, and by eighteen Residents of Nantucket (Residents) who are either abutters or residents living in the general vicinity of the site. These proposed interveners had participated in the local hearing before the Board, and had filed lawsuits in Superior Court challenging the Board's decision granting the comprehensive permit.[3] On July 13, 2020, the presiding officer denied the motions to intervene, but permitted both the NLWC and the Residents to participate on a limited basis as interested persons pursuant to 760 CMR 56.06(2)(c).[4]

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[2] The NLWC recently changed its name; at the time it filed its motion to intervene, it was the Nantucket Land Council.

[3] These cases were stayed pending issuance of this decision. *Meredith, et al. v. Nantucket Zoning Board of Appeals et al.*, No. 1975CV00024 (Nantucket Super. Ct., Motion to Stay allowed Sep. 6, 2019); *Nantucket Land Council, Inc. et al. v. Nantucket Zoning Board of Appeals et al.*, No. 1975CV00025 (Nantucket Super. Ct., stay automatically entered Aug. 28, 2021).

[4] In May 2020, Werner Lohe was assigned as presiding officer in this hearing. Both the NLWC and the Residents moved to vacate the assignment. The Committee's chair denied

In the meantime, soon after the appeal was filed, the developer was in communication with the Massachusetts Environmental Policy Act (MEPA) Office with regard to the appropriate time for filing of an Environmental Notification Form (ENF) pursuant to MEPA, G.L., c. 30, § 62A. There was disagreement between the Board and the developer as to when that filing should take place, and on September 6, 2019, the Board filed a motion with this Committee to dismiss this appeal for failure to comply with 760 CMR 56.06(4)(h), the comprehensive permit regulation governing compliance with MEPA procedures. Ultimately, the ENF was filed with the Secretary of Energy and Environmental Affairs in March 2020, and on June 5, 2020, the Secretary issued her certificate on the ENF, determining that the proposed development does not require an Environmental Impact Report (EIR). Exhs. 12; 35(h), p. 1. On July 13, 2020, the presiding officer denied the motion to dismiss.

As it was preparing to file its ENF, Surfside Crossing modified the design to one in which all 156 units would be condominium units in eighteen multi-family buildings. *See* Exh. 12, 23rd page (Page 2 of 8). Pursuant to 760 CMR 56.07(4), it notified the Committee of this change on April 7, 2020, noting that in certain respects, the changes reduced the development's impact on local concerns slightly. On July 31, 2020, the presiding officer ruled that the changes were not substantial under the Committee's regulatory standard, and the case moved forward to hearing based upon the modified design.[5] Pursuant to 760 CMR 56.06(7), the presiding officer issued a Pre-Hearing Order (PHO) on September 24, 2020, and the parties submitted pre-filed direct and rebuttal testimony by seventeen witnesses. On March 4 and March 5, 2021, a remote hearing was conducted by video communication, at which the parties had the opportunity to cross-examine witnesses, and the Interested Persons were permitted to

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that motion. *See* Order Denying Motions of Board and Proposed Intervener Nantucket Land Council to Vacate Reassignment of Presiding Officer (June 22, 2020).

[5] In August, the Board and NLWC filed separate collateral civil actions in the Superior Court. The Board's case was dismissed. *See Nantucket Zoning Board Appeals v. Housing Appeals Committee, et al.*, C.A. No. 2075CV00022 (Nantucket Super. Ct., Memorandum of Decision and Order on State Defendant's Motion to Dismiss, Mar. 18, 2021). The NLWC's case proceeded. *See below*.

make unsworn statements through counsel. Briefs were filed and a site visit was conducted on May 13, 2021.[6]

Meanwhile, in the Superior Court case filed in August 2020 seeking review of the presiding officer's denial of the NLWC's motion to intervene, the court had denied the NLWC's motion to stay the Committee's hearing, and both cases proceeded. On June 22, 2021, after briefs in the Committee's case had been filed, but while the matter was still under consideration, the court vacated the presiding officer's ruling on intervention and remanded the case for further consideration.[7] Then, the Residents also sought reconsideration of the denial of their motion to intervene. On September 10, 2021, the presiding officer granted the NLWC's motion to intervene, and on November 9, 2021, he granted the Residents' motion to intervene. Each ruling limited the participation of the interveners to issues articulated in their pleadings.

A Supplemental Pre-Hearing Order (SPHO) was issued on December 7, 2021, further pre-filed testimony was filed, an additional remote hearing session was conducted on March 23, 2022, to permit cross-examination of witnesses, and further briefs were filed on May 9, 2022.

The Committee issued a Proposed Decision on July 7, 2022, permitting the parties to file objections pursuant to 760 CMR 56.06(7)(e)(9). A final Decision was issued September 16, 2022. *Surfside Crossing, LLC v. Nantucket Zoning Board of Appeals*, No. 2019-07 (Housing Appeals Comm. Sep. 16, 2022) (*Surfside Crossing I*). The Committee found, as an initial matter, that because of the conditions that had been imposed by the Board, the projected return on total development costs for the project failed to meet the necessary minimum Return on Total Cost (ROTC) of 15% (actually showing a loss), and therefore the project was uneconomic. Based upon the shifting burden of proof under the Comprehensive Permit Law, the Committee then considered whether the Board and interveners had met their burden of proving local concerns sufficient to outweigh the regional need for affordable housing. It addressed concerns about open space design and open space planning (that is, zoning concerns about open space within the development

[6] The site visit had been postponed to lessen risks associated with the COVID-19 pandemic.

[7] *Nantucket Land Council, Inc. v. Housing Appeals Committee and Surfside Crossing, LLC*, C.A. No. 2075CV00021 (Nantucket Super. Ct., Memorandum of Decision… June 22, 2021).

site and also townwide planning concerns about what open spaces should be preserved), protection of wildlife habitat (primarily for the northern long eared bat, an endangered species that roosts throughout Nantucket's pitch pine forest), traffic concerns at an intersection near the site, fire safety concerns (the adequacy of access to the site for fire trucks, the possibility of forest fire with high winds, insufficiency of municipal water supply, combustibility of pitch pines and shrub oaks in the area, and potential difficulties residents might encounter in evacuating), and municipal sewer capacity for serving the development. It concluded that all those concerns had been or would be resolved in a manner that protects the health, safety, and other interests of the occupants of the housing, of nearby residents, and of the town, and it therefore ordered the Board to issue a Comprehensive Permit for the development as proposed by the developer.[8]

The Board, the NLWC, and the Residents all appealed the Committee's decision to the Superior Court.[9] The court did not consider the Committee's decision on the merits, but rather ruled that the Committee erred in its ruling on July 31, 2020 that the developer's change in the design of the project—from a mixture of six large multifamily buildings and single-family cottages to all multi-family buildings—was insubstantial. It ordered that the matter be remanded to the Board for further hearings pursuant to 760 CMR 56.07(4)(a), which provides for further review of only the changes made to the housing proposal. *Meredith, et al. v. Housing Appeals Committee, et al.*, C.A. No. 2075CV00025, 2075CV00026, slip op. at 9, 14 (Nantucket Super. Ct. Jan. 2, 2024). The developer's motion for reconsideration was denied by the Superior Court on June 11, 2024. After a conference of counsel to establish the parameters of the remand, the presiding officer issued an Order of Remand on July 16, 2024. That order established both a schedule for the hearing on remand and the issues to be considered by the Board. *See* Section V-A, below. After two extensions of the deadline for completion of the

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[8] The Committee also reviewed and ruled upon about two dozen conditions in the Board's decision to which the developer had raised objections.

[9] *See Town of Nantucket Zoning Board of Appeals v. Surfside Crossing, LLC, et al.*, C.A. No. 2275CV00027 (Nantucket Super. Ct., filed October 17, 2022), *Meredith, et al. v. Housing Appeals Committee, et al.*, C.A. No. 2275CV00025 (Nantucket Super. Ct., filed October 14, 2022), *Nantucket Land Council, Inc. v. Housing Appeals Committee, et al.*, C.A. No. 2275CV00026 (Nantucket Super. Ct., filed October 27, 2022). The Board later stipulated to dismissal of its appeal with prejudice. The remaining appeals were consolidated.

hearing, the Board issued a decision on April 14, 2025, denying the comprehensive permit. Town of Nantucket Zoning Board of Appeals Decision on Comprehensive Permit Application (filed Apr. 14, 2025).

The developer renewed its appeal before this Committee, an additional conference of counsel was conducted, and a Second Supplemental Pre-Hearing Order (SSPHO) was issued on July 2, 2025. Further direct and rebuttal pre-filed testimony was filed, three additional remote hearing sessions were conducted in late September[10] to permit cross-examination of witnesses,[11] and filing of briefs and reply briefs was completed on December 9, 2025. At the request of the NLWC, the Committee issued a proposed decision on March 11, 2026, permitting the parties to file objections pursuant to 760 CMR 56.06(7)(e)(9) and G.L. c. 30A, § 11(7).[12]

[10] On the afternoon of September 23, 2025, the day before the first evidentiary session, the Residents filed a Motion to Preserve the Jurisdiction of the Executive Office of Energy and Environmental Affairs [EOEEA] by Continuing the Trial until September 30, 2025. The motion was based on a petition for failsafe review under 301 CMR 11.04 that the Residents had submitted to the EOEEA on August 25, 2025.

The presiding officer denied the continuance and proceeded with the hearing. Since the legal issues were novel to everyone present, however, he took any substantive issues raised by the motion under advisement and suggested that the parties brief the issues. *See* Tr. RI, 6-13. None of the parties have briefed issues regarding the petition, and therefore there is no issue regarding failsafe review to be addressed in this decision.

On November 24, 2025, the developer filed with the Committee a copy to the EOEEA's November 21, 2025, determination in response to the environmental justice petition. In a lengthy decision, the EOEEA found that the project does not qualify for failsafe review. The Residents moved to strike the document. This document was not offered as evidence in the hearing, but rather it is an administrative filing consistent with 760 CMR 56.06(4)(h). For that reason, the motion to strike was denied on December 1, 2025

[11] Transcripts of these sessions are cited herein as "Tr. RI, Tr. RII, and Tr. RIII" to avoid confusion with transcripts from the Committee's original hearing sessions in 2021 and 2022, which are cited as "Tr. I, Tr. II, and Tr. III."

[12] The NLWC also requested that it be permitted to present oral argument before the full Committee.

## III. FACTUAL BACKGROUND

The housing site is a roughly rectangular, 13.6-acre parcel of land fronting on South Shore Road just south of the intersection of South Shore Road and Surfside Road in Nantucket. It is an undeveloped parcel[13] that is served by public water and sewer systems and is surrounded by developed land—single family homes on large lots to the west, south, and east, and to the north an affordable housing development of 40 homes on smaller, quarter-acre lots. *See* Exh. 2, p. 4; 79, sheets 1, 3. The site is in an area that is zoned Limited Use General-Two (LUG-2) with a minimum residential lot size of 80,000 square feet. Tr. I, 58-59, 67. The area consists of mostly single-family homes, although about a quarter mile to the south is a large, multi-unit residential facility, Sherburne Commons, and a half mile to the south, set back from South Shore Road, is a second affordable housing development also of 40 homes also on quarter-acre lots. Tr. I, 113, 145; Exh. 2, p. 4. South Shore Road is about a mile long, ending at the municipal sewage treatment facility at the ocean front. Exhs. 25, p.168, fig. 12; 144, ¶ 9.

The proposed development will consist of 18 buildings, each with eight or nine condominium units, spread approximately evenly throughout the site. Between the buildings are surface parking areas, and in the center of the site is a swimming pool, a clubhouse, a basketball court, a playground, and a large, open lawn area. The residential buildings are generally set back from the lot line between 25 and 35 feet, and at the perimeter is an undisturbed open-space buffer generally between 10 and 25 feet wide. *See* Exh. 79.

The residential buildings are generally two stories, though a majority of them have a third lower level on one side with terraces below the surrounding ground level, which minimizes the height of the buildings. Exhs. 36, ¶ 37; 4 pp. 25, 22, 24. The buildings are architecturally similar, using three building types, and the project architect testified that the designs and building materials are intended to evoke "Nantucket's architectural vernacular," with individual buildings not having a monolithic shape, but rather being

[13] In 2022, the parcel was wooded. After the Committee's decision ordering the Board to modify its decision to grant the permit, the developer cleared the site and began construction of some infrastructure, proceeding with early stages of the development at risk pursuant to 760 CMR 56.05(12)(a).

composed of "smaller masses sized to reflect the proportions of a typical [but very large] single-family Nantucket home," providing variety and visual interest. Exh. 36, ¶¶ 34, 35, 38, 39; *see also* Exh. 4; Tr. I, 81, 144-145.

## IV. STANDARD OF REVIEW AND BURDENS OF PROOF

In all cases before the Committee, the ultimate question is whether the decision of the Board is consistent with local needs. G.L. c. 40B, §§ 20, 22; 760 CMR 56.07(1). The burdens of proof, however, vary depending upon whether the Board has denied the permit or granted it with conditions. In this case, the Board initially granted a permit with conditions, and in its 2022 decision, the Committee analyzed the facts based upon the respective burdens of proof applicable to such appeals. *See Surfside Crossing I*, slip op. at 8-9; 760 CMR 56.07(2).

On remand, however, the Board denied the comprehensive permit. In the case of a denial, the developer may establish a prima facie case by proving, with respect to the aspects of the project which are in dispute, that its proposal complies with federal or state requirements, or with generally recognized standards as to matters of health, safety, the environment, design, open space, or other matters of local concern. 760 CMR 56.07(2)(a)(2); *for detailed discussion, see 104 Stony Brook, LLC v. Weston*, No. 2017-14, slip op. at 12-16 (Mass. Housing Appeals Comm. June 22, 2023), *aff'd sub nom. City of Cambridge v. Housing Appeals Committee*, No. 2381CV02105 (Middlesex Super. Ct. June 10, 2025) (criticizing one aspect of the Committee's approach to the prima facie case), *appeal docketed* Nos. 2025-P-0986, 2025-P-1007*; see also SLV School Street, LLC v. Manchester By-The-Sea*, No. 2022-14 (Mass. Housing Appeals Comm. Dec. 3, 2024), *aff'd sub nom. Town of Manchester By-the-Sea v. Massachusetts Housing Appeals Comm., et al.,* No. 2577CV0002 (Essex Super. Ct. Feb. 11, 2026) (approving Committee's approach to prima facie case); *River Marsh, LLC v. Pembroke*, No. 1019-04, slip op. at 6-10 (Mass. Housing Appeals Comm. Apr. 11, 2024). Further, "a prima facie case may be established with a minimum of evidence." *100 Burrill Street, LLC v. Swampscott*, No. 2005-21, slip op. at 7 (Mass. Housing Appeals Comm. June 9, 2008).

If the developer sustains its burden, the burden shifts to the Board to prove a valid local concern that supports the denial and that the concern outweighs the regional housing need. 760 CMR 56.07(2)(b)(2); *see also, e.g., Stony Brook, supra*, No. 2014-14, slip op. at

11. When an intervener is allowed to participate, it must similarly demonstrate a valid local concern that outweighs the regional need for affordable housing. *518 South Ave. v. Weston*, No. 2022-12, slip op. at 7 (Mass. Housing Appeals Comm. Jan. 23, 2025).

## V. LOCAL CONCERNS

### A. Overview of Issues on Remand

In the Board's first decision, it granted a comprehensive permit, reducing the proposed 156-unit development to 60 units and imposing a number of conditions. On appeal, four justifications for that decision were litigated and ultimately decided by the Committee: open space and wildlife concerns, traffic concerns, fire safety, and sewer capacity. The issues in contention remain similar now, on remand, though sewer issues have been mooted by Nantucket's installation of a new sewer main, and neither the NLWC nor the Residents are any longer pursuing claims regarding protection of wildlife. In addition, the NLWC and the Residents now place great emphasis on possible harm to nearby public and private wells, an issue that received, at most, passing attention in the earlier stages of this appeal. Regarding all the issues, however, in its remand order the Superior Court referred specifically to 760 CMR 56.07(4)(a), which limits further review to "only the changes in the proposal or aspects of the proposal affected thereby…." *See Meredith v. Housing Appeals Committee, supra*, slip op. at 14. This limits the issues before the Committee now, although if a change in the proposal gives rise to a local concern that was not present with the original proposal, it can now be considered on remand.

In accordance with the court's order, the Committee's presiding officer, in consultation with the parties, issued an Order of Remand to the Board identifying the following changes in the housing proposal as subject to further review:

a. Building types, including both architectural style (e.g., detached dwelling vs. apartment or townhouse) and tenure (e.g., owner-occupied vs. condominium),
b. Number, location, and size of buildings,
c. Increases in building heights,
d. Number and location of parking spaces,
e. Roadways and traffic circulation within the site and off-site traffic impacts if there is evidence that the proposed modifications increase those off-site impacts,
f. Open space design within the site,

g. Other matters within the scope of remand (that is, matters affected by the proposed modifications) that are currently unanticipated.

When this appeal was renewed after the Board issued its decision denying the comprehensive permit, the SSPHO was prepared to clarify what issues were raised by the changes in the proposal, and therefore at issue in the hearing.[14] We address these issues, if briefed by the parties, with the first step in our analysis being to confirm that each arises from changes in the proposal. If they are merely issues that were raised or could have been raised about the original proposal, we need not consider them. The issues are:

1. Possible harm to the Island's public water supply from its sole source aquifer related to the project's location in a Public Wellhead Recharge District (PWRD), Nantucket Zoning Bylaws, §139-12(G)(2)(q) [sic][15] (SSPHO, § V-4(a) and (b)),
2. Possible harm to adjacent private wells, Board of Health regulations, § 386-6(E) (SSPHO, § V-4(c)),
3. Concerns related to the requirements of the Nantucket Historic District bylaw, Nantucket Bylaws, c. 124, §§ 8-13, *see* Exh. 64, p. 10 (Attach. 1) authorized by Mass. Acts of 1970, c. 395, as amended (Nantucket Bylaws Appx, § A301-4); ((SSPHO, § V-4(d)),
4. Adequacy of local public safety services or infrastructure and of emergency access to the site by public safety vehicles and of emergency egress from the site by residents (SSPHO, §§ V-4(e), V-4(f), V-4(h)),
5. Adequacy of pedestrian access to Surfside Road (SSPHO, § V-4(g)),
6. Concerns related to the requirements of the Nantucket affordable housing bylaw or requirements (affordable housing covenants), Nantucket Bylaws, c. 100, 139-8B (not in evidence[16]), authorized by Mass. Acts of 2002, c. 302

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[14] Parties must identify in the proposed pre-hearing order all issues they intend to litigate. Unfortunately, the Second Supplemental Pre-Hearing Order, which was negotiated and signed by all the parties and the presiding officer, is overly complicated and wordy. The subsections of section V-4 of that order do, in fact, enumerate the issues as raised by the parties, but they are phrased in such a manner as to suggest that either the proponent or the other parties have the burden of proving compliance or non-compliance with various laws. This, of course, cannot change the burdens of proof as established in the regulations, and as explained in the text above, the proper standard is a shifting burden to determine whether local concerns outweigh regional housing needs.

[15] This provision of the Nantucket bylaws was put into evidence in two different forms. Though the language is identical, it appears in Exh. 90, p. 77 as § 139-12(G)(2)(q) and in Exh. 15, p. 62 as § 139-12(B)(2)(q). Throughout this decision, we will refer to Exh. 15 (and thus § 139-12(**B**)(2)(q)) since it is more complete. (Further, provisions in the Nantucket bylaws are referred to interchangeably as sections or chapters).

[16] This bylaw was not admitted into evidence, though its state enabling legislation was. *See* Exh. 97.

(Nantucket Bylaws Appx, § A301-11 (Exh. 97)) (SSPHO, § V-4(i)),

7. Concerns related to open space and natural features relating to Nantucket Bylaws, c. 66, and Subdivision Regulations, § 358-2.17 (Exh. 98, 99) (SSPHO, § V-4(j)),
8. Miscellaneous issues related to possible changes in conditions surrounding the project (SSPHO, § V-6)
9. Miscellaneous issues related to possible undisclosed changes in the project (SSPHO, Residents' Appendix, ¶ 1)

**B. Drinking Water Protections for Public Wells**

The proposed development is in a Massachusetts Department of Environmental Protection (DEP) designated Zone II recharge area for a public well. The Board and interveners argue that the development's stormwater management system is inadequate, and therefore the public water supply will be contaminated. Their primary focus is on risks associated with PFAS (per- and polyfluoroalkyl substances, sometimes referred to as "forever chemicals").

As a preliminary matter, the developer argues that this issue is not properly before us in this proceeding on remand pursuant to 760 CMR 56.07(4)(a) since the stormwater management system for the modified project is substantially identical to that of the original project. Developer's Brief, p. 28. Whether we should consider this issue turns on whether the challenges made by the Board and the interveners are related to the minor changes in the stormwater management system. This issue was raised in the SSPHO, before it was clear how it would be raised in testimony and argument. Although building types and locations and site design have changed with modification of the proposal, the original project's stormwater management system and the modified proposal's system both infiltrate stormwater into the ground utilizing a combination of catch basins, manholes, subsurface infiltration systems, and a stormwater separator. *See* Exhibit 84, p. 279. The developer's expert testified that "the only substantive change [is] the inclusion of an oil/grit separator in the place of a proprietary separator at the suggestion of the Board's peer review consultant." Exh. 128, ¶ 43. Further, the total amount of impervious surface has been reduced a little (2½%), resulting in slightly less stormwater that must be captured by the system. Exh. 128, ¶¶ 22-24. Although the effectiveness of the system may be affected minimally by the changes, the Board and the interveners have not shown

that the issue they argue, which pertains to whether the developer can comply with a provision in the local bylaw, is based on any change in the stormwater management system or to the project otherwise. Therefore, they have not demonstrated a valid local concern that should be addressed here on remand with regard to the stormwater management system.

During pre-hearing discussions and in the SSPHO, the Board and the interveners also addressed whether the possibility of PFAS contamination in and of itself might be an independent reason to review the design of the stormwater system, regardless of whether there had been any changes in the design. This additional issue for the Board and interveners to prove was described as "to prove that changes in the conditions or circumstances surrounding the project raise local concerns of such a nature that fairness requires that they be considered in the Committee's final decision." SSPHO, § V-6. The testimony showed that possible PFAS contamination is a significant public health issue that has emerged nationwide in recent years. Exh. 134, ¶ 12. But, the Town of Nantucket has been aware of PFAS contamination since 2019 or earlier. Exh. 155, ¶ 9; Tr. RI, 131; *see also* Exh. 139, ¶ 9. And, as the developer points out, PFAS contamination was mentioned in passing in the original hearing before the Committee and thus was clearly an issue of which the parties were aware, at least as a nascent issue, but chose not to pursue at that stage. *See* Tr. I, 105-106; Developer's brief, pp. 28-29. Therefore, the Board and interveners have not shown that potential PFAS contamination represents such a change in circumstances as to require our review in this remand proceeding.

Nevertheless, although we rule that the Board and interveners have failed to demonstrate the stormwater management system changes raise a valid local concern to be considered on remand, for completeness of the record we will address their argument regarding the project's compliance with the Town's bylaw below.

**1. Regulation of Zone II Wellhead Protection Areas**

DEP Drinking Water Regulations define protection zones for public wells. Zone I is the area within 400 feet of a well, an area that must be owned or controlled by the water supplier and on which land uses are prohibited other than those directly related to the provision of public drinking water or that have no significant adverse impact on water quality. 310 CMR 22.02; 22.21(1)(b). Zone II is the broader area of an aquifer that

contributes water to a well under the most severe pumping and recharge conditions that can be realistically anticipated. 310 CMR 22.02. The regulation requires local officials, when applying for state approval of the well as a public water source, to confirm that local "zoning and nonzoning controls" are in place that meet the state requirements to prohibit identified land uses unless specified standards are met, in order to protect water quality.[17] 310 CMR 22.21(1), (2). The regulation states (with the last provision, § 22.21(2)(b)(7), being at issue in this case):

> 22.21: Groundwater Supply Protection
> The following requirements shall apply to all persons to protect groundwater used as sources of public drinking water…:
> (2) Source Approval
> (a) …
> (b) Wellhead protection zoning and nonzoning controls submitted to the Department… shall collectively prohibit the siting of the following land uses within Zone II… unless designed in accordance with the performance standards specified in 310 CMR 222.21 (2)(b)1. through 7.:
> 1. storage of … septage…unless in compliance with 310 CMR 32.30…;
> 2. storage of [snow removal] chemicals… unless… within a structure…;
> 3. storage of chemical fertilizer… unless... within a structure…;
> 4. storage of animal manures, unless…within a structure…;
> 5. storage of liquid hazardous materials… unless [in ground-level containers];
> 6. the removal of soil…;
> 7. and land uses that result in the rendering impervious of more than 15% … of any lot or parcel… unless a system for artificial recharge of precipitation is provided that will not result in the degradation of groundwater quality.

Like other towns, Nantucket has promulgated local controls that conform to the state standards. It has established a Public Wellhead Recharge District (PWRD) by means of a zoning bylaw which copies the language in the state regulation, adding three words that make the provision stricter than is required by the state regulation, prohibiting:

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[17] The DEP regulation contemplates the possibility of exceptions since it requires "written notice to the Department of any and all local by-laws, ordinances, rules and regulations that allow for the grant of a variance, waiver or exemption from any of the wellhead protection zoning or nonzoning controls submitted to the Department…." 310 CMR 22.21 (2)(c). The Nantucket wellhead zoning controls have no provisions for variances or other exceptions.

> All land uses… that result in rendering impervious more that 15% … of any lot… unless a system for artificial recharge of *95% of annual* precipitation is provided that will not result in degradation of groundwater quality.

Nantucket Zoning Bylaws, § 139-12(B)(2)(q) (Public Wellhead Recharge District, Prohibited Uses), Exh. 15, p. 62 (emphasis added). The added language represents a standard not found in the DEP regulation.

### 2. The Developer' Prima Facie Case Regarding Stormwater Management

From the time the project was first proposed, the developer retained Donald Bracken, a registered professional engineer with over 30 years of experience, who specializes in land development, site design, sanitary sewer design, stormwater management, and environmental permitting, and has designed nearly a dozen developments on Nantucket. Exhs. 30, ¶¶ 1-6; 30(a); 128, ¶¶ 3-6. He designed the stormwater management system as well as all other civil engineering site plans; his original, 200-page, 2018 Stormwater Report and the later version of it, revised to May 24, 2023,[18] were admitted into evidence. Exhs. 30(b); 84. He provided written responses to critiques of his plans at various stages in the proceedings, and during the Committee's hearing, filed three sets of prefiled testimony, on which he was cross-examined. Exhs. 30; 128, 129.

Mr. Bracken testified unequivocally and repeatedly that the design meets the Massachusetts Stormwater Management Standards. The stormwater management system consists of deep sump catch basins, manholes, water quality inlets (oil/grit separators), and subsurface infiltration systems, with roof runoff discharged separately into subsurface infiltration areas. Exhs. 30, ¶¶ 52-53; 128, ¶ 25. Generally, he stated, "[t]he drainage system has been designed to adequately handle up to the 100-year storm event and meet DEP Stormwater Standards." Exh. 84, p. 4. Regarding wellhead protection, he stated, "The stormwater system is designed in compliance with applicable standards…

[18] Though the buildings and layout of the development changed substantially from the original proposal to the modified proposal, Mr. Bracken's testimony is that the stormwater management systems are "essentially identical…, with the only substantive change being the inclusion of an oil/grit separator in place of a proprietary separator at the suggestion of the Board's peer review consultant." Exh. 128, ¶ 43; RII, 71.

[and] is consistent with many other designs approved and constructed in Zone II's in Nantucket." Exh. 80, p. 1, ¶ 1; *see also* Exh. 81. He also stated that the project "will not result in degradation of groundwater quality." Exh. 80, p. 2, ¶ 3. His testimony is supported by his detailed, technical Stormwater Report. Exhs. 30(b); 84. He stated that "The design of the stormwater drainage system complies with the Department of Environmental Protection's Stormwater Management Standards." Exh. 128, ¶ 26; *see also* Exhs. 30, ¶ 54.; 129, ¶¶ 69, 73, 80, 81, 84, 93

As noted above, the developer need make only a minimal showing to establish a prima facie case, and, in a long line of cases, the Committee has consistently considered the developer's prima facie case based solely on evidence supplied by the developer. *See, e.g., 104 Stony Brook, supra,* No. 2017-14, slip op. at 12-16. Based on the evidence presented by the developer, it has established a prima facie case by proving compliance with state standards.[19]

[19] The opposing parties have challenged much of the evidence recited here in support of the prima facie case. Their conflicting evidence is considered below as we address local concerns. But even if we were to consider that evidence to discredit the developer's prima facie presentation, it would not be sufficient to do so successfully, in light of our standard for the prima facie case. "It may suffice for the developer to simply introduce professionally drawn plans and specifications." *Sunderland, supra,* No. 2008-02, slip op. at 5 n.4, quoting *Tetiquet River Village, Inc. v. Raynham*, No. 1988-31, slip. op. 9 (Mass. Housing Appeals Committee Mar. 20, 1991). "[E]xpert testimony directly addressing the matter in issue is more than sufficient to establish the developer's *prima facie* case." *Sunderland, supra,* No. 2008-02, slip op. at 9; *Canton Property Holding, LLC v. Canton*, No. 2003-17, slip op. at 22 (Mass Housing Appeals Comm. Sept. 20, 2005) (expert testimony that design will comply with state stormwater management standards is sufficient to establish prima facie case). *See also Oxford Housing Auth. v. Oxford*, No. 1990-12, slip op. at 5 (Mass. Housing Appeals Comm., Nov. 18, 1991) (plans must be sufficient to permit Committee to evaluate proposal with regard to aspects that are in dispute and to permit full cross-examination); *Watertown Housing Auth. v. Watertown*, No. 1983-08, slip op. at 5, 10-12 (Mass. Housing Appeals Comm. June 5, 1984) ("requirements are to be applied in a common sense, rather than an overly technical manner in context of establishing prima facie case"). And the Appeals Court has confirmed that "[i]t has long been held that it is unreasonable for a board to withhold approval of an application for a comprehensive permit when it could condition approval on the tendering of a suitable plan that would comply with State standards." *Holliston, supra,* 80 Mass. App. Ct. 406, 416, citing *Board of Appeals of Hanover v. Housing Appeals Comm.,* 363 Mass. 339, 381 (1973).

### 3. Response by NLWC, the Board, and the Residents

#### a. The Argument that the Bylaw has the Force of State Law and is Not Reviewable by this Committee

The NLWC and the other parties first raise an argument of law, that the "Board's permitting decision under state regulations is not reviewable" by this Committee because "DEP does not act as permitting authority under § 22.21(2)(b)(7) [but rather] that regulation expressly confers municipal jurisdiction over [stormwater] in Zone II." NLWC's brief, pp. 9, 11-12. As will be seen below, this Committee only asserts jurisdiction over local bylaws, and even then, only to the extent that they are stricter than state law. That DEP has required municipalities to establish local land use controls does not deprive this Committee of jurisdiction to review local requirements that are stricter than state law.

#### b. The Argument that the Proposal Violates State Law

Assuming the Committee does exercise its jurisdiction, the NLWC argues more directly that the "stormwater system does not comply with [state] Standards 5 and 6 because [it does not include] enhanced stormwater treatment" components, arguing that "Since [stormwater] would not be treated properly in accordance with Standards 5 and 6, the developer has failed to meet the 'no degradation of groundwater' standard" in 310 CMR 22.21(2)(b)(7). NLWC brief, p. 13. First, to the extent this is an attempt to discredit the developer's prima facie case, we consider compliance with state law based solely on the developer's case. In any event, even assuming we would consider the other parties' evidence, their evidence and arguments do not discredit the developer's prima facie case. See the discussion in section V.B.3.d. *See also 104 Stony Brook, supra,* No. 2014-17, slip op. at 40-41.

#### c. The Argument that the Nantucket Bylaw in its Entirety is State Law and Therefore Cannot be Waived

The NLWC and other parties argue that as a matter of law, "Stormwater Management Standard 6 requires compliance with the PWRD bylaw, which cannot be waived as a matter of state law. …Standard 6 requires compliance with local bylaws… that are stricter than state… regulations: 'Proponents must comply with local source

water protection ordinances, bylaws, and regulations.' (Ex. 136, p. 27)"[20] NLWC brief, p. 12. This statement is incorrect.

Though not only the Stormwater Standards themselves, but also technical specifications in the Stormwater Handbook are referenced in the state regulations, the legal "requirement" cited by the NLWC appears in a table in the Handbook, and not in Standard 6. *See* Exh. 121, p. 2; 310 CMR 10.05(6)(k)(6). "In 1996, the Massachusetts [DEP] issued the Stormwater Policy that established Stormwater Management Standards aimed at encouraging recharge and preventing stormwater discharges from causing or contributing to the pollution of the [waters] of the Commonwealth." Stormwater Handbook Vol. I, p. 1. These Stormwater Standards have been codified as regulations and therefore have the force of law. *See* 314 CMR 9.06(6)(a).[21] "In 1997, MassDEP published the Massachusetts Stormwater Handbook *as guidance on the Stormwater Policy*." Stormwater Handbook Vol. I, p. 1. (emphasis added). Thus, despite the NLWC's assertions to the contrary, the guidance document is not state law. The NLWS erroneously asserts that "Standard 6, which references § 22.21(2)(b)(7), mandates compliance with local rules that are stricter than state regulations: 'Proponents must comply with local source water protection ordinances, bylaws, and regulations.' (Ex. 136, p. 27)." NLWC brief, p. 10. It does not.[22] Rather, the Board cites text from the

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[20] The source of the language is not identified on p. 27, but rather in Exh. 136, ¶ 16.

[21] The Stormwater Handbook states, the ten "Stormwater Management Standards have been incorporated in the Wetlands Protection Act Regulations, 310 CMR 10.05(6)(k) and the Water Quality Certification Regulations, 314 CMR 9.06(6)(a)." *Id.*

[22] Standard 6 provides, in full:

> Stormwater discharges within the Zone II or Interim Wellhead Protection Area of a public water supply, and stormwater discharges near or to any other critical area, require the use of the specific source control and pollution prevention measures and the specific structural stormwater best management practices determined by [MassDEP] to be suitable for managing discharges to such areas, as provided in the Massachusetts Stormwater Handbook. A discharge is near a critical area if there is a strong likelihood of a significant impact occurring to said area, taking into account site-specific factors. Stormwater discharges to Outstanding Resource Waters and Special Resource Waters shall be removed and set back from the receiving water or wetland and receive the highest and best practical method of treatment. A "storm water discharge" as defined in 314 CMR 3.04(2)(a)1 or (b) to an Outstanding Resource Water or Special Resource Water shall comply with 314 CMR 3.00 and 314 CMR 4.00. Stormwater

Stormwater Handbook—the guidance document—which includes an explanation of the Stormwater Standards. The Handbook's explanation of Stormwater Standard 6 includes a table that provides, in relevant part:

> Proponents must comply with local source water protection ordinances, bylaws, and regulations. The Drinking Water Regulations, 310 CMR 22.21(2)(b)(7), require the development of land use controls in the Zone II that prohibit land uses that result in rendering 15% or 2500 square feet of a lot impervious, whichever is larger, unless a system of artificial recharge that does not degrade groundwater quality is provided.

Stormwater Handbook, Vol. I, Table CA 3 Standard 6.[23] The Board's reliance on the first sentence requiring compliance with local rules and regulations has no legal basis.[24] In comparison, the second sentence refers to a provision of state law, the Massachusetts Drinking Water Regulations, with which the developer must comply. Moreover, DEP's regulations provide that "310 CMR 10.21 through 10.37 do not change the requirement of any other Massachusetts statute or by-law. A proposed project must comply with all *applicable* requirements of other federal, state and local statutes and by-laws…." 310 CMR 10.24(4)(a) (emphasis added). Therefore, the Board's argument that Standard 6 mandates compliance with local rules that are stricter than state regulations and that compliance with Standard 6 is not possible without compliance with the local

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> discharges to a Zone I or Zone A are prohibited unless essential to the operation of a public water supply.

[23] Notably, that same table also provides that "Developers can comply with these land use controls by designing, constructing, operating and maintaining a stormwater management system in compliance with the Stormwater Management Standards."

[24] Even if compliance with local rules were embedded in a requirement of state law, we do not agree that it would deprive this Committee of our ability to waive local rules and regulations pursuant to Chapter 40B. Here, even if it were a state requirement, no prohibition on waiver is present in the plain language of the guidance document. Moreover, to imply such a prohibition would allow municipalities to eschew their Chapter 40B responsibilities by enacting unreasonably restrictive requirements that prohibit affordable housing development. In affirming a Committee decision, the Superior Court recently rejected a similar argument that *was* rooted in state law. *See Town of Manchester-By-The-Sea v. Housing Appeals Comm.*, No. 2577CV0002, slip op. at 22-23 (Essex Super. Ct. Feb. 11, 2026) ("to rule that a municipality can bar use variances in its zoning bylaws and then point to G.L. c. 40A, § 10, as a means to prevent the construction of affordable housing would entirely swallow the Legislature's long recognized intent in enacting [Chapter 40B which] is to provide relief from exclusionary zoning practices which prevented the construction of badly needed low and moderate income housing in the Commonwealth.")

groundwater protection bylaws and regulations is misplaced. Standard 6 has no requirement regarding local rules and regulations and DEP's regulations are clear that the Drinking Water Regulations do not change or supersede the law of Chapter 40B. *See id.* The Drinking Water Regulations require only that the developer provide a system for artificial recharge of precipitation that will not result in the degradation of groundwater quality. *See* 310 CMR 22.21(2)(b)(7).

**d. The NLWC's and Other Parties' Local Concern Argument**

The appellees' case to meet their burden of proving a valid local stormwater concern that outweighs the regional need for affordable housing is stated most clearly in NLWC's brief. [25] After a lengthy discussion of the overall regulatory context surrounding the development, they present specific allegations that the design of the stormwater management system does not comply with the technical requirements of the Stormwater Management Standards. NLWC brief, pp. 13-15. Since the developer must comply with applicable state requirements in any case, the scope of our review our authority is limited to review of asserted local concerns based on local requirements and regulations. *See Green View Realty, LLC v. Holliston*, No. 06-16, slip op. at 9-10 (Mass Housing Appeals Comm. Jan. 12, 2009), *aff'd sub nom. Holliston v. Housing Appeals Comm.*, 80 Mass. App. Ct. 406 (2011), *F.A.R. den*. 460 Mass. 1116 (2011) ("…our focus is on local concerns, and nothing in Chapter 40B suggests that we should consider environmental issues raised under state and federal law"); *see also 104 Stony Brook, supra*, No. 2017-14, slip op. at 28. More specifically, our local concerns analysis addresses only that part of the local bylaw that is stricter than the state requirement. *See Holliston v. Housing Appeals Comm.*, 80 Mass. App. Ct. 406, 420 ("…incumbent on the board… to identify a local interest protected by those aspects of the by-law that are stricter than [state law] and demonstrate that such interest outweighs the regional need for low and moderate income housing"). The appellees are required to demonstrate that safeguards provided by the local requirement with respect to that local interest afford greater protection against the asserted harms than those afforded by state or federal regulation. *See id.*

[25] We also consider the very similar arguments addressed in the Residents' brief; the Board chose to rely on the arguments as presented by the NLWC. Residents brief, pp. 19-44; Board brief, p. 24.

The parties agree that Nantucket bylaw § 139-12(B)(2)(q) applies in this case since more than 15%—in fact, 52%—of the site will be impervious surface. Exh. 128, ¶ 28. As noted above, the only part of this local requirement that is stricter than state law is the requirement that 95% of precipitation be recharged. In applying § 139-12(B)(2)(q) to any particular development proposal, the question arises as to what, if any, technical criteria should be used. Regarding industrial or commercial facilities described in § 139-12(B)(2)(s), the bylaw does, in fact, provide some guidance. That is, § 139-12(B)(3), in its first paragraph, describes permitting procedures for activities in existing facilities. Exh. 15, p. 63. Then, § 139-12(B)(3)(b) provides that, "In order to comply with Subsection 139-12(B)(2)(s)[1], any person or firm proposing land uses which exceed the thresholds of this subsection shall apply the practices and technologies found in a publication entitled: 'Massachusetts Stormwater Standards Handbook, Volume 1-3,' (MassDEP 2008…as… amended…." Exh. 15, p. 64. No such guidance, however, is provided for residential uses, which are at issue in this case.[26] Nevertheless, the parties all agree that the Massachusetts Stormwater Management Standards, as they appear in the Massachusetts Stormwater Handbook, vol. 1, c. 1 (which are codified at 310 CMR 10.05(6)(k) and are in the record here as Exhibit 121, pp. 1-2), are to be applied in implementing the Town bylaw, and we accept that agreement. *See, e.g.,* Developer brief, pp. 6 (¶ 21), 32; NLWC brief, p. 7; Exh. 128, ¶ 26.

The NLWC's and other parties' central argument regarding the local bylaw provisions that are identical to the state regulation is that

> "Stormwater Standards 5 and 6 require enhanced stormwater treatment for discharges from [land uses with] higher pollutant loads (Standard 5) into Zone II wellhead protection areas (Standard 6). At the hearing, Mr. Bracken [the developer's expert witness] admitted his proposed system contains none of the Treatment BMPs [Best Management Practices] listed on the tables in MassDEP's Stormwater Handbook [Tr. RII, 12], which lists specific 'Treatment BMPs' required for LUHPPLs[27] [Land Uses with Higher Potential Pollutant Load] or discharges within a Zone II…."

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[26] Even if we assume a drafting error—since there is no subsection (s)[1], it is possible that these provisions were intended to refer to § 139-12(B)(2)(q)[1] rather than § 139-12(B)(2)(s)[1]—the bylaw would provide no guidance in the present case since § 139-12(B)(2)(q)[1] applies only to "nonresidential uses." Exh. 15, p. 62.

[27] LUHPPLs include "parking lots with high-intensity-uses (1000 vehicle trips per day or more)." Standard 5 (Massachusetts Stormwater Handbook, vol. 1, c. 1, p. 12, 3rd para). Mr. Bracken

NLWC brief, p. 13. This argument is based on the testimony of Mr. Reardon, one of the NLWC's experts. Exh. 136, ¶¶ 12-18. The issues here are sufficiently intertwined that it is sometimes difficult to determine what part of the testimony from both sides is directed to the narrow local issue we must consider— the stricter requirement that stormwater management systems must achieve recharge of 95% of precipitation— and what part is directed more broadly. We have considered all the testimony.

In response to the NWLC's argument, Mr. Bracken testified that while BMPs are certainly described in detail in the Stormwater Handbook, they are not synonymous with treatment measures required for stormwater, and that the project's design uses "two pretreatment devices that achieve the required TSS [total suspended solids] removal and then into an infiltration system which is a treatment system itself. So if I were to say what the treatment would be, it would be the infiltration system, which is an accepted practice." Tr, RII, 12-14, 16, 19-21; *see also* Developer brief, pp. 7-9; Exhs. 80, 81. He addressed several technical points, such as that the system uses commonly accepted pre-treatment devices to remove at least 44% of total suspended solids prior to discharge into the infiltration system. Exh. 129, ¶ 69. He pointed out that the design satisfies Standards 5 and 6 by removing 89% of total suspended solids based on a one-inch water quality volume. Exhs. 81, p. 2; 129, ¶ 67; *see also* Tr. RII, 8-9, 12-17. He noted that the same type of system is often accepted in Nantucket, listing projects that have been approved. Exhs. 128, ¶¶ 27-34; 128(b); Tr. RII, 79-81. Finally, he cited to the Massachusetts Stormwater Handbook itself: "Infiltration basins are highly effective treatment systems to remove many contaminants…." Massachusetts Stormwater Handbook, vol.2, c. 2, p. 89 (Exh. 121, p. 173). Most convincing is an example in the handbook itself of a compliant system which is the same as the system proposed in this case—deep-sump catch basins, an oil/grit separator for additional pre-treatment, and finally an infiltration basin for a high-intensity parking lot with greater than 1,000 vehicle trips per day. Massachusetts

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asserted that even though the project will generate more than 1000 trips per day, because there are multiple lots, no single one of which generates that many trips, the project is not a LUHPPL. *See* Tr. RII, 5-8. We need not decide whether the multiple lots should be considered together, since the parties agree that "[w]hether the project qualifies as a LUHPPL is irrelevant because [certain standards] for LUHPPLs under Standard 5 [are] the same as… for Critical Areas under Standard 6." Board brief, p. 14; *see also* Tr. RII, 8, 10.

Stormwater Handbook, vol. 3, c. 1, p. 34 (Exh. 121, p. 309); Exh. 128, ¶¶ 52-53 Tr. RII, 21, 82-84. Importantly, Mr. Bracken's view was confirmed by an independent stormwater review conducted by the engineering firm Weston and Sampson in early 2025 on behalf of the local Wannacomet Water Company, which concluded that the stormwater management system "is in compliance with the MassDEP Stormwater Standards, as well as the Town's Use and Intensity Regulations for land use within the Public Wellhead Recharge District." Exhs. 128, ¶ 56; 128(c);[28] Tr. RI, 138. [29] As the developer notes, the Nantucket Bylaw provides that the Wannacomet Water Company determines "which techniques and practices are appropriate for each respective application." Town of Nantucket (Zoning) Bylaw, § 139-12G(3)(b).

With regard to the Massachusetts Stormwater Management Standards, we find Mr. Bracken's testimony and the opinion of the engineering firm on behalf of the entity responsible for determining compliance to be more credible than that of Mr. Reardon and the other experts, and we find that the NLWC and other opposing parties have not established a violation of the applicable standards that would constitute a local concern. Mr. Reardon is a qualified expert, testifying in good faith. But when the NLWC argues that not all pollutants, including PFAS, will be removed from the stormwater, and "[t]hat is why Reardon concluded that the project provides 'inadequate protection for the public water supply,'" it conflates the *practical* local concern (and perhaps reality) that some small amount of pollutants of various sorts will almost inevitably escape a stormwater management system with the *technical, legal* local concern which must be based upon a failure to comply with a local regulatory requirement. It may well be that Mr. Reardon and others view the protections embodied in the bylaw through the Massachusetts

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[28] The local 95% recharge requirement discussed elsewhere was mentioned in passing, though there is no indication that it was analyzed in detail.

[29] Prefiled testimony of the Board's peer-review consultant, John Chessia supports Mr. Reardon's view rather than Mr. Bracken's. Exh. 135, ¶ 19. His earlier written reports, however, largely support the position that the project complies with the applicable requirements. Exhs. 21, pp. 61, 63-64 (4/10/19 revision, pp. 29, 31-32); 118, p. 14; *see also* Exh. 128, ¶ 55. Because of this, while we have considered his testimony, we do not consider it determinative; it largely highlights the differences in opinion among the experts, and Mr. Chessia's credibility as an expert rather than an advocate is not enhanced by his comments referring to Mr. Bracken as having "concocted a new 'plan'," that is, a "new phony plan." Exh. 135, ¶¶ 17, 18.

Stormwater Management Standards as inadequate to protect the water supply, PFAS being a particular concern, [30] but that does not establish a cognizable local concern that supports denial of the comprehensive permit. *See* NWLC brief, p. 14; Exh. 136, ¶ 24.

More particularly, the three added words in the PWRD bylaw establish a requirement that goes beyond the state regulation, 310 CMR 22.21(1), (2), and Stormwater Management Standards—the requirement that 95% of annual precipitation be recharged. Mr. Bracken testified that the proposed design complies fully: "We are recharging 100 percent of any runoff generated on the site. … In our opinion, that meets the 95% [local] requirement." Tr. RI, 137, 133; Exhs. 84, p. 279; 128, ¶ 56. He acknowledged that this is a contentious issue—specifically that the experts disagree on the definition of "annual precipitation." Tr. RI, 133. But, he pointed out, "Most projects on Nantucket exceed the 15% impervious coverage [threshold in the bylaw]."[31] Exh. 80, p. 2. More specifically, "The project complies with [the] standards referenced in the by-law and therefore… will not result in degradation of groundwater quality."[32] Exh. 80, p.

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[30] PFAS are, as noted previously, a growing public health concern in Nantucket. The experts who testified on behalf of the Residents, the NLWC, and the Board—Andrew Shapero and Kristen Mello—have extensive knowledge of PFAS contamination and other forms of contamination both generally and with regard to the specific conditions on Nantucket. *See* Exh. 138, 139. The developer, however, argues that not only does Nantucket have no restrictions regarding PFAS contamination from runoff from residential developments, but neither is there state or federal regulation in this regard. *See* Tr. RIII, 77. Generally, residential developments, as opposed to commercial uses, have not been identified as a source of PFAS contamination. Tr. RIII, 76; Exh. 134, ¶ 10. Nantucket, in particular, in response to a serious PFAS problem on some parts of the island, has conducted an extensive PFAS monitoring and planning program, but has not identified residential runoff as a potential source of contamination nor recommended additional stormwater treatment. Exh. 134, ¶¶ 11-13; Tr. RIII, 76-77; *see also generally* Exh. 138. Considering all the extensive expert testimony provided, we find that of the developer's environmental health expert, Sonja Sax, to be the most credible, and we agree with her that the risk here of groundwater contamination by PFAS is speculative. *See* Exh. 134, ¶¶ 14-15.

[31] The developer also argues with regard to application of the stormwater bylaw generally, and PFAS in specific, that it should prevail because the Board failed to treat its application as equally as possible in comparison to unsubsidized housing. Developer brief, p. 27, 30, 36; *see* G. L. c. 40B, § 20; 760 CMR 56.07(2)(a)(4); *Zoning Bd. of Appeals of Braintree v. 383 Washington St., LLC*, 105 Mass. App. Ct. 592, 603 (2025). There is some testimony from the developer's expert in this regard. *See* Exh. 128, ¶¶ 27, 34, 38; 128(b), 129, ¶ 91. This might well be an independent ground for overturning the Board's denial of a permit, the developer did not provide sufficient detail to establish a violation of the law.

[32] Only the possibility of contamination has been put into issue by the parties, but another concern for public wells is that they be recharged sufficiently. Mr. Bracken stated, "The proposed volume

2, ¶ 3. As a matter of common sense, and considering typical stormwater system design, it seems reasonable to credit Mr. Bracken's opinion, but the Nantucket bylaw's 95% recharge provision is unusual. As will be seen below, when it is applied in a highly technical way—as we must apply it—the NLWC has sustained its burden of proving that the design does not meet that requirement.

To show noncompliance, the NLWC and Residents raise several technical arguments about the 95% recharge requirement, but the one that is intuitively most questionable is sufficient to show that the design does not satisfy the requirement. Recharge is typically considered in relation to stormwater runoff.[33] That is, calculations (most often for a particular storm, though possibly measured on an annual basis as well) are prepared to estimate total volume of runoff if no recharge is provided. It is a fairly straightforward matter to design a system that will recharge 95% of estimated runoff. The Nantucket requirement, however, is not for recharge of stormwater runoff, but rather of total precipitation. The NLWC's expert, Mr. Horsley, pointed out that a significant amount of precipitation never becomes runoff. It is intercepted by vegetation where it is absorbed or evaporates, or it pools in various places from which it ultimately evaporates. He suggested convincingly that if the site design results in more than 5% of precipitation being intercepted or evaporated, no recharge mechanism will be able to recharge 95% of the precipitation. Exh. 80, pp. 2-3, ¶¶ 6-7. Mr. Bracken responded that as a result it may be "virtually impossible to recharge 95% of precipitation on any project. Exh. 80, p. 3. Though Mr. Horsley's approach is highly technical, we find that his testimony with regard to this particular site—that the project's "conventional asphalt pavement… and roof shingles [with] interception rates of 15-20% limit the available recharge to 80-85% of the precipitation, does not comply with the 95% recharge required by the Nantucket Public Wellhead Recharge Bylaw" is credible. Exhs. 137, ¶ 11; 80, p. 3, ¶ 6.

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of recharge on site [from the project] will be greater than pre-existing condition consisting of woodland." Exh. 80, p. 3, ¶ 6. This line of argument was not pursued by the parties.

[33] Any argument that PFAS in rainwater reaching well water could be a public health hazard is beyond speculative and was refuted on cross-examination of the developer's environmental health expert by the Residents' counsel. Tr. RII, 56-58.

However, even assuming that failure to meet the 95% recharge requirement recharge represents a valid local concern,[34] "[i]t is not enough to simply point out a lack of compliance with local regulations or complain that the local board's power has been taken away. The board must show that the impacts on the local [environment] outweigh the local need for affordable housing…." *Holliston v. Housing Appeals Comm.*, 80 Mass. App. Ct. 406, 420. The NLWC has not done this. In all the voluminous materials presented to us, we do not find quantification of sufficient risk to the public to outweigh the regional need for housing. Mr. Horsley's calculation that recharge would hypothetically be limited to 80% to 85% of precipitation provides some precision regarding the proportion of recharge, and he testified in detail about how pollutant loads might be related to stormwater volumes, but he made no attempt to describe, much less quantify, how *less* than the required amount of rainwater reaching groundwater or the well would adversely affect public health. *See* Exhs. 137, ¶¶ 13-30; 80, p. 3. Even if the argument had been made that the volume of water available to be pumped from the well would decrease, based on the evidence presented here, such an argument would be insufficient to outweigh the regional need for housing. The NLWC and other parties have not sustained their burden of proof.

Finally, we note that in the section of its brief addressing whether the local concern outweighs the regional housing need, the NLWC cites *Reynolds v. Zoning Board of Appeals of Stow*, 88 Mass. App. Ct. 339 (2015). Board brief, pp. 19-20. That case, however, is distinguishable from the current circumstances since not only was the risk of groundwater contamination in the Stow's Water Resource Protection District from an on-site sewage disposal system as well as from stormwater, but also because there was a clear finding that the violation of the local bylaw was, based on undisputed calculations, more likely than not to cause excessive nitrogen levels in the nearby well. *Reynolds v. Zoning Board of Appeals of Stow, supra*, at 349-350 (2015). Therefore, the appellees

[34] An alternate way of framing this issue is that the NLC has not presented clear evidence of the risk presented by noncompliance with the Town's recharge requirement, and therefore it has not established a legitimate local concern. Therefore, there is no concern to weigh against the need for affordable housing.

have not demonstrated a valid local concern that outweighs the need for affordable housing regarding the stormwater system's impact on public wells.[35]

### C. Private Wells

The Residents argue that the project will endanger private drinking water wells by failing to comply with local requirements for setback of stormwater management structures from wells on abutting properties. Residents brief, pp. 30-44. The developer argues in response that "despite an abutter improperly locating its wells within one hundred feet of the then-already-disclosed infiltration systems (without informing the Board of Health of the location of the infiltration systems), [it has] submitted a revised Well Exhibit Plan dated January 8, 2025, depicting a relocated infiltration system for parking lot runoff outside of the required one-hundred-foot (100') setback." Developer brief, p. 9.

#### 1. The developer has established a prima facie case.

The developer's design engineer, Mr. Bracken, testified with regard both to the stormwater management system design in relation to setbacks from private wells and the history of adjustments to that design. His testimony is supported by detailed plans. Exhs. 85, 107.

During the lengthy Board hearing and appeal process, after the developer's revised plans, including stormwater system design plans, became public in 2020, the abutting property owner at 1 and 1R Whereowhero Lane submitted plans to the Nantucket Board of Health to install new wells within ten feet of the property line of the proposed development. Exh. 128, ¶ 61; *see* Exh. 85. Massachusetts Stormwater Management Standards require that wells be set back one hundred feet from stormwater management infrastructure. Tr. RII, 32, 93. The well applications to the Board of Health did not note the location of the proposed infiltration structures, and the Board of Health, being unaware that the stormwater system was within the regulatory one-hundred-foot setback, approved the plans in July 2022, and the wells were installed. Exh. 128, ¶¶ 61, 62; *see also* Exh. 129, ¶¶ 20-32.

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[35] We also note the developer's argument that the Town has approved other stormwater management systems like the one proposed here. *See* Developer brief, pp. 10 (¶ 46), 32.

Mr. Bracken prepared new plans to relocate the stormwater management structures and based on that, testified that the proposed stormwater management system will comply with setback requirements for the protection of adjacent private wells.[36] Exh. 128, ¶ 59. This testimony and the supporting plans are more than sufficient to establish a prima facie case. Exhs. 128, ¶¶ 59-63; 85; 107; *see also* Tr. RII, 29-35, 85-86, 88-89, 93-95.

**2. The Residents' Local Concerns Case**

Initially, in a long, discursive section of its brief, the Residents rely largely on lay testimony regarding concerns about well placement that are not legal requirements—the desirability of vegetated cover, concerns about fencing, "human activities," "dog waste," etc. Residents brief, p. 32, *see generally* pp. 30-44. Similarly, they raise concerns about features of the development—parking lots, walkways, emergency generators, and so on—that are located outside of the 100-foot setback and not prohibited. Residents brief, pp. 33-34. They go on to argue that the Board of Health regulations, § 386-6(E), requires a well and a leaching facility to be separated by 300 feet in the direction that is down gradient in groundwater flow from the leaching facility. Resident brief, pp. 38, 42; *see* Exh. 105. This would be a local requirement that is stricter than the state requirement and would be subject to waiver if risks associated with it were outweighed by the regional housing need. However, the setback requirement in the regulations does not apply to this project since it was promulgated after the comprehensive permit application was filed. Exh. 129, ¶ 25; Tr. RII, 31; *see 518 South Ave., LLC v. Weston*, No. 2022-12 (Mass. Housing Appeals Comm. Jan. 23, 2025), slip op. at 36 ("any regulation not in effect at the time of the filing of the application will not be applied"); 760 CMR 56.02 (*Local Requirements and Regulations*). But even if it did apply, although there is extensive testimony, mostly from lay witnesses, of possible risks to drinking water, this situation is clearly distinguishable from *Reynolds v. Zoning Board of Appeals of Stow*, 88 Mass. App. Ct. 339, 349-350 (2015), which is relied upon by the Residents. Leaching of stormwater here is different from the septic leaching in *Reynolds*, and detailed calculations have not

[36] To ensure that there is no ambiguity regarding this issue, we include a condition (§ VI(8)(b), below) requiring that final plans and construction provide one-hundred-foot setbacks from all wells on adjoining properties.

been provided as they were in *Reynolds*. The Residents have not carried their burden of proof.

### D. Historic Design

Historic design is an important issue in Nantucket since, as we noted in our previous decision, *Surfside Crossing I*, "land use acquisitions for open space and extensive review by an island-wide HDC [Historic District Commission] have been the most actively used growth management tools." Exh. 24, p. 48. Though pre-filed testimony concerning historic design was admitted in our original hearing, the issue was not briefed and therefore waived in that stage of the proceeding, and therefore the Committee now considers it for the first time. *See Surfside Crossing I*, slip. op. at 5, n. 9. In this hearing on remand, the issue was not briefed by the Board or the NLWC, but only by the Residents.

#### 1. The Committee's Jurisdiction

Nantucket was the first town in Massachusetts to establish a local historic district, when it protected its "old town" in 1955. The district was extended to the entire island in the early 1970s. The protection differs slightly from most other towns because it stems from a special act of the legislature, the Historic District Commission Act, Chapter 395 of the Massachusetts Acts of 1970, as amended (Act), and also from the Nantucket Historic District Commission Bylaw Chapter 124, sections 8-13, promulgated pursuant to statewide enabling legislation, G.L. c. 40C. Every building built or renovated anywhere on the island is subject to review by the Historic District Commission (HDC).

The Residents argue that there is no jurisdiction under Chapter 40B to waive substantive requirements in the Act since the Act is a state law. This issue, however, was resolved definitively by the Supreme Judicial Court in *Dennis Housing Corp. v. Zoning Bd. of Appeals of Dennis*, 439 Mass. 71, 79-80 (2003). In that case, the Old King's Highway Regional Historic District had also been created by special act of the legislation (St. 1973, c. 470). In Nantucket, as in Dennis, there is a local historic district commission, and it is the local building inspector who enforces the prohibition against uncertified construction within the district. Exh. 64, p. 11 (Attach. 1, § A301-4(5)(b); St. 1970, c. 395, as amended, § 5(b). The Court held that "[w]here a town historic committee exercises a degree of 'supervision of the construction of buildings,' requiring that the

exterior features of such buildings be 'appropriate' to the historic district, and where the building inspector … is the local official that operates to uphold and enforce the town historic committee's power of supervision, we are satisfied that a town historic committee comes within the definition of 'local board,'" and is therefore subject to the jurisdiction of Chapter 40B. *See also* 760 CMR 56.02: *Local Board*. Thus, not only the requirements of the Nantucket bylaw, but also those of the Act are within this Committee's jurisdiction.

**2. The developer has established a prima facie case.**

The modified project has been designed by the architectural firm Workshop/APD, represented by its founding principal, Andrew Kotchen. Exh. 133, ¶ 5. Over a period of 27 years, Mr. Kotchen and his firm have designed approximately 250 buildings, including 150 homes, on Nantucket. Tr. RI, 110-112.

The 18 large buildings in the proposed development are architecturally similar, using three building types. Exh. 132, ¶¶ 34, 41. Mr. Kotchen testified (and the drawings show) that the designs and building materials are intended to evoke "Nantucket's architectural vernacular," that is, with individual buildings, instead of having a monolithic shape, being composed of "smaller masses sized to reflect the proportions of a typical [but very large] single-family Nantucket home," which provides variety and visual interest. Exh. 36, ¶¶ 34, 35, 38, 39; *see also* Exh. 4; Tr. I, 81, 144-145. The design, including shape and massing, was inspired by a large, 9,000-square-foot single-family home located a half mile from the project, which his firm designed and which was approved by the HDC. Exh. 133, ¶ 13; Tr. RI, 80-81. They are "designed to mimic the majestic large single-family structures seen throughout Nantucket." Exh. 133, ¶ 18.

Mr. Kotchen testified that he relied on his years of experience with the HDC approvals to design the project in compliance with the guidelines. Exh. 133, 8-12, 19; Tr. RI, 70, 80. He testified that the new, modified design, in addition to being more in keeping with structures typically approved by the commission than the developer's original proposal, is consistent with the Nantucket Historic District Commission guidelines. Exh. 132, ¶ 39; Tr. RI, 114. This testimony, together with the plans themselves, is sufficient to establish the developer's prima facie case. *See* Exh. 4.

### 3. The Residents' Local Concerns Case

Present and former members of the HDC and architectural design professionals Diane Coombs and Vallorie Oliver testified on behalf of the Residents in opposition to the design. The heart of Ms. Coombs' testimony, as quoted in the Residents' brief is that:

> the eighteen (18) condominium buildings would be grossly out of scale and character with the immediate neighborhood in their bulk height, density, style, and appearance. They would be expansive, tall, repetitious, and very closely spaced. Whereas the neighborhood has long been composed of well-spaced and varied homes, the new development could comprise a large number of commercial-scale buildings up against one another. There would be little if any variation in their style or arrangement. This is inconsistent with the historic variety of architecture on Nantucket and in this particular neighborhood….

Residents brief, pp. 4-5; Exh. 64, ¶ 20. Ms. Oliver's testimony is more specific:

> the South Shore Road neighborhood – which contains the Project Site as well as the residential properties to its south – is more rural in character, feel, and construction than much of Nantucket, and is less dense than most developed areas on the Island. It is dominated by shingled single-family houses, horse barns, sheds, and similar structures, most of which are generously spaced and screened from one another and from the few nearby roads and travelled ways. A notable exception is part of the Sherburne Commons housing development.

Exh. 143, ¶ 8. Other parts of her testimony concern various design details such as vehicular access, rear- and side-yard setbacks, and unexplained concerns about building heights, parking and lighting design, and even proximity to another affordable housing development. Exh. 143, ¶¶ 9, 12, 13, 23-26, 28. Her conclusion is that the design is

> inconsistent with Nantucket's uniquely historic built and natural landscape. It would cast an artificial suburban shadow on a neighborhood that, if anything, is quintessentially rural Nantucket. Although the developer claims that the condominium buildings would incorporate design elements to alleviate that monotony, the buildings nonetheless would be of the same essential design and scale as one another and that and their concentration and arrangement on the site would be grossly out of charter with the existing built and natural environment of the immediate surroundings."

Exh. 143, ¶ 22.

Though it is admittedly difficult to assess the weight of the local concern—"the need … to promote better site and building design in relation to the surroundings"—the Residents' argument in this regard is minimal. It states, "Nantucket relies heavily on tourism for their economy, hence any effort by Housing Appeals Committee to go away

from enforcing the language of the HDC Act would harm all Nantucket residents and the Island generally and adversely affect the economy of the Island and therefore the economy of the Commonwealth." Residents brief, pp. 14-15.

**4. Discussion**

The two dominant recurring themes regarding historic concerns about the proposal are the compatibility of the 18 buildings with the surrounding neighborhood of single-family homes and the large size of each of the buildings.

As noted at the outset, the neighborhood consists of mostly single-family homes, although about a quarter mile to the south is a large, multi-family residential facility, Sherburne Commons. Tr. I, 113, 145; Exh. 2, p. 4. Mr. Kotchen's testimony with regard to compatibility is convincing:

> I think it would be dishonest to say that 18 apartment buildings are consistent with all of the structures that surround it. That's not a fair statement to make. I think in the program that we were given to design, we designed buildings that represent a scale and context that integrated into that neighborhood. It's generally single-family homes around it. I believe that the structures the way they have varied mass elements to them do not appear like large, square boxes that are two and three stories tall with formal trim that exist in other parts of the island.[37] And therefore, the scaling of them is larger than the context but the design of them is responsible in the way it fits in with the aesthetics of the neighborhood. … Rhythmic windows that exist in the project. And the trim color [— ] … the trim detailing often seen on many homes on Nantucket is not elaborate, not ornate [ — ] it's not of another place. … And the way the buildings are ultimately sited and the way they twist and turn around the property to not create too repetitive in orientation of the same structure. We intentionally mixed them, changed window penetration on them to create that variety.

Tr. IR, 75-77.

> I believe the [proposed] structures have embedded in them many of the principles that members of the HDC continually enforce in the meeting hearings I've been to over the years. They believe in the term additive massing where a structure is not a large box, it is made up of a series of gable forms that are interconnected. They like to see varied ridge heights, breaking long ridges and stacking them up and down and mixing one and two story, in some cases three, masses on a structure. They like to see elements like rhythmic

[37] Mr. Kotchen also notes that the HDC has approved other residential developments that have "a more formal/commercial look and feel," though he provided little detail and the developer has not pressed the issue of unequal treatment of affordable housing under 760 CMR 56.07(2)(a)(4). Exh. 133, ¶¶ 17-18.

> windows and they applaud people that come in with natural trim to the weather, that they recede in the natural landscape. Those are four key elements that I've heard over and over again by various board members over 27 years of being in front of HDC on Nantucket.

Tr. RI, 62-63.

Regarding the second theme, the size of the buildings, it is difficult to argue in any Chapter 40B context that size alone—independent of massing and design—is a local concern that supports denial of a comprehensive permit. It is axiomatic that Chapter 40B was enacted to permit housing to be built at greater density than typical single-family suburban neighborhoods. But this is particularly true on Nantucket. In addition to the facts noted above, Mr. Kotchen testified, "I believe the buildings on [the] Surfside Crossing [proposal] is (sic) around 11,000 square [feet] each, and I would say the average home we design on Nantucket in aggregate is around ten to 14,000 square feet. … similar size to an individual building at Surfside Crossing." Tr. RI, 111.

In considering all the evidence, we find the testimony of Mr. Kotchen to be more credible than that of the other witnesses and therefore conclude that the Residents have not sustained their burden of proving a local concern that outweighs the regional need for housing.

### E. Public Safety Services and Infrastructure and Emergency Access and Egress

#### 1. Arguments Presented at the Initial Housing Appeals Committee Hearing

At the initial hearing in this case, both the Board and the Residents raised three questions concerning fire safety that were considered in some depth—adequacy of access for fire trucks, adequacy of egress for residents, and the possibility of forest fire.

The possibility of forest fire has not been briefed on remand, and therefore we need not address it. *But see Surfside Crossing I*, slip op. at 34. The other two local concerns are listed in sections V-4(e), V-4(f), and V-4(h) of the Second Supplemental Pre-Hearing Order, and were briefed by the Residents, but not by the Board or the NLWC. Emergency egress for residents received relatively little attention during the hearing on remand, but we will address it below. Access for fire trucks and related public safety questions received the most attention during the hearing on remand, and we will also address those issues below.

### 2. The Developer's Prima Facie Case

First, we note that the facts regarding these issues have not changed since our initial decision. *See Surfside Crossing I*, slip op. at 32-34. The Residents, however, took the opportunity to renew or amplify the arguments made earlier. They summarize their position as follows:

> The project's design imposes lengthy delays for emergency responders because … [they must] first … navigate a chokepoint "single means of access" to the general neighborhood where the Project is to be located [at the beginning of a dead-end road], followed in series by then … having to navigate another chokepoint "single means of access" to get to the Project site of the buildings to be built, together with mis-designed internal parking lot layouts that fail to include any of the requirements designated by Nantucket Fire Department and Emergency Management officials for access by Fire Department equipment in the event of an emergency….

Residents brief, p. 45. They raise several subsidiary issues as well.

The developer's architect testified that "The Project will meet all local state, and federal fire safety regulations," and, in particular, that all of the buildings will be protected by an automatic sprinkler system. Exh. 132, ¶¶ 52, 53.

Two additional experts testified in more detail with regard to safety issues. Robert Michaud is a professional engineer with a master's degree in civil engineering with over 30 years of experience in transportation planning and engineering. Exh. 34(a). In April 2020, he prepared a comprehensive Traffic Impact Assessment for the modified project (Exhibit 34(e)). Along with a number of other issues, such as roadway capacity, trip generation, crash data, sight-line-safety characteristics, and so on, the Assessment states:

> Site Access/Circulation. AutoTURN analysis has been completed for the preliminary site plan using the Towns Ladder truck and single unit (SU) delivery truck. Site access, circulation aisles and parking layout provide adequate maneuvering are for the largest potential responding vehicle (ladder truck)."

Exh. 34(e), p. 2. He elaborated in his pre-filed testimony saying,

> [My firm] conducted a swept-path analysis for responding fire apparatus, specifically Nantucket Ladder No. 1, to determine capability of this vehicle to access and circulate within the subject property…. It is my professional opinion that the proposed driveway location and geometry and internal site roadway dimensions and layout are sufficient to meet the access and circulation needs of the responding vehicle. This opinion is buttressed by the fact that a second emergency access route is provided along South Shore Road…. [A] traffic blockage at the Project Site would not prevent emergency

> vehicles from accessing properties located further down South Shore Road, as an alternative means of access is available to the site and other properties along South Shore Road… by way of alternate roadways—namely Sherburne Commons Lane via Miacomet Road.

Exh. 34, ¶¶ 28-30.

A second witness for the developer was Jeremy Souza. He has a bachelor's degree in fire science and a master's degree in public administration; he has been a firefighter since 1994, with instructor certifications, rising to the rank of deputy fire chief in the T.F. Green Airport Fire Rescue department; he holds a Fire Prevention Officer II credential from the Massachusetts Department of Fire Services and is a registered Fire Protection Engineer in Massachusetts and six other states; he was an Emergency Services Specialist for the National Fire Protection Association (NFPA) and is currently employed by Code Red Consultants, specializing in building and fire code consulting. Exh. 130, ¶¶ 1-9. Since 2015, he has worked with the Nantucket Fire Department, the Nantucket Police Department, and the Nantucket Cottage Hospital providing training and facilitating emergency response exercises at the Nantucket airport. Exh. 130, ¶¶ 10-11. He also reviewed the swept-path analysis and other aspects of fire safety and access and agreed that access is adequate. Exh. 37, ¶¶ 14-28; *see* Exhs. 37, App. A; 76; 130, ¶¶ 33. He noted that he did not analyze access by aerial ladder to the building since there is no requirement in the Nantucket zoning bylaws, subdivision regulations, state regulations, or NFPA standards requiring such access.[38] Exh. 130, ¶ ¶ 34, 40. Nantucket Fire Chief Cranston agreed that the design complied with the requirements of the Massachusetts Fire Code, including sprinkler plans and hydraulic calculations (though he had a number of other safety concerns, discussed below). Exh. 140, ¶ 8.

The developer has clearly presented sufficient evidence to establish its prima facie case of compliance with state regulations or generally recognized standards with regard to access for fire trucks and related public safety questions, including emergency egress

[38] He also noted that neither state regulations nor NFPA standards require a second, emergency access; the International Fire Code, which is not adopted in Massachusetts, requires such access for a development that is larger than 100 housing units, but does not require it for a development the size of the proposed development if it has a sprinkler system. Exh. 130, ¶¶ 37-39.

for residents.[39] *See 383 Washington Street, LLC v. Braintree*, No. 2020-04, slip op. at 6-8, 11-23 (Mass. Housing Appeals Comm. Mar. 15, 2022), *aff'd* 105 Mass. App Ct. 592, 603-605 (2025), *citing Sugarbush Meadow, LLC v. Sunderland*, No. 2008-02 (Mass. Housing Appeals Committee June 21, 2010), *aff'd* 464 Mass. 166 (2013).

### 3. The Residents' Local Concerns Case

#### a. Unique Circumstances

The Residents introduce their argument by noting that because Nantucket is an island 30 miles from the mainland it "presents unique circumstances." Residents brief, p. 45. It draws attention to "major weather events," unreliable transportation to and from the mainland, water supply from a "sole source aquifer," power blackouts related to an undersea cable, unavailability of mutual aid from neighboring communities for firefighting,[40] and a hospital "that has ten beds [and] no intensive care units." Residents brief, pp. 46-47. "In this context," the town has difficulty hiring firefighters, the Nantucket Fire Department has "a long-term short staffing problem … [and] doesn't have enough firefighters to meet national standards for firefighting." Residents brief, pp. 48-49; *see also* Exh. 145, ¶¶ 5-7. Based upon this, the Residents presented the testimony of James Burneka. Mr. Burneka has been a consultant to the Nantucket Fire Department on firefighter health training "focused on the links between firefighting and cancer." Exh. 145, ¶¶ 2-4. He has experience as a firefighter, and in the course of his work "felt compelled to and did comment on the [department's] firefighting capabilities, including those arising from the Department's lack of staffing." Exh. 145, ¶¶ 2, 4. The Residents cite his opinion that staffing levels would be "inadequate in the event of a major fire," presenting "insurmountable firefighting challenges for the Nantucket Fire Department" at a very large residential development. Exh. 145, ¶ 8; Residents brief, p. 50.

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[39] As with other issues in this case, e.g., public well protection in Section V-B(2), above at n. 19, the Residents' have argued that the developer has not established a prima facie case. Even if we were to consider their conflicting evidence, which is discussed below in relation to local concerns, it would not be sufficient to discredit the developer's prima facie presentation.

[40] Mutual aid is clearly of limited value on Nantucket, though it is not entirely unavailable. For the twelve-hour Veranda House hotel fire, additional personnel responded from Hyannis, Yarmouth, Dennis, Harwich, and Sandwich. Exh. 106, p. 3; cf. Exh. 147, ¶ 11.

While these circumstances may well create some unease for the town in general, they are not sufficient legal justification for denial of a comprehensive permit. Pursuant to the comprehensive permit regulations,

> if the denial…. is based upon the inadequacy of existing municipal services or infrastructure, the Board shall have the burden of proving that the installation of services… is not technically or financially feasible. Financial feasibility may be considered only where there is evidence of unusual topographical, environmental or other physical circumstances with make the installation of the needed service prohibitively costly.

760 CMR 56.07(2)(b)(4). First, accepting that fire department staffing is inadequate—and, more specifically, inadequate to fight a fire at the proposed development—there is serious doubt as to whether this regulation can be interpreted to justify denial of a permit when the services involved are not inadequate with regard to the specific housing proposal, but rather are a townwide problem. But we will assume that a townwide deficiency can be considered. Even then, there the Residents' argument fails. First, without any regard to unusual topographical or physical circumstances, that is, whatever the cause of the deficiency, the Residents could sustain their burden by proving that "installation of services is not technically feasible." However, we find that the recitation of the unusual difficulties Nantucket faces is not sufficient to prove that the installation of services—that is, the hiring of adequate staff—is not technically feasible. Second, in the alternative, with evidence of unusual circumstances, the Residents could prove that hiring of adequate staff is not financially feasible. They have introduced no evidence, however, of financial infeasibility.

**b. Aerial Ladder Truck**[41]

Next, the Residents present testimony from Stephen Murphy, Nantucket's former fire chief, that the department relies "frequently (if not entirely) on the use of an aerial ladder truck to reach multi-story buildings… for rescue operations," and "the layout of the parking and setbacks [does] not allow for adequate access." Residents brief, p. 51, Exh. 43, ¶ 10. Robert Bates, the current fire chief, expressed the same opinion (in language that is identical verbatim). Exh. 146, ¶¶ 9-10. He did, however, provide

[41] It is not clear that this issue was properly raised in the SSPHO. *See* SSPH, §§ V-4(f), V-4(h). We will address it in any case.

additional detail, indicating that in a number of locations, access for aerial operations would be limited. Exh. 146, ¶ 13. Similar testimony on this issue (and other fire safety issues) was provided by former Nantucket firefighter Beau Barber. Exh. 147, ¶¶ 2, 13.

While we recognize the responsibility of the Residents' primary witnesses—as public safety professionals—to advocate for design that allows for fighting fires in the most practical and effective ways possible, we cannot conclude that the Residents have carried their burden of proving concerns raised about the design of the current proposal are sufficient to outweigh the regional need for affordable housing.

It is undisputed that there is no local requirement, state fire code requirement, nor NFPA standard that requires that buildings be accessible by aerial ladder truck. Exh. 130, ¶¶ 34, 40. Significantly, two of the Residents' experts, in raising concerns about the proposed development, emphasized the importance of a ladder truck in fighting fires in "multi-story buildings."[42] Exhs. 43, ¶¶ 9-10; 146, ¶ 9. The record provides limited guidance as to whether the buildings in this development should be considered multi-story buildings since the term can be used to describe either buildings with two stories or buildings with three or more stories.[43] The developer's fire safety consultant described the project's buildings as "two stories tall with a walkout basement level on one side." Exh 131, ¶ 22.

More important than definitions are the facts about the design as shown on the architectural plans themselves. They show that the areas around the buildings are heavily graded so that they are for the most part two-story buildings. Detailed elevation plans (showing heights above grade of various elements) and perspective drawings are provided for all three building types. Examination of these plans and drawings, in Exhibit 4, sheets 21-27, 32-37, 42-48, shows the following. The buildings are not particularly tall, with the dominant ridgelines of the pitched roofs above the second floors being about 30 feet above grade. For Building Types A1 and A2, two elevations appear as entirely two stories, the majority of the third elevation appears as two stories, and about half of the fourth elevation is two stories. The part of each building that is not or does not appear as

[42] The testimony of the current fire chief is relatively brief and makes no mention of the ladder truck. *See* Exh. 140.

[43] *See, e.g.*, https://www.oed.com/dictionary/multi-storey_adj .

two stories has a large walk-out basement area ten feet below grade, where the building has three stories, if the basement level is included as a story. Building Type B is entirely a two-story design. In the Type A buildings, which have roughly four dozen windows each, there appear to be only five windows that are "third-story" windows. All the second-story windows in all the buildings have sills that are 12 feet and 2 inches above grade.[44] These facts do not support any critical need for a ladder truck. And in any case, the ladder truck will have access to significant portions of the development; Mr. Souza testified that analysis of aerial ladder access was included in the swept-path analysis that was performed, and "showed that at least 50% of each building was able to be reached by Nantucket Fire Department's aerial device, [and that in] many cases, three sides of each building could be accessed." Exh. 131, ¶ 41.

It is also significant that protection for residents is provided since the buildings each have a complete sprinkler system.[45] *See Zoning Board of Appeals of Sunderland v. Sugarbush Meadow, LLC*, 464 Mass. 166,184 (2013) (affirming Committee's grant of a comprehensive permit for 150 units in five three-story buildings, holding that "the additional risk to occupants and firefighters… was minimal in light of the advanced sprinkler system… and the likelihood that… a ladder truck would be made available through mutual aid…"); *383 Washington Street, LLC v. Braintree*, No. 2020-04 (Mass. Housing Appeals Comm. Mar. 15, 2022), *aff'd* 105 Mass. App. Ct. 592 (2025).

Finally, the Residents and their witnesses gave considerable attention to a recent fire in Nantucket at the Veranda House hotel. Generally, the relevance of a fire at a different location is unclear, but what is more important is that "[c]omparison between the Surfside Crossing buildings and the Veranda House fire… is wholly inaccurate." Exh.

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[44] *N.b.* that windowsill heights are shown on the plans as 22'-2", which is the measurement above basement grade, which is 10 feet below actual grade.

[45] The buildings will have NFPA 13R sprinkler systems complying with the State Building Code. According to statistics published by NFPA, in 96% of home fires, including apartments, when sprinklers were present, the fire was confined to the room of origin. In 85% of the fires, a single sprinkler controlled the fire, and in 99.2% of the fires, fewer than five sprinklers controlled the fire. Civilian death rates in buildings with sprinklers are 89% lower than in buildings without sprinklers, with injuries and fatalities generally limited to people who were "intimate with ignition," that is, close enough to the fire that sprinklers did not have time to operate to prevent the casualty or where the fire was too small to activate a sprinkler. Exh. 131, ¶¶ 23, 26-28.

130, ¶ 42. The Veranda House hotel was a large, three-story, wood-frame building without a sprinkler system built over a century prior to the 1975 enactment of the State Building Code. Exhs. 130, ¶¶ 43-45; 131, ¶ 22.

Having considered all the testimony, we give greatest credibility to the testimony of the developer's fire safety consultant, Jeremy Souza.[46] *See* Exh. 130, generally, e.g., ¶ 42. The Residents' experts did not provide convincing testimony that the Nantucket Fire Department will be so limited in its ability to fight a fire that the local concern outweighs the regional need for affordable housing.

**c. Blocking of Access by Fire Vehicles or Egress by Residents of the Development or of the Neighborhood at the Entrance**

With regard to fire access, the Residents also argue that even with a second, emergency access driveway, "[i]f those entrances were blocked or that portion of South Shore Road rendered impassible…, [there could be] delays in controlling a fire allow[ing] it to spread within a large residential area." Residents brief, p. 52; Exh. 43, ¶ 14. The concern is stated most succinctly by the former Nantucket Emergency Management and Marine Safety Coordinator David Fronzuto, who testified, "The only approved vehicular access into and out of the neighborhood is via South Shore Road. That road effectively is a dead-end street that ends at the ocean…." Exh. 144, ¶ 9; *see also* Exh. 68, ¶¶ 7, 11. Deputy Fire Chief Robert Bates testified to the same concern. Exh. 146, ¶ 15. The current fire chief, Michael Cranson, expressed a similar opinion, though his primary concern appeared to be only that "a second means of emergency access and egress more remote from the primary access… is preferred…."[47] Exh. 140, ¶¶ 10-11.

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[46] The Board's "Fourth Argument" with regard to public safety services access is that the developer cannot overcome the cumulative weight of the unanimous testimony of eight witnesses submitted by Residents…" Board brief, pp. 45, 57, *see also* pp. 63, 66. "Of course, the credibility of witnesses is not determined by the number of witnesses appearing for one side or the other." *Commonwealth v. McCauley*, 391 Mass. 697, 703, n.5 (1984).

[47] The question of a need for more than one primary access road was resolved during the first hearing before this Committee, where we found that having only one primary access road is not a significant local concern; we noted there that Board's traffic consultant had said, "two driveways are not needed." Exh. 23, p. 54, ¶ 3; *Surfside Crossing I*, slip op. at 32. The concern about having a single access during emergencies was resolved when the developer added a reinforced-turf emergency access road. Exh. 37, ¶ 22; Exh. 3, sheet 3. There was testimony during the recent hearing that the emergency access "is too narrow at 15 feet." Exh. 144, ¶ 10. Clearly, however, a width of 15 feet will accommodate fire trucks since Chief Murphy stated in written comments,

Closely related to this are concerns about neighboring residents. The Residents argue, "The single means of access for the Project design is also unsafe for the proposed development's neighbors: the nearby Nantucket Residents testified that the single means of egress, the project location and configuration leave them unable to safely exit the neighborhood in the event of a fire." Residents brief, p. 55-56. More specifically, a neighbor is quoted in the Residents' brief: "[T]he only means of egress [for my property] in case of a fire would be via the 1000 feet of Wherowhero Lane... and then north on South Shore Road, which is a dead end to the south." Residents brief p. 56; *Exh. 152,* ¶ 23. Another neighbor testified, "For our Property and the Zimicki property, the only means of egress in case of a fire would be via the 1000 feet of Wherowhero Lane (just south of the Weinhold property) and then north on South Shore Road, which is a dead end to the south." Exh. 153, ¶ 20; *see also* Exh. 154, ¶ 15(b); Residents brief, p. 56.

We note first that neither the design of the development nor the surrounding circumstances regarding this issue have changed since we addressed this issue in our initial decision. *See Surfside Crossing I*, slip op. at 32, 34. Though a considerable amount of new testimony was introduced, the facts remain the same. The entrance to the housing development is near the beginning of South Shore Road, that is, just south of the intersection with Surfside Road. Exh. 144, ¶ 10. This has always been a concern for residents who currently live on South Shore Road, which is about a mile long. That is, nearly all the other roads intersecting with South Shore Road are also dead-end roads. Therefore, as a practical matter, all day-to-day egress from the neighborhood is to the north on South Shore Road. But, the one road that is not a dead-end road the entrance road into the Sherburne Commons residential community, which is the second road a few hundred feet south of the development site. Tr. I, 145. That road, Sherburne Commons Lane, continues through Sherburne Commons and connects with Miacomet Road. Exh. 13, Figure 1; Tr. I, 145. It is a private, unpaved, gated, emergency-access road. Exh. 41, ¶ 19. We find the testimony of the developer's expert that in an emergency this can be used to access South Shore Road and the development from the south to be credible. Exh. 34, ¶ 30. Just as this emergency access road alleviates concerns for residents of Sherburne

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"No on-street parking on one-way sections where width will be reduced below 13 feet." Exh. 18, p. 3, ¶ 1(b).

Commons itself by providing emergency access from Miacomet Road, it also alleviates any local concern regarding similar emergency access to the proposed development if South Shore Road or the intersection of South Shore Road and Surfside Road is blocked. *See also* Tr. I, 164-165.

**d. Water Supply**

The Residents argue,

> sprinklers aren't reliable here … because the same water from the same strained sole source water supply source is being used simultaneously for all the general public's uses Island wide, and for this Project, the same water not simultaneously being used by the general public, is planned to be used both for sprinklers and for hoses for fire department firefighting purposes, and the record is clear that there isn't enough reliable water to do all of this and for this project at this location at the same time.

Residents brief, p. 63.

In support, they first offer recorded remarks of Nantucket Water Department Superintendent Mark Willett.[48] He states that due to PFAS contamination,

> I've turned wells off, … so we're running kind of lean on the system and it's putting a lot of stress on the system and that I don't know if any of you have noticed or if you're on Town water there might have been a few instances during the week throughout the summer each week where the water pressure wasn't that great….

Exh. 101, p. 4; *see* Board brief, p. 64.

Further, the Residents cite the testimony of Firefighter Beau Barber. *See* Board brief, p. 65. He testified that based on his personal experience at the Veranda House hotel fire, Nantucket has insufficient water supply to fight a large fire.[49] At the Veranda House fire, three fire vehicles each had "an ideal pump capacity of over 1,000 gal./min.," but that "[f]or nine hours, the Department [could not exceed] at peak roughly 2,000 gal./min. on average and the available pressure was at its limit... [N]early ALL of the town's available pressure was consumed due to friction loss in the system, [and] it is clear to

[48] Mr. Willett made his remarks in an unrelated community meeting in 2024 concerning the town's capital improvement budget. We view them as reliable.

[49] He also testified, "I disagree with current Nantucket Fire Chief Cranson… that Nantucket has adequate water pressure and volume for even moderate firefighting activities." Exh. 147, ¶ 5.

me… that… there would not be sufficient capacity to fight a major fire at the proposed Surfside Crossing Development....” Exh. 147, ¶¶ 7-8; *see* Board brief, p. 65.

There are several weaknesses in this argument. First, Nantucket is in the process of improving its water supply system. Superintendent Willett was asked to “put a percentage factor on the possibility” of whether he would have to take corrective action in 2027—whether it was “50/50 or is it a lot higher than that” —and he responded, “I don’t think it’s that high yet…. And no worries, I could literally replace production with [a] new well. … I’m hoping by 2027 that I have my pump station built and my new well out where the water tower is.” Exh. 101, p. 4.

Second, the developer’s fire safety expert, Mr. Souza, testified that a single sprinkler “generally equates to approximately 30 gallons per minute or less.” Exh. 131, ¶ 26. “The assertion that thousands of gallons per minute of water will be needed for hours to extinguish a fire in a building at the proposed Surfside Crossing development… does not align with the [NFPA] statistical data [for] sprinklered buildings.” Exh. 131, ¶ 29. We find Mr. Souza’s conclusions more credible than Mr. Barber’s.

Finally, the lack of water capacity is a claim of inadequacy of municipal services or infrastructure governed by 760 CM 56.07(2)(4), which was discussed above in Section V-E(3)(a). The Board might show that provision of adequate water is either technically or financially infeasible. Superintendent Willett’s testimony shows that if increased water system capacity were necessary to protect the proposed development, it would be a solvable problem. The Board introduced no evidence that shows that such improvements are not financially feasible.

On this record, the Residents have not met their burden to prove a valid local concern that outweighs the need for affordable housing.

### F. Adequacy of Pedestrian Access

The original project plans included a sidewalk along the west side South Shore Road from the housing development to Surfside Road. The modified plans have removed the sidewalk.[50]

[50] The reason for the removal does not appear in the record. In its brief, however, the developer states that “as part of the process with the Natural Heritage [and Endangered Species Program (NHESP)] approval, the Applicant was required to provide an undisturbed fifty-foot (50’) buffer

There is no allegation that there is any local regulation or other requirement for sidewalks in this area. *See* Residents brief, pp. 71-79.

Directly across the road from the development is the South Shore Road Bike Path. Exh. 3, sheet 3. The developer has agreed to provide a "marked crosswalk and ADA compliant ramps… across South Shore Road at its intersection with the proposed site driveway to provide a connection to the existing paved South Shore Road Bike Path and a pedestrian connection to the nearby NRTA bus stop located on Fairgrounds Road." Exh. 13, p. 18.

The Residents provided a considerable amount of argument and lay opinion with regard to the sidewalk but did not present either expert testimony or detailed factual evidence to show that the bike path would not be a safe alternative for pedestrians. They have failed to prove a local safety concern that outweighs the regional need for affordable housing.[51]

### G. Claims about Changed Conditions and Undisclosed Changes

The Residents summarize two of the six sections of their brief as follows:

> SECTION II. During the remand hearing, the parties discovered for the first time that the Developer had unannounced physically expanded the Project to include use of the Town of Nantucket's real estate interests and the Housing Appeals Committee lacks jurisdiction to cause real estate relinquishment by a municipality.
>
> SECTION VI. Developer's unannounced modification of the proposed project by the removal from the Project of a pedestrian safety pathway … creates the risk of physical injury that outweighs the need for housing.

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at the front of the project, eliminating the ability to provide an easement in this area for sidewalks. A conservation restriction permanently restricting disturbance in this area was recorded in the Nantucket Registry of Deeds…." Developer brief, p. 40; *see also* Exh. 35; Tr. III, 133-134. The Residents' view is slightly different: "The Developer… told the Board of Appeals that the developer could not construct the previously promised pedestrian walkway because the developer had proceeded 'at risk' while appeals were pending to sign a voluntary conservation restriction that applies to the land where the pedestrian pathway was to be constructed." Residents brief, p. 78. The reason for the modification is not relevant to the question of whether a significant local safety concern has been proven. The question of the sidewalk was not considered in our first decision, though other traffic concerns were considered, and the NHESP approval process was mentioned tangentially. *See Surfside Crossing I*, slip op. at 27-31.

[51] Consistent with the developer's plans, but to remove any ambiguity, we include a condition (§VI(8)(a), below) requiring the developer to provide the crosswalk.

Residents brief, pp. 1-2.

The concern raised by the Residents suggests that it is improper for the developer to locate certain of the project's utilities over the existing municipal sewer and sewer easement that are on the project site.[52] Board brief, pp. 17-18. They concede that they had the opportunity to address this issue, as it was "[d]uring the remand hearing, [that] the parties discovered for the first time that the developer had unannounced physically expanded the project…." Board brief, p. 16. They have produced no evidence that the project has been expanded, which the developer vehemently denies. *See* Developer reply brief, p. 3. The developer also cites the cases of *Perry v. Planning Bd. of Nantucket*, 15 Mass. App. Ct. 144, 158 (1983) and *Martin v. Simmons Properties, LLC*, 467 Mass. 1, 10 (2014) for the proposition that the project, as the servient estate of the town's easement for its sewer main, it is entitled to use the property so long as it does not interfere with the use of the dominant estate. We find that the Residents have not established a justification for denial of the permit in this regard.

We have addressed the substantive questions concerning the removal of the sidewalk in Section V-F, above.

Finally, the Residents' argument that after our decision in *Surfside Crossing I*, "circumstances changed: the Island became exposed to widespread PFAS contamination incidents…," was addressed in Section V-B, above. *See* Residents supplemental reply brief, p. 5.

**H. Affordable Housing Needs**

The Board dedicates its entire brief to Nantucket's unique housing needs and to its response to those needs. It summarizes its argument stating that:

> there is no "regional" need for subsidized housing on Nantucket. … there is no need to locate subsidized housing on Nantucket to serve "regional" needs because commuting challenges preclude year-round residents from full-time, in-person employment off-island…. Nantucket should be treated differently from other Massachusetts communities… not only because its subsidized housing needs are

[52] The Board has not raised this issue, nor joined in the Residents' argument. There is a serious question as to whether the facts alleged by the Residents—that they could suffer property damage if there were a sewer main failure—are sufficient to establish their standing to raise this issue. *See* Board brief, p. 17; *see also Surfside Crossing I*, slip op. at 34-37.

> unique in terms of the "region" in which it is located, but also because of its extraordinary efforts to comply with both the letter and intent of Chapter 40B….

Board brief, pp. 1-2.

Then, first it points out that Nantucket faces:

> a local housing crisis more acute, more urgent, and more isolated from regional solutions than any mainland municipality will ever face. … Nearly two-thirds of Nantucket's housing stock sits empty for most of the year while working families face impossible choices. They are being forced to choose between their homes and their financial survival. The median home price reached $3.5 million in 2024; wages have increased 200% since 1995, but housing prices have soared over 800%.... [and] over 40% of its workforce is housing cost burdened….

*Id.*, pp. 6, 2, 4.

Second, with regard to its response to the housing crisis, the Board argues that the town "has demonstrated unprecedented commitment to affordable housing creation," and points to a great number of commendable activities in support of affordable housing—its Select Board has prioritized housing; with the Nantucket Affordable Housing Trust, it has built a number of affordable housing developments; it has enacted an inclusionary zoning bylaw, has dedicated Community Preservation Act funding to housing, created the Nantucket Community Land Trust in 2025, obtained Neighborhood First housing funding, and so on. Board brief, pp. 3, 6-19. It points in particular to the Nantucket Housing Production Plan 2021 (HPP). *Id.*, p. 20, *see* Exh. 141(e).

Finally, the Board suggests that the proposed development fails to meet the community's need for affordable year-round housing—that the "ultimate occupancy patterns" of the market-rate units will reflect the broader problem on the island that "roughly 70 percent of the potential housing supply on Nantucket has been absorbed by the seasonal market" of very expensive housing. Exh. 141(e), p. 27. It criticizes the developer for failing to make any formal commitment to limit prices of the market-rate units that it has suggested will help fill a need for people year-round residents at an income level somewhat above 80% of area median income required by Chapter 40B. Board brief, p. 21.

These arguments fail for a number of independent procedural and substantive reasons.

First, these very broad issues were not placed in issue in the Second Supplemental Pre-Hearing Order, and thus the developer was deprived of the opportunity to present

evidence to refute them.[53] Issues not raised in the pre-hearing order are excluded from consideration. *722 Main Street, LLC. v. Oxford*, No. 2021-11 (Mass. Housing. Appeals Comm. Mar.20, 2025) slip op. at 30, n.38; *O.I.B. Corp. v. Braintree*, No. 2003-15 (Mass. Housing. Appeals Comm. Mar. 27, 2006) slip op. at 6, n.6., *aff'd*, No. 2006-1704 (Suffolk Super. Ct. July 16, 2007).

Substantively, the argument that there is no regional affordable housing need is a mere assertion supported by no facts put into evidence. Passing reference was made to the idea that a logical region might be Cape Cod and the Islands, but there was no elaboration as to the need there. *See* Exh. 141, ¶ 13. In any case, it defies logic to assume that, given the overwhelming need that the Board describes on Nantucket, there is no need in the larger region. Included throughout the Board's argument is an appeal to Nantucket's unique situation as an isolated island. But if it should therefore be considered its own region, it has clearly shown that there is great need in that region. Determination of what is a proper region and of regional need requires careful analysis, which has not been provided here. *See Zoning Bd. of Appeals of Sunderland v. Sugarbush Meadow, LLC,* 464 Mass. 166, 173 (2013) ("The word 'region' is not defined in either the act or the regulations.… the HAC must exercise its discretion in determining the appropriate 'region.'").

With regard to the Nantucket's efforts to plan for and create affordable housing, we acknowledge that it has done a great deal of work.[54] Central to that work is its

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[53] The only issue listed in the Second Supplemental Pre-Hearing order which touches upon the issues raised in the Board's brief is in § V-4(i): "Whether the project as proposed meets the established local requirements to address affordable housing needs unique to Nantucket. *See* Nantucket Bylaws Appx., § A301-11, Affordable Housing Covenants." But "Covenant Housing is a program… for affordable homeownership up to 150 percent of AMI [Area Median Income]…." Exh. 141(e), p. 40; *see* Exh. 97. Even though this issue is listed on the order, there is no authority within Chapter 40B for this Committee to consider compliance with housing other than low or moderate income housing, the upper limit of which is 80 percent of AMI).

[54] The testimony of Municipal Housing Director Kristie Ferrantella is particularly compelling regarding both the housing need and the town's recent efforts. *See* Exh. 121, ¶¶ 3-58. We appreciate her work and the appeal from town counsel that "Nantucket stands as a model of proactive, community-supported affordable housing development, [which] has consistently chosen … creative solutions over excuses," Board brief, p. 23. But we also note that the town's own planning document describes the tension that is common in many Massachusetts communities: "…few on Nantucket openly oppose the concept of affordable housing. While some broad anti-affordability sentiment was expressed through the community engagement process for this HPP, it

Housing Production Plan (HPP), which was first adopted in in 2016 and revised in 2021. Indeed, in our first decision in this case we noted that it "is particularly strong." *Surfside Crossing I*, slip op. at 21. The Board notes that it "has been repeatedly certified by the Executive Office of Housing and Livable Communities over the past four years." Board brief, p. 20. But the HPP was not certified until after the application for a comprehensive permit was filed in this case. *See Surfside Crossing I*, slip op. at 21, n.24. Therefore, the Board cannot argue that its decision should be upheld pursuant to 760 CMR 56.03(1)(b) and 56.03(4)(f). Clearly, Nantucket has made progress in the last few years. "From 1985 through 2019, Nantucket hovered at just 1-2% on the SHI [Subsidized Housing Inventory]…, [but] in recent months [it has raised its] SHI percentage to 6.55%...."[55] Board brief, pp. 11, 7. But the project before us and the circumstance surrounding the Board's denial of the comprehensive permit must be considered as of the date of application in 2018.

Finally, the Board argues that there is "a critical and systemic flaw when this legislation [Chapter 40B] is applied to an expensive seasonal resort market such as Nantucket: market-rate units overwhelmingly become seasonal or investment properties, creating stark economic and social divisions within developments while completely failing to serve the year-round residents…." *Id.*, p. 22. If this is in fact the case, it is an issue of policy to be taken up by the General Court, not this Committee.

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is much more common for citizens to identify concerns about the scale, location, design or other characteristics of specific projects…. [Nevertheless,] there is a vocal segment of Nantucket's population that openly opposes the idea of constructing *any* additional housing, especially affordable housing." Exh. 141(e), p. 44, 45.

[55] "We now stand at 405 units, representing 6.55% of our year-round housing stock, and by the end of 2026, we are projected to reach 590 units. This trajectory puts us within striking distance of the critical 10% Safe Harbor [SHI] goal of 618 units that will provide permanent local control over our housing development." Exh. 141, ¶ 30.

## VI. CONCLUSION

Based upon review of the entire record and upon the findings of fact and discussion above, the Housing Appeals Committee concludes that the decision of the Board is not consistent with local needs. The decision of the Board is vacated, and Board is directed to issue an amended comprehensive permit that conforms to the application of Surfside Crossing, LLC, as modified, and as provided in the text of this decision and subject to the following conditions.

1. 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).

2. The comprehensive permit issued by the Board shall conform to the application submitted to the Board, as modified by the developer and by the following conditions.

3. The development, consisting of 156 total units, including 39 affordable units, shall be constructed substantially as shown on plans prepared by Bracken Engineering, Inc. (Exhibit 79) entitled "'Surfside Crossing,' a Proposed 40B Development in Nantucket, Massachusetts," dated February 15, 2018, revised through June 26, 2023 (including Exhibit 3, revision of February 28, 2018) and plans prepared by Workshop/APD (Exhibit 4) entitled Surfside Crossing, HAC Presentation, March 23, 2020.

4. The Board shall not include new, additional conditions.

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

6. The developer shall submit final construction plans for all buildings, roadways, stormwater management system, and other infrastructure to Nantucket town entities, staff

or officials for final comprehensive permit review and approval pursuant to 760 CMR 56.05(10)(b).

7. All Nantucket town 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 Nantucket. Submission of plans and materials to the Town for review or approval shall be to the appropriate municipal official with relevant expertise to determine whether the submission is consistent with the final comprehensive permit, such determination shall be made in an expeditious manner, consistent with the timing for review of comparable submissions for unsubsidized projects, and approval shall not to be unreasonably withheld. *See* 760 CMR 56.07(6)

8. 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.

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

(a) The developer shall provide a marked crosswalk and ADA compliant ramps across South Shore Road at its intersection with the proposed site driveway to provide a connection to the existing paved South Shore Road Bike Path and a pedestrian connection to the nearby NRTA bus stop located on Fairgrounds Road.

(b) Final plans shall show, and construction shall ensure, that all stormwater leaching structures (not including connecting piping) shall be set back at least one hundred feet from all wells on adjoining properties.

(c) Construction in all particulars shall be in accordance with all applicable local zoning and other by-laws in effect on the date of the submission of the developer's application to the Board (April 12, 2018), pursuant to 760 CMR 56.02: *Local Requirements and Regulations*, except those waived by this decision or in prior proceedings in this case.

(d) The subsidizing agency or project administrator may impose additional requirements for site and building design so long as they do not result in less

protection of local concerns than provided in the original design or by conditions imposed by this decision.

(e) 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.

(f) All construction shall be consistent with detailed construction plans and specifications reviewed and approved by the subsidizing agency.

(g) The Board and all other Nantucket town staff, officials, and boards shall promptly take whatever steps are necessary to ensure that building permits and other permits are issued to the applicant, without undue delay and in conformity with the standard permitting practices applied to unsubsidized housing in Nantucket, 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.

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

(i) This comprehensive permit is subject to the cost certification requirements of 760 CMR 56.00 and EOHLC Guidelines issued pursuant thereto.

This is a proposed decision issued pursuant to 760 CMR 56.06(7)(e)(9) and G.L. c. 30A, § 11(7). The parties may file objections and argument in writing by March 25, 2026.

Housing Appeals Committee

Date: March 11, 2026

__PROPOSED DECISION__
Shelagh A. Ellman-Pearl, Chair

_____

Lionel G. Romain

_____

James G. Stockard, Jr.

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Werner Lohe, Presiding Officer