COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

100 BURRILL STREET, LLC

v.

SWAMPSCOTT ZONING BOARD OF APPEALS

No. 05-21

DECISION

June 9, 2008

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HOUSING APPEALS COMMITTEE

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DECISION

I. PROCEDURAL HISTORY

In January 2005, 100 Burrill Street, LLC, submitted an application to the Swampscott Zoning Board of Appeals for a comprehensive permit pursuant to G.L. c. 40B, §§ 20-23 to build a condominium of twelve units of mixed-income affordable housing on a quarter-acre site at the corner of Burrill Street and Rock Avenue in Swampscott. Exh. 1, § I-1; Pre-Hearing Order, § II-1 (Oct. 19, 2006). The housing would be funded under either the Housing Starts program of MassHousing (Massachusetts Housing Finance Agency) or the New England Fund of the Federal Home Loan Bank of Boston. Exh. 1, § I-2. On October 28, 2003, the Board denied the application, and filed its decision with the Swampscott Town Clerk. Exh. 1. The developer appealed the decision to this Committee.

In early 2006, the parties engaged in mediation, which was unsuccessful. The Board then filed a Motion to Dismiss, alleging that the developer failed to meet the application requirements contained in 760 CMR 31.01(1)(a) through (c). The hearing officer denied that motion. Ruling on Board's Motion to Dismiss (Aug. 10, 2006). Thereafter, pursuant to

the Committee's regulations, the parties negotiated a Pre-Hearing Order,[1] which was issued by the presiding officer; prefiled testimony was received from thirteen witnesses;[2] a site visit and three days of hearings to permit cross-examination of witnesses were conducted; and post-hearing briefs were filed.[3] Based upon the facts and analysis below, we vacate the Board's decisions and order it to issue a comprehensive permit.

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1. In the Pre-Hearing Order, the parties stipulated that the town of Swampscott has not satisfied any of the statutory minima defined in G.L. c. 40B, § 20, thus foreclosing the defense that its decision is consistent with local needs as a matter of law pursuant to that section. Pre-Hearing Order, §§ II-2, II-6 (Oct. 19, 2006). They also stipulated that the applicant had satisfied the application requirements contained in 760 CMR 31.01(1), as the hearing officer had ruled in denying the Board's Motion to Dismiss, though the Board reserved it right to appeal. Pre-Hearing Order, §§ II-3 through II-5, III-1(a).

2. Several issues were raised with regard to witnesses. First, the Board objected to the prefiled testimony of Timothy Wensus on the basis that he was not listed in the Pre-Hearing Order. Because the testimony could not have been identified when the witness list was prepared and for other reasons argued by the developer, the presiding officer's ruling that the testimony should not be excluded is correct. See Tr. I, 7; Appellant's Reply to... the... Opposition to Appellant's Motion to File ... Testimony..., (filed Mar. 8, 2007). In addition, the Board argues that Mr. Wensus' education and experience are not sufficient to qualify him as an expert in this case. He has a graduate degree in fire protection engineering, experience as a firefighter, and employment experience as a fire safety engineer. Exh. 40, ¶¶ 3-5; also see Tr. I, 110, 123-126. His testimony is within his field of expertise and will aid the Committee as fact finder. See *Simon v. Solomon*, 385 Mass. 91, 431 N.E.2d 556, 566, (1982). Thus, Mr. Wensus' testimony (Exh. 40) was properly admitted into evidence.

Second, the Board moved to strike approximately two dozen portions of the rebuttal testimony of the developer's principal. See Motion to Strike... (filed March 5, 2007). We note that the direct testimony of this witness is replete with unsubstantiated opinions, and agree that portions of his rebuttal testimony are of limited relevance, state opinions that have little or no weight concerning documents which speak for themselves, are poorly worded, or for other reasons might be struck in a trial before a court or a jury. But, with the exceptions noted by the hearing officer, their admission into evidence under the less strict rules governing administrative proceedings does not prejudice the Board—this Committee is experienced in evaluating such testimony. The hearing officer's ruling with regard to this testimony was a proper exercise of her discretion. See Tr. I, 7-8; Exh. 36.

3. An abutter to an abutter to the development site moved to intervene pursuant to 760 CMR 30.04. His motion was denied, though he was permitted to participate in the hearing as an interested person pursuant to 760 CMR 30.04(4). Ruling on Motion to Intervene (Jun. 8, 2006).

The Committee issued two proposed decisions, and the objections and arguments submitted in response were provided to Committee members for their deliberations. See 760 CMR 30.09(5)(h), 760 CMR 56.06(7)(e)(9). The hearing officer, who presided over the evidentiary sessions and site visit, also participated in the deliberations of the Committee.

II. MOTION TO DISMISS

In November 2007, the Board filed a second motion to dismiss arguing that new evidence that the developer's principal (the sole manager of the limited liability corporation) had filed a Chapter 13 voluntary bankruptcy petition "raise[s] significant substantial questions regarding the Applicant's current and future ability to obtain site control...."[4] Appellee's Motion to Dismiss, p. 6 (filed Nov. 28, 2007).

Early in this proceeding the developer established that it has control of the development site. Exh. 9; also see Ruling on Board's Motion to Dismiss, pp. 3-4 (Aug. 10, 2006). In a manner strikingly similar to that in the case of *Paragon Residential Properties, LLC v. Brookline*, the Board continues to press its argument that the developer has not met the site control requirement found in 760 CMR 31.01(1).[5] In that case, we discuss in detail the relevance of bankruptcy in circumstances under which site control is based upon a purchase and sale agreement, and a part of that decision is particularly germane here:

> [W]hether the Bankruptcy Court will permit the sale to occur involves complex factual and legal issues that are not and should not be before the Committee. ... See *Bay Watch Realty Trust v. Marion*, No. 02-28, slip op. at 5 (Mass. Housing Appeals Committee Dec. 5, 2005). Furthermore, this Committee has previously ruled that, "[s]o long as there is no deception involved, the final structure of the business entities that ultimately execute that agreement is of little importance. It is for this reason, among others, that our regulations permit transfer of permits on a fairly routine basis. See 760 CMR 31.08(5)...." *Delphic Associates, LLC v. Middleborough*, No. 00-13, slip op. at 4 (Mass. Housing Appeals Committee July 17, 2002), [*aff'd* 449 Mass. 514, 870 N.E.2d 67 (2007)]. Moreover, the possibility that a 50 percent ownership interest in [the developer] may be conveyed to others does not affect the determination of site control under the Committee's regulations. Under 760 CMR 31.01(3), [the developer] has met the requirement of "a preliminary determination in writing by the subsidizing agency that the applicant has sufficient interest in the site" and would also meet the standard that "the applicant, or any entity 50% or more

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4. The Board asserts that site control is a jurisdictional requirement. Appellee's Motion to Dismiss, pp. 1, 5, 9-10 (filed Nov. 28, 2007). It is not. *Town of Middleborough v. Housing Appeals Committee*, 449 Mass. 514, 520-521, 870 N.E.2d 67, 74 (2007).

5. The Committee's regulations were amended effective February 22, 2008. The new section that corresponds to section 31.01(1) is virtually identical. See 760 CMR 56.04(1).

> of which is owned by the applicant, owns a 50% or greater interest, legal or equitable, in the proposed site, or holds any option or contract to purchase the proposed site...." *Id.* In either instance, the circumstance "shall be considered by the Board or the Committee to be conclusive evidence of the applicant's interest in the site." *Id.*

Paragon Residential Properties, LLC v. Brookline, No. 06-14, slip op. at 11 (Mass. Housing Appeals Committee Mar. 26, 2007). In light of this and the Supreme Judicial Court's expansive interpretation that the developer need not establish "a present title in the site," we conclude that the developer's showing of site control has not been impaired. See *Hanover v. Housing Appeals Committee*, 363 Mass. 339, 378, 294 N.E.2d 393, 420 (1973). The Board's Motion to Dismiss is denied.

III. LOCAL CONCERNS

When the Board has denied a comprehensive permit, the ultimate question before the Committee is whether the decision of the Board is consistent with local needs. Under the Committee's regulations, the developer may establish a *prima facie* case by showing that its proposal complies with state or federal requirements or other generally recognized design standards. 760 CMR 31.06(2), 760 CMR 56.07(2)(a)(2). The burden then shifts to the Board to prove first, that there is a valid health, safety, environmental, or other local concern that supports the denial, and second, that such concern outweighs the regional need for housing. 760 CMR 31.06(6); 760 CMR 56.07(2)(b)(2); also see *Hanover v. Housing Appeals Committee*, 363 Mass. 339, 365, 294 N.E.2d 393, 413 (1973); *Hamilton Housing Authority v. Hamilton*, No. 86-21, slip op. at 11 (Mass. Housing Appeals Committee Dec. 15, 1988).

The local concerns raised by the Board in the Pre-Hearing Order were described broadly as concerns about "the environment," "the historical or archeological importance of the site," and other concerns including, but not limited to, parking, access for emergency vehicles, vehicular sight distance at the development's entrance, and "design and/or density" issues. Pre-Hearing Order, §§ IV-3, IV-5. Those issues are articulated more precisely in the Board's brief as the "overwhelming ...mass and density" of the

building, "parking and traffic safety issues," and "fire fighting safety issues."[6] Board's Brief, p. 2; also see Developer's Brief.

A. Factual Overview

The site of the proposed housing is in a residential neighborhood in Swampscott at the corner of Burrill Street and Rock Avenue. It has been described as a "superb" site for affordable housing in a central location within a quarter mile of not only the public library, the town municipal building, the police station, and the fire station, but also a commuter rail station and the beach. Tr. II, 62; Exh. 24, ¶¶ 21, 32; Exh. 31, ¶ 16; Exh. 31-H. Burrill Street is a collector street that connects Massachusetts Route 128 to U.S. Route 1A, and Rock Avenue is a side street. Board's Brief, p. 4.

The immediate neighborhood consists of predominantly single-family and two-family homes with some three-family and non-residential uses. Exh. 1, p. 5, ¶ 6; 33, ¶ 12; 34, ¶ 10; Tr. I, 37-43, 77, 80, 87-88. They are typically two and a half story buildings. Exh. 30-D; 30-I; 30-J; 30-K; 30-L; 30-M; 30-N; 30-Q; 30-R; 30-S; 30-T; 30-U; 33, ¶¶ 12, 13; 34, ¶¶ 10, 11. A half block from the site, at the corner of Burrill and New Ocean Streets, there is a three-story, flat-roofed building. Exh. 31-B; 30-C; 30-G; 30-H; 30-N; 30, ¶ 28; see Exh. 2 (Locus Map); also see Exh. 33, ¶ 15. The site itself is approximately one-quarter acre, and on it is an unused wooden church and its attached rectory. See Exh. 2, sheet 1.

The developer proposes to replace the existing building with a three and one half story building containing twelve condominium units and a partially-below-grade garage. Board's Brief, p. 4; Exh. 1, § I-1; Exh. 3, sheets A-7 to A-10; Tr. I, 33. The front entrance to the building will be on Rock Avenue, on what is referred to as the eastern side of the site, and the entrance to the garage will be on the north side of the site on Burrill Street. Board's Brief, p. 4; Exh. 2, sheet 2.

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6. Issues not briefed are waived. See *An-Co, Inc. v. Haverhill*, No. 90-11, slip op. at 19 (Mass. Housing Appeals Committee Jun. 28, 1994), citing *Lolos v. Berlin*, 338 Mass. 10, 13-14 (1958).

B. Building Mass

The Board first argues that the mass of the proposed building—it is "effectively ... a four-story building, having four levels plus the roof, due to the exposed portion of below-grade garage"—and its small setbacks from both the street and abutting houses "overwhelms the site," and "is completely oversized in relation to the neighborhood." Board's Brief, p. 5, 9, 12.

The proposed building is indisputably large. It is a uniformly rectangular three-and-one-half-story building with a below-grade garage. Exh. 3, sheets A-7 to A-10; Tr. I, 33. Its average roof height is about 38 feet above grade in the front of the building, and the highest element is about 47 feet. Exh. 3, sheet A-7. It is four feet higher at the rear. Exh. 3, sheet A-8. The building is about 80 feet wide and 65 feet deep. Exh. 2, sheet 2; 3, sheet A-1.

As indicated above, our initial inquiry is as to whether the developer sustained its burden of establishing a *prima facie* case with respect to the design of the building as its massing relates to the surrounding neighborhood. 760 CMR 31.06(2). Although the issue of massing was not presented as clearly as it might have been by either party during the hearing, it was definitely put into issue in the Pre-Hearing Order, which included among issues that of whether "the design and/or density of the Project will ... pose a serious health or safety issue to the residents or the public." Pre-Hearing Order, § IV-3(c)(iv).

The evidence offered by the developer was the brief and general testimony of its architect. This expert testified that his firm was hired "to create a design that fit the diverse character of the area and was within site layout parameters that [he] had to work with.... In addition to receiving a site plan of existing conditions, [he] surveyed the neighborhoods and created an original concept.... The building footprint was derived largely by the parking requirement.[7] [The firm] wanted the smallest footprint that would

7. Reconciling overall building design with parking requirements is typically one of the more difficult tasks in urban architecture, and we do not draw an inference from this testimony that parking considerations overshadowed all other design considerations--including massing and the relationship of the building to the existing neighborhood.

allow [it] to fulfill the parking requirements and an exterior in keeping with the Town Hall, Fire Station, and Public Library.... All of the new building concept plans have open space consistent with the surrounding neighborhood." Exh. 25, ¶¶ 6, 10. He concluded that he "[did] not believe that the project presents any valid local health, safety, environmental, design, open space, or planning concerns." Exh. 25, ¶ 5.

Under our precedents, "a *prima facie* case may be established with a minimum of evidence." *Canton Housing Authority v. Canton*, No. 91-12, slip op. at 8 (Mass. Housing Appeals Committee Jul. 28, 1993). For example, "it may suffice for the developer to simply introduce professionally drawn plans and specifications." *Tetiquet River Village, Inc. v. Raynham*, No. 88-31, slip. op. 9 (Mass. Housing Appeals Committee Mar. 20, 1991).

The evidence before us is similar to that in *Canton Housing Authority*, in which we found that a *prima facie* case had been established even though "[t] he evidence presented by the Housing Authority during its case in chief was not extensive" because, in part, "it was clear that the architect who designed the project visited and studied the site and then designed a building that conforms to Executive Office of Communities and Development (EOCD) design requirements and would work well in the neighborhood." *Canton Housing Authority, supra*, slip op. at 6.

On the other hand, the facts before us are distinguishable from those in *Tetiquet River Village*, where we ruled that the developer had not established a *prima facie* case with regard to a sewage pumping station. In that case, testimony from an engineer "was limited primarily to the issue of cost [and] [h]e did not testify that he was involved in the design of the system or that he had reviewed any design to insure that it is feasible or meets minimum standards." *Tetiquet River Village, Inc., supra*, at 10-11. In addition, "serious questions remain[ed]... about exactly what system [had] been proposed and whether sufficient design work [had] been done to ensure that it [would] function in a satisfactory manner...," and other plans had not been signed by a registered architect as required by our regulations. *Id.*, at 11-12.

We find that the developer has established a *prima facie* case that the proposed development conforms to generally recognized design standards with regard to building massing in relation to the surrounding neighborhood.

The Board responded with testimony from its expert housing consultant, who described the building and neighborhood in detail, and concluded that that "the project would be overwhelming for the site and the neighborhood." Exh. 30, ¶¶ 31, 49, 51, 26-54; Tr. II, 66.

The developer challenged this witness' credentials as an expert. We find, however, that his education, professional memberships, teaching experience, and thirty-five years of hands-on experience in development, financing, construction, and management of commercial and residential real estate make him a highly qualified expert in affordable housing development. Exh. 30, ¶¶ 2-17; Tr. II, 45. Since an expert need not be a specialist in the particular area in which he or she offers an opinion, it is permissible for us to consider this opinion with regard to massing. *Adoption of Hugo*, 428 Mass. 219, 233-234, 700 N.E.2d 516, 525-526 (1998).

That does not, however, determine the credibility or weight that we should assign to this witness' testimony or to his conclusions. In fact, we do not find his ultimate opinion convincing because, with regard to massing, it is largely conclusory.[8] He provided little in the way of comparative dimensions or volumes, few generally accepted

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8. As noted above, this issue of massing was described in the Pre-Hearing Order as "the design and/or density of the project." Pre-Hearing Order IV-3(c)(iv). The witness' testimony that the calculated density of the proposed development is 51.50 units per acre, compared to the existing density of the neighborhood of 14.66 units per acre, while specific in a numerical sense, has little probative value. "Density... is seductively easy to quantify, and yet quantification does not provide an objective answer to the question of what density is appropriate." See *CMA, Inc. v. Westborough Zoning Board of Appeals*, No. 89-25, slip op. at 27 (Mass. Housing Appeals Committee Jun. 25, 1992); also see *Franklin Commons Ltd. Partnership v. the Franklin*, No. 00-09, slip op. at 7 (Mass. Housing Appeals Committee Sep. 27, 2001). That is, density refers to "the impact of the development on factors ranging from municipal services and traffic to aesthetics and overall livability of the surrounding neighborhood." *Hastings Village, Inc. v. Wellesley*, No. 95-05, slip op. at 20 (Mass. Housing Appeals Committee Jan. 8, 1998), *aff'd* No. 00-P-245 (Mass.App.Ct. Apr. 25, 2002)(2002 WL 731689). Therefore, to prove a legitimate local concern with regard to density it is not enough to simply refer to the level of density in the abstract, but rather there must be proof with regard to the impact of the development on particular "factors" in the surrounding neighborhood or the community at large.

design standards, and no graphic illustrations to elucidate his testimony. We find that the Board has not presented sufficient credible evidence to establish a local concern with regard to building massing that outweighs the regional need for affordable housing.

C. Parking and Traffic Safety

The second issue raised by the Board concerns parking and traffic safety. The proposed development will provide sixteen below-grade, indoor parking spaces and two outdoor spaces. Exh. 3, sheet A-1, Exh. 31, ¶ 48. Vehicles will enter and exit the site using Burrill Street. See Exh. 3, sheet A-8. Burrill Street is a fairly heavily traveled collector street. Exh. 31, ¶ 25. As noted above, the immediate neighborhood consists of predominantly single-family and two-family homes with some three-family and non-residential uses. Some of the nearby homes have off-street parking, but there is also a considerable amount of public on-street parking. Exh. 24, ¶ 21; 30-D; 30-U. On Rock Avenue, approximately a dozen spaces are located within 100 feet of the site. Exh. 24, ¶ 16, 20. Parking is not allowed on Burrill Street immediately adjacent to the development site, but is available on the opposite side of the street. Exh. 12, p. 1; 24, ¶17; 24-A. Loading and unloading of vehicles will be possible at the front door on Rock Avenue, at the back door from Burrill Street, or in the garage. Exh. 24, ¶ 22.

The developer's traffic engineer examined the design of site access, evaluated sight distances to determine whether vehicles will be able to enter and exit from the site safely, and studied traffic impacts. Exh. 12, 20,27. He concluded that the driveway will operate safely, and that the expected nine to eleven additional vehicle trips resulting from the development during the peak traffic hour will not affect traffic operations in the area.[9] Exh. 12, p. 4; 20, p.2; 27, ¶ 5, 6; 37, ¶ 23. Thus, the developer has established a *prima facie* case that with regard to parking and traffic safety the proposed development complies with generally recognized design standards.

In response, the Board raised a number of interrelated concerns about parking and safety, and presented its own traffic expert to support its position. It is important to note

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9. The new development will result in an average of 106 additional vehicle trips per day. Exh. 20, p.1. Burrill Street currently carries between 3,500 and 4,000 vehicles per day. Exh.31, ¶ 22.

at the outset that among the various points made by the Board, the only question that bears serious scrutiny is whether cars will be able to exit safely onto Burrill Street. That is, other, lesser concerns were raised in the Board's brief, but they are significant only to the extent that they support the Board's primary argument. For instance, in its brief the Board states that "additional safety hazards would be created by the lack of loading and unloading areas... and the lack of a trash-collection/pick-up area." In fact, the Board did not go on to argue that this is a significant concern in its own right, but rather only that this would cause large vehicles to stop on Burrill Street, which in turn "would impair sightlines of vehicles exiting the garage." Board's Brief, p. 19. Similarly, the Board argued, "The garage design shows sixteen extremely tightly packed parking spaces." Board's Brief, p. 17. By itself, this is only a matter of convenience and not a local concern which would support the denial of a permit. See *Cirsan Realty Tr. v. Woburn*, No. 01-22, slip op. at 11 (Mass. Housing Appeals Committee Jun. 11, 2003); *Hastings Village, Inc. v. Wellesley*, No 95-05, slip op. at 27-29 (Mass. Housing Appeals Committee Jan. 8, 1998); *Canton Property Holding, LLC v. Canton*, slip op. at 17-18 (Mass. Housing Appeals Committee Sep. 20, 2005), *aff'd on other grounds and remanded* No. SJC-10057 (April 1, 2008). It has relevance to the larger issue, however, since the Board argued that because of it, some drivers "will likely back out onto the street." Board's Brief, p. 17. In a similar vein, the Board cannot be heard to argue that the absolute number of parking spaces is inadequate, since in fact the proposal provides the minimum of 1.5 parking spaces per housing unit that is required by the Swampscott Zoning Bylaw. Exh. 21, § 3.1.1.3 (p. 18).

The Board's expert drew our attention to a number of additional facts that may affect the safety of cars exiting onto Burrill Street. First, the existing demand for parking in the area, though it varies by time of day and by season and has not been quantified exactly, is already great.[10] Exh. 31, ¶ 47. This is because in addition to residences, there are the public facilities described above and a commuter rail station and a beach within a quarter mile of the site. Exh. 31, ¶¶ 16-18, 46. The proposed entrance to the site is 140

10. This is corroborated by residents of the area. Exh. 33, ¶¶ 23-28; 34, ¶¶ 21-22, 26-28, 33.

feet south of a signalized intersection of Burrill Street and Route 1A. Exh. 31, ¶ 21. This intersection has one of the highest frequency of car crashes in Swampscott.[11] Exh. 31, ¶ 31. Currently, during high-volume times, traffic stopped at the traffic signal queues up to or beyond the proposed entrance. Exh. 31, ¶ 32-33. No parking is permitted on Burrill Street adjacent to the site, and to discourage rail commuters from parking, it is restricted on the opposite side to 30 minutes from 6:30 a.m. until 9:30 a.m. Exh. 31, ¶ 35. Nonetheless, because the "no-parking" restriction is not well enforced, it is common for cars to park illegally on Burrill Street directly in front of the site. Exh. 32, ¶¶ 42, 45; also see Tr. III, 32-33.. The expert concluded that such illegal parking poses a safety hazard by limiting visibility when cars are exiting the proposed housing development.[12] Exh. 31, ¶¶ 34, 43. There will be a similar effect if vehicles stop temporarily on Burrill Street to load and unload. Exh. 31, ¶¶ 57-58, 64.

The Board's expert also considered how much parking demand would be generated by the proposed development. He indicated that based upon nationwide Institute of Traffic Engineers statistics, the average peak parking demand in suburban condominium developments is 1.46 vehicles per dwelling unit, and that an "85th percentile peak parking demand" (which would be exceeded less than 15% of the time on any given day) is 1.68 vehicles per unit. Exh. 31, ¶ 49. Based on this, he concluded that the Swampscott zoning by law requirement of 1.5 spaces per unit "may understate

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11. A nearly tautological argument might be made that in a heavily traveled corridor such as this, any increase in traffic at all or any increase in parking will lead to an incremental increase in the number of crashes along the corridor itself. The Board's expert minimized the significance of such effects, and it was not briefed in detail by the Board. See Tr. II, 103, 104; *An-Co, Inc. v. Haverhill*, No. 90-11, slip op. at 19 (Mass. Housing Appeals Committee Jun. 28, 1994)(issues not briefed are waived), citing *Lolos v. Berlin*, 338 Mass. 10, 13-14 (1958); also see *Page Place Apts., LLC v. Stoughton*, No. 04-08, slip. op. at 10 (Mass. Housing Appeals Committee Feb. 1, 2005)(additive effects of a relatively small development on an already congested area are speculative). Therefore, we will consider only the more significant question of the safety of cars exiting the site.

12. The expert notes that the hazard may be exacerbated if residents back out of the garage. Since the spaces in the garage are not angled, we see no evidence that this is particularly likely. Exh. 3, sheet A-1; cf. Tr. II, 78. In fact, the residents of the new development may well be less likely to back out of an underground garage than residents of existing homes are to back out of their driveways.

parking demands," and that because visitors to the development will not normally have access to the garage, the development will increase on-street parking demands in the vicinity of the site. Exh. 31, ¶ 50, 52, 53, 56; Tr. II, 103. This opinion that there will be an increase in parking demand is straightforward, but the expert's opinion of the ultimate effect of this less clear. Though the implication of his testimony with regard to demand is that it will contribute to a hazard, the testimony itself is somewhat equivocal: "To the extent that on-street parking occurs on either side of the project driveway, it will impair sight lines of motorist leaving the garage and will constitute a potential public safety hazard." Exh. 31, ¶ 55; also see Exh. 31, ¶¶ 61, 62, Tr. II, 103.

We have carefully considered the logic and credibility of all of the testimony of the town's expert. Some of his postulations are debatable. For instance, even though by most standards, this neighborhood, with its commuter rail and bus service, would be more accurately described as semi-urban than suburban, he defends his use of nationwide suburban parking demand statistics. Exh. 31, ¶ 51; Tr. II, 101; cf. Exh. 37, ¶¶ 16-17. Despite some reservations, however, we accept his preliminary conclusions, first, that illegal parking or short-term stopping will pose some degree of hazard to cars exiting the site, and second, that the proposed development will increase on-street parking demand in the vicinity of the site. See Exh. 31, ¶ 53, 56; Tr. II, 103.

But we conclude that there is not sufficient evidence to prove the proposed development will create a hazard great enough to outweigh the regional need for affordable housing. We are not persuaded that the increased risk here is significant. As the developer's expert noted in his rebuttal testimony there are many other residences that park in driveways off of Burrill Street in much the way the proposed development's residents will. Exh. 37., ¶ 7. In fact, his opinion is that "the proposed driveway [will] operate more safely than a majority of the existing driveways along Burrill Street." *Id.* That is, while it will be unusual for cars to back out of the proposed development's garage, that is the common practice with regard to many adjacent driveways, where backing and other maneuvering is routine due to tandem parking of two or three cars in driveways. Exh. 27, ¶ 14. Similarly, trash trucks stopping in front of the proposed development will create no more of a hazard than they currently do stopping in front of

houses on the street. Thus, the Board has not proven that the hazard that will be created is significant.

Further, there is much that the Board or the town can do to minimize traffic hazards. If deliveries from Burrill Street are deemed a truly serious problem, the no-parking area adjacent to the site can be changed to "no-stopping," which would require that furniture and other deliveries be made through the front door on Rock Avenue. Even simpler solutions may address much of the problem. Part of the reason for the current illegal parking on Burrill Street is that the "no-parking" sign is incorrectly placed. Tr. II, 88. This should be corrected.[13] In addition, even though the street is only 30 feet wide, the yellow double line separating the lanes of oncoming traffic is in the exact center of the street. Tr. II, 89; Exh. 31, ¶ 19. As suggested by the Board's expert, it should be placed off-center to provide a visual cue that will strongly discourage illegal parking in the travel lane adjacent to the site. See Tr. II, 89.

D. Firefighting Safety

The final issue raised in this case is fire safety, primarily whether there will be adequate access to the building for fire fighting.[14] The developer introduced testimony from two expert witnesses—a highly qualified professional engineer and fire safety expert and a second fire protection engineer, who also had had extensive hands-on fire fighting experience. See Exh. 28, 38, 40; also see n. 2, above. The first expert testified that the proposed development "more than adequately satisfies the state's criteria for fire apparatus access and access to exits." Exh. 28, ¶ 9. He further indicated that no parking restrictions are required to ensure that access. *Id.* Finally, he noted that although the design is for a

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13. Since the concern here is public safety, we are not at all persuaded by the Board's argument that "more vigorous enforcement of the parking restrictions would only increase the scarc[ity] of parking." See Board's Brief, p. 20.

14. One of the Board's experts briefly raised a concern that "the project may constitute an 'exposure hazard' to abutting buildings, mean[ing] that if the fire escapes form the windows of the building and overlaps onto the side of the building , it can expose other buildings to fire and heat hazards." Exh. 35, ¶ 31. The developer's expert responded in equally general terms that the building will be as safe as any other in Massachusetts. Exh. 38, ¶ 6; also see Exh. 40, ¶ 15. Neither party addressed this issue fully, and we conclude that the Board has not satisfied its burden of proving that "exposure hazard" is a local concern that outweighs the need for affordable housing.

wood-frame building, it includes appropriate fire-resistance-rated construction and an automatic sprinkler system. *Id.* This is sufficient to establish the developer's *prima facie* case with regard to fire safety.

The Board responded with testimony from the chief of the Swampscott Fire Department and from its fire prevention officer. Their most significant concerns were due to overhead electric utility wires on Burrill Street and Rock Avenue, on-street parking on Rock Avenue, and limited building setbacks from adjacent properties. See Exh. 32, 35; Board's Brief, p. 21. Much of this testimony addressed the desirability of having access to the roof to fight a fire. See Exh. 32, ¶¶ 34-36. And the focus of the testimony was on access using the fire department's large ladder truck. See e.g., Exh. 32, ¶ 36. The chief also discussed the use of ground ladders, though he indicated that they are "generally used as back-up to the aerial ladder, and are used for additional escape routes." See Exh. 32, ¶ 37. The fire safety officer elaborated that his opinion was that "narrow setbacks [would] compromise the ability to use ground ladders" on the sides of the building away from the streets. Exh. 35, ¶ 25.

The fire department uses an aerial ladder truck with a tiered ladder that extends to 93 feet. Exh. 32, ¶¶ 29-30. To evaluate the use of this truck and ladder, a "feasibility test" was conducted by the Swampscott Fire Department using the truck and scaffolding built by the developer to indicate the location of the gutter line on the proposed building.[15] See Exh. 32, ¶¶ 47-57; 35, ¶ 13. Both the fire chief and the fire safety officer carefully analyzed the situation relying on the test and their study of the site and the design for the proposed development. See Exh 32, 35.

With regard to access from Burrill Street, it was apparent that aerial "access... could not be accomplished" due to the position of the electrical wires. Exh. 32, ¶ 62. This conclusion was not explicitly disputed by the developer's experts, and we accept it. Cf. Exh. 38, ¶ 3. But with regard to access from Rock Avenue, although it is readily apparent that the chief and fire safety officer have a basis for concern, the actual results of

15. At the Rock Avenue side, the gutter line is between 28 and 35 feet above ground level and the top of the roof nearly 50 feet above ground level. Exh. 3, sheet A-7;1 Exh. 32, ¶ 19.

the feasibility test and analysis were inconclusive.[16] The chief testified that aerial access "was obtained only after many maneuvers... [with the] truck... positioned parallel to and partially on the sidewalk, and under the utility wires." Exh. 32, ¶¶ 54, 55. He clearly preferred to approach the building with no cars on the street so that the truck could be maneuvered immediately adjacent to the sidewalk, and testified that if even one car had been parked on Rock Avenue, "it would have been extremely difficult, and possibly impossible, to reach the roof...." Exh. 32, ¶ 58; see Exh. 32, ¶ 30. The fire chief's ultimate conclusion is similarly indefinite: "In my opinion,... the project may present serious fire safety issues...." Exh. 32, ¶ 79. The fire protection officer agreed with the chief's analysis, and his conclusion was slightly less equivocal: "the project presents serious fires safety issues...." Exh. 35, ¶ 34. His further opinion was that "the fire department's ability to effectively fight a fire at the project would be largely dependent on the project's interior systems (sprinklers and standpipes)."[17] Exh. 35, ¶ 36.

The developer made a number of points in response. First, one expert noted that the minimum requirement under state fire prevention regulations is that there be paved access for a fire truck on one side of a building. Exh. 28, ¶ 9. Second, with regard to parked cars, he noted that fire departments routinely cope with such situations.[18] Exh. 28, ¶ 9. In rebuttal testimony, he analyzed the width of the both Rock Avenue and Burrill Street in detail, and they concluded that both provide access in accordance with nationally recognized standards. Exh. 38, ¶¶ 4-5. More important, the developer's second expert

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16. The developer alleges that the feasibility test was not conducted in the manner agreed to by the parties. Exh. 36, ¶ 18; Tr. I, 65-72. This allegation was not explored in detail during the hearing, and therefore we have not relied on it in our review of the evidence.

17. He also opined that because the proposed building is "so different from... other buildings in the neighborhood, the aerial and ground ladder techniques that the Fire Department would generally use on other building in this neighborhood would likely not be available." Exh. 35, ¶ 25. This is of little relevance if other techniques are available.

18. If we believed that a no-parking area for fire access in front of the building on Rock Avenue were critical, we could impose it as condition. We do not believe such a condition is necessary, but if, after the building is completed, the town continues to believe that such a zone is desirable, it may create one by parking regulation. We also note that it is the town's responsibility to ensure that illegal parking does not impede access by emergency vehicles. *Life Savers Ministries, Inc. v. Chelmsford*, No. 02-18, slip op. at 8 (Mass. Housing Appeals Committee Aug. 2, 2004), *aff'd*, No. 04-03374 (Middlesex Super. Ct. Feb. 7, 2006).

reviewed possible fire fighting procedures in considerably greater detail. See, e.g., Exh. 40, ¶¶ 9, 11, 16. Most of his testimony addressed the fire chief's contention that aerial access was critical and that ground ladder access only secondary. He stated that that contention "is not entirely true," and that in fact "each fire scene is a unique situation to which the proper tools must be applied..., [that] [g]round ladders and aerial ladders should be used in concert," and that in some cases an aerial ladder is not necessary. Exh. 40, ¶ 12. He agreed with the chief that the department's ground ladders have a working height of 30 to 32 feet. Exh. 40, ¶ 8. He then went on to state his opinion not only that ladders can be deployed on all sides of the building if a "beam raise" technique is used in difficult areas, but also that even though they are more dangerous, "ground ladders can generally be deployed much faster than an aerial ladder...," and that the building's highest windows are within reach of ground ladders, allowing for rescue operations to take place during the initial stages of an incident. Exh. 40, ¶¶ 11, 13, 14. He also stated his opinion that while the feasibility test may have shown that direct access to the roof with the aerial ladder requires a difficult maneuver; such ladders are often also used for "master stream operations." Exh. 40, ¶ 16. Admittedly, such operations are defensive operations that are used only when "an interior fire attack is no longer possible" and there are no firefighters in the building. *Id.* But they are important for protecting surrounding buildings, and because the aerial ladder "is typically located far away from and much higher than the building" and the water sprayed down onto the building, the ladder truck could effectively be located in the center of either Rock Avenue or Burrill Street. *Id.* Finally, he suggested that difficulties presented by the site, including limited roof access, can be dealt with more effectively if the Fire Department documents and addresses those conditions using a "pre-planning process." Exh. 40, ¶ 10.

We have reviewed the testimony of the experts carefully and after comparing their analysis and considering their credibility, we find that there is aerial access to the building and its roof, albeit with difficulty, on one side of the building from Rock Avenue. We find that using ground ladders, there is access to all sides of the building, including to all windows on the highest occupied floor (the third floor). We conclude that the local

concern with regard to fire fighting access to the building, while legitimate, is insufficient to outweigh the regional need for affordable housing.

IV. 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 Swampscott Board of Appeals is not consistent with local needs. The decision of the Board is vacated and the Board is directed to issue a comprehensive permit as provided in the text of this decision and the conditions below.

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

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

(a) The development, consisting of 12 total units, including 3 affordable units, shall be constructed substantially as shown on plans by Parsons and Faia, Inc. (Proposed Site Plan, March 31, 2004) (Exhibit 2, sheet 2) and architectural plans by Pitman & Wardley, LLC, Architects (plans entitled 100 Burrill Street Condominiums, June 2, 2005, rev'd July 11, 2005) (Exhibit 3).

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

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

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

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

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

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

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

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

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

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

Housing Appeals Committee

Date: June 9, 2008

Werner Lohe, Chairman

Joseph P. Henefield

Marion V. McEttrick

James G. Stockard, Jr.

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