

HOUSING APPEALS COMMITTEE
HILLTOP PRESERVE LTD. PARTNERSHIP, Appellant

Decision # **No. 00-11**
Appellant: **HILLTOP PRESERVE LTD. PARTNERSHIP, Appellant**
Appellee: **WALPOLE BOARD OF APPEALS, Appellee**
Date: **April 10, 2002**
DECISION

I. PROCEDURAL HISTORY

On March 16, 2000, the Hilltop Preserve Limited Partnership submitted an application to the Walpole Zoning Board of Appeals for a Comprehensive Permit pursuant to G.L. c. 40B, s.s. 20-23 to build mixed-income affordable rental housing near Route 1 in Walpole, to be financed under the Massachusetts Housing Finance Agency (MHFA) 80/20 or the Expanding Rental Affordability (ERA) program. After due notice and public hearings, the Board unanimously denied the permit on October 4, 2000. From this decision the developer appealed to the Housing Appeals Committee. The Committee held a conference of counsel, conducted a site visit, and held six days of de novo evidentiary hearing, with witnesses sworn, full rights of cross-examination, and a verbatim transcript.[1] Following the presentation of evidence, counsel submitted post-hearing briefs.

II. FACTUAL BACKGROUND

The developer proposes to build a 300-unit apartment complex on a 42-acre site off Hilltop Drive and Pine Street in Walpole at the Foxborough town line. The apartments will be directly south of

the strip of land bordering Route 1 that has been reserved for commercial use. See Exh. 5, sheet 5. Route 1 is a divided, four-lane highway, and in this location runs generally east-west. It can fairly be described as "a commercial strip," though in this area, at least half of the lots along the highway are undeveloped. Board's Brief, p. 25; Exh. 27; Tr. I, 41-44. The site is generally shaped like the letter "U," with the upper, northern portions abutting the highway. As a result of the earlier proceedings before the Board, in order to accommodate to the town's interest in preserving commercial uses along the highway, four acres at the top of the U directly adjacent to Route 1 have been set aside by the developer for future commercial development. Tr. I, 34-35, 61; Exh. 7, p. 4.

The bottom of the U is formed by the shoreline of a large pond, Ganawatte Farm Pond. The housing will be built in the middle part of the U, on the central, 20-acre portion of the site, which is separated from the pond by several acres of wetlands and six acres of upland, open-space buffer. Tr. I, 33, 35.

Inside the U is an area which is not controlled by the developer, and which was subdivided some time ago into approximately a dozen lots-three abutting Route 1 and the remainder

located on a short cul-de-sac, Sunset Drive. Sunset Drive was intended as a residential subdivision, though only two houses have been built. Exh. 5; Tr. I, 27.

When the application was filed in March 2000, nearly all of the site and Sunset Drive were zoned as a Rural Residence (RR) district, though the portions along Route 1 and Pine Street were within a Limited Manufacturing (LM) district. Pre-Hearing Order, s. I-7. In May 2000, the town enacted a zoning change. The only areas affected by the change were the proposed development site and the lots it surrounds on Sunset Drive. These areas are now zoned Limited Manufacturing, which permits a wide variety of manufacturing, retail, professional, and other commercial uses. Pre-Hearing Order, s. I-8; Exh. 16; Tr. I, 54.

The proposed development consists of thirteen three-story buildings with one-, two-, and three-bedroom apartments. Tr. I, 58-59. There will also be a swimming pool, a tot lot, two tennis courts, and a clubhouse, which will contain common facilities for the residents and management offices. Exh. 5; Tr. I, 59.

III. ISSUES

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 generally with state and federal requirements or other generally recognized design standards. 760 CMR 31.06(2). The burden then shifts to the Board to prove first, that there is a valid health, safety, environmental, or other local concern, which supports the denial, and second, that such concern outweighs the regional need for housing. 760 CMR 31.06(6); also see *Hanover v. Housing Appeals Committee*, [363 Mass. 339](#), 365, 294 N.E.2d 393, 412 (1973); *Hamilton Housing Authority v. Hamilton*, No. 86-21, slip op. at 11 (Mass. Housing Appeals Committee Dec. 15, 1988). As will be seen, our analysis of each of the local concerns raised by the Board leads us to conclude that the Board has failed to meet its burden.

This case is somewhat unusual, however, in that each of the local concerns raises, to one degree or another, the question of adequacy of existing municipal services. That is, though town counsel was skilled in presenting the Board's evidence so as to focus attention on this particular proposal, that could not disguise a much more general concern on the part of the Board that it is difficult for existing municipal services to accommodate the demands of large multifamily developments.

There can be no doubt that in Walpole, as in any number of towns, ongoing development is stretching municipal services to their limits. Any additional burden on services, whether from affordable housing or other development, is problematic. Therefore, it comes as no surprise that much of the testimony presented by the town in this case implicitly raises the argument

that the Board's denial of a comprehensive permit should be upheld because of the inadequacy of municipal services, that is, because of the difficulty the town faces in expanding these services in the face of unabating demand. Though we fully appreciate the difficulties of municipal finance, that argument has been presented frequently since the Comprehensive Permit Law was enacted over thirty years ago, and it has found little favor under the statute and our regulations. And because this issue is complicated and often misunderstood, before we address the particular facts before us, we believe it is useful to review the law of municipal services, particularly as applied to subdivision approval and special permits.[2]

A. Municipal Services in a Traditional Land Use Context

Early court cases addressed services, particularly water supply, in general terms. "Provision for an ample supply of water for the use of those who dwell or do business in crowded centers of population is manifestly a public utility of first importance." *Loring v. Commissioners of Boston*, 264 Mass. 460, 464, 163 N.E. 82, 84 (1928). "[T]he ... landowner had a right to a supply of water, which it was the duty of the city as the operator of a public utility [citing *Loring*] to furnish on the same terms on which it furnished water to others." *B.&B. Amusement Enterprises, Inc. v. City of Boston*, [297 Mass. 307](#), 308, 8 N.E.2d 788, 789 (1937).

Later court cases began to differentiate between the role of planning boards and the role of water and sewer commissions. The role of planning boards under the Subdivision Control Law, Chapter 41, s. 81K, et seq. is to ensure that appropriate infrastructure is provided when subdivisions are created. Thus, even where "there was an acute shortage of water and lack of water pressure... and... a fire hazard had been created," the Court stated that "the Legislature, by the subdivision control law..., thus far has not given to planning boards the power unconditionally to disapprove a

subdivision plan because its execution would impose new demands upon a community's existing water supply." *Daley Construction, Inc. v. Planning Board of Randolph*, [340 Mass. 149](#), 156, 163 N.E.2d 27, 31 (1959). But the Court noted that the record did not present the question of "whether, once the plan is approved, the owners of the lots... can later compel the provision to their premises of their share of the available town or water company water."

The Daley analysis was extended in *Baker v. Planning Board of Framingham*, [353 Mass. 141](#), 144-145, 228 N.E.2d 831, 833 (1967) in the context of sewer and drainage services. The Court held that the planning board had no power to deny subdivision approval where proposed sewage and surface drainage installations met established local requirements, even though the town would incur the additional expense of construction of a sewer pump station and rerouting of drainage water.

But more critical to our inquiry into municipal services is the role of water and sewer commissions, which are the bodies that

authorize the actual connection of new developments to existing services. In *Rounds v. Board of Water & Sewer Commissioners of Wilmington*, [347 Mass. 40](#), 44, 46, 196 N.E.2d 209, 212-214 (1964), the Court provided general guidance concerning the factual decisions that must be made with regard to both water connections and service extensions. It noted that "[a] town water system... is obliged to furnish water to each prospective customer 'on the same terms on which it [furnishes] water to others' (see *B.&B. Amusement Enterprises, Inc. v. City of Boston...*), but it does not follow that all prospective customers are similarly situated so that the same terms must be applied to all of them. Prospective customers whose demands for water necessitate extensions of existing systems may stand on a different basis. ... A municipality... is permitted to exercise a reasonable and fair discretion in determining whether and upon what terms to make extensions of its lines." In *Clark v. Board of Water & Sewer Commissioners of Norwood*, [353 Mass. 708](#), 710-711, 234 N.E.2d 893, 895 (1968), the Court stated that "if the connection would at once overload the sewer and risk serious flooding and danger of injury to persons and property, immediate [connection to the sewer] would not be required.... The sewer commissioners, [however,] are not empowered to postpone presently sought connections to give precedence to connections contemplated for the future.... Reasonable sewer capacity being shown to serve the petitioners' buildings, they had a right to the connections."

Off-site municipal roadways present issues that are slightly different from those presented by water and sewer services. But the courts have been similarly circumspect in construing the power of a planning board under the Subdivision Control Law, and yet have left room to address the practical need to address off-site problems, at least in a limited way. Thus, in *Mac-Rich Realty Construction Co. v. Planning Board of Southborough*, 4 Mass.App.Ct. 79, 341 N.E.2d 916, 920 (1976), the Appeals Court stated, in dictum, "An otherwise proper subdivision plan may not be disapproved on the grounds that the subdivision will adversely affect traffic patterns or municipal services in the community as a whole. [citing *Daley, supra*]." But the Supreme Judicial Court,

in *North Landers Corp. v. Planning Board of Falmouth*, 382 Mass. 432, 437 n.6, 416 N.E.2d 934, 938 n.6 (1981), held that the adequacy of a public way adjacent to a proposed development could properly be considered (without deciding, however, whether inadequacy of the public way alone would justify disapproval of the subdivision). The board's power was narrowly confined to issues that it had precisely regulated. Thus, a board may not require improvements to a state highway where subdivision regulations authorize it to require improvements only to streets and ways. *Sullivan v. Planning Board of Acton*, 38 Mass.App.Ct. 918, 920, 645 N.E.2d 703 (1995) (rescript); also see *North Landers Corp. v. Planning Board of Falmouth, supra*; *Castle Estates, Inc. v. Park and Planning Board of Medfield*, [344 Mass. 329](#), 334, 182 N.E.2d 540, 545 (1962). And yet where a developer had offered to mitigate inadequacies in the public way, it was within the authority of the

board to impose conditions requiring those traffic improvements. *Miles v. Planning Board of Millbury*, 29 Mass.App.Ct. 951, 954, 558 N.E.2d 1150, 1153 (1990) (rescript), rev. den. 408 Mass. 1104, 562 N.E.2d 90.

Early cases involving special permits under the Zoning Act are somewhat similar to those under the Subdivision Control Law. In *Weld v. Board of Appeals of Gloucester*, [345 Mass. 376](#), 379, 187 N.E.2d 854 (1963), the Court held that permit conditions requiring later determinations rendered a decision advisory and therefore invalid, but it implied that conditions requiring off-site road improvements-if specific enough-would be proper. In *MacGibbon v. Board of Appeals of Duxbury*, [369 Mass. 512](#), 340 N.E.2d 487, 492 (1976), rehearing den. [369 Mass. 523](#), 344 N.E.2d 523, the Court found that concern about erosion was not grounds for outright denial of the special permit because "[t]he board [had] the power to order... conditions [that would mitigate erosion of on-site fill and adjoining upland]."

When the Zoning Act was substantially revised in 1975, a specific provision was added regarding special permits that allow an increase in density. The board may require the developer, "as a condition for the grant of said permit, [to] provide certain open space,... traffic or pedestrian improvements, installation of solar energy systems,... or other amenities." G.L. c. 40A, s. 9, para. 2. At the same time, the existing, general power of local boards to impose design conditions on special permits remained clear. G.L. c. 40A, s. 9, para. 1; also see *V.S.H. Realty, Inc. v. Zoning Board of Appeals of Plymouth*, 30 Mass.App.Ct. 530, 533, 570 N.E.2d 1044, 1045 (1991). There are no reported cases, however, that clarify to what extent a board may require off-site improvements when no density bonus is being sought.[3]

To summarize, two things emerge from the above analysis of municipal services in a traditional land use context. First, in the case of special permits, the legislature chose to explicitly authorize the permitting authority to condition the permit on the provision of infrastructure improvements by the developer when the proposal takes advantage of a density bonus. G.L. c. 40A, s. 9. Second, in the absence of such explicit provision for other proposals in the Zoning Act or for any proposal under the

Subdivision Control Law, off-site improvements are generally not required unless agreed to by the developer, although in some fact-dependent situations, courts have made exceptions and approved conditions requiring such work.

B. Municipal Services in the Context of the Comprehensive Permit Law

It might be argued as a matter of public policy that because comprehensive permits typically involve density increases as certain special permits do, boards of appeals should have the power to require developers to make off-site improvements. There is an equally strong, or stronger argument, however, that such a rule

would be a barrier to the construction of affordable housing. But where possible this Committee demurs at setting public policy. The Comprehensive Permit Law was enacted by the legislature without a provision authorizing the requiring of off-site improvement of municipal services. Further, the law stated in our regulations and precedents is clear. The regulations provide that the difficulties in providing municipal services should not stand in the way of the development of affordable housing. Specifically, they state clearly that the denial of a comprehensive permit may be upheld based upon the inadequacy of municipal services or infrastructure only if the Board proves that installation of adequate services is not technically feasible or is not financially feasible due to unusual geographical or environmental circumstances. 760 CMR 31.06(8).[4]

But the nature of municipal services-from public water supply to schools, for instance-varies greatly, as do the facts surrounding different proposed developments and the availability of services in particular locations. For certain types of municipal services, our regulation applies straightforwardly. But for others, notably water and sewer services and roadways, while the general principle in the regulation that the town must provide municipal services usually applies, in certain cases, based upon careful factual analysis, we have fashioned a narrow exception within the regulation. Therefore, before we review the facts in the case before us, it is useful to examine how different types of services are dealt with under the Comprehensive Permit Law.

1. Schools - School budgets are constantly in flux, and in all school districts, teacher hiring, classroom sizes, and catchment boundaries for particular schools are adjusted to account for changes in population. Thus, our rulings have been uniform. Three of our earliest cases addressed the issue. In *Interfaith Housing Corp. v. Gardner*, No. 72-05, slip op. at 14 (Mass. Housing Appeals Committee Feb. 13, 1974), where the local schools were overcrowded and the high school had lost its accreditation, we said, "...the legislature felt that existing needs for low and moderate income housing were so overriding as to have priority over the admittedly pressing problem of overcrowded schools." In *Wilson Street Trust v. Norwood*, No. 71-06, slip op. at 25 (Mass. Housing Appeals Committee Feb. 13, 1974), aff'd, No. 112304 Eq. (Norfolk Super. Ct. May 7, 1975), we said, "the impact on the school system is not a ground under the statute to support a denial of a

comprehensive permit." And in *Woodcrest Village Assoc. v. Maynard*, No. 72-13, slip op. at 27 (Mass. Housing Appeals Committee memorandum Feb. 13, 1974), aff'd, [370 Mass. 64](#), 345 N.E.2d 382 (1976), we concluded that "...the statute does not recognize [inadequate school facilities, rising costs, and the exacerbation of these problems by additional schoolchildren] as sufficient grounds for denial of a comprehensive permit." In *Georgetown Housing Auth. v. Georgetown*, No. 87-08, slip op. at 12 (Mass. Housing Appeals Committee June 15, 1988), a case involving the cost of both schools and other town services, we stated the principle

more broadly: "We have ruled in other cases that the requirement for a town to provide municipal services is imposed upon it by law. The Town cannot use its duty to provide such services as a basis for denying or restricting a Comprehensive Permit. The cost of necessary municipal services is simply not an element of the concept of consistency with local needs." Also see *Millhaus Trust of Upton v. Upton*, No. 74-08, slip op. at 7 (Mass. Housing Appeals Committee July 8, 1975); *Haverhill Green Assoc. Ltd. Partnership v. Haverhill*, No. 87-14, slip op. at 33 (Mass. Housing Appeals Committee Sep. 15, 1988), aff'd, No. 88-5861 (Suffolk Super. Ct. Nov. 28, 1989); *Silver Tree Ltd. Partnership v. Taunton*, No. 86-19, slip op. at 33 (Mass. Housing Appeals Committee Oct. 19, 1988), aff'd, No. 88-6435E (Suffolk Super. Ct. May 10, 1989).

2. Emergency services - Police, firefighting, and emergency medical services present issues that are very similar to school services. In fact, in many cases, towns are less immediately concerned with the additional drain on emergency services caused by new development. Because of class size limitations, even a handful of new students may require a direct, measurable outlay of resources to hire a new teacher, but new households do not create any such immediate effect on emergency service personnel needs. Instead, they increase the pressure on resources in an incremental way, and it is perhaps for this reason that rarely in our cases have towns argued that affordable housing should not be permitted since it would require the hiring of additional emergency personnel.

One difference between emergency services and school services is that the location of new development may affect the availability of emergency services. That is, particularly if emergency services are provided from one central location, development at the outskirts of town may strain services in the sense that response times may lengthen. But even though the housing may be "at such distance from the center of Town, [that] there will be delays in police and fire services reaching [the site],... [the] duty of supplying adequate fire and police services is a municipal duty which the town must supply as it does to other residents...." *Line Street Assoc. v. Southampton*, No. 83-06, skip op. at 5-7 (Mass. Housing Appeals Committee Nov. 22, 1985), aff'd sub nom. *Houle v. Southampton*, No. 85-472 (Hampshire Super. Ct. Jan. 2, 1987). Also see discussion in section II-C(1)(b)???????, *infra*.

3. Roadways - Quite different from school services and emergency services is the roadway infrastructure that a town provides for its residents. But on the townwide level, affordable housing creates incremental pressure on the townwide roadway

infrastructure, just as it does on schools, and the costs associated with that can no more be used to justify denial of a comprehensive permit than can the costs of schools. *Merrimack Meadows Corp. v. Tewksbury*, No. 87-10, slip op. at 33 (Mass. Housing Appeals Committee Aug. 23, 1988) ("There is no evidence that the Town has done anything to limit or control [traffic] growth. It is simply not realistic for the Town to start to address the

overall problems in the Route 133 corridor by denying this application...").

Further, the town cannot require the developer to remedy existing traffic problems even if they are in the area where the proposed development is located. *Mapleleaf Development Assoc. v. Haverhill*, No. 88-14, slip op. at 22 (Mass. Housing Appeals Committee Jan. 27, 1993) ("The city cannot point to a bad situation which it is under a duty to remedy as a ground for denying a comprehensive permit..."); *Silver Tree Ltd. Partnership v. Taunton*, No. 86-19, slip op. at 24-26 (Mass. Housing Appeals Committee Oct. 19, 1988), aff'd, No. 88-6435E (Suffolk Super. Ct. May 10, 1989) (developer's offer of limited roadway improvements cannot be used to impose upon him the burden of a major realignment of bridge approaches); also see *Medway Housing Auth. v. Medway*, No. 82-07, slip op. at 22, 26 (Mass. Housing Appeals Committee Mar. 28, 1983) (off-site sidewalks); *Sheridan Development Co. v. Tewksbury*, No. 89-46, slip op. at 6 (Mass. Housing Appeals Committee Jan. 16, 1991) (existing off-site traffic hazard).

The exception within our regulation, however, is that a developer may properly be required to mitigate specific traffic problems that the new development will cause on roads in the immediate vicinity of the site.[5] *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 36-37 (Mass. Housing Appeals Committee June 25, 1992). As is clear from the lengthy discussion in *Westborough*, when mitigation is necessary, it frequently addresses existing problems as well. Thus, a detailed factual analysis is necessary to apportion the costs of mitigation between the problems caused by the new development and existing problems. See *CMA, Inc. v. Westborough*, supra, slip op. at 37.

4. Water and Sewer - Water and sewer services present issues quite similar to traffic, though sometimes more complex. Again, the developer cannot be expected to address townwide inadequacies. *Millhaus Trust of Upton v Upton*, No. 74-08, slip op. at 20-21 (Mass. Housing Appeals Committee July 8, 1975) (possible inadequacies of water supply not justification for denial of comprehensive permit where the entire town would benefit from various needed improvements, in regard to which the town has been derelict).

Similarly, the town cannot require the developer to remedy existing infrastructure problems even if they are in the area where the proposed development is located. *North Attleborough, Dexter Street L.L.C. v.*, No. 00-01, slip op. at 17 (Mass. Housing Appeals Committee Jul. 12, 2000) (partial sewer blockage and manhole surcharging problem unaddressed for fifteen years may not be used as the basis for denial of permit); *Franklin Commons Ltd. Partnership v. Franklin*, No. 00-09, slip op. at 15 (Mass. Housing Appeals Committee Sep. 27, 2001) (long-standing sewer capacity

problems related to inflow and infiltration not sufficient justification for denial of permit).

What may properly be required of the developer is that it provide limited off-site water or sewer services or mitigate

specific problems if necessitated by the new development itself. This is the clear implication, if not the holding, of one of our earliest cases, *Woodcrest Village Assoc. v. Maynard*, No. 72-13, slip op. at 18-19 (Mass. Housing Appeals Committee memorandum Feb. 13, 1974), aff'd, [370 Mass. 64](#), 345 N.E.2d 382 (1976) (developer agreed to construct 2,000 feet of sewer). It is also consistent with our holding with regard to traffic in *CMA, Inc. v. Westborough*, supra, slip op. at 36. And, as discussed above with regard to traffic, sorting out what mitigation is required because of the proposed development and what is necessitated by existing problems requires detailed factual analysis.[6]

C. The Board has not satisfied its burden of proving a local health and safety concern that outweighs the regional need for housing.

The local concerns raised by the Board, as enumerated in the Pre-Hearing Order, are the adequacy of the sprinkler system proposed for the development, the adequacy of emergency access, the adequacy of water supply for fire protection and for domestic use, the adequacy of sewer service, and pedestrian safety. Pre-Hearing Order, s. II-C(2). We will address each, grouping them into four slightly different categories.

1. Fire Protection

a. Water supply at the site is adequate for fire protection.

Water for both fire protection and domestic use will be supplied to the development by the Walpole municipal water system. The developer maintains that the water supply to the site is adequate, and the town disputes this. Water for fire protection must be sufficient to supply both sprinkler systems in the buildings and the needs of firefighters who arrive at the scene of a fire. (All of the buildings in the proposed development will be built with an integrated "fire protection package," that is, they will have automatic fire detection devices, sprinkler systems, and alarm systems. Tr. I, 126. The Board also maintains that the development should be built to a sprinkler system standard higher than that required by the Massachusetts State Building Code; see section III-C(1)(b), below.)

The developer presented testimony from Bob Cummings, a well-qualified, expert, professional engineer, who specializes in sprinkler and alarm systems. Tr. I, 120-126, 133. Mr. Cummings undertook an analysis of water needs and availability for the proposed development. Tr. I, 134-137; II, 31-52; see Exh. 14.

Beginning his analysis of the need for water on the National Fire Protection Association requirements for the sprinkler system, he determined that the maximum demand would be 328.9 gallons per minute (gpm) at 54.3 pounds per square inch (psi) (including 100

gallons per minute additional "hose stream" for firefighters to

use-typically from within the building on a fire partially suppressed by the sprinklers). Tr. II, 31-34, 36, 42, 95. He then reviewed results of the water flow tests performed using hydrants located on Route 1 at the site and on Pine Street at the intersection of Route 1, just north of the site. See Exh. 12, 5, 13; Tr. II, 43-49. The test at Pine Street showed static pressure of 58 psi and 505 gpm flow with residual pressure of 42 psi. The test on Route 1 showed static pressure of 63 psi and 995 gpm flow with residual pressure of 54 psi. Tr. II, 43-44, 49; Exh. 12. Using the location with the higher pressure and flow-Route 1-Mr. Cummings calculated that at the 54.3 psi pressure required for the combined sprinkler/hose stream demand, 995 gpm would be available, leaving an excess of roughly 670 gpm at 54.3 psi. Exh. 28; Tr. II, 50-52, 61. This, in his opinion, was more than adequate for fire protection. Tr. II, 53. (There was no indication in testimony of how many gallons per minute this excess would be equivalent to at 20 psi, though clearly it would be more than 670 gpm.)

The Walpole fire chief, who is also highly qualified in terms of both academic credentials and practical experience, approached the problem differently, and testified that both using the Iowa Formula and his own experience, 3,600 to 4,000 gpm at 20 psi would be necessary. Tr. III, 116. His opinion was based on the assumption that the building would not be sprinklered. Tr. III, 172.

Finding common ground between different approaches used by different experts is never easy. It can be helpful to examine independent standards such as those used by the Insurance Services Office, Inc. (ISO) in its classification system, which provides guidance in setting private insurance rates. See Exh. 31. Though these standards are in no way binding, they are sometimes illuminating.

For fire insurance purposes, the ISO calculates flows at 20 psi. Exh. 31, at p. HPLP 3006. The fire chief testified and Exhibit 14 clearly shows that 2,200 gpm are available at 20 psi.[7] Tr. III, 170, 172; Exh. 14, at p. HPLP 1826 (upper right corner). Mr. Cummings testified that ISO standards for needed flow for an unsprinklered building the size of the proposed buildings are 2,200 to 4,000 gpm at 20 psi. Tr. II, 97. Presumably a sprinklered building would require less flow, though not significantly less in the worst case scenario, that is, if the sprinklers fail to contain the fire and the entire building burns. But in that case, the excess flow of 670 gpm at 54 psi plus the 100 gpm "hose stream" would be available to the firefighters. Though it is not clear how much this flow represents at 20 psi-the availability of this excess is consistent with Mr. Cummings' testimony that there is adequate water supply for fire protection.

We accept Mr. Cumming's conclusion, and find that the Board has not rebutted it.

Finally, even if we had found that water service was inadequate here, if that situation resulted from a townwide problem or an existing infrastructure problem, then under our law and regulations the town would be obligated to find a remedy rather

than deny the comprehensive permit. In this case, there has been

no proof by the town that installation of adequate services it is not technically or financially feasible, nor that there is a specific water service problem caused by the proposed development. See 760 CMR 31.06(8); *Millhaus Trust of Upton v Upton*, No. 74-08, slip op. at 20-21 (Mass. Housing Appeals Committee July 8, 1975); and discussion in section III-B(4), above. In fact, part of the case presented by the Board was that an additional problem in fighting fires was that in the case of a fire that could not be extinguished for several hours, an insufficient volume of water might be available due to storage problems in the town water system. We discuss the storage issue in more detail in section III-B(2), below, but if this were in fact true, it would certainly not be a problem specific to this site, but rather an existing, widespread or townwide problem that the municipality would be under an obligation to remedy.[8] See Tr. III, 189-190, 193; Exh. 25, p. HPLP 1791.

b. Adequate fire fighting services can and will be supplied to the proposed housing.

The location in which this housing development is proposed is unusual. For everyday access, its location near a major commercial highway is ideal for an automobile-oriented apartment complex. Residents and visitors can come and go easily, and traffic and visual impacts on neighbors are minimized. Tr. I, 30. But because this development is at the edge of town, access for emergency services is less than ideal.

The primary concern articulated by the town is that the site's location is inherently unacceptable for the proposed housing due to the length of time required for fire apparatus to respond to a fire. The crux of the problem, however, lies with the inadequacy of the townwide emergency response system.[9] The Walpole fire chief testified that the town's system of response from a single central location is "an extremely ineffective way to run the business," and that not only is fire response in Walpole inadequate in comparison to surrounding towns, but that it also prevents the town from doing fire prevention. Tr. III, 36, 41-42, 143-149, 212-216, 244-245. But, as discussed in section III-B(2), above, the inadequacy of townwide emergency services is not justification for denial of a comprehensive permit.[10] 760 CMR 31.06(8); *Line Street Assoc. v. Southampton*, No. 83-06, skip op. at 5-7 (Mass. Housing Appeals Committee Nov. 22, 1985), *aff'd sub nom. Houle v. Housing Appeals Committee*, No. 85-472 (Hampshire Super. Ct. Jan. 2, 1987) (even though the housing may be "at such distance from the center of Town, [that] there will be delays in police and fire services reaching [the site],... [the] duty of supplying adequate fire and police services is a municipal duty which the town must supply as it does to other residents....").

Related to fire response times are concerns about the sprinkler system in the buildings, since such systems are designed

to suppress fires quickly and control or limit the spread of the fire while firefighters are en route. The developer proved that the proposed fire protection system has been designed to comply

with accepted safety standards, and it has provided the sprinkler system required by the Massachusetts State Building Code. Tr. I, 137-146; Tr. II, 18-21; Exh. 14; see particularly 780 CMR s.s. 310.4, 503.1 (Table 503), 904.7, 906.2.2 (Massachusetts State Building Code). The Board argues, however, that if this housing is built, the sprinkler system should be designed to the NFPA 13 standard rather than the NFPA 13R[11] standard, that is, that the developer should be required to meet a higher sprinkler system standard than that required by the state building code.

There can be no doubt that in most fire situations, the primary purpose of a sprinkler system is to slow the spread of a fire and thus lengthen the effective response time. Tr. I, 7. On the surface, the NFPA 13 system would seem to provide a significant amount of additional protection for residents. In addition to the normal sprinkler heads in living units, hallways, and stairwells, sprinkler heads would be placed in uninhabited areas, such as attics spaces. Tr. I, 147-148, 151-152. For fires starting in those areas, the enhanced system might add to the effective response time.[12] But in apartment buildings, the vast majority of all fires-and an even greater number of fires resulting in injury or death-start in inhabited areas. Exh. 29; also see Tr. I, 150, 153. Thus, the NFPA 13 system, which is designed principally to provide property protection, does not provide significantly more life protection in an apartment than does the residential, NFPA 13R system. Tr. I, 150; II, 8. We find that the Board has not proven that protection in such limited circumstances justifies the installation of the NFPA 13 system.[13] And, in addition, we are very reluctant to impose building code requirements on affordable housing that could not be imposed on market rate housing. Such requirements obviously raise the costs of construction, and the purpose of the Comprehensive Permit Law is to eliminate barriers to the construction of affordable housing. It is only truly exceptional circumstances, which have not been proven here, that would justify deviating from the policy stated in the Comprehensive Permit Law that local requirements be "applied as equally as possible to both subsidized and unsubsidized housing." G.L. c. 40B, s. 20.

The Board also argues that the proposed development is isolated by Route 1, and attempts to portray the highway as a nearly impenetrable barrier, which might prevent firefighters from reaching the proposed housing. A large stadium used for professional football games and concerts is located on Route 1 in Foxborough, approximately a mile south of the site. Undoubtedly, there is very heavy traffic on the highway for about two hours before and after particularly large events at the stadium, which occur approximately 20 times per year. Tr. III, 131-132. But state police officers control the highway and intersections during these events, and we have not been convinced that emergency

vehicles are unable to pass through the intersection of Route 1 and Pine Street. See Tr. III, 63-69, 126-128; Exh. 26. In addition, there are already a number of residences in the same area, including the recent, partially built Ganawatte Farms subdivision. Tr. I, 37-38; II, 133; III, 124, 201; IV, 176; also see Tr. I, 43-44, III, 158-167. And, the catastrophe that the Board conjures

up is too remote a possibility to justify the denial of a comprehensive permit. See *Silver Tree Ltd. Partnership v. Taunton*, No. 86-19, slip op. at 24-25 (Mass. Housing Appeals Committee Oct. 19, 1988) (possibility that a 100-year storm might flood a street on both sides and cut off a peninsula is speculative).

Finally, the Board presented evidence to show that provision of emergency services is not financially feasible. The Walpole town administrator testified that budget constraints may require reductions in public safety personnel, and that there is no possibility of opening a fire station in south Walpole. Tr. VI, 16-17. But our discussion of emergency services, above, has assumed that there would be no fire station in south Walpole, and we have seen no proof as to how personnel reductions might affect the specific housing development that is before us. Under the facts presented here, even though the housing site is on the south side of Route 1 at the town line, the Board has not sustained its burden of proving that "installation... of services... is not technically or financially feasible... due to unusual... physical circumstances...." See 760 CMR 31.06(9), Pre-Hearing Order, s. II-D(5), Tr. VI, 13.

c. Access to the site for medical emergencies is adequate.

Little time was spent during the hearing on medical emergencies, which pose problems similar to, but of even less concern than fires. Residents of these apartments are the same distance or even slightly closer to emergency services than residents of the new Ganawatte Farm subdivision. Assuming that the first response when a medical emergency call is received is by fire apparatus, the response time would be the same. Tr. II, 30. And, apartment residents are arguably at a slight advantage in any case since they have more neighbors close at hand who may offer assistance than do those who live in single-family homes. To prohibit the construction of affordable housing based upon inadequate medical emergency response time would violate the Comprehensive Permit Law's injunction that local requirements are to be "applied as equally as possible to both subsidized and unsubsidized housing." G.L. c. 40B, s. 20.

2. Townwide Water Supply

In addition to the testimony of the fire chief with regard to the adequacy of water supply for firefighting specifically at the site (see II-B(1)(a), above), the Board also presented evidence from a registered professional civil engineer concerning the

overall, townwide water supply in Walpole. In particular, it argues that townwide storage capacity affects water availability for both general use and for firefighting.

Walpole draws its water from its own wells, and accounts for variations in short-term supply and usage by maintaining several large storage tanks. Tr. V, 13-15. There has been at least some water supply deficiency since 1987, when the town began adding new wells. Tr. V, 65; VI, 33-34; Exh. 25, p. HPLP 1791, 1806. In

particular, there are water quality problems and lack of storage capacity that make it difficult to respond to high mid-summer demand and routine maintenance needs. Tr. V. 29-30, 35, 45-48, 59. There is not, however, an emergency situation that has resulted in water being unavailable or the town needing to place a moratorium on water connections. Tr. V., 73, 77-78, 110-111. It is fair to say, however, that at present water shortages are likely during dry summer months. For example, the town imposed an outdoor water restriction in 1999, though this is quite common in towns in the vicinity of Walpole. Tr. VI, 105-107.

The Board's expert testified that there is adequate water available in the aquifer below the town, and that in fact the amount of water available to be drawn from wells in 1999 exceeded the average daily demand by about 40%. Tr. V, 112-113, 185, 67. But because of expected increases in demand, that expert believes that there will be serious deficits by 2010 and 2020. Tr. V, 28, 109-110. It is quite clear, however, that such deficits are not inevitable, but have been projected so that the town can plan to meet future needs. Tr. VI, 108. In fact, the town has plans for rehabilitating wells, for building a new storage tank, and for implementing leak detection and water conservation programs. Tr. V, 46-49, 59, 182-183. This work is likely to be completed in 2004. Tr. V, 58, 62; VI, 96. Because of this situation, the Board "has not suggested that the insufficiency... should stand as a permanent bar to construction" of the proposed development, but rather that it be delayed until the water system improvements have been made. Board's Brief, p. 29 (filed Jun. 25, 2001).

The developer's expert forcefully challenges the conclusions that the Board relies upon. He points to a conceded calculation error, as well as a number of disagreements over methodology. Tr. V, 91, 95, 102, 130-131; VI, 97-98, 114-115, 118, 145-147, 155, 158-159; Exh. 46-50; cf. Tr. V, 190-193. He concludes that both water demands and resulting supply deficits were overestimated. Tr. VI, 87. Further, from 1997 until 2000, the South Walpole storage tank never dropped below its normal operating water level. Tr. VI, 110-112. Taking all of the relevant factors into consideration, he believes that the town does not need to build the planned additional storage tank. Tr. VI, 156.

On balance, we find the presentation by the developer's expert regarding water supply to be the more credible. And particularly since the town is moving ahead with plans to rehabilitate wells and increase storage capacity, we find that the Board has not sustained its burden of proving that the water supply is so inadequate so as

to constitute a local concern which outweighs the regional need for housing.

Finally, any inadequacy in water supply is an existing townwide problem. See, e.g., Tr. V, 29-30, 44; Exh. 25, p. HPLP 1791, 1806. This cannot justify the denial of the comprehensive permit. 760 CMR 31.06(8); Millhaus Trust of Upton v Upton, No. 74-08, slip op. at 20-21 (Mass. Housing Appeals Committee July 8, 1975); also see discussion in section III-B(4), above.

3. Sewer

The developer proposes that sewage flow by gravity within the site to a privately-owned pump station (which will have a holding tank and 24-hour maintenance), and then be pumped by force main to connect to an existing town sewer at the intersection of Route 1 and Pine Street. Tr. II, 119-125, 155; Exh. 5, sheet 6. There is currently no sewer main along Route 1, though such a main was recommended in the town's 2000 Master Sewer Plan. Tr. II, 121; VI, 33; Exh. 17, 19. The Board argues that the developer's plan is inconsistent with the town's sewer master plan, that it will use an inordinate amount of future capacity, that it will perhaps cause surcharging of the existing system, and that therefore the comprehensive permit should be denied.[14]

We will address the sewer master plan in general first. A sewer master plan is a planning tool which attempts to anticipate the sewer needs of future development; its purpose is not to control development, nor does it impose specific requirements on new development. Tr. 2, 140-141, 158; Tr. IV, 10-11, 127-128. It must be contrasted with a Zoning Master plan. If the town's zoning bylaw is consistent with a master plan, then together they actually control development in the town. Under some circumstances, when such a master plan provides sufficiently for affordable housing, we will give it deference. See Harbor Glen Assoc. v. Hingham, No. 80-06, slip op. at 12-14 (Mass. Housing Appeals Committee Aug. 20, 1982); KSM Trust v. Pembroke, No. 91-02, slip op. at 5-8 (Mass. Housing Appeals Committee Nov. 18, 1991). Obviously, when it makes technical and financial sense, a developer should attempt to conform to the town's sewer master plan. But such a plan may not be used as a barrier to the development of affordable housing. We understand that at some indefinite time in the future the town hopes to be able to install a sewer main along Route 1, and as a result would prefer that no new development take place in this area until that service is available. But that is not justification for preventing the proposed development from taking advantage of the practical alternative of connecting by force main to the existing sewer at the intersection of Route 1 and Pine Street.

The Board also argues that under any design scenario, the construction of the proposed 300 units greatly exceeds the growth projections upon which the sewer master plan was based. Specifically, the master plan assumed that 85 additional single-family homes (or 340 bedrooms) would be added each year.[15]

Tr. IV, 44. To place this projection in context, calculations from the Master Sewer Plan show 6,309 developed lots and 3,916 undeveloped lots in Walpole (whose 2000 population was 22,912). Exh. 17, pp. HPLP 2032-2044; also see Tr. IV, 129-130; V, 86. Of the developed lots, 3,539 currently have municipal sewer service. Id. We believe that in essence the town's argument is the one we rejected in *Millhaus Trust of Upton v. Upton*, supra, namely that the proposal overburdens the townwide sewer system as a whole. Under the Comprehensive Permit Law, it is not sufficient to simply point to the fact that a large multi-family affordable housing proposal was not anticipated in the master plan. 760 CMR 31.06(8); see discussion in section II-B(4), above.

Moving beyond planning issues to specific design concerns raised by the town, we credit the testimony of the developer's

expert witness, James Colantonia, a registered professional engineer with prior experience working in the town of Walpole. Tr. II, 103, 108-110. The proposed approach is consistent with industry standards, and in fact has some advantages over a purely gravity fed system. Tr. II, 129-131, 151. In general, force mains are common in Walpole, which has many public and private pump stations, with three in the immediate area of the site and additional stations proposed for the future. Tr. II, 133, 137-138; Exh. 19: Exh. 17, p. HPLP 2088. Specifically, the town is concerned that the system has not yet been designed to the point of providing full construction drawings, and that there is the potential for it to cause surcharging of the municipal system, perhaps requiring upgrading of downstream sewer mains. Tr. IV, 40-43, 46.

The design of the on-site pumping station with a holding tank is straightforward, and final construction drawings need not be provided at this time. Tr. II, 151; see *Oxford Housing Auth. v. Oxford*, No. 90-12, slip op. at 4-5 (Mass. Housing Appeals Committee Nov. 18, 1991). The problem of possible surcharging is minimized by the use of a pumping system. While flows in the parts of the municipal system that are fed by gravity tend to peak at the same time—at the times of day when domestic usage is highest—the holding tank permits the release of sewage from the proposed development to be timed for intervals when more capacity is available in the municipal system. Tr. II, 142. The Board's expert conceded this. Tr. IV, 48, 110-112. The Board has not established a concern with the sewer design sufficient to outweigh the need for affordable housing. See Tr. IV, 120.

Finally, even if improvements to the municipal sewer infrastructure were essential, we find that the possible lack of downstream capacity is not a problem specific to this development, but rather, an existing infrastructure shortcoming that the town is obligated to remedy. E.g., Tr. IV, 97-98; see 760 CMR 31.06(8); *Dexter Street L.L.C. v. North Attleborough*, No. 00-01, slip op. at 17 (Mass. Housing Appeals Committee Jul. 12, 2000); *Franklin Commons Ltd. Partnership v. Franklin*, No. 00-09, slip op. at 15 (Mass. Housing Appeals Committee Sep. 27, 2001); and discussion in

section III-B(4), above.

4. Pedestrian Safety

The Board also raised the concern that there are not adequate pedestrian facilities along Route 1 and for crossing Route 1. The sidewalks within the proposed development are adequate, although as proposed they would not connect with either Route 1 or Pine Street. Exh. 5; Tr. III, 197.

There are currently no sidewalks along Route 1. Tr. III, 198; IV, 162. Though it is unclear to what extent people desire to walk along the highway, there are already several existing uses that are just as likely to need pedestrian access as the proposed housing. An amusement center, a dormitory that will house young people at the Iorio skating facility, and a new preschool are all located on Route 1, and football fans routinely walk along the highway to and from the stadium. Tr. III, 198-199, 204, 207-208; IV, 165, 163,

198; Exh. 39. The intersection nearest the proposed housing is that of Route 1 and Pine Street. It currently has traffic signals, but no crosswalks; other intersections on Route 1 do have crosswalks, and crosswalks could be added at this location. Tr. III, 130, 198; IV, 168-170. Finally, as part of infrastructure improvements related to the construction of a new stadium, sidewalks will be extended on both sides of Route 1, at least as far as the Foxborough/Walpole town line, and perhaps as far as the proposed development. Tr. III, 202-203.

Pedestrian access is an existing problem, which will not be exacerbated by the proposed development, and is not grounds for denial of the comprehensive permit. *Sheridan Development Co. v. Tewksbury*, No. 89-46, slip op. at 6 (Mass. Housing Appeals Committee Jan. 16, 1991); also see cases cited in section III-B(3), above. If pedestrian controls at the intersection do not exist when the stadium-related improvements are completed, they should be installed at the developer's expense, and in any case the developer should extend the sidewalks within the development to provide access to both Route 1 and Pine Street. See conditions in sections IV-2(b), IV-2(c), below.

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 Walpole 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 shall be constructed as shown on drawings entitled "The Preserve," dated March 15, 2000, revised August 18, 2000 signed and stamped by Harold William Moore, P.E. (Exhibit 5).

(b) Sidewalks within the development shall be extended to both Route 1 and Pine Street.

(c) If pedestrian controls at the intersection of Route 1 and Pine Street do not exist when stadium-related sidewalk improvements are completed, the developer shall pay for installation of such controls if approved by the town.

(d) The developer shall apply, pursuant to usual town procedures, for water and sewer connection permits. Such permits shall be issued pursuant to 760 CMR 31.09(3) upon payment of established fees in effect at the time of the developer's original application to the Board (including the usual required contribution to an infiltration/inflow reduction program, if any), reduced by the proportion that affordable units are in relation to total housing units.

(e) The developer shall install the sewage holding tank described at Tr. II, 155, which shall be subject town review and approval pursuant to 760 CMR 31.09(3).

3. Should the Board fail to carry out this order within thirty days, then, pursuant to G.L. c. 40B, s. 23 and 760 CMR 31.09(1), 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 may impose additional requirements for site and building design so long as they do not result in less protection of local concerns than provided in the original design or by conditions imposed by the Board or this decision.

(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) 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.

(e) 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, s. 22 and G.L. c. 30A by instituting an action in the Superior Court within 30 days of receipt of the decision.

Housing Appeals Committee

April 10, 2002

/s/ Werner Lohe, Chairman
/s/ Joseph P. Henefield
/s/ Marion V. McEttrick
/s/ Mark Siegenthaler
/s/ Frances C. Volkmann

[1] The Committee issued a joint Pre-Hearing Order (Jan. 10, 2001), agreed to by the parties. In it, the parties stipulated that the developer satisfies two of the three jurisdictional requirements found in 760 CMR 31.01(1), that is, that it is a limited dividend organization and that it controls the site.

Pre-Hearing Order, s.s. I-3, I-4. Whether the proposal is fundable pursuant to 760 CMR 31.01(1)(c) remained at issue. But by choosing not to brief this question, the Board has conceded that the introduction into evidence of a project eligibility or site approval letter from the Massachusetts Housing Finance Agency (MassHousing) has satisfied this third requirement. See *Cameron v. Carelli*, [39 Mass. App. Ct. 81](#), 85, 653 N.E.2d 595, 598 (1995); also see Pre-Hearing Order, s. II-C(1)(a). In any case, we find that the MassHousing letter of June 20, 2000 (Exh. 2), updated September 11, 2000 (Exh. 3), established that the proposal is fundable. 760 CMR 31.01(2)(f).

The Board also conceded that Walpole has not met any of the statutory minima defined in G.L. c. 40B, s. 20 (e.g., that 10% of its housing stock be subsidized housing; see 760 CMR 31.04), thus foreclosing the defense that its decision is consistent with local needs as a matter of law pursuant to that section. Pre-Hearing Order, s.s. I-2.

[2] With regard to issues on which the Comprehensive Permit Law and regulations are silent, we frequently look to precedents from traditional land use law for guidance. See *Northern Middlesex Housing Assoc. v. Billerica*, No. 89-48, slip op. at 9 (Mass. Housing Appeals Committee Dec. 3, 1992), *aff'd* No. 93-0067-D (Suffolk Super. Ct. May 17, 1994). Even when that is not the case, such precedents provide useful background for our analysis.

[3] Such conditions would also be subject to the "rational nexus" and "rough proportionality" limitations related to uncompensated takings under the U.S. Constitution. See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309 (1994).

[4] 760 CMR 31.06(8) provides: "In the case of either a denial or an approval with conditions, if the denial or conditions are based upon the inadequacy of existing municipal services or infrastructure, the Board shall have the burden of proving that the installation of services adequate to meet local needs is not technically or financially feasible. Financial feasibility may be considered only where there is evidence of unusual topographical, environmental, or other physical circumstances which make the installation of the needed service prohibitively costly."

[5] This is common practice for development under traditional land use controls as well. See *Miles v. Planning Board of Millbury*, 29 Mass.App.Ct. 951, 558 N.E.2d 1150, 1153 (1990), rev. den. 408 Mass. 1104, 562 N.E.2d 90 (conditions formalizing the developer's offer to improve an adjoining public way are within the authority of the board). We believe that where the developer does not offer such mitigation, under the Comprehensive Permit Law it may be required. An exception to this rule may be if the town has no history of requiring traffic mitigation when approving traditional development.

In *Stuborn v. Barnstable*, No. 98-01, slip op. at 20, n.14 (Mass. Housing Appeals Committee Mar. 5, 1999), we indicated that it may also be permissible for a board to impose certain unusual on-site requirements, such as public access.

[6] In exceptional factual circumstances where there are no practical solutions to the problem the proposal presents, the permit may be denied. This appears to be the holding in *Berkshire*

East Assoc. v. Huntington, No. 80-14, slip op. at 19-23 (Mass. Housing Appeals Committee June 1, 1982), and is consistent with the "technical feasibility" provision of 760 CMR 31.06(8). Assuming that the water problems in Huntington were not specifically related to the proposed housing, if mitigation had been technically and financially feasible, the town should have been required to provide the services.

[7] Exhibit 31 (at p. HPLP 3006) shows figures used by the ISO for both needed and available flows in various locations in Walpole. The needed flow figures are not particularly helpful since they range from 750 gpm at 20 psi to 6000 gpm at 20 psi, and for a "Rte 1 at Pine" test location they simply indicate the needed flow as "info only." The available flow at that location is shown as only 850 gpm at 20 psi. But it seems likely that this test was done at the Pine Street location where the developer's consultants also found lower pressure, since this 850-gpm figure is consistent with the graphic representation of pressure for "Test 1" on page HPLP 1825 of Exhibit 14.

[8] There was testimony that since the area in which the site is located is supplied by booster pumps and the central area of Walpole has excess storage capacity, improvements in those pumps could remedy the situation. Tr. V, 122, 123, 126; also see Tr. VI, 124-126. Other improvements are also being undertaken by the town. See section III-B(???), below; also see Tr. V, 46-49, 59, 182-183.

[9] The developer also argues convincingly that the Board's

unwavering focus on response time is misplaced. The fire protection system design is based on an integrated system of detection, alarm, and fire suppression. When the system detects a fire (even in an attic, where there are heat sensors), an alarm will sound both in the building and the fire department, and if the fire is in an inhabited location, the fire will be suppressed to give residents additional time to get out of the building safely. Tr. II, 11. Such a system provides an added margin of safety since it does not rely on an uncertain manual alarm and unpredictable response time by the fire department. Tr. II, 9, 12, 25.

[10] The Board makes the interesting argument that because of the number of units in this distant location, there is an increased probability of fire apparatus being far from the scene of a second, nearly simultaneous alarm. This is undoubtedly true. And, if we could infer a coherent plan to locate housing in central areas of the town and leave outlying areas truly rural, this might bear consideration. But the Board has not shown that any such comprehensive plan exists in Walpole, and in fact, subdivisions of single-family homes are scattered in what appears to be quite random fashion throughout the town. Exh. 38. Thus, where the Board has not proven a nexus between a reasonably well implemented, townwide development plan and fire safety concerns, we will not consider the location of this development per se to be a legitimate local concern.

[11] The NFPA 13R (National Fire Protection Association, 13-Residential) standard was developed as a less comprehensive and therefore less costly version of the NFPA 13 standard in order to encourage more widespread use of sprinkler systems in residential buildings Tr. I, 150.

[12] This cannot be said conclusively, however, because even with the NFPA 13R system, the heat sensors in some locations, e.g., the attic would send an alarm to the Fire Department. See Tr. II, 11.

[13] There was also testimony from both experts about the added protection provided by the sprinklers in closets and bathrooms required in the NFPA 13 system. See, e.g., Tr. II, 66, 72-73; II, 112. We find that the Board has not sustained its burden in proving that these offer a significant advantage.

[14] Neither party has proposed, in the context of this hearing, that the developer install a gravity sewer system, apparently because of the great expense involved. See Tr. II, 159: IV, 88, 133-137; Board's Brief, pp. 32-33.

[15] Testimony indicated that there is townwide restriction limiting new development to 85 homes per year. The bylaw or regulation that contains this restriction was not offered into evidence, nor was the restriction itself put forward in evidence or argument as an independent justification for denying the comprehensive permit. Therefore, we do not consider it.

End Of Decision

