COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

ESSEX, ss. No. 19 MISC 000185 (KTS)

COLCHESTER PROPERTIES, LLC,	)
Plaintiff,	)
v.	)
CHARLES PERRAULT, RONALD HATEM, BRIAN BOES, STEPHEN F. DEFEO, JR., and MICHAEL COMEI, as they are members of the COMMUNITU DEVELOPMENT BOARD Of the CITY OF METHUEN,	)
Defendants.	)

DECISION

This case tests the limits of a planning board's authority to deny approval of a residential subdivision that, on its face, meets the letter of the zoning ordinance under which it was proposed. Colchester Properties, LLC ("Colchester") sought approval of a 9-lot subdivision for the property at 80 Myrtle Street (the "Property") under the Methuen zoning ordinance that permitted an increase in the density of development if the developer employed "low impact development techniques" ("LID" techniques) in the subdivision's construction. The planning board in Methuen, referred to as the Methuen Community Development Board (the "Board"), denied Colchester's proposal because the Board did not find that the types or numbers of LID techniques in the project design were sufficient to qualify for the density bonus contemplated by the zoning ordinance.

What brings this case to the Land Court is the fact that no subdivision rules or regulations were ever adopted in Methuen to guide the Board in its application of this concept of low impact development techniques. The Board did not realize this failure until after Colchester applied for approval of, at first, a 15-lot subdivision. Within weeks of that application, the City Council repealed the section of the zoning ordinance in question, but, by then, it was too late. Colchester's application had frozen the zoning classification set forth in the ordinance. The Board denied Colchester's original proposal to construct the 15-lot subdivision and, subsequently, the 9-lot subdivision that is now under review.

This is an appeal of the Board's decision under G. L. c. 41, § 81BB. I conducted a trial over two days beginning on March 1, 2022 and heard closing arguments on June 15, 2022. As this was a trial *de novo*, I make the following findings of fact and rulings of law based on the testimony, the trial exhibits, the stipulations before the court, and the arguments of the parties.

Findings of Fact[1]

1. The Property contains 174,247 square feet of land (approximately 4 acres) with frontage of 163.44 linear feet on Myrtle Street. It is located in the Rural Residential zoning district under the Methuen zoning bylaw and map. The minimum lot size in this district is 80,000 square feet with minimum lot frontage of 200 linear feet. As such, the Property is a lawful preexisting nonconforming lot.[2] Presently, it is improved by several structures that occupy a footprint of 5,590 square feet, with another 27,335 square feet of paved area.

[1] Exhibit ("Ex.") 1 is the Statement of Agreed Facts submitted by the parties prior to trial. Unless otherwise noted, my findings of facts are based on the Statement of Agreed Facts. In addition, the parties submitted prefiled testimony of their respective expert witnesses in lieu of live direct examination. Cross-examination of each expert witness took place live. The prefiled testimony of Robert M. Roseen is Ex. 39, Eric W. Botterman is Ex. 40, Kevin R. Dandrade is Ex. 41, and Peter F. Ellison is Ex. 42.

[2] Testimony of Wayne Capolupo, manager of Colchester, Tr. Vol. I, p.38.

Historically, the Property was used as a restaurant, a function hall, and an inn known as the "Sweetheart Inn." There is also a single-family dwelling on the Property.

2. The Property is also encumbered by two easements: a 25-foot-wide utility easement and a 50-foot-wide access easement. Both easements benefit land at the rear of the Property fronting on Arrowood Street, which is now part of a neighboring subdivision to the north. Neither easement is presently used by the owners of the benefitted land, and they appear to be remnants from the original Arrowood Street development that goes back more than a decade. Based on the testimony at trial, they are likely obsolete.[3]

3. The record owner of the Property is Michael E. Condon, Trustee of the Tavern Realty Trust ("Condon"). At some point prior to June 1, 2015, Condon approached Wayne Capolupo, an experienced builder and developer, about the possibility of pursuing the development of the Property for some higher and better use. The Sweetheart Inn building was dated and the long-term prospects of running a successful inn or restaurant there were dim.[4] They agreed that Capolupo would assist Condon in pursuing approvals for a residential project. Capolupo formed "Colchester Properties, LLC" as the business entity through which he would pursue the approvals.

4. As of June 1, 2015, Section VI-D of the Methuen zoning ordinance contained the "Table of Dimensional Regulations" that set forth the following exception:

> "Notwithstanding the Table of Dimensional Regulations, *where Low Impact Development (LID) techniques are employed in the design of a subdivision and in accordance with the LID requirements of the Subdivision Rules and Regulations* (emphasis added), the minimum dimensional requirements on a lot shall be fifty (50) feet

[3] Wayne Capolupo testified that he intended to seek the extinguishment of the easements if his project was approved. Tr. Vol. I, pp. 87-88.
[4] Tr. Vol. I, pp. 36-37.

of frontage and 5,000 square feet of area with not less than a 20 foot setback from other structures on the same or adjacent lots and front and rear setback of no less than 20 feet."[5]

The term "Low Impact Development techniques" was not defined in the zoning ordinance, nor did the Methuen Subdivision Rules and Regulations define or even make reference to "LID techniques" or "LID requirements."

5. "LID techniques," however, is a term of art in the civil engineering industry, commonly understood to be innovative approaches to the design of stormwater management systems that preserve open space, reduce the likelihood of impacting existing vegetated area, consolidate development, reduce the effects of development on the environment, and naturally recharge water resources. Robert M. Roseen, P.E., a civil engineer with a concentration in the investigation, design, testing, and implementation of innovative approaches to stormwater management, testified about LID techniques on behalf of Colchester. He explained that LID techniques are generally divided into two categories: structural and non-structural. Structural LID techniques are engineering-based and involve the creation of a structure, such as a bioretention area or a drainage swale, to manage stormwater. Non-structural LID techniques are typically planning-based strategies which are intended to protect wetland and surface water and reduce the amount of impervious surface in a development. Clustering lots and creating open space are examples of non-structural LID techniques.[6]

6. On June 1, 2015, Colchester submitted an application to the Board under Section VI-D for preliminary subdivision approval of a 15-lot subdivision at the Property. That project proposed to employ certain LID techniques as part of the stormwater management system in order to satisfy the condition for a higher-density subdivision required by Section VI-D.

[5] Ex. 3, City of Methuen, Massachusetts Comprehensive Zoning Ordinance of 1989 (revised through October 2, 2014).
[6] Ex. 39, ¶25; Tr. Vol. I, p. 148.

7. Two weeks later, on June 15, 2015, the Methuen City Council voted to repeal the aforementioned exception provided by Section VI-D of the zoning ordinance. As fate would have it, the Colchester proposal would be the only project that was ever submitted to the Board that sought subdivision approval under Section VI-D.[7]

8. On July 13, 2016, the Board denied Colchester's 15-lot subdivision for reasons that included a determination that Colchester's plan did not employ a sufficient number of "true" LID techniques.

9. Colchester appealed the Board's decision to the Land Court in a case titled *Colchester Properties, LLC v. Joseph Leone, et al.*, 16 MISC 000461 (GHP). On May 10, 2018, after hearing the parties' joint motion for remand, the court (Piper, J.) entered a Judgment of Remand, which returned the matter to the Board for a new public hearing on a revised 13-lot subdivision that the parties agreed Colchester would submit for the Board's consideration.[8]

10. On remand, Colchester and the Board engaged in a lengthy public hearing process, during which Colchester made several different proposals, starting with the 13-lot subdivision referenced in the Judgment of Remand, and ending with the 9-lot project now on appeal. The constant throughout the public hearing process was a fundamental disagreement about which or how many LID techniques were satisfactory to the Board to approve Colchester's higher density subdivision as contemplated permitted by Section VI-D.

[7] Ex. 1 ¶¶15, 19.

[8] Ex. 9. The parties also signed a settlement agreement entitled "Agreement on Remand" that set forth the parameters under which Colchester's new proposal would be considered by the Board. Ex. 7. The parties have raised certain legal and factual arguments concerning whether the agreement was breached by either party during the public hearing process that ensued. Because the parties appear to have both voluntarily departed from the terms of the agreement as the public hearing process unfolded and the typical give-and-take between a developer and a local board occurred, I am not persuaded that the agreement was breached by either party.

The Board's Decision

11. On March 14, 2019, the Board voted to deny Colchester's 9-lot plan.[9] The Board explained that, in light of the absence of any "specific provisions for LID techniques" in its subdivision rules and regulations, it evaluated the LID techniques proposed by Colchester using Section XI-D of the Methuen zoning ordinance and the Site Design Credits criteria contained in the Department of Environmental Protection ("DEP") Stormwater Handbook (the "Stormwater Handbook").

12. Section XI-D is the special permit bylaw in Methuen. Subsection 17 of that bylaw provides a path for approval of a higher density residential development, called an "Open Space Residential Development" ("OSRD"), if at least 50% of the property in the development is dedicated to open space. In particular, subsection 17(A)(1)(g) provides that the primary purpose of the OSRD is "[t]o encourage the use of Low Impact Development (LID) design techniques in an effort *to reduce the effects of development on the environment and encourage natural recharge of water resources* (emphasis added)." However, Subsection 17 does not provide guidelines for measuring the adequacy of these techniques if used in an OSRD project.

13. The Board applied the OSRD bylaw to Colchester's plan and determined that it did not meet the initial threshold for an OSRD special permit because it demonstrated

> "that zero (0) lots can be created as the site does not contain sufficient frontage to create one lot in the Rural Residential (RR) Zoning District. Moreover, the Open Space Residential Special Permit section of the Zoning Ordinance requires 50% open space; here, the applicant only provided 30% open space."[10]

However, Colchester had not submitted its plan seeking special permit approval as an OSRD. It makes sense for the Board to look at Colchester's plan in the context of Section XI-D because

[9] Ex. 24, Certificate of Denial.
[10] Ex. 24, § 3(a).

the purpose of LID techniques found in that section is applicable to the LID requirement of Section VI-D, but the special permit requirements themselves are inapplicable to the Colchester plan.

14. Next, the Board applied the Site Design Credits criteria of the Stormwater Handbook and determined that the LID techniques proposed by Colchester were insufficient in quantity and quality to support approval under Section VI-D.[11]

15. The Board made specific findings on the proposed LID techniques as follows:

> "4) The Board considered the following proposed development techniques to determine if they are "LID" or LID" (sic) techniques:
>
> a) The reduction of lot sizes, setbacks, and frontage. The Board determined that reduced lot areas and frontage setbacks without corresponding open space are counter to the intent of LID, and therefore, this is not a LID technique. A true LID requires a significant portion of the property to be preserved as open space in exchange for reduced lot areas, etc.
>
> b) The increased planting of trees along the roadway. Note 7 on Sheet 5 of 11 of the Subdivision Plan revised through 2/28/19 states that street trees shall planted as per sections 4.7.1 and 4.7.2 of the Methuen Subdivision Rules and Regulations; therefore no planting of trees is proposed above and beyond the requirements of the Subdivision Rules and Regulations. The Board found that simply satisfying required tree planting is not a LID technique.
>
> c) The use of bioretention areas within the cul-de-sac. The Subdivision Plan revised through 2/28/19 does not show any bioretention areas within the cul-de-sac.
>
> d) The disconnection of each individual roof runoff from the roadway drainage system to discharge into separate rain gardens. Although directing rooftop runoff to a "qualifying area" is a LID technique, this project does not meet the requirements for this technique as set forth in the Credit 2 Rooftop Runoff Directed to Qualifying Areas of the Mass DEP Massachusetts Stormwater Handbook.
>
> e) The maintenance of a fifty (50') foot buffer zone around wetland resource area. The Board determined that this is not a unique LID technique. All definitive subdivisions must comply with the Methuen Conservation Commission rules and regulations. According to their regulations all activity

[11] Ex. 24, § 4.

within 50 feet of any wetland will have a significant adverse impact on the wetland and shall not be permitted. The Applicant's plan to maintain a fifty foot buffer zone around the wetland resource areas is not a unique LID technique but is a requirement of the Methuen Conservation Commission.

f) The implementation of a Contech unit to provide total suspended solids removal[CMM3]. The Board found that this is not a LID technique.

g) The omission of sidewalks from the plan. The Board determined that the omission of sidewalks without the corresponding open space is counter to the intent of LID, and therefore this is not a LID technique. A true LID requires a significant portion of the property to be preserved as open space in exchange for reduced pavement and impervious surface.

h) The implementation of grass swales in lieu of sloped granite curbing. The proposed "country drainage" does not recharge the groundwater as it merely redirects the street drainage into an existing conventional system, and is therefore, not a LID technique.

i) The implementation of driveway culverts with twelve (12") inches of cover. The Subdivision Plan revised through 2/28/19 does not show driveway culverts.

j) The use of dead-end roadway ending in a cul-de-sac. The Board determined that the use of a dead-end road without the corresponding open space is counter to the intent of LID, and therefore this is not a LID technique. A true LID technique requires a significant portion of the property to be preserved as open space in exchange for reduced pavement and impervious surface.

k) The reduction of pavement width from the previously waived twenty-six (26') feet to twenty-four (24') feet. The Board determined that the reduction of pavement without the corresponding open space is counter to the intent of LID, and therefore this is not a LID technique. A true LID requires a significant portion of the property to be preserved as open space in exchange for reduced pavement and impervious surface."[12]

16. Significantly, the Board did not find that the absence of LID requirements in the Methuen Subdivision Rules and Regulations was a reason for its denial of the project.

17. The Board also denied Colchester's request for five waivers of the subdivision rules and regulations:

[12] Ex. 24, § 4.

a. a reduction in pavement width of the subdivision roadway from 26 feet to 24 feet;

b. the use of grass swales along the roadway instead of sloped granite edging;

c. elimination of sidewalks;

d. a dead-end road with a cul-de-sac that exceeded the maximum; and

e. a waiver from the typical roadway cross-section of a 2% crown from the center of the roadway to the edge of the roadway in the cul-de-sac in favor of a 1% slope from the center island to the edge of the roadway.

The Project

18. Millennium Engineering has been Colchester's civil engineer since it first proposed the 15-lot subdivision in 2015. Eric W. Botterman, P.E., Millennium's manager of all operations, testified about the design of the project under review. Colchester's plan proposes 9 lots that are clustered along a single roadway that is 402 feet long and ends in a cul-de-sac with a landscaped center. The roadway is located largely in the area of the existing driveway and parking lot. It is also located to coincide with the location of the utility easement that benefits, but is not used for, the land in the Arrowood Street development. The lots range from 7,061 square feet to 14,764 square feet in land area and each have at least fifty feet of frontage on the proposed way. Seven lots are clustered along the eastern side of the proposed way; two lots are on the western side of the way configured in a manner that avoids the Arrowood Street access easement. The plan also features two open space parcels—1.01 acres in the north portion of the Property and .26 acres in the southwest portion of the Property—which constitute more than 30% of the entire Property.[13]

[13] Ex. 21, Site plan for proposed 9-lot subdivision for 80 Myrtle Street.

19. There is a total of 23,170 square feet of proposed pavement, post-development, which represents a reduction of more than 15% from the existing paved area.[14] However, the total impervious area proposed by the project is greater than the existing condition.

20. As demonstrated by the Stormwater Management Report prepared by Millennium, the proposed stormwater management system for the project meets all of the performance standards of the Stormwater Handbook.[15] The new system will improve collection, treatment, recharge, and drainage of stormwater over the existing condition.

21. In order to comply with Section VI-D, but in the absence of subdivision rules and regulations concerning LID techniques, Millennium designed the subdivision to employ LID techniques based on the guidance it received from the Board and its peer review consultant, The Engineering Company ("TEC").[16] TEC advised the Board to direct Millennium to use the list of LID techniques in the Stormwater Handbook to satisfy the requirements of the now-repealed Section VI-D of the zoning ordinance.

22. The Stormwater Handbook contains a section titled "Low Impact Development Site Design Credits," which is a crediting system developed by DEP that encourages developers to incorporate LID techniques in their developments. In exchange for employing LID techniques, the DEP allows developers to reduce or eliminate traditional man-made stormwater management structures used to treat and infiltrate stormwater. The credit system is available as follows:

> "The Low Impact Development Site Design Credits encourage environmentally sensitive site design and Low Impact Development techniques for managing stormwater that *minimize impervious surfaces and preserve natural hydrologic conditions* (emphasis added). The credits allow project proponents to reduce or eliminate the structural

[14] Ex. 40, ¶41.
[15] Ex. 1 ¶92; Ex. 23, Stormwater Management Report prepared by Millennium Engineering dated November 11, 2014, revised February 28, 2019.
[16] Tr. Vol. II, pp. 23-24.

stormwater BMPs otherwise required to meet Standards 3 and 4 by directing stormwater runoff to qualifying pervious surfaces that provide recharge and treatment."[17]

23. This section of the Stormwater Handbook identifies 47 distinct design criteria that are part of the crediting system acceptable to DEP for projects that do not meet the letter of its stormwater performance standards. Engineers in the industry consider these 47 criteria to also be LID techniques.[18]

24. Colchester's expert Roseen explained the purpose and intent of LID techniques and how they interrelate with the 47 criteria identified in the Stormwater Handbook.

25. The Site Design Credits criteria are limited to projects that do not comply with the performance standards 3 and 4.[19] The DEP has deemed the satisfaction of these criteria to be an acceptable alternative to providing groundwater recharge and treatment of stormwater on a project where man-made structures are unable to meet the standards. By their nature, the Site Design Credits criteria incentivize low density of development, the creation of open space, the reduction of impervious areas, and the natural recharge of groundwater.

26. The Colchester project is not the type of development anticipated by the Site Design Credits criteria.[20] Colchester has proposed a high-density subdivision that complies fully with the performance standards of the Stormwater Handbook.[21] It does not need to trade the

[17] Ex. 13, Low Impact Development Site Credits of the Massachusetts Stormwater Handbook; "BMPs" is the acronym used by DEP in the Stormwater Handbook to refer to "best management practices."
[18] LID techniques are also described in a publication entitled the "Massachusetts Low Impact Development Toolkit" published by the Executive Office of Energy and Environmental Affairs. The Toolkit is made up of six "Fact Sheets" each of which describes a different low impact development strategy, but all of which "use careful site design and decentralized stormwater management to reduce the environmental footprint of new growth. This approach improves water quality, minimizes the need for expensive pipe-and-pond stormwater systems, and creates more attractive developments." Ex. 14, Massachusetts Low Impact Development Toolkit. The LID techniques described in the Toolkit are the laymen's version of the Site Design Credits criteria. Ex. 1 ¶53. TEC suggested that Colchester use the Toolkit to guide its design of the original 15-lot proposal but changed to the Site Design Credits criteria as the public hearing on the 9-lot plan unfolded.
[19] Ex. 39, ¶68; Ex. 13.
[20] Tr. Vol. I, p. 117.
[21] Ex. 40 ¶107; Ex. 39 ¶¶75-76.

employment of LID techniques for site credits in order to achieve compliance with DEP standards 3 and 4. Regardless, the Board selected the Site Design Credits criteria as the metric by which to evaluate Colchester's project because each criterion is a LID technique.

27. The Board's request that Colchester employ all of the Site Design Credits criteria, despite already complying with standards 3 and 4, was anomalous. The purpose of the Site Design Credits criteria is to incentivize lower density development where there are opportunities on the development site to reduce the amount of impervious area and protect the environment. The Colchester plan, however, and the Section VI-D ordinance under which it was proposed, contemplates a high-density subdivision. In addition, the Colchester project will be the redevelopment of a previously improved property where there is limited undisturbed area available for some of the protections envisioned by the criteria. It is likely impossible for a high-density development like Colchester's to meet all of the Site Design Credits criteria because the criteria encourage a low-density development. Roseen likened applying the Site Design Credits criteria to Colchester's project to attempting to put a square peg in a round hole.[22]

28. Nevertheless, Millennium followed the Board's direction and designed the subdivision to employ as many "well-established" LID techniques identified in the Site Design Credits criteria as possible, including:

a. use of rain gardens on 8 of 9 house lots to infiltrate rooftop runoff;

b. clustering of the 9 lots toward the southerly end of the Property with the concomitant creation of open space that comprises in excess of 30% of the parcel;

[22] Ex. 39, ¶75; Tr. Vol. I, p. 126. Roseen explained the Board's reliance on the Site Design Credits criteria as follows: "I think they are being misapplied. . .So it's a misapplication of a tool that's supposed to. . .create low-density environmental site design, which is great stuff, but that's not what's being done here. They are looking for something with a high-density bonus through the employment of LID structural controls." Tr. Vol. I, p. 117.

c. reduced pavement width by 2 feet (from the 26-foot standard to 24 feet);

d. reduced pavement and impervious cover by the elimination of sidewalks on both roadsides totaling about 14 feet;

e. reduced lot areas, setbacks, and frontage by the inclusion of open space;

f. use of country drainage (grass roadside swales) versus curb and gutter conveyance to promote infiltration largely following the existing topography of the land;

g. the jurisdictional wetland resource areas will not be disturbed, and a 25-foot no disturb buffer has been provided;

h. 50-foot stream buffers with no impervious cover are included;

i. trees along the roadway to provide canopy cover; and

j. a landscaped cul-de-sac.[23]

29. These LID techniques totaled 32 of the Site Design Credits criteria.[24] Botterman and Roseen testified about all 32 LID techniques and how each contributed to achieving the goal of preserving or improving the natural recharge of water resources and reducing the effects of the proposed development on the environment.[25] For example, Colchester's plan employs structural BMPs, such as rain gardens, to help maintain predevelopment hydrology and water quality through decentralized management of rooftop runoff. This is accomplished by the filtration and infiltration of the rooftop runoff close to its source, thereby reducing offsite runoff and

[23] Ex. 39, ¶27; Ex. 40, ¶59.

[24] Ex. 40 ¶111; Ex. 39, ¶80. The Site Design Credits criteria identifies 47 LID techniques. However, only 41 of the criteria would apply to Colchester because 6 of the criteria relate to coastal development, which this is not. The total number of Site Design Credits criteria against which the Colchester plan was measured is 41, although the total from the Stormwater Handbook is actually 47. For Site Credit No. 1, Colchester's plan uses 4 of the 7 LID techniques; for Site Credit No. 2, Colchester's plan uses 16 of 19 applicable LID techniques according to the Stormwater Handbook; and for Site Credit No. 3, Colchester's plan uses 12 of 15 LID techniques. Ex. 40, ¶¶112-115; Ex. 39, ¶¶81-84.

[25] Ex. 40, ¶¶ 67-86; Ex. 39, ¶¶14, 32-55

contribution to downstream flooding.[26] The project also employs nonstructural BMPs, such as clustering lots, to create open space and generally reduce the amount of impervious area in the roadway construction.

30. According to Roseen, the LID techniques proposed by Colchester will provide benefits that include the partial restoration of predevelopment hydrology by providing groundwater infiltration and recharge, the protection of water quality by providing infiltration, and the protection of habitat and surface waters by limiting the development envelope. Those benefits also include contributing to climate resiliency by maintaining the "sponge factor" (the sites' ability to store runoff during extreme storm events), maintaining stream and wetland baseflow, and protecting aquatic biota by limiting changes in hydrology, contaminants, and temperature.[27] I credit Roseen's expert opinion on this issue.

31. Roseen further opined that the LID techniques proposed by Colchester should not be evaluated based on the sheer number of techniques employed. Rather, their value should be measured by examining whether the techniques perform in a manner that achieves the ultimate goal of LID techniques, which is to preserve and improve the natural recharge of water resources and to reduce the effects of the proposed development on the environment.[28] Whether that can be achieved by using all 41 of the applicable techniques identified in the Site Design Credit criteria or a lesser number is not the relevant inquiry. In Roseen's opinion, the LID techniques employed in the Colchester plan will improve the natural recharge of water resources and reduce the effects of the proposed development on the environment by minimizing the amount of impervious area to the extent possible. I also credit Roseen's expert opinion on this issue.

[26] Ex. 39, ¶38; Ex. 40, ¶69. Millennium also submitted a letter to the Board that laid out in written form how its design employed 32 LID techniques. Ex. 22, Millennium Letter dated February 28, 2019.
[27] Ex. 39 ¶ 29.
[28] Tr. Vol. I, pp. 124-126.

32. The Board's peer review consultants, Kevin R. Dandrade, P.E. and Peter F. Ellison, P.E., did not disagree that Colchester employed 32 of the possible 41 LID techniques. Rather, they took issue with Colchester's failure to employ 41 out of 41 possible LID techniques. Paramount in their respective analyses was Colchester's failure to satisfy the DEP standard for 100% compliance with the Site Design Credits criteria. They both testified that achieving 100% compliance with the Site Design Credits criteria was essential for Colchester's proposal *because that is the DEP's policy for projects that do not meet performance standards 3 and 4.*[29] However, neither of the Board's experts explained in a convincing manner why 100% compliance with the Site Design Credits criteria related to the efficacy of the LID techniques proposed by Colchester, *whose project already met performance standards 3 and 4*. Instead, their testimony reflected more of a tick and tie review of Colchester's plan against the Site Design Credits criteria, where a failure to meet one criterion or the other was automatically treated as a disqualifying factor.

33. In addition to faulting the plan for its failure to employ 41 techniques and achieve 100% compliance, Dandrade and Ellison discounted the value of the 32 LID techniques included in the Colchester plan.

34. Ellison was critical of any of the LID techniques proposed by Colchester if they overlapped with either Methuen's subdivision rules and regulations or the limitations on development imposed by the Methuen Wetlands Protection Ordinance and its supporting regulations. For example, Ellison criticized Colchester's proposal to plant new trees in the subdivision because, even though that is a recognized LID technique, the subdivision rules and regulations already require the planting of trees. Similarly, Ellison discounted Colchester's

[29] Ex. 42, ¶¶13, 18-19.

proposed reduction in impervious surfaces through street design because "[t]he elimination of sidewalks or reduction of street pavement width are street designs used in subdivisions in Methuen not seeking the density bonus of Section VI-D."[30] Regarding the wetlands that existed on the Property, Ellison testified that Colchester's treatment of that area as open space was "not offering any greater concession than what is already required under the Wetlands Protection Ordinance and the Rules and Regulations of the Conservation Commission."[31]

35. This approach to discounting the value of a LID technique if it overlapped with another local planning rule or regulation reflected a subjectivity or randomness that is not rooted in either the Methuen zoning ordinance or the Site Design Credits criteria.

36. Finally, Ellison opined that the 9-lot proposal "is not consistent with Low Impact Development" because Colchester "failed to design a Project that employed sufficient LID techniques to qualify as a LID development per MassDEP's Site Design Credits or to warrant the density and dimensional bonus sought by Colchester under Section VI-D."[32]

37. This testimony reflected Ellison's and, perhaps, the Board's preoccupation with the idea that Colchester should not be allowed an increased density of development under Section VI-D without sacrificing something in return—a *quid pro quo* that was not sanctioned by Section VI-D. Colchester's plan was never intended to be a low impact development *project* like an OSRD, where the developer trades open space for a special permit allowing a higher lot count. Rather, Section VI-D allowed Colchester to submit a plan for a high-density development if it employed low impact development *techniques*. Whether the Colchester plan itself is a low

[30] Ex. 42, ¶24.
[31] Ex. 42, ¶24.
[32] Ex. 42, ¶¶26-27.

impact development project is a different question than whether the project employs LID techniques, but only the latter is required by Section VI-D.

38. I am not persuaded by the expert testimony from Dandrade and Ellison that the failure of Colchester to satisfy 100% of the Site Design Credits criteria was related to whether Colchester reasonably satisfied the goals described in Section XI-D—to reduce the effects of the project on the environment and to increase the natural recharge of water resources. I do not ascribe any nefarious intent to their recommendations to the Board, but they were arbitrary and, perhaps, driven by the outcome which the Board wished to achieve.

39. Colchester also sought waivers of five subdivision regulations.

a. *Roadway Pavement Width.* The project proposes a roadway width of 24 feet, as opposed to the required 26 feet. The Board previously agreed to grant this waiver to Colchester when it proposed the 13-lot subdivision which has a longer roadway and, therefore, would have more paved area. The reduction in paved area also reduces the amount of impervious surface, which is a non-structural LID technique under the Site Design Credits criteria. The Board has historically granted waivers for reduced pavement width, including two projects in the month prior to the decision in this case.[33]

b. *Grass Swales versus Granite Edging.* The project proposes to substitute grass swales in lieu of sloped granite edging required by the subdivision rules and regulations. The use of grass swales as opposed to curbing is a LID technique which, if employed, would further the intent of Section VI-D to reduce the effects of the project on the surrounding environment and contribute to the natural recharge of water resources.

[33] Ex. 27, Board's Decision approving the Gulezian Farms subdivision; Ex. 28, Board's Decision approving the 494 Howe Street subdivision; Ex. 31, Board's Decision approving the 2 Maple Street subdivision; Ex. 33, Board's Decision approving the Lynbrook Road Extension subdivision; and Ex. 35, Board's Decision approving the Maple Park Reserve subdivision.

The Board has waived compliance with this requirement on at least 3 recent subdivisions.[34]

c. *Elimination of Sidewalks.* The project does not include sidewalks. There are currently no sidewalks on Myrtle Street where the subdivision roadway will intersect with Myrtle Street, which diminishes, in part, the utility of requiring sidewalks in the subdivision. Furthermore, the inclusion of sidewalks will likely require the elimination of the roadside grass swales and, hence, would run counter to the use of a LID technique that is encouraged under Section VI-D. It is also a waiver that the Board has a history of granting.[35]

d. *Dead End Road Length with Cul-de-sac.* Colchester proposes a roadway that is 402 feet. The subdivision rules and regulations contemplate a dead-end road of less than 500 feet. A waiver for dead end road length has been historically granted.[36] A shorter roadway also reduces the impervious surface in the subdivision which is a LID technique.

e. *Roadway Slope in the Cul-De-Sac.* The final request seeks a waiver of the usual requirement for the roadway to have a crown that causes stormwater to drain to the edges of the roadway where it will be captured in the proposed drainage system. The subdivision rules and regulations for roadway construction require the roadway to have a crown in the middle so that stormwater will drain to either side of the roadway and be

[34] Ex. 27; Ex. 28; and Ex. 33.
[35] Ex. 28; Ex. 29, Board's Decision approving the Marjorie Street Extension subdivision; Ex. 30, Board's Decision approving the Nelson Farm subdivision; Ex. 31; Ex. 32, Board's Decision approving the Village at Merrimack Greens subdivision; Ex. 33; Ex. 34, Board's Decision approving the Great Oaks subdivision; and Ex. 37, Board's Decision approving the Margaret's Way subdivision (98 Forest Street).
[36] Ex. 2, City of Methuen Subdivision Rules and Regulations §4.2.3.2; Ex. 26, Board's Decision approving the Pine Grove Ave. subdivision; Ex. 27; Ex. 28; Ex. 29; Ex. 30; Ex. 31; Ex. 32; Ex. 33; Ex. 34; Ex. 36, Board's Decision approving the Ivy Street Extension (Maroun Subdivision); Ex. 37; and Ex. 38, Board's Decision approving the Minerva Drive subdivision.

handled by the drainage features proposed along the sides of the roadway. In the cul-de-sac, such a crown will push stormwater towards the center of the cul-de-sac and would require the installation of conventional stormwater management techniques in order to drain that water. If waived, the slope of the roadway in the cul-de-sac will push the water from the middle of the cul-de-sac to the edge of the roadway and into an area of grass swales. Thus, it is a LID technique.

40. Concerning these waivers, the parties agreed that, if granted, none would pose a substantial safety risk to the public.[37]

41. Ironically, the waivers that were denied by the Board are the types of development techniques that are encouraged by the OSRD special permit bylaw because they further the LID goals of reducing impervious cover and managing stormwater using a property's natural features or through other practices that protect the environment.

Discussion

Standard of Review

The appeal of a planning board's decision denying subdivision approval is brought under G. L. c. 41, § 81BB, and requires the court to find facts *de novo* and determine whether, on those facts, the plan conforms to the reasonable rules and regulations of the planning board. *Rettig v. Planning Bd. of Rowley*, 332 Mass. 476, 478 (1955). "A planning board's decision. . .will be upheld unless premised upon 'a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary.'" *Musto*, 54 Mass.App.Ct. 831, 837 (2002), quoting *Davis v. Zoning Bd. of Chatham*, 52 Mass.App.Ct. 349, 355 (2001). It is the intent of the subdivision control law that any subdivision plan filed with the planning board shall receive the approval of such board if

[37] Ex. 1, ¶¶65-69, 131.

said plan conforms to the reasonable rules and regulations of the planning board pertaining to subdivisions of land. *Musto v. Planning Bd. of Medfield*, 54 Mass.App.Ct. at 836 ; *Arrigo v. Planning Bd. of Franklin*, 12 Mass.App.Ct. 802, 807-808 (1981); *Bd. of Selectmen of Ayer v. Planning Bd. of Ayer*, 3 Mass.App.Ct. 545, 548 (1975). A planning board's authority includes the discretion to waive strict compliance with its subdivision rules and regulations "when such waiver is in the public interest and not inconsistent with the intent and purpose of the subdivision control law." *Musto*, 54 Mass.App.Ct. at 837; see *Mac-Rich Realty Constr., Inc. v. Planning Bd. of Southborough*, 4 Mass. App. Ct. 79, 85 (1976). The board may also review a subdivision for compliance with the use and lot-dimension restrictions in the local zoning ordinance. *Beale v. Planning Bd. of Rockland*, 423 Mass. 690, 696 (1996). But the planning board's authority extends no further. "A planning board does not have a roving commission. The only purposes recognized [by G. L. c. 41 § 81M] are to provide suitable ways for access furnished with appropriate municipal utilities, and to secure sanitary conditions." *Collings v. Planning Bd. of Stow*, 79 Mass.App.Ct. 447, 454 (2011), quoting *Sealund Sisters, Inc. v. Planning Bd. Of Weymouth*, 50 Mass.App.Ct. 346, 351 (2000).

When a planning board denies approval of a subdivision, it is the developer's burden to prove that the planning board exceeded its authority in so deciding. *Fairbairn v. Planning Bd. of Barnstable*, 5 Mass.App.Ct. 171, 173 (1977). While the trial judge should not substitute his or her own judgment for that of the planning board, the board's decision will not be sustained where the board acted outside of its authority under the subdivision control law. *Strand v. Planning Bd. of Sudbury,* 5 Mass.App.Ct. 18, 21 (1977). "A planning board may not exercise its authority to disapprove a plan on the vague grounds that the best interest of the town or the

public interest would be served by its disapproval." *O.I.B., Corp. v. Planning Bd. of Braintree*, 6 LCR 57, 62 (1998).

In this case, the Board denied Colchester's project based on two principal findings. First, Colchester's plan did not provide sufficient open space as that requirement is defined in the OSRD special permit bylaw. Second, the plan did not employ a sufficient number of LID techniques to justify the approval of a higher density subdivision as provided in Section VI-D of the zoning ordinance.

The Board's Application of the OSRD Special Permit Bylaw

As to the first finding, the Board's application of the OSRD special permit requirements to Colchester's plan was improper. Colchester proposed a LID project under Section VI-D of the zoning ordinance, an as-of-right use that was not subject to the special permit analysis for an OSRD project. Colchester's project was never intended to meet the requirements of an OSRD because the special permit bylaw contemplates a tradeoff, where a developer dedicates at least 50% of his land as open space and, in return, is granted a density bonus to allow a higher density of development on the remaining land. The OSRD tradeoff must meet the requirements of the ordinance and go through the discretionary special permit process, but Colchester's application under Section VI-D required neither an open space tradeoff, nor was it subject to the Board's discretion under a special permit review. And, there was no minimum open space requirement like there is with an OSRD. This *de facto* application of the special permit criteria to an as-of-right use went far beyond the Board's authority and was legally untenable. See *Collings*, 79 Mass.App.Ct. at 454.

The Board's Application of the Site Design Credits Criteria

As to the second finding, the Board interpreted Section VI-D to require Colchester to employ all 41 applicable LID techniques described in the Site Design Credits criteria. It is the Board's mandate of 100% compliance with these criteria that Colchester has challenged.

The now-repealed Section VI-D permitted a high-density residential subdivision if the project employed LID techniques, but it gave no further direction. The fundamental question, then, is whether the zoning ordinance provided sufficient guidance for the Board to determine whether Colchester employed LID techniques that would justify approval of its 9-lot subdivision.

The court must interpret the meaning of a zoning bylaw using the ordinary principles of statutory construction. *Framingham Clinic, Inc. v. Zoning Bd. of Appeals of Framingham*, 382 Mass. 283, 290 (1981); *Deadrick v. Zoning Bd. of Appeals of Chatham*, 85 Mass.App.Ct. 539, 545 (2014). The court looks to the language of the bylaw as the principal source of insight into its intent. *Shirley Wayside Ltd. P'ship v. Bd. of Appeals of Shirley*, 461 Mass. 469, 477 (2012). When the language is plain and unambiguous, the court should enforce the bylaw according to its plain wording unless literal construction would yield an absurd or unworkable result. *Commonwealth v. DeBella*, 442 Mass. 683, 687 (2004). In so doing, the court should endeavor to interpret the bylaw to give effect to all its provisions so that no provision will be inoperative or superfluous. *Connors v. Annino*, 460 Mass. 790, 796 (2011). Where the bylaw does not furnish a definition for a word or phrase, the court should give the word or phrase its usual and accepted meaning as long as the meaning is consistent with the purpose of the bylaw. *Eastern Point, LLC v. Zoning Bd. Of Appeals of Gloucester*, 74 Mass.App.Ct. 481, 486-487 (2009); *Murray v. Bd. of Appeals of Barnstable*, 22 Mass.App.Ct. 473, 478 (1986).

Where ambiguities exist in the language of the bylaw, the court should defer to the local board's reasonable construction because the local board is deemed to have special knowledge of the history and purpose of its bylaw. *Shirley Wayside Ltd. P'ship v. Bd. of Appeals of Shirley*, 461 Mass. at 475 ; *Deadrick v. Zoning Bd. of Appeals of Chatham*, 85 Mass.App.Ct. at 545; *Petrillo v. Zoning Bd. of Appeals of Cohasset*, 65 Mass.App.Ct. 453, 460 (2006). If the board's interpretation of its bylaw is reasonable, the court may not substitute its judgment. *Tanner v. Bd. of Appeals of Boxford*, 61 Mass.App.Ct. 647, 649 (2004). Such deference, however, should be given only when the board's interpretation is reasonable. *Pelullo v. Croft*, 86 Mass.App.Ct. 908, 909 (2014).

Section VI-D of the Methuen zoning ordinance provided an exception to the minimum dimensional requirements for a residential lot. By its plain language, where LID techniques were employed in the design of a subdivision, "in accordance with the LID requirements of the Subdivision Rules and Regulations," the minimum dimensional requirements for lot size and frontage would be reduced to not less than 5,000 square feet and 50 linear feet, respectively.

The Board has argued that Section VI-D was invalid on its face because the Board never adopted any "LID requirements" for inclusion in Methuen's Subdivision Rules and Regulations. It argues Section VI-D is so vague that the meaning of "LID techniques" cannot be ascertained by applying the usual principles of statutory construction and "men of common intelligence must necessarily guess at its meaning and differ as to its application," and therefore the court should declare it void. See *Commonwealth v. Carpenter*, 325 Mass. 519, 521 (1950). The Board's argument fails for several reasons.

First, this Court's review of the Board's decision is confined to the reasons stated by the Board for its denial. *Canter v. Planning Bd. of Westborough*, 4 Mass.App.Ct. 306, 307 (1976).

The Board did not deny Colchester's plan because Section VI-D was vague; in other words, in its decision, the Board did not make a finding that Section VI-D too vague. Hence, it is not part of my review.

Second, the Methuen zoning ordinance provides a window into the intended meaning of "LID techniques" through Section XI-D(17)(A)(1)(g) of the OSRD special permit bylaw. That section identifies the purpose of a LID design technique as follows: "to reduce the effects of development on the environment and encourage natural recharge of water resources." As a matter of statutory construction, it is exceedingly unlikely that the City of Methuen intended the term "LID techniques" as used in Section VI-D to mean something different than this articulation of the purpose of LID techniques in Section XI-D. Thus, the baseline set by the zoning ordinance for the use of LID techniques under Section VI-D must be interpreted to mean techniques that "reduce the effects of development on the environment and encourage natural recharge of water resources."[38]

Third, "LID techniques" is a term of art, commonly accepted in the engineering industry, which is captured in, at least, the DEP regulations and the Site Design Credits criteria. All of the experts at trial agreed that an appropriate definition of LID Techniques is contained in 310 CMR 10.04, which provides that:

> "Low Impact Development Techniques mean innovative stormwater management systems that are modeled after natural hydrologic features. Low impact development techniques manage rainfall at the source using uniformly distributed decentralized micro-sale controls. Low impact development techniques use small cost-effective landscape features located at the lot level."

Several actual techniques which can be employed to satisfy this definition are identified in the Site Design Credits criteria.

[38] It is also worth noting that the Board, as the special permit granting authority, has great familiarity and experience applying the rules of the bylaw when it considers OSRD applications.

Using the industry-accepted definition of "LID techniques" in light of the purpose articulated in Methuen zoning ordinance Section XI-D(17)(A)(1)(g), Section VI-D was not unreasonably vague. The Court finds that Section VI-D was intended to permit a reduction in lot size and frontage in a residential subdivision if a developer employed LID techniques, such as those described in the Site Design Credits criteria, *that reduced the effects of development on the environment and promoted natural recharge of water resources*. Section VI-D provided as-of-right permission for a high-density development if the project employed LID techniques that satisfied this purpose. This was the only condition or requirement imposed by Section VI-D.

The Board went significantly beyond the reasonable application of this requirement when it declared that Colchester's plan would be measured against the DEP standard of 100% compliance with the Site Design Credits criteria for projects that do not meet the performance standards of the Stormwater Handbook. The Board imposed criteria on the Colchester project that are intended to bring low density developments that do not meet standards 3 and 4 into compliance with the Stormwater Handbook. The decision of the Board to suggest these criteria as guidelines for the Colchester plan's LID techniques requirement was, in and of itself, reasonable, but the requirement for strict compliance by a high-density project which already met standards 3 and 4 was arbitrary and unreasonable. The Board's decision to apply the Site Design Credits criteria in this manner created an all-or-nothing scenario. Rather than evaluate Colchester's proposed LID techniques for their effectiveness in satisfying the intent of the ordinance, the Board simply counted the number of LID techniques proposed by Colchester and, where the LID techniques overlapped with other local rules and regulations, it discounted, or even disregarded, the value of those LID techniques *because* they overlapped.

Support for this application is not found in the Methuen zoning ordinance or the subdivision rules and regulations. Rather, it was an *ad hoc* standard apparently conceived by the Board to achieve its desired outcome, which was to prevent the construction of a high-density development on the Property unless, perhaps, Colchester made further concessions as to its lot count. In so doing, the Board's analysis resembled that of a "roving commission" attempting to protect the public interest where it otherwise lacked the regulatory authority to deny the project. This standard was legally untenable and beyond the Board's authority to implement.

Furthermore, the manner in which the Board applied this standard, by discounting the value of a LID technique simply because it overlapped with other local planning regulations, finds no support in the Site Design Credits criteria and was arbitrary and unreasonable. The fact that a LID technique may overlap with other local regulations intended to achieve the same or similar result does not, without further guidance, allow the Board unbridled discretion to ignore the project's use of the LID technique. Indeed, the Site Design Credit criteria contemplates such an overlap and does not support the concept of discounting a LID technique because of the overlap. Otherwise, no development could ever achieve 100% compliance with the criteria if each technique that overlapped with a local rule or regulation did not count.

Based on the testimony of Roseen and Botterman, which I credit, Colchester's 9-lot plan effectively employs LID techniques that will improve stormwater management over the existing condition using structural and non-structural BMPs intended to naturally recharge water and consolidate development, thereby reducing the effects of development on the environment. For these reasons, the Board's decision that the Colchester plan did not satisfy Section VI-D is annulled.

Waivers of Subdivision Rules and Regulations

Concerning Colchester's requests for waivers of the five subdivision rules, the Board has discretion to waive strict compliance when the waiver serves the public interest and is not inconsistent with the intent and purpose of the Subdivision Control Law. G. L. c. 41, § 81; *Musto v. Planning Bd. of Medfield*, 54 Mass.App.Ct. at 837. Here, the Board's decision on Colchester's waiver requests was infected by the standard it applied in denying the project for inadequate LID techniques.

The basis for the Board's denial of the waiver requests is unclear. Initially, the Board asserted that the project is not eligible for any waivers because the existing Property does not meet the basic dimensional regulations of the zoning ordinance and, therefore, is not even eligible to be subdivided until Colchester obtains a variance from the Methuen zoning board. This finding ignores the fact that the Property is a preexisting nonconforming lot that has been the subject of a subdivision public hearing process since 2015 with no prior mention by the Board of the need for a variance. In addition, all of the waiver requests relate to the reduction of impervious area and the implementation of structural and nonstructural BMPs which are the types of LID techniques which Section VI-D encouraged. In other words, the Board denied the waiver requests which, in and of themselves, were some of the very LID techniques identified in the Site Design Credits criteria that the Board directed Colchester to employ with 100% efficiency.

Furthermore, the Board agreed to grant four of the five waivers in the "Agreement of Remand" it entered into with Colchester in connection with the Judgment of Remand of the

earlier Land Court case.[39] While I do not find that the Agreement of Remand is binding because both parties departed from its terms over the course of the public hearing process on remand, it is evidence that the Board recognized that the waivers were reasonable, in the public interest, and not inconsistent with the Subdivision Control Law. Indeed, the Board agreed at trial that, if granted, none of the waivers would pose a substantial safety risk to the public.

Finally, there was substantial evidence that, in the recent past, the Board has granted all of the same waivers on other residential subdivisions.

The Board's decision to deny the waivers requested by Colchester was arbitrary, unreasonable, and not supported by the evidence adduced at trial. As such, that part of the Board's decision is also annulled.

Conclusion

For the reasons set forth in this Decision, I find and rule that the Board's decision denying Colchester's application for approval of the 9-lot subdivision under Section VI-D of the Methuen zoning ordinance and denying the requested waivers of the subdivision rules and regulations was legally untenable, arbitrary, unreasonable and otherwise beyond the proper exercise of the Board's lawful authority. Colchester's claim in Count III for breach of the Agreement on Remand is dismissed. The matter is remanded to the Board for the purpose of issuing an approval of Colchester's plan subject to any standard conditions of the Board which do not materially alter or interfere with the 9-lot subdivision plan approved by this Decision, but which may include the imposition of conditions requiring the installation of an advanced

[39] The Board agreed to grant waivers that would allow the omission of sidewalks, the use of grass swales in lieu of sloped granite curbing, the use of driveway culverts with 12 inches of cover, the use of a dead-end roadway with a cul-de-sac, and the reduction of roadway pavement width from 26 feet to 24 feet. Ex. 7.

warning sign on Myrtle Street and vegetation trimming along Myrtle Street to improve sight distances as described in Paragraph 8 of the Board's decision.

Judgment will enter annulling the decision of the Board and ordering approval of the 9-lot subdivision with the requested waivers.

So Ordered.

By the Court. (Smith, J.)

/s/ Kevin T. Smith

Attest: */s/ Deborah J. Patterson*
Deborah J. Patterson
Recorder

Dated: September 21, 2022.