COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

LEBLANC

v.

AMESBURY ZONING BOARD OF APPEALS

No. 06-08

DECISION

May 12, 2008

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HOUSING APPEALS COMMITTEE

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DECISION

I. PROCEDURAL HISTORY

On April 1, 2005, Roger LeBlanc submitted an application to the Amesbury Zoning Board of Appeals for a comprehensive permit pursuant to G.L. c. 40B, §§ 20-23 to build 56 rental affordable, mixed-income rental housing units known as Eagle Point on a 10-acre site off Clark's Road in Amesbury.[1] The housing is to be financed under the Massachusetts Housing Partnership (MHP) Permanent Rental Financial Program.

On June 22, 2006, the developer filed an appeal with this Committee alleging that the Board had not rendered a decision within the statute's time limitations, and asked that the Committee determine that a permit has been granted constructively. On July 11, 2006, the Committee opened its hearing by conducting a Conference of Counsel. On August 7, 2006, the developer filed a Motion for Summary Decision, which was denied on December 1, 2006.

In the meantime, on August 22, 2006, the Board had filed a decision with the Amesbury Town Clerk granting a comprehensive permit, but reducing the size of the development to 44 housing units. The developer amended its initial pleading, asserting that

1. Fourteen units will be rented to low or moderate income households, one of the units will be reserved for the manager of the development, and the remainder will be rented at market rates.

conditions imposed rendered the project uneconomic and requesting that the Committee vacate the Board's decision.

Thereafter, pursuant to the Committee's regulations,[2] the parties negotiated a Pre-Hearing Order, which was issued by the presiding officer; prefiled testimony was received from thirteen witnesses;[3] a site visit and three days of hearings to permit cross-examination of witnesses were conducted; and post-hearing briefs were filed.[4]

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2. Preliminary hearing procedures are described in 760 CMR 30.09(4) and 760 CMR 56.06(7)(d). Our regulations, which originally appeared at 760 CMR 30.00 and 31.00, have been amended and recodified effective February 22, 2008 as 760 CMR 56.00. The new regulations themselves indicate that they are generally to be applied to matters pending before us. 760 CMR 56.08(3). Since many provisions of the new regulations are identical to those in the previous version, few issues of fairness with regard to retroactive application are raised. For convenience, throughout this decision we cite both the old and new regulations; it may be assumed that the two versions are identical unless we indicate to the contrary.

3. One witness was Robert Engler, a housing consultant who had a business association a number of years ago with Committee Member James G. Stockard, Jr. The evidence shows that neither Mr. Engler nor his firm has a financial interest in the outcome of this matter. Tr. II, 52, 57-58, 143. After consideration of the Committee's Standing Order No. 05-02 (Avoidance of Appearance of Improper Influence, May 9. 2005), Mr. Stockard has declined to recuse himself in this matter.

4. A number of residents of an abutting residential condominium moved to intervene. Their motions were denied, though the condominium trust, through a trustee as representative, was permitted to participate on a limited basis as an interested person. See 760 CMR 30.04, 56.06(2). The trust filed a final written statement just prior to the filing of briefs by the parties. See Memorandum from Tracey Chalifour (filed Feb. 28, 2008). (The condominium is variously referred to in the record as Birchwood Point, Briarwood Village, and Camelot Village.)

During the hearing, the Board moved to strike certain testimony concerning background information upon which an expert relied. See Tr. II, 53. Though that information is not critical to any of our findings, the motion is denied.

In its brief, the Board requested issuance of a proposed decision. Board's Brief, p. 43; see 760 CMR 30.09(5)(h), 56.06(7)(e)(9). A proposed decision was in fact issued, and in addition to having the complete record in this matter available, the full Committee reviewed the parties' written comments.

The Board also requested oral argument before the full Committee. Board's Brief, p. 43. The full Committee considered that request before it began deliberations, and the request is hereby denied. Concerning practical considerations which limit the full Committee's ability to hear evidence and argument, see *Wilmington Arboretum Apts. Assoc. Ltd. Partnership v. Wilmington*, No. 87-17, slip op. at 3, n.2 (Mass. Housing Appeals Committee Order Sep. 28, 1992), *aff'd,* 39 Mass. App. Ct. 1106 (1995)(rescript).

II. PROJECT ELIGIBILITY

The Board put the developer to his proof with regard to two of the three project eligibility requirements contained in 760 CMR 31.01(1) and 56.04(1).[5] That provision requires that the developer be a limited dividend organization and that the proposed project be fundable by a subsidizing agency. 760 CMR 31.01(1)(a), 31.01(1)(b); 760 CMR 56.04(1)(a), 56.04(1)(b). Under 760 CMR 31.01 and our precedents, these matters have been established by introduction into evidence of a determination of project eligibility by the Massachusetts Housing Partnership.[6] Exh. 3. Assuming that determination is rebuttable under our old regulations, the Board has not introduced "sufficient evidence to determine that the project is no longer eligible for a subsidy." See 760 CMR 31.01(2)(f), 31.07(1)(a); also see Exh. 35, ¶ 2. (The new regulations provide that such a determination is *conclusive.* See 760 CMR 56.04(6), 56.07(2)(a)(1).)

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5. The parties stipulated with regard to other preliminary matters. First, they stipulated that the developer, as owner of the property, controls the site of the proposed housing. Pre-Hearing Order, § II-5 (May 8, 2007); see 760 CMR 31.01(1)(c), 56.04(1)(c); Exh. 35, ¶ 1. Second, they stipulated that prior to 2007, the town of Amesbury had not satisfied any of the statutory minima defined in G.L. c. 40B, § 20, thus foreclosing the defense that its decision is consistent with local needs as a matter of law pursuant to that section. Pre-Hearing Order, § II-4, II-6 (Oct. 19, 2006). The Board reserved its right, however, to argue that by approving a 240-unit affordable housing development in March 2007 it satisfied the statutory 10% housing unit minimum or met its planned production goal. See 760 CMR 31.04(1), 31.0431.07(1)(i) and 56.03(3)(a), 56.03(4). Under our precedents and the regulations, any such progress toward the town's housing goals that was made *after* Board issued its decision with regard to this proposal is irrelevant. See *Caseletto Estates, LLC v. Georgetown*, No. 01-12, slip op. at 21 (Mass. Housing Appeals Committee May 19, 2003). This approach was upheld in *Zoning Board of Appeals of Canton v. Housing Appeals Committee*, No. SJC-10057 (Apr. 11, 2008). Also see 760 CMR 56.03(1).

6. The Board appears to also argue either that a private individual may not qualify as a limited dividend organization or that Mr. LeBlanc testified that he was not such an organization. It is somewhat unusual for the developer to be a private individual, but it has always been the case under the Comprehensive Permit Law that such an individual, if he commits to entering into a regulatory agreement limiting his profit, may qualify it as a limited dividend organization. See *Owens v. Belmont*, No. 89-21, slip op. at 3-4 (Mass. Housing Appeals Committee, Jun. 25, 1992); also see *Daddario v, Greenfield*, No 80-03, slip op. at 10 (Mass. Housing Appeals Committee June 15, 1981), *aff'd,* 15 Mass. App. Ct. 553, 446 N.E.2d 748 (1983); *Dennis Housing Corp. v. Dennis*, No 01-02, slip op. at 2, n.1 (Mass. Housing Appeals Committee May 7, 2002). With regard to Mr. LeBlanc's testimony, his intent was clearly not to offer a legal opinion as to whether he, as an individual, might also be a limited dividend organization. See Tr. I, 36-41.

III. FACTUAL OVERVIEW

The development site is an irregularly shaped ten-acre parcel of land with 135 feet of frontage at 29 Clark's Road. Exh. 5. The proposal includes an entrance roadway that proceeds into the site perpendicular to Clark's Road in a southeasterly direction, with twelve housing units located along its northeast side. Exh. 5. Where the property abuts an on-ramp for Interstate Route 95, the roadway turns right, and continues past six more housing units, and then descends a steep slope toward a wooded wetlands. Exh. 5. The wetlands on the site are slightly more than four acres, and the roadway makes a crossing that is 260 feet long. Exh. 40, ¶ 22; see Exh. 5, sheet 2. The developer will fill 6,500 square feet of wetlands, and then replicate 7,200 square feet of wetlands nearby. Exh. 5, sheet 4. On the other side of the wetlands are the remaining 37 units and a manager's unit, and the roadway ends in a circular turnaround. Exh. 5, sheet 2. The total length of the roadway is about 1,800 feet. Tr. II, 5.

To the northwest of the site is a 120-unit residential condominium on an eight-acre parcel of land. Exh. 35, ¶ 8.

IV. ECONOMIC EFFECT OF THE CONDITIONS

When the Board has granted a comprehensive permit with conditions, the central question before the Committee is whether the decision of the Board is consistent with local needs.[7] Pursuant to the Committee's procedures, however, there is a shifting burden of proof. The Appellant must first prove that the conditions in aggregate make construction of the housing uneconomic. See 760 CMR 31.06(3), 56.07(2)(a)(3); *Walega v. Acushnet*, No. 89-17, slip op. at 8 (Mass. Housing Appeals Committee Nov. 14, 1990). Specifically, the developer must prove that the conditions imposed make it "impossible to proceed... and still realize a reasonable return." 760 CMR 31.06(3)(b), 56.02 (definition of "uneconomic"); G. L. c. 40B, § 20.

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7. The developer also alleged that the Board did not apply density standards as equally as possible to subsidized and unsubsidized housing. See Exh. 30, ¶ 5(c), 5(d); 760 CMR 31.06(4), 56.07(2)(a)(4). This issue was raised in the Pre-Hearing Order, but appears to be asserted only with regard to allegedly inappropriate conditions, and not the major substantive issues in the case. See Pre-Hearing Order, § IV-3.

The proper methodology to be used in analyzing the economics of a rental housing proposal is a Return on Total Cost (ROTC) analysis. *Bay Watch Realty Trust v. Marion*, No 02-28, slip op. at 10, (Mass. Housing Appeals Committee Dec. 5, 2005). Once the ROTC is established for a particular approved development, we then compare it to a standard benchmark to determine whether it is reasonable. As will be seen below, we conclude that in this case the smaller development approved by the Board is uneconomic.

A. The Developer's Presentation

In the case before us, although the developer has objected to a number of conditions imposed by the Board, there are three issues that it alleges have the greatest financial impact and render the development uneconomic. The most important is the reduction from 56 units to 44 units. The developer also alleges that requiring it to build an off-site water main and an on-site wetlands bridge are unnecessary and costly.

After receiving the Board's decision, the developer's financial consultant prepared a *pro forma* financial statement based upon the 44-unit development that had been approved. Exh. 36, ¶ 9. First, the *pro forma* first contains a "Development Budget." Exh. 36-A, p. 1. This was prepared jointly by the developer and his consultant. See, e.g., Exh. 35, ¶¶ 14, 15. It contains cost estimates based on an identical, 48-unit affordable housing project completed by the developer in Ipswich in 2005. Exh. 35, ¶¶ 9, 10. It shows total development costs of $10,385,543. Exh. 36-A, p. 1. The financial consultant testified that from his experience, these costs were reasonable. Exh 36, ¶¶ 13, 15-17.

Then, estimates of operating costs and income were prepared to complete an operating analysis. See Exh. 36-A, p. 3. Three factors were considered: projected rents, per-unit operating costs, and permanent loan terms. Exh. 36, ¶ 18. The rent of the affordable units was established using U.S. Department of Housing and Urban Development (HUD) income limits, and market rents were established using a market analysis prepared by the developer and a local realtor. Exh. 36, ¶ 18. Annual operating costs were estimated at $7,085 per unit. Exh. 36-A, p. 3, Exh. 36, ¶18. Loan terms reflecting MHP underwriting guidelines were assumed to be 7.13% interest with an amortization of 30 years and a debt coverage ratio of 1.10. The consultant testified that all of these are reasonable. Exh. 36, ¶ 18, 19.

Then, using the standard analysis—the net operating income of $429,697 divided by the total development cost of $10,385,543—the financial consultant calculated that the Return on Total Cost (ROTC) for the development would be 4.14%. Exh. 36-A, p. 5; Exh. 36, ¶ 9. He compared this to the benchmark established under the MHP Guidelines, which indicate that a projected ROTC of at least 2½% above the current yield on ten-year U.S. Treasury notes is required to fairly compensate the capital investor.[8] Exh 36, ¶¶ 6-9. Since the current Treasury note yield is 5.0%, a reasonable return is at least 7.5%, and thus, he found, the developer will not realize a reasonable return.[9] Exh. 36, ¶ 9; Exh. 41, ¶ 10(a)(i).

B. The Board's Presentation

1. General Issues – In rebuttal, the Board presented testimony prepared by its own financial expert. Most, if not all, of his testimony consists of argument based directly or at an underlying level on the fact that the estimates presented by the developer at the time of the hearing, in 2007, were different from those contained in the funding application that the developer submitted to MHP in 2004. For instance, he noted inconsistencies between 2004 and 2007 figures for construction costs, certain soft costs,[10] operating expenses, and income, and also that the methodology for calculating the maximum allowable developer's fee changed during that period.[11] Exh. 41, ¶¶ 13(b), 13(e), 13(c); 14; also see Exh. 41, ¶ 17. And, he used the differences between the figures to argue that it was not the conditions imposed by the Board, but rather "the changes [in the estimates] made by the Applicant that made the project uneconomic." Exh. 41, ¶ 23. But these arguments misunderstand the nature of the proof that is required in the *de novo* hearing before this Committee. "[G]enerally, the testimony we receive during our hearing attempts to establish… costs,

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8. The formal title of the MHP Guidelines is "Local 40B Review and Decision Guidelines: A Practical Guide for Zoning Boards of Appeal Reviewing Applications for Comprehensive Permits Pursuant to M.G.L. Chapter 40B" (Massachusetts Housing Partnership and Netter, Edith M., November 2005). The financial experts testifying for both the developer and the Board accepted the guidelines and the ROTC methodology referred to in them. Exh. 36, ¶¶ 6-9 ; 41, ¶¶ 6-10.

9. The Board's expert agreed that 7.5% is the proper threshold. See, e.g., Exh. 41, ¶ 21; 41-I.

10. These are architecture and engineering costs, marketing and rent-up costs, appraisal cost, and reserves. Exh. 41., § 13(e).

11. We note that the opposing consultants agree on the methodology to be used for determining the developer's fee that was in effect in 2007. See Exh. 36-A, p. 2; Exh. 41, ¶ 13(c)(ii).

rents, and other values *as of the time of the hearing*."[12] *Bay Watch Realty Trust v. Marion*, No 02-28, slip op. at 15 (Mass. Housing Appeals Committee Dec. 5, 2005)(emphasis added). Particularly since costs frequently rise over time, the developer's more up-to-date figures from the time of the hearing are likely to be more reliable, and the costs estimated in 2004 are largely irrelevant. The Board has not introduced independent evidence either to directly challenge the developer's figures or to prove its own alternative estimates as of the time of the hearing. Without such evidence, the Board cannot make a convincing argument that the developer's figures are consciously or erroneously inflated. We find that the developer's figures are credible. Thus, in general, and specifically with regard to the particular items discussed in this paragraph, the figures used by the developer's financial consultant are appropriately used in the *pro forma*.

We should also note that although the Board's expert provided a great deal of detailed testimony and information, he did not prepare his own *pro forma* financial statement for the 44-unit development as approved by the Board. See Exh. 41, 41-A through 41-I. The result is a myriad of figures, financial statements, and arguments that are not easily analyzed or compared.

2. Costs – In addition, the Board's expert challenged particular costs. For off-site mitigation, he first correctly points out a mathematical error. The developer estimated that a bridge over the wetlands would cost $225,000, and that a water main and five fire hydrants on Clark's Road would cost $500,000, for a total of $725,000. Exh. 35, ¶ 12. Both he and his financial consultant, however, either made an arithmetic error or double-counted the cost of the hydrants and entered an incorrect total of $775,000 on the *pro forma*. Also see Tr. II, 92.

The Board's expert also argues that the cost of a 750-foot water main "will not exceed $350,000." Exh. 41, ¶ 13(d)(3)(e). The evidence shows, however, that the Board

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12. The Board's expert points out that the MHP Guidelines state, "All of the line items in the *pro forma*,... should be estimated in current dollars at the time of submission of the request for a Project Eligibility Letter...." MHP Guidelines, p. 15; Exh. 41., § 28(a). He fails to note, however, that the purpose of the guidelines "to assist communities in reviewing comprehensive permit projects..." MHP Guidelines, p. 2. Since local review of a project normally takes place immediately after a Project Eligibility Letter is issued, it is logical for the local board of appeals to use the figures in the *pro forma* just reviewed by the subsidizing agency. It is no less logical for us to rely on figures current as of the date of our hearing.

required replacement of a twelve-inch main "along Clark's Road from Main Street, to include Macy Street (Route 110) to the entrance of the proposed development....."[13] Exh. 1, p. 20 (condition 61). This is considerably longer than assumed by the Board's expert—in fact, well over 2,000 feet. Tr. I, 124, also see Tr. I, 112, 117; Exh. 35, ¶¶ 8, 12; 42, ¶ 4. Therefore, we accept the developer's estimate of $500,000.

Finally, the Board's expert questions the $225,000 cost for a wetlands bridge. See Exh. 41, ¶ 13(d)(2). He correctly notes that in the developer's testimony, he simply "assum[es] that if [he] receives approval [from the Amesbury Conservation Commission under the local wetlands bylaw], the only way such approval would be granted is with a bridge wetlands crossing, rather than a filled wetlands crossing." Exh. 35, ¶ 12. The developer's brief and suggested revisions to the Proposed Decisions provide little additional clarification, but rather indicate that plans for a bridged crossing were also submitted to the Board, and cite only to testimony that appears to indicate that the bridge would be required under the state Wetlands Protection Act. Developer's Brief, p. 18, Tr. I, 133; Developer's Suggested Revisions to Proposed Decision, p. 2. In fact, it is the Board's position that no such bridge is required, though it is unclear what will be required under the WPA. Tr. II, 94. Under these confusing circumstances, the proper application of the law is as follows. The Board properly required in its decision that the developer comply with the WPA. Exh. 1, pp. 5, 12 (conditions 11, 42-H, 42-I). The Board reviewed the developer's original proposal, which showed a filled wetlands crossing with culverts, and apparently later saw plans for a bridge crossing. Exh. 5, sheet 4. The Board was required to act on the developer's proposal under the local wetlands bylaw on behalf of the Amesbury Conservation Commission. G.L. c. 40B, § 21. The Board did not explicitly list local wetlands waivers at the end of its decision, as it did for the local zoning bylaw and subdivision regulations. See Exh. 1, pp. 26-27. However, it implicitly recognized that it was granting such waivers (or was required by law to grant such waivers). That is, in Condition 19, in reference to the local bylaw, it noted, "Except as waived by this Decision...." Exh. 1, p. 6 (condition 19). Thus, the Board

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13. It is irrelevant that this condition was apparently conceived of at a meeting between the developer and the Amesbury Fire Department. See Exh. 47; Tr. I, 114-117. The off-site water main was not part of the original comprehensive permit application, but rather was a condition of approval imposed by town officials.

approved a wetlands crossing under the local bylaw, and since there is no evidence of stricter local requirements for such a crossing, that approval anticipated a crossing in compliance with the WPA. The developer does not need to obtain any further approval by the Conservation Commission itself, but the Board, in Condition 42-C, properly required ministerial review of final construction plans. Exh. 1, p. 11 (condition 42-C). That is, under the Comprehensive Permit Law, no further hearing before the Conservation Commission could be required, but ministerial review should take place, and may well be conducted by the town's conservation agent, just as construction supervision by that staff member was required by the Board. See Exh. 1, p. 17 (condition 43); see 760 CMR 56.05(100(b), 31.09(3)); *Tiffany Hill, Inc. v. Norwell*, No. 04-15, slip op. at 29 (Mass. Housing Appeals Committee Sep. 18, 2007). Thus, with regard to the wetlands crossing, the developer must comply only with state law, no wetlands bridge was required by the Board, and therefore $225,000 is not a proper expense to be carried on the *pro forma*.

3. Operating Analysis – The Board's expert also challenges specific items in the operating analysis. See Exh. 41, ¶ 14. Once again, however, he primarily points out differences between the 2004 and 2007 figures, and our review shows nothing out of the ordinary. Though not explained in detail, it appears that in 2007 the developer's expert substituted corrected rent levels based upon methodology from the U.S. Department of Housing and Urban Development (HUD) for the figures originally used. Exh. 36, ¶ 18; 41-G. We find these credible. With regard to operating expenses, using the figures provided by the Board's expert, it appears that some expenses increased, while others decreased, but that overall per-unit operating expenses increased only from $6,478 to $7,085. Exh. 41-G. This is reasonable due both to the passage of time and expected increases in per-unit costs related to differences in scale. See Exh. 36, ¶ 19.

C. Synthesized *Pro Forma* Analysis

As indicated above, the *pro forma* prepared by the developer's expert used standard methodology, and was critiqued by the Board's expert. Some of the specific line items were challenged, and others were not. We have reviewed the areas of agreement and disagreement ourselves, above, and provide a synthesized analysis here:

1. Development Budget

Hard Costs		
Acquisition	350,000	developer's figure - § III-B(1)
Site Preparation	882, 302	developer's figure - § III-B(1)
Off-Site Mitigation (water/hydrants/bridge)	500,000	Committee's finding - § III-B(2)[14]
Construction (units)	5,132,288	developer's figure - § III-B(1)
Construction Overhead, Gen. Req., Profit	950,543	developer's figure - § III-B(1)
Hard Cost Contingency	387,007[15]	developer's figure - not disputed
Sub-Total Hard Costs	8,202,140	
Soft Costs		
Surveys & Permits	45,000	developer's figure - not disputed
Architecture & Engineering	40,000	developer's figure - § III-B(1)
Legal, Title, & Recording	65,000	developer's figure - not disputed
Accounting & Cost Certification	20,000	developer's figure - not disputed
Civil/Environ./Geotech. Engineering	50,000	developer's figure - not disputed
Finance Fees	120,493	developer's figure - not disputed
Taxes	5,900	developer's figure - not disputed
Insurance	32,000	developer's figure - not disputed
Construction Loan Interest	168,690	developer's figure - not disputed
Rent-Up & Marketing	45,000	developer's figure - § III-B(1)
Appraisal/Consulting/Due Diligence	15,000	developer's figure - § III-B(1)
Inspections (lender)	7,500	developer's figure - not disputed
Development Consultant	10,000	developer's figure - not disputed
Operating Reserve	103,914	developer's figure - § III-B(1)
Soft Cost Contingency	36,425	developer's figure - not disputed
Developer Fee	1,143,481	developer's figure - § III-B(1)
Sub-Total Soft Costs	1,908,403	
Total Development Costs	10,110,543	

14. The citations in this column refer to sections in this decision, above.

15. The hard cost contingency may well be a figure calculated as a percentage of another figure. There was no evidence provided concerning this, and therefore, we have used the figure in the developer's *pro forma*. This is likely true of other figures, as well, such as the soft cost contingency, finance fees, and construction loan interest.

Thus, we find that the total development cost for the 44-unit development approved by the Board is $10,110,543.

2. Operating Analysis

We accept the operating analysis prepared by the developer's expert. See § III-B(3), above. Annual net operating income is estimated to be $429,697. Exh. 36-A, p. 3.

3. ROTC

The return on total cost (ROTC) is net operating income divided by total development cost, that is, $429,697 divided by 10,110,543 or 4.2%. As noted above, the parties are in agreement that the minimum acceptable ROTC in this case is 7.5%. Therefore, we conclude that the conditions imposed by the Board make construction of the housing uneconomic.

D. The Economics of the Development Proposed by the Developer

Finally, the Board argues that under our recent ruling in *Avalon Cohasset, Inc. v. Cohassset,* No. 05-09, slip op. at 11-12 (Mass. Housing Appeals Committee Sep. 18, 2007), that the 56-unit development that he proposed was also uneconomic, and that the developer should be required to prove that the development as conditioned by the Board is significantly more uneconomic. See Board's Brief, p. 8, 19-25.

We note at the outset that our *Cohasset* decision was not issued until after the hearing had begun in the present case. Our general rule is that the developer must simply prove that the development is uneconomic as conditioned by the Board. See, e.g., *Princeton Development, Inc. v. Bedford*, No. 01-19, slip op. at 8-9 (Mass. Housing Appeals Committee Sep. 20 2005), *aff'd* No. 05-3711 (Middlesex Super. Ct. Nov. 14, 2007). In *Cohasset*, in a case involving the denial of a change in the project after a permit had been issued, we stated, "Under the facts presented here, ...to sustain its burden the developer is required to establish... that the ROTC for the development [approved by the Board] is significantly more uneconomic...." *Cohasset, supra*, slip op. at 12. We gave no indication as to whether in the future, under different factual circumstances, a mere allegation by the Board should be sufficient to impose such a burden on the developer or whether the Board should be held to some higher standard. Under the facts in the case *currently* before us, where the hearing was under way when the *Cohasset* ruling was issued, we rule that the developer was not required

to offer proof with regard to the economics of the originally proposed development.[16]

V. LOCAL CONCERNS

Since the developer has sustained its initial burden, the burden shifts to the Board to prove that there is a valid health, safety, environmental, or other local concern that supports each of the conditions imposed, and that such concern outweighs the regional need for low or moderate income housing. 760 CMR 31.06(7), 56.07(2)(b)(3). To justify its limitation of the development to 44 units, in its brief the Board raises several issues: concerns about the impact of the stormwater management system and other aspects of site design on wetlands (density/stormwater drainage)(Board's Brief, p. 27, 33, 35, etc/); lack of recreational features (areas over drainage structures)(Board's Brief, p. 32); lack of loop at the end of the development's roadway (Board's Brief, p. 34); and insufficient "visual separation" from the Briarwood Village condominium (Board's Brief, p. 34).

As a preliminary matter, we note that much of the argument presented by the Board and of the evidence presented by its expert witnesses rests on alleged "data gaps" and incompleteness of plans. See, e.g., Exh. 39, ¶ 5; 40, ¶ 8; Board's Brief, p. 26. At the permitting stage, however, the developer is required to provide only preliminary plans. 760 CMR 5605(2), 31.02(2); *Transformations, Inc. v. Townsend*, No. 02-14, slip op. at 10-11 (Mass. Housing Appeals Committee Jan. 26, 2004); *Delphic Assoc., LLC v. Middleborough*, No. 00-13, slip op. at 15-16 (Mass. Housing Appeals Committee Jul. 17, 2002), *aff'd on other grounds, Town of Middleborough v. Housing Appeals Committee*, 449 Mass. 514, 870 N.E.2d 67 (2007). Final construction plans will, of course, be subject to technical review and approval by the Board's consulting engineers or town staff. See section VII-2(b), below; also see 760 CMR 56.05(10)(b). If the Board wished to argue that the developer's plans were incomplete, it was required to raise that issue early in the Committee's hearing by motion. 760 56.06(5)(b)(3), 30.07(2)(d). It did not do so. Further, our review of the plans indicates

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16. On the surface, the evidence presented by Board's expert appears to support the idea that 56-unit development was uneconomic. See Exh. 41-I, last column. But his figures are based on entirely different assumptions than those of the developer's expert, and, as noted above, we find them to be not only hard to analyze, but also less credible than the developer's figures. The evidence before us is not sufficient to determine what the ROTC would have been for the 56-unit development.

that they are quite complete. See Exh. 5; 10; 13; 14; 43-C. Thus, testimony or argument at this point in the proceedings that the *plans* are deficient (as opposed to the design itself) is not evidence of local "health, safety, environmental, design, open space or other" concerns that can be weighed against the need for affordable housing. See 760 CMR 31.06(7), 56.07(2)(b)(3).

A. The Impact of the Stormwater Management System and Other Aspects of Site Design on Wetlands

1. The Board's Evidence – To meet its burden of proof, the Board presented testimony from two experienced consultants who had provided peer review of the proposed development to the Board throughout the permitting process—an accredited environmental planner and a professional civil engineer. Both of these witnesses offered a great deal of general discussion, and then provided more detailed testimony. We will address their general comments first, and then their specific concerns.

The environmental planner testified that he and his staff "analyzed the project's impact to wetlands plus associated technical assessment of drainage structures...."[17] Exh. 40, ¶ 5. He alleged that a series of reviews was necessary "to address data gaps, incomplete analyses and information, errors in the plans and calculations, and other deficiencies....." Exh. 40, ¶ 7. He testified that his "professional opinion is that [due to wetlands issues] the Eagle Point project... is too dense...." Exh. 40, ¶ 11. "[S]ignificant wetlands resource impacts [will] result if the project is built out as currently designed." Exh. 40, ¶ 27. In support of this quite general conclusion, he first noted that 6,500 square feet of wetland will be filled, and a crossing built over the wetlands. Exh. 40, ¶ 12. He noted that this is regulated by the state Wetlands Protection Act (WPA), G.L. c. 131, § 40, and then engaged in a lengthy discussion of the treatment of the project design under that law. Exh. 40, ¶¶ 12-13, 17-22. He noted that the developer did not provide information concerning U.S. Army Corps of Engineers approval, though there is no indication that the developer is required to provide to the Board or this Committee any such information concerning federal approval. Exh. 40, ¶¶ 15-16. None of this testimony provides concrete evidence that wetlands resources will be

17. A considerable amount of this witness' testimony consists of comparing this proposed development and a similar development built by the same developer that required considerable less wetlands disturbance. See Exh. 40, ¶¶ 10, 14, 23, 25. Such comparison is irrelevant.

damaged, or that that damage is sufficient to outweigh the regional need for affordable housing. In fact, it is superfluous since the development will be required to comply with the state WPA and federal law in any case. See *O.I.B. Corp. v. Braintree*, No. 03-15, slip op. at 5-6 (Mass. Housing Appeals Committee Mar. 27, 2006); *Princeton Development, Inc. v. Bedford*, No. 01-19, slip op. at 10 (Mass. Housing Appeals Committee Sep. 20, 2005), *aff'd* No. 05-3711 (Middlesex Super. Ct. Nov. 14, 2007).

Much of the testimony of the Board's engineer was similarly general. She testified that she believed that the development's designer had "experienced difficulties meeting minimal local and state stormwater and drainage regulations." Exh. 39, ¶ 4. She indicated that the plans did not exhibit "a level of engineering completeness or accuracy to determine" whether the design would function adequately. Exh. 39, ¶ 4. She testified that the most recent plans were "deficient and incomplete." Exh. 39, ¶ 7. Though she clearly had significant reservations about the development, when her testimony is analyzed in detail, most of it is inconclusive. That is, she testified that inadequate design "can lead to... flooding... and adverse effects on wetlands. Exh. 39, ¶ 5. Failure to submit certain calculations "could also lead to flooding...." Exh. 39, ¶ 6. "In summation, it is my opinion that [various factors] led to difficulty meeting minimum state and local stormwater standards." Exh. 39, ¶ 9 The design of a large number of drainage structures "adds to the potential for future problems." Exh. 39, ¶ 10. "These types of deficiencies can be an early indication of future facility problems. ... I was not able to determine with sufficient confidence that the proposed development was designed would minimize substantial flooding risks nor protect public health, safety, and environmental quality." Exh. 39, ¶ 11. None of this testimony is concrete evidence that the stormwater system will function, or malfunction, in such a way as to cause sufficient damage to local concerns to outweigh the regional need for affordable housing.

As mentioned above, however, several more specific points were made in the testimony of these two experts. The most detailed part of the environmental planner's testimony is that in which he provides twelve "comments."[18] See Exh. 40, ¶ 26. In the first

18. Four of the twelve comments addressed stormwater management. The remainder addressed other issues in the case, matters that are no longer in issue, or were irrelevant comparisons to another development.

of these is his only reference (in eight pages of single-spaced testimony) to the Amesbury Wetlands Bylaw. He comments that three buildings and two large underground drainage vaults are located in the wetlands buffer zone, one thirty-five feet from the edge of the wetlands and the other—a 25 by 120 foot concrete and steel structure—seven feet from the edge. Exh. 40, ¶ 26 (first bullet point); also see Exh. 40, ¶ 18. He then notes that "[u]nder the Amesbury wetlands guidance policy, a minimum separation of 25 feet from the wetland edge is considered as a 'No Disturbance Zone'..., while there is a further separation of 50 feet designated as a 'No Structure Zone.'" Exh. 40, ¶ 26 (first bullet point). He provides no further elaboration of what, if any, damage this might cause so that it might be weighed against the need for affordable housing. His second comment simply indicates that the unspecified impact to the wetlands could be avoided by "reducing the density" of the project, that is by eliminating buildings and housing units from the project. Exh. 40, ¶ 26 (second bullet point). He then for the first time mentions, without elaboration, "steep topography and poor soils" as constraints on the site in addition to the wetlands. Exh. 40, ¶ 26 (seventh bullet point). Finally, he states that maintenance of eighteen separate underground recharge structures is a concern because it must be performed regularly to avoid clogging with silt and debris. Exh. 40, ¶ 26 (ninth bullet point). This could be problematic since maintenance typically involves vacuum trucks and mechanical equipment which could damage the wetlands buffer zone or leak oil or gasoline into the wetlands.

The most detailed part of the engineer's testimony is that in which she identified five "key engineering design deficiencies." See Exh. 39, ¶ 7. She drew attention to the following. Some of the "underground infiltration vaults did not have flat bottoms... and were not designed below the frost line...;" should a vault become clogged, "flooding could occur." Exh. 39, ¶ 7 (first bullet point). "[R]oof recharge beds were not equipped with emergency overflow pipes;" more "information is needed to determine whether... flooding will be an issue...." Exh. 39, ¶ 7 (second bullet point). "The infiltration basin overflow pipes were not modeled as 'outlets' in the [developer's] hydrological software...;" there is no way to determine whether... pre-development flows will be exceeded, which can cause... flooding...." Exh. 39, ¶ 7 (third bullet point). "There is a surcharge condition occurring during the 25-year storm event at the inlet of the infiltration basin at station 8+50; ...it could

pose a direct impact to the on-site residents and wetlands..." Exh. 39, ¶ 7 (fifth bullet point). As with the previous witness' testimony, it is apparent, because of two explicit references to state stormwater management requirements within the testimony, that each of these issues can and should be addressed during review under the state WPA. The fifth "deficiency" is that use of the decks above the vaults as recreation areas "is not recommended [because of the need for] regular access for maintenance and possible repairs or replacement." Exh. 39, ¶ 7 (fourth bullet point).

What emerges from the lengthy testimony of these two witnesses—testimony concerning comprehensive permit plans, which need only be preliminary—is that nearly all the issues they raised can be addressed during review of final plans under the state Wetlands Protection Act. The only matters that possibly raise legitimate local concerns involve maintenance. (Even though it is likely that these, too, will be addressed during WPA review, we will also address them by condition. See section VII-2(c), below.)

2. The Developer's Response – Although we have already noted that much of the testimony of the Board's experts was general and therefore largely irrelevant, it was contradicted by the developer's experts. The developer's wetlands consultant testified that the wetlands crossing and wetlands replication[19] were unremarkable, that a federal permit has been received, and that permitting under the state WPA is proceeding. See generally, Exh. 44, ¶ 3. Similarly, the developer's engineer responded to the issues raised by the Board and concluded generally that "the project as designed meets or exceeds all state and federal requirements..., [and] adequately addresses the stormwater management and other engineering related concerns expressed by the [Board's] expert testimony...." Exh. 43, ¶ 6.

More important, however, are the more specific concerns raised by the Board. First, however, we have already noted that nearly all these concerns will be addressed under the state Wetlands Protection Act. But in addition, there is a significant question as to whether in fact there are *any* local requirements that are stricter than the WPA. The parties seemed to

19. Since no evidence was presented concerning local replication requirements that are stricter than state law, this would appear to be an issue solely under the WPA. Nevertheless, we have reviewed the testimony of the opposing witnesses and we accept that of the developer's expert, that is—in response to testimony that it is "a difficult undertaking with an uncertain outcome"—that given the particular conditions on this site, replication can be accomplished successfully. Exh. 44, ¶¶ 3(a), 3(l); cf. Exh. 40, ¶ 24.

have assumed the existence of such stricter requirements in the Pre-Hearing Order and their briefs. But review of the Amesbury Wetlands Bylaw reveals no such provisions—at least with regard to buffer zones or setbacks from the wetlands. See Exh. 29. Further, there is no evidence that Amesbury has wetlands regulations to implement its bylaw; the Board's expert refers only to "wetland guidance policy," and no such policy was admitted into evidence. Exh. 40, ¶ 26 (first bullet point). Finally, the evidence that does appear in the record is the written opinion of the developer's wetlands scientist that the standards under the local bylaw "are no more stringent than those required under [state wetlands regulations]." Exh. 11. On this basis alone there is justification for ruling that the Board has not met its burden of establishing a legitimate local concern.

In addition, the detailed criticisms presented by the Board's experts are contested by the developer. The developer's wetlands expert testified affirmatively that "[t]here are no direct impacts to wetland resource areas proposed in the vicinity of the infiltration vaults. Once built, they will not pose any threat to the wetlands and their primary function as infiltrators could be characterized as a benefit by assuring gradual infiltration of water to the groundwater table...." Exh. 44, ¶ 3(b). The developer's engineer responded directly to three of the five "key engineering design deficiencies" raised by the Board's engineer. He indicated that the bottom elevations of the infiltration vaults were designed in response to on-site testing, which showed that seasonal high ground water elevations are "generally at or shallower than frost depth." Exh. 43, ¶ 5(d)(1). He indicated that for those infiltration basins that do not infiltrate 100 percent of runoff in a 100-year storm events, overflow pipes were in fact modeled as 'outlets', and that in any case the overflow pipes would be modeled as culverts instead of orifices in the final design." Exh. 43, ¶ 5(d)(3). And he indicated that although the surcharge condition that the Board's engineer identified at one particular infiltration basin is based on a storm condition in excess of state policy, it would nevertheless be corrected in the final design. Exh. 43, ¶ 5(d)(5). He did not respond substantively to the second concern of the Board's—that recharge-bed overflows had not been addressed sufficiently. But he indicated the developer's willingness to comply with state stormwater management standards in this regard. Exh. 43, ¶ 5(d)(2). Nor did he respond to the fifth concern about the use of decks above infiltration vaults for recreation. But from the

testimony of the Board's engineer it seems that this is a planning issue involving the compatibility of recreation with maintenance, and not an engineering matter that effects the functionality of the stormwater management system. See Exh. 39, ¶ 7 (fourth bullet point); section V-B, below.

The one significant issue that has not been addressed clearly by the developer is the danger that maintenance vehicles may pose in the wetlands buffer zone. See Exh. 40, ¶ 19. Though it is unclear whether this is truly a local concern or simply another matter that will be addressed under state law, it can be easily addressed by a condition prohibiting motorized vehicles on unpaved surfaces in the buffer zone, that is, by requiring maintenance to be performed either by hose extensions from vehicles or by hand. See Tr. I, 17-18. See section VII-2(d), below.

After evaluating all of the evidence presented by the expert witnesses, we conclude that the Board has not sustained its burden of establishing specific local concerns with regard to stormwater management that outweigh the regional need for affordable housing.

B. Recreational Facilities

The Board also argues that recreational facilities on the site are inadequate. Board's Brief, pp. 32-33. The environmental planner alleged an unspecified "safety concern" resulting from the location of the tot lot and a sitting area "adjacent to" the development's access roadway. Exh. 40, ¶26 (fifth bullet point). Similarly, he stated without elaboration that it is "unsuitable… to place a children's play area atop an underground drainage vault built of concrete and steel." Exh. 40, ¶26 (fifth and sixth bullet points). The Board's engineer testified that the use of the decks above the vaults as recreation areas "is not recommended [because of the need for] regular access for maintenance and possible repairs or replacement." Exh. 39, ¶ 7 (fourth bullet point).

This testimony is not convincing. It could equally well be argued that from a stormwater management point of view locating a tot lot or basketball court on an existing structure rather than paving over green open space is a beneficial and creative design. Further, no defects in design were elicited on cross-examination of the developer's engineer. See Tr. II, 9-15. In any case, the Board has not met its burden of proving a local concern in this regard that outweighs the need for affordable housing.

C. Roadway Loop

Next, the Board contends that the design of the access roadway is inadequate. Board's Brief, p. 34. The only testimony in support of this position is the testimony of the Board's environmental planner: that the cul-de-sac design of the roadway "creates circulation barriers and poses safety issues to residents and children playing, riding bikes, walking, or driving. A better plan is to design a loop circulation pattern...." Exh. 40, ¶ 7 (twelfth bullet point). This testimony is not sufficiently detailed to establish the existence of a local concern that outweighs the regional need for affordable housing.

D. Visual Separation from Birchwood Village

Finally, the Board asserts that one of the proposed buildings is too close to an existing condominium on Clark's Road. Board's Brief, p. 34. In its post-hearing statement, the condominium trust joined in this argument, stating, "Many trees [on the development site] will come down, and vehicles will be used and parked in close proximity to at least one of the buildings, and the pool, at Birchwood Pointe." Post-Hearing Statement, p. 4, ¶ 4 (filed Feb. 28, 2008). Once again, however, the Board presented little evidence to substantiate its claim. The environmental planner testified only that "placement of... housing units #51-53 is within 50 feet of the adjoining Briarwood Village condominium complex, [which] is an insufficient separation affording minimal open space and visual separation that would help buffer the [new units] from... Briarwood Village...." Exh.40, ¶ 26, (fourth bullet point). The development plans do, in fact, show that the corner of the closest proposed building is set back forty-three feet from the property line that separates the two developments. Exh. 5, sheet 2. But there is no indication at all in the record of how far the existing pool and building are from the property line. Further, the configuration of the proposed buildings, with the closest of them turned at a angle from the property line and most of the buildings located quite a distance away, minimizes their impact. Residents of the condominium are entitled, however, to have visual buffering between their property and the six parking spaces located near the property line. See section VII-2(e), below.

The Board has not established the existence of a local concern with regard to visual separation between the proposed development and Birchwood Village that outweighs the regional need for affordable housing.

VI. MISCELLANEOUS CONDITIONS

The developer has also challenged a number of conditions as being illegal, improper, or otherwise beyond the authority of the Board. Under our precedents interpreting of G.L. c. 40B, § 23 and under 760 CMR 31.08(1)(b) and 56.07(5)(a)(2), all of the conditions imposed by the Board are to be reviewed in aggregate to determine whether they render the proposal uneconomic, and if so, each condition contested by the developer is to be reviewed to determine if it is consistent with local needs.[20] See, e.g., *Princeton Development, Inc. v. Bedford*, No 01-19, slip op. at 18 (Mass. Housing Appeals Committee Sep. 20, 2005,), *aff'd* No. 05-3711 (Middlesex Super. Ct. Nov. 14, 2007); *Walega v. Acushnet*, No. 89-17, slip op. at 8, (Mass. Housing Appeals Committee Nov. 14, 1990); also see Pre-Hearing Order, § IV.

In this case, the Board has imposed and the developer has challenged an extraordinary number of conditions—approximately one hundred. Many of these are ambiguous, unnecessary, or improper. See Pre-Hearing Order, § IV-2 (pp. 3-10). For instance, the Board has required the developer to submit a written request for waiver if "the final design of the project necessitates further waivers" of local requirements. Exh. 1, p. 2, ¶II-7. This is superfluous in light of the detailed regulatory provisions governing changes in a project after a permit has issued. See 760 CMR 31.03, 56.05(11), 56.07(4). Similarly, a number of the conditions run afoul of our longstanding rule against conditions subsequent, which, by requiring subsequent submissions and approvals, undermine the entire purpose of a single, expeditious comprehensive permit. See, e.g., Exh. 1, p. 4, ¶ 7;also see *Peppercorn Village Realty Trust v. Hopkinton*, No. 02-02, slip op. at 22 (Mass. Housing Appeals Committee Jan. 26, 2004); *Hastings Village, Inc. v. Wellesley*, No. 95-05, slip op. at 33-34 (Mass. Housing Appeals Committee Jan. 8 1998), *aff'd*, No. 00-P-245 (Mass., App. Ct. Apr. 25, 2002); *Owens v. Belmont*, No. 89-21, slip op. at 13-15 (Mass. Housing Appeals Committee June 25,

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20. A more difficult question is presented in situations in which we have found that the conditions imposed do not render the proposal uneconomic. But even in that case, we will engage in a much more limited review of the conditions. For a full discussion, see *Archstone Communities Trust v. Woburn*, No. 01-07, slip op. at 20-21 (Mass. Housing Appeals Committee, Jun. 11, 2003), *appeal docketed, Board of Appeals of the City of Woburn v. Housing Appeals Committee*, S.J.C. No. 10014 (argued Feb. 4, 2008); *Peppercorn Village Realty Tr. v. Hopkinton*, No. 02-02, slip op. at 16-17 (Mass. Housing Appeals Committee Jan. 26, 2004).

1992). Other provisions improperly impinge upon the prerogatives of the subsidizing agency. See Exh. 1, p. 6, ¶ 41; also see *Attitash Views, LLC v. Amesbury*, No. 06-17 (Mass. Housing Appeals Committee summary decision Oct. 15, 2007).

Neither of the parties, however, has briefed these many points of contention in detail. Nor must we address each and every condition since the appropriateness of most may be resolved by reference to our regulations and precedents. Several, however, merit specific attention.

Conditions 30-34 (Exh. 1, pp. 7-8: "Management Documents") – The Board cites no authority for the far-reaching requirements for documentation of maintenance that it has imposed in conditions 30 through 34. Maintenance plans for stormwater management systems, however, are commonplace and useful. Though such a plan is likely to be imposed under the Wetlands Protection Act, in case it is not, we will do so by condition. Conditions 30 to 34 are stricken and the condition in section VII-2(f), below, is imposed in their place.

Condition 42-44 (Exh. 1, pp. 9-17: "Conditions Precedent to Commencement of Project [and] ...Issuance of Building Permit") – These demanding requirements imposed by the Board in conditions 42 through 44 may be enforced only if they "are applied as equally as possible to both subsidized and unsubsidized housing." G.L. c. 40B, § 20. That is, any requirement that has not been imposed by the town of Amesbury on unsubsidized development is void.

VII. CONCLUSION

Based upon review of the entire record and upon the findings of fact and discussion above, the Housing Appeals Committee affirms the granting of a comprehensive permit, but concludes that certain of the conditions imposed in the Board's decision render the project uneconomic and are not consistent with local needs. The Board is directed to issue an amended 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 and the Board's decision except as provided in this decision.

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

(a) The development, consisting of 56 total units, including 14 affordable units and a manager's unit, shall be constructed substantially as shown on plans by Eastern Land Survey Assoc., Inc. (Site Development Permit Plan, March 28, 2005, rev'd Jan. 20, 2006 (Exhibit 5) and architectural plans by H.H. Morant & Co., Inc., Architects, April 17, 2001 (Exhibit 6), and shall be subject to those conditions imposed in the Board's decision filed with the Amesbury Town Clerk on August 22, 2006 (Exhibit 1) that are not inconsistent with this decision.

(b) Final construction plans for all buildings, roadways, and elements of the stormwater management system shall be submitted for final comprehensive permit review and approval to the Board's engineering consultants or such other agent as the Board may designate for final review pursuant to 760 CMR 31.09(3), 56.05(10)(b).

(c) Final construction plans for all elements of the stormwater management system shall be approved under the Wetlands Protection Act., G.L. c. 131, § 40.

(d) During routine maintenance of infiltration basins, no motorized vehicles shall be permitted on unpaved surfaces in the 100-foot wetlands buffer zone. That is, maintenance shall be performed either by hose extensions from vehicles or by hand.

(e) A visual buffer not less than seventy feet long and six feet high shall be constructed and maintained between the six parking spaces near housing units 51, 52, and 53 and the property line of the development. The Birchwood Condominium Trust may choose whether it shall consist of a wooden fence or evergreen trees or shrubbery, though the Trust may not select the exact type of building materials or evergreen vegetation.

(f) The developer shall prepare a maintenance plan for the stormwater management system, which shall address routine and non-routine maintenance of all drainage facilities and roadways. Prior to commencement of construction, this plan shall be submitted to and approved by the Amesbury conservation agent, town engineer, consulting engineer, or such other official as may be determined by the

Board. Such agent shall apply standards consistent with town practices with regard to non-subsidized housing.

3. Should the Board fail to carry out this order within thirty days, then, pursuant to G.L. c. 40B, § 23 and 760 CMR 31.09(1), 56.07(6)(a), this decision shall for all purposes be deemed the action of the Board.

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

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

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

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

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

(e) This comprehensive permit is subject to the cost certification requirements of 670 CMR 56.00 and DHCD guidelines issued pursuant thereto.

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

(g) The Board shall take whatever steps are necessary to insure that a building permit is issued to the applicant, without undue delay, upon presentation of construction

plans, which conform to the comprehensive permit and the Massachusetts Uniform Building Code.

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

Housing Appeals Committee

Date: May 12, 2008

Werner Lohe, Chairman

Joseph P. Henefield

Marion V. McEttrick

James G. Stockard, Jr.

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