COMMONWEALTH OF MASSACHUSETTS

HOUSING APPEALS COMMITTEE

PARAGON RESIDENTIAL PROPERTIES, LLC

v.

BROOKLINE ZONING BOARD OF APPEALS

No. 04-16

DECISION

March 26, 2007

TABLE OF CONTENTS

I. PROCEDURAL HISTORY… 1

II. FACTUAL OVERVIEW 4

III. PRELIMINARY ISSUES 6

A. Jurisdiction 6

1. Site Control 7

2. Fundability 12

B. The Developer's Qualifications 13

IV. ECONOMIC EFFECT OF THE BOARD'S CONDITIONS 15

A. The Developer's Presentation 16

B. The Board's Response 20

1. Methodology 24

2. Land Value 27

3. Construction Costs 30

4. Revenue from Sales 34

C. Conclusion 37

V. LOCAL CONCERNS 39

A. Density, Height and Open Space 40

B. Local Requirements and Comprehensive Plan.. 44

C. Other Concerns Related to Building Design.. 46

D. Other Challenged Conditions.. 49

V. CONCLUSION 57

COMMONWEALTH OF MASSACHUSETTS

HOUSING APPEALS COMMITTEE

PARAGON RESIDENTIAL PROPERTIES, LLC, Appellant	
v.	No. 04-16
BROOKLINE ZONING BOARD OF APPEALS, Appellee	

DECISION

This is an appeal pursuant to G.L. c. 40B, §§ 20-23, and 760 CMR §§ 30.00 and 31.00, brought by Paragon Residential Properties, LLC (Paragon), from a decision of the Brookline Zoning Board of Appeals granting a comprehensive permit with certain conditions with respect to property located on Marion Street in Brookline, Massachusetts. For the reasons set forth below, the decision of the Board is set aside and the comprehensive permit is ordered modified to conform to this decision.

I. PROCEDURAL HISTORY

On October 14, 2003, Paragon submitted an application to the Board for a comprehensive permit pursuant to G.L. c. 40B, §§ 20-23, for a condominium project consisting of 88 units and 96 parking spaces on a 15,036 square foot parcel at 45 Marion Street, Brookline. Paragon later amended its application to reduce the size of the project to

68 units and 80 parking spaces. The project was to be financed by the Massachusetts Housing Finance Agency (MassHousing) Housing Starts program. Pre-Hearing Order, § II, ¶ 2; Exhs. 1, 2(a).

The Board's decision indicates that the public hearing began on November 6, 2003, and continued on December 4 and 18, 2003 and March 18, April 22, May 20 and June 10, 2004, with a site visit being held on December 21, 2003. The Board issued its decision granting the permit with specified conditions on July 6, 2004. On July 22, 2004, Paragon filed its appeal with the Housing Appeals Committee. Jonathan Davis, a neighbor of the site residing on Park Street, filed a motion to intervene on August 3, 2004. The Committee held a Conference of Counsel on August 9, 2004.[1] The Board moved to dismiss for lack of jurisdiction on August 23, 2004. Paragon filed a motion on September 10, 2004, requesting that the Board's decision be deemed a constructive grant of the comprehensive permit, or alternatively, a *de facto* denial of the comprehensive permit. The presiding officer granted the motion to intervene for identified limited purposes, but denied the motions to dismiss, for constructive grant and for a determination that the Board's decision constituted a *de facto* denial. *Paragon Residential Properties, LLC v. Brookline,* No. 04-16 (Mass. Housing Appeals Committee Dec. 1. 2004 Ruling on Prehearing Motions). The Appellant and the Board both sought reconsideration of the respective rulings. The presiding officer denied those requests as well. *Paragon, supra,* No. 04-16 (Mass. Housing Appeals Committee June 6, 2005 Ruling on Motions for Reconsideration).

---

1. A hearing officer of the Committee, who is not the presiding officer, conducted the Conference of Counsel. The Committee's Chairman, who is a resident of Brookline, has recused himself from participation in this appeal.

The presiding officer conducted a Pre-Hearing Conference on August 8, 2005. On August 18, 2005, the Board submitted a motion to have the full Housing Appeals Committee hear the testimony in the appeal and a motion for the recusal of James G. Stockard, Jr., a member of the Committee.[2] On October 6, 2005, the Board filed an emergency motion to dismiss or stay the proceedings. The presiding officer issued the Pre-Hearing Order on November 8, 2005 and subsequently denied the emergency motion. *Paragon, supra,* No. 04-16 (Mass. Housing Appeals Committee Jan. 23, 2006 Ruling on Board's Emergency Motion to Dismiss or, in the Alternative, to Stay Proceedings before the Committee).

The parties thereafter submitted pre-filed direct testimony and Paragon filed pre-filed rebuttal testimony. Less than a week before the evidentiary hearing was scheduled to commence, the Board filed an emergency motion to continue the hearing. The Presiding Officer denied that motion and ruled on pending motions *in limine* and motions to strike portions of pre-filed testimony. On April 3, 2006, the Committee's *de novo* evidentiary hearing commenced. The hearing continued on eight additional days between April 4 and 20, 2006, consisting of sworn witness testimony for the purposes of cross-examination. The presiding officer also conducted a site visit. After the conclusion of oral testimony, at the presiding officer's request, the Board also submitted selected additional pages of Brookline

---

2. The presiding officer denied the request for the full Committee to hear the evidence on March 2, 2006. With respect to the Board's motion for Mr. Stockard's recusal, in accordance with the Committee's Standing Order No. 05-02, the presiding officer inquired into the relationship between the firm of Stockard & Engler & Brigham and the Appellant in this matter. Following the submission of written and oral evidence on this issue, and in consideration of that evidence, Mr. Stockard notified the Director of the Department of Housing and Community Development that he would not recuse himself. The presiding officer thereafter denied the Board's motion for Mr. Stockard's recusal, appending copies of the Committee's Standing Order No. 05-02 and Mr. Stockard's notice to Director Gumble to her ruling. *Paragon, supra,* No. 04-16 (Mass. Housing Appeals Committee Jan. 22, 2007 Ruling on Motion for Recusal of James G. Stockard, Jr.).

Town By-laws relating to the effective dates of various provisions. Those pages are admitted into evidence as Exh. 59. Following the submission of a verbatim transcript, the Board and Paragon filed their post-hearing memoranda on July 14, 2006. The Board moved for a proposed decision in accordance with 760 CMR 30.09(5)(h) and G.L. c. 30A, § 11.

The Intervener ultimately chose neither to submit evidence in the hearing nor to file a post hearing brief, although he did attend the site visit. The Intervener's failure to submit evidence or argument on any issue constitutes a waiver of all issues he intended to raise in this proceeding. See, e.g., *Rising Tide Development, LLC v. Sherborn,* No. 03-24, slip op. at 7, 19 n.23 (Mass. Housing Appeals Committee Mar. 27, 2006) (Sherborn); *Washington Green Development, LLC v. Groton,* No. 04-09, slip op. at 3 n.2 (Mass. Housing Appeals Committee Sept. 20, 2005), citing *Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85, 653 N.E.2d 595, 598 (1995).

II. FACTUAL OVERVIEW

The Appellant proposes to construct the housing on property located at 45 Marion Street, Brookline. On the property currently is a three and one-half story apartment building containing 16 residential units. The site is a narrow, rectangular parcel containing approximately 15, 036 square feet. It is approximately 77 feet in width (fronting on the north side of Marion Street) and 195 feet long. Pre-Hearing Order, § II, ¶ 12. Exhs. 1, 2(a), 2(e)(ii) Sheet 2.

The site is located between Webster Street and Marion Street in a dense, urban block in Brookline near the major Coolidge Corner intersection. The buildings in this block contain mixed uses, including residential, retail, hotel, nursing facility, commercial and

religious uses. Abutting the property site to the East is a five-story commercial building consisting of approximately 130,000 square feet of space, known as the Verizon Building. Located on the West side of the site is a ten-story multifamily residence known as the Intercontinental Building. Directly behind the building is the eight-story Marriott Hotel. Part of the rear wall of the hotel is set back approximately one and one-half feet from the property line separating the site and the hotel. Nearby on the corner of Beacon and Park Streets is a 14-story multifamily residential building (the Druker Building). The elevation of Marion Street is lower than that of Beacon Street and Webster Street. Exh. 27, ¶ 18; 2(a); 5 Sheet 2.

The site is located in an M-2.0 Apartment House District established by the Brookline Zoning By-laws. Subject to certain requirements contained within those by-laws, multifamily dwellings, including condominiums, are permitted in an M-2.0 Apartment District. Pre-Hearing Order, § II, ¶ 13. The site is a short walk to the MBTA Green Line and near many stores, services, entertainment and a medical district. Exh. 2(a). Intervener Jonathan Davis resides in a multifamily dwelling with rear sight lines to the site.

In its original application to the Board for a comprehensive permit, Paragon proposed to build a twelve-story building containing 88 condominium units with 22 to be designated as low or moderate income housing. The application proposed 96 parking spaces on two levels, to be constructed underneath the residential floors of the building. Pre-Hearing Order, § II, ¶¶ 1-2. During the course of the hearing before the Board, Paragon submitted an amendment to the application in the form of revised project plans, which among other things, modified the 12-story proposed structure and reduced the number of total units to 68, the number of units set aside for affordable housing to 19 and the number of parking spaces to 80. The

Board's decision dated July 6, 2004, granted a comprehensive permit subject to a number of conditions. Pre-Hearing Order, § II, ¶¶ 3-5. Included among the 30 conditions is Condition 2, which requires that the building be no more than eight, rather than 12 stories in height, and that the building height transition from eight stories at the rear of the site to five stories at Marion Street. Condition 2 also requires a substantially narrower above-grade building width than was presented in the 68-unit proposal. Pre-Hearing Order, § II, ¶¶ 6-7; Exh. 1.

The Town of Brookline has not satisfied any of the statutory minima set forth in the second sentence of the definition of "consistent with local needs" in G.L. c. 40B, § 20 or in 760 CMR 31.04. Pre-Hearing Order, § II, ¶ 8. Paragon has received an August 25, 2003 letter from MassHousing regarding project eligibility. Pre-Hearing Order, § II, ¶ 9. The Appellant has entered into a Purchase and Sale Agreement dated October 5, 2003 regarding site acquisition, which was filed with the Board as a part of the Application. Pre-Hearing Order, § II, ¶ 10. Subsequent to filing the Application with the Board, Paragon entered into a First Amendment to Purchase and Sale Agreement dated as of January 22, 2004, which was filed with the Board. Pre-Hearing Order, § II, ¶ 11. Additional facts specific to the disputed issues are addressed below in the discussions of these issues.

III. PRELIMINARY ISSUES

A. Jurisdiction

To be eligible to proceed on a comprehensive permit application before a zoning board, or to bring an appeal before the Housing Appeals Committee, an applicant must fulfill three jurisdictional requirements. The Board has renewed its motion to dismiss on the grounds of lack of jurisdiction. The question of whether Paragon satisfied these

jurisdictional requirements was addressed exhaustively by the presiding officer in her pre-hearing rulings. See *Paragon, supra,* No. 04-16 (Mass. Housing Appeals Committee Dec. 1, 2004 Ruling on Prehearing Motions) (*Ruling on Prehearing Motions*, Appendix A); *Paragon, supra, No*. 04-16 (Mass. Housing Appeals Committee June 6, 2005 Ruling on Motions for Reconsideration) (*Ruling on Reconsideration*, Appendix B); *Paragon, supra,* No. 04-16 (Mass. Housing Appeals Committee Jan. 23, 2006 Ruling on Board's Emergency Motion to Dismiss or … Stay Proceedings ….) (*Ruling on Emergency Motion*, Appendix C).

In the evidentiary hearing before the Committee, the Board introduced additional facts that it contends require a finding that Paragon has not met the site control or fundability. Its brief emphasizes its renewed arguments that Paragon has not shown that it controls the site as required by 760 CMR 31.01(1)(c), and that the project is fundable, as required by 760 CMR 31.01(1)(b). Board brief pp. 19-31.

1. Site Control

One of three jurisdictional requirements to proceed with this appeal is that "the applicant shall control the site." 760 CMR 31.01(1)(c). The parties agree that Paragon entered into a purchase and sale agreement with Marion Properties Group LLC (Marion Properties) with respect to the subject property, and that the agreement was thereafter amended. Pre-Hearing Order, § II, ¶¶ 10-11.

Paragon is a family owned business. Jonathan Glick is the manager and sole stockholder of Paragon. Tr. VI, 33-34, 61. Marion Properties, which currently owns the site, is owned and controlled primarily by Jonathan Glick's father, Marvin Glick. Jonathan Glick has a 20% share in the company. Tr. VI, 13-14, 33-34, 70. Marion Properties and

other parties, whom the Board alleges are related to Paragon, are defendants in the civil proceeding *Samuel Weener, et al. v. Marvin Glick, et al.*, C.A. No. 03-5000 (Middlesex Super Ct.). In that proceeding, a temporary restraining order (TRO) was issued prohibiting Marion Properties from conveying or encumbering the property. Exh. 45.

Marion Properties has filed for bankruptcy protection under Chapter 11. Exh. 39. As a result of the bankruptcy filing, the Superior Court proceeding has apparently been stayed, according to the Board. Board brief, p. 5. According to the Board, in a Joint Plan of Reorganization filed with the Bankruptcy Court, Marion Properties and Paragon propose to convey 50 percent of the interest in the property and Paragon to current creditors of Marion Properties, including creditors who have filed suit against Marion Properties in Middlesex Superior Court. Board brief pp. 3-4; Exh. 42, p. 11. The Board argues that there is no certainty that the new owners would support the project.

The TRO. The Presiding Officer has already twice rejected the Board's arguments that the TRO rebuts the presumption of site control in this matter. In her *Ruling on Prehearing Motions,* she stated that "[h]olding an 'option or contract to purchase the proposed site' constitutes conclusive evidence of an applicant's interest in the site, 760 CMR 31.01(3), which in turn gives rise to a rebuttable presumption that an applicant has demonstrated site control for the purposes of G.L. c. 40B. 760 CMR 31.07(1)(b) (footnote omitted)." *Id.* at 4. She pointed out that "[t]here is no evidence that the temporary order will turn into a permanent order," *id.* at 5, and ruled the TRO did not rebut the established presumption. *Id.*

The presiding officer also rejected the Board's argument that amendments to 760 CMR 31.00 in 1991 established a higher threshold for site control than the language "interest in the site" found in 760 CMR 31.01(3). *Id.* at 6-7. Also see *Ruling on Reconsideration* at 2-3. She also discounted the Board's arguments that the proposed sale of condominium units as well as individual deed riders and restrictions regarding the sale of affordable units in any regulatory agreement, would constitute an encumbrance prohibited by the TRO. *Ruling on Prehearing Motions* at 7.[3]

In its post-hearing brief, the Board renews many of these arguments, and raises additional arguments in its challenge to site control on the basis of the TRO. Board's brief pp. 20-26. We concur in the presiding officer's previous rulings and analysis on this issue and need not repeat those discussions here. See Appendices A-B. We will only address new arguments raised by the Board in its post-hearing brief.

The Board argues that the presumption of site control was rebutted because the issuance of the TRO demonstrates that the applicant in the Superior Court had shown a likelihood of success on the merits. However, the Board has not submitted the complaint in the Superior Court in this proceeding, and there is nothing in the record to establish what "success on the merits" would provide as relief to the plaintiffs.

The Supreme Judicial Court has provided guidance on this issue in *Hanover v. Housing Appeals Committee,* 363 Mass. 339, 377-78, 294 N.E.2d 393 (1973). In *Hanover,*

---

3. We need not reach a determination of whether the comprehensive permit and any provisions therein, or language in individual deed riders or regulatory agreements would constitute encumbrances on the property within the scope of the TRO. Suffice it to say that the existence of a comprehensive permit does not require an owner to comply with its provisions. A property owner remains free to use the land in any other lawful manner.

the Court considered the statute, and took a practical, rather than a hyper technical, view of a developer's potential interest in a site. See *id.* at 377. The Court noted that the statute "does not explicitly state the requisite property interest necessary to qualify as an applicant for a comprehensive permit, and ruled that the statute does not require an applicant to establish present title. *Id.* Accordingly, we conclude that the TRO is not a basis to require dismissal of this proceeding.

The Bankruptcy Proceeding. In its second attempt to dismiss this matter based on lack of site control, the Board introduced evidence of a pending bankruptcy proceeding involving Marion Properties. Exhs. 39-44. Although the Board argued that the Bankruptcy Court would disfavor a sale because Paragon and Marion Properties are substantially related entities, the presiding officer ruled that that neither the existence of potentially complex bankruptcy proceedings nor the allegation that the purchase and sale agreement may be a related-party transaction, was sufficient to rebut the presumption of site control because the Board had not demonstrated that the purchase and sale agreement has been invalidated, nor that it would be annulled. *Ruling on Emergency Motion* at 2 (Appendix C).

During the evidentiary hearing, the Board supplemented its evidence concerning the nature of the bankruptcy proceedings in an effort to support a renewal of its argument that Paragon lacks site control within the meaning of 760 CMR 31.01(3). It submitted a Joint Plan of Reorganization filed in the Bankruptcy Court proceeding, suggesting that Marion Properties proposes conveyance of ownership shares totaling 50 percent to other entities including creditors of Marion Properties. Board brief pp. 3-4; Exh. 42. This, the Board argues, rebuts the presumption of site control.

As the presiding officer noted, whether the Bankruptcy Court will permit the sale to occur involves complex factual and legal issues that are not and should not be before the Committee. She noted the Committee's view that to establish site control, the developer need only establish a colorable claim of title, and that adjudication of complex title disputes or similar matters between private parties is best left to the expertise of the courts. *Ruling on Emergency Motion* at 2-3. See *Bay Watch Realty Trust v. Marion,* No. 02-28, slip op. at 5 (Mass. Housing Appeals Committee Dec. 5, 2005). Furthermore, this Committee has previously ruled that, "[s]o long as there is no deception involved, the final structure of the business entities that ultimately execute that agreement is of little importance. It is for this reason, among others, that our regulations permit transfer of permits on a fairly routine basis. See 760 CMR 31.08(5)…." *Delphic Associates, LLC v. Middleborough,* No. 00-13, slip op. at 4 (Mass. Housing Appeals Committee July 17, 2002). Moreover, the possibility that a 50 percent ownership interest in Marion Properties or Paragon may be conveyed to others does not affect the determination of site control under the Committee's regulations. Under 760 CMR 31.01(3), Paragon has met the requirement of "a preliminary determination in writing by the subsidizing agency that the applicant has sufficient interest in the site" and would also meet the standard that "the applicant, or any entity 50% or more of which is owned by the applicant, owns a 50% or greater interest, legal or equitable, in the proposed site, or holds any option or contract to purchase the proposed site…." *Id.* In either instance, the circumstance "shall be considered by the Board or the Committee to be conclusive evidence of the applicant's interest in the site." *Id.*

The Board also argues that it never required Paragon to definitively establish title to the property but to provide evidence that it has the right to build the project it has proposed, and that it had the right to deny the application for failure to supply sufficient information under DHCD Guidelines for Local Review of Comprehensive Permits, Section II.C. It argues that relying on the existence of a purchase and sale agreement in this context does not provide adequate protection against "frivolous" applications and renders 760 CMR 31.01(1)(c) meaningless. We disagree with the Board's claim. Paragon has demonstrated a sufficient interest in the site to proceed with its appeal. The appeal will not be dismissed on this basis.

2. Fundability

The Board also renews its argument that the pending bankruptcy proceedings preclude Paragon from complying with the lending requirements of the subsidizing agency, MassHousing, and therefore the financing commitment should be terminated. The presiding officer previously determined that the pendency of bankruptcy proceedings affecting the seller of the premises did not rebut the presumption of fundability satisfied by the August 25, 2003 project eligibility letter issued to the Appellant by MassHousing, the subsidizing agency for this project. *Ruling on Emergency Motion* at 3-4. See Pre-Hearing Order, § II, ¶ 9; 760 CMR 31.01(2), 31.07(1)(a), 31.01(1)(b). We concur with the presiding officer's analysis and reasoning in those rulings and focus here on issues raised by the Board in its post-hearing brief.

As the presiding officer noted in her ruling, in response to the Board's counsel's request to retract the project eligibility determination on this basis, MassHousing informed

counsel for the Board that "it took no position on the parties' dispute and that unless otherwise indicated, the conditions in those documents must be satisfied at the time the loan closes." *Ruling on Emergency Motion* at 3-4. During the evidentiary hearing, Paragon stipulated that MassHousing "will not close a loan to a borrower that is then in bankruptcy." Tr. II, 70. The Board claims that Paragon has "immersed itself" in Marion Properties' Plan for Reorganization. Board brief pp. 30-31. Therefore, the Board argues that Paragon has failed to meet its burden that the project is fundable.

On December 9, 2005, MassHousing extended the effectiveness of the project eligibility letter for Paragon for an additional 12-month period. Exh. 49. Despite the arguments renewed by the Board in its post-hearing brief, MassHousing has not withdrawn its project eligibility determination. Therefore Paragon's status before MassHousing remains unchanged. The Board has not rebutted the presumption established by the project eligibility letter. Moreover, consistent with Paragon's stipulation, in the context of its final approval as the subsidizing agency, MassHousing will examine Paragon's ability to meet its conditions, including those conditions raised by the Board. See *Ruling on Emergency Motion* at 3-4.[4] The challenge to the Committee's jurisdiction on this basis is rejected.

B. The Developer's Qualifications

The Board alleges that the developer lacks the qualifications to complete the project. As a general rule under the Comprehensive Permit Law, the Committee will not review a

---

4. Although it raised the point in the Pre-Hearing Order (at § IV, ¶ 6), the Board did not specifically address the limited dividend requirement of 760 CMR 31.01(1)(a) in its brief, thereby waiving it. *Sherborn,* No. 03-24, slip op. at 7, 19 n.23; *Washington Green,* No. 04-09, slip op. at 3 n.2; *Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85, 653 N.E.2d 595, 598 (1995). In any event, this Committee has frequently noted that under Chapter 40B, "the critical step in the formation of a limited dividend

developer's qualifications. In one of our earliest decisions, we declined to pursue the board's allegations that the developer lacked the financial ability and "reputation… in the community" to proceed with the development, but rather left those concerns in the hands of the subsidizing agency. *T/D/B Realty Tr. v. Northbridge*, No. 71-05, slip op. at 12-13 (Mass. Housing Appeals Committee Aug. 5, 1974). Our regulations are even more explicit, and provide that generally we are not to hear evidence with regard to the developer's capabilities. 760 CMR 31.07(4). This issue has most recently been addressed by the Land Court in *Henshaw v. Board of Appeals of the Town of Tisbury*, Land Court No. 304282, 2006 WL 2514177 (Aug. 31, 2006). The Court reiterated the comments we made in *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 7 (Mass. Housing Appeals Committee June 25, 1992) that "issues such as the financial arrangements, the profit projections, the developer's qualifications, and marketability are issues which are not intended to be reviewed in detail within the comprehensive permit process" and are not "matters of concern in the usual sense." *Henshaw*, 2006 WL 2514177, *9. See *Meadowbrook Estates Ventures, LLC v. Amesbury,* No. 02-21, slip op. at 6-7 (Mass. Housing Appeals Committee Nov. 14, 2006).

The approach described in *Meadowbrook, Henshaw, CMA,* and 760 CMR 31.07(4) represents sound policy. The policy reflects the judgment of state housing officials that certain of the complex issues that arise in the development process cannot be sorted out easily in an adversarial hearing process, but rather are best left to the managerial discretion of the subsidizing agency or project administrator—in this case, MassHousing.

---

organization is the signing of a regulatory agreement prior to construction." *Delphic Associates,* No. 00-13, slip op. at 4 and cases cited.

Our regulations do permit us to inquire into the developer's "ability to finance, construct, or manage the project" if "good cause" is shown. 760 CMR 31.07(4). The Board argues that Paragon has no experience in developing affordable housing projects, and suggests further that the nature of the family enterprise and the existence of the bankruptcy proceedings demonstrate that the Appellant is unqualified. Tr. VI, 73; Board brief pp. 5-6, 36. These allegations do not rise to the level that warrants our taking the unusual step of examining the developer's qualifications, and we decline to exercise our discretion to do so. See *Meadowbrook,* No. 02-21, slip op. at 6-9. The developer has engaged a qualified architect and development consultant. Review of the qualifications of the development team will be part of the final approval process. We expect that MassHousing will conduct a thorough review of the developer's qualifications as part of its final review. See 760 CMR 31.09(3), 31.01(2)(b)(6).[5]

IV. ECONOMIC EFFECT OF THE BOARD'S CONDITIONS

When a developer appeals a board's grant, with conditions, of a comprehensive permit, the ultimate question before the Committee is whether the decision of the Board is consistent with local needs. Pursuant to the Committee's procedures, however, there is a shifting burden of proof. The Appellant must first prove that the conditions in the aggregate

5. Both market-rate developers and affordable housing developers are subject to some review by the lenders with whom they work. Only affordable housing developers, however, undergo the additional level of scrutiny provided by 760 CMR 31.09(3). This provides the town with additional protection. The town may also, of course, protect itself by requiring a bond or other security for the proper completion of the work. Cf. G.L. c. 41, § 81U. If the town were permitted to apply more stringent qualification standards to affordable housing developers than it does to market-rate developers, it would run afoul of the statutory provision that all requirements be applied "as equally as possible to subsidized and unsubsidized housing." G.L. c. 40B, § 20. See *Meadowbrook,* No. 02-21, slip op. at 6-9.

make construction of the housing uneconomic. See 760 CMR 31.06(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 [or profit] as defined by the applicable subsidizing agency…." 760 CMR 31.06(3)(b); also see G. L. c. 40B, § 20. Paragon argues, relying on testimony of its experts and documentary evidence, that it has provided sufficient evidence that the conditions render the project uneconomic. The Board contends that Paragon has failed to make its *prima facie* showing.

A. The Developer's Presentation

Although Paragon objects to many of the conditions contained in the Board's decision, the primary condition it cites as rendering the project uneconomic within the meaning of Chapter 40B is Condition 2, which provides limitations on height and setbacks, which in turn require reducing the number of units and the amount of marketable space for the project:[6]

> The Project must be revised to a maximum building height not to exceed 8 stories. The building shall transition in a graceful manner in height from 8 stories at the rear of the Property to 5 at Marion Street. In revising the project plans, the Applicant shall address the Board's finding that the existing lot is an unusually narrow and deep parcel (77' wide by 195.27' deep), more than 2.5 times as deep as it is wide. Accordingly, in addition to the massing configuration herein described for height and height transition from the rear of the Property to the street frontage, a substantially narrower above-grade building width than presented in the revised Application, dated 5/12/04, is required. The Applicant's Project revision shall also address the finding that the present project's unreasonable encroachment into side yard setbacks (especially @ the west side) with disregard for the Town of Brookline's zoning density controls carefully developed over more than 40 years will

6. Other conditions the developer challenged as contributing to making the project uneconomic are Conditions 6, 7, 8, 9, 12, 17, 18, 20, 21 and 25. See Pre-Hearing Order, § IV, ¶ 7.

> neither benefit the occupants of the building nor the occupants of the neighboring properties.

Exh. 1. Because this condition did not specify the building width, the number of permissible units or setbacks, or the detailed manner in which the height should transition "gracefully" from the back to the front of the building, Paragon submitted the testimony of an architect engaged to design a revised plan for the building based on his interpretation of the height and setback requirements.

The developer's architect has over 25 years' experience as an architect, specializing in high density urban developments, including residential developments. He is familiar with Brookline zoning and land use regulations. He participated in the preparation of the original building plans submitted to the Board as well as the 68-unit project proposed during the course of the Board hearing and on appeal to the Committee. Exh. 27, ¶¶ 4-6, 11-14.

The architect stated that it was impossible to determine with certainty the size and shape of the building that would be required by the decision, and that he had to make certain reasonable assumptions. He gave his opinion that the conditions in the decision would result in a building with a maximum of 36 units, with gross area of approximately 93,900 total square feet, including below grade parking, a first floor with a lobby and mechanical systems and floors 2 through 8 of living space. The net living area would be approximately 43,555 square feet. He assumed the decision would not require side yard setbacks of greater than 12 feet each because wider setbacks would require a building too narrow to permit dwelling units on each side of a public corridor, resulting in a unit size and floor plan configuration that would not be marketable. Exh. 27, ¶¶ 36-37.

To address the requirement of a graceful transition in height from eight stories at the rear of the property to five at Marion Street, he provided for one transition, near the front of the building, stating that any more gradual transition would result in the need for a third egress stair and a resulting reduction in net living area or fewer but larger units. Exh. 27, ¶ 38. The architect's design provides that the first five floors of the building would extend to Marion Street and the upper three stories would be recessed away from Marion Street, with a change in exterior finish to provide a visual change to the building. The architect testified that he submitted this proposal to create the impression of a five-story building, rather than one of eight stories. This design would result in a building with 36 units, of which 9 are affordable, and 80 parking spaces, of which 16 are tandem. Tr. I, 89-90; Exh. 33, ¶¶ 10-12.

Paragon's affordable housing and development consultant, a real estate consultant and developer, has over 20 years' experience involved in the financial analysis of mixed-income housing development "to determine the likely return to investors and lenders, and … secure the necessary … investment." Exh. 29, ¶ 4. He was engaged by Paragon to advise regarding project permitting feasibility and financing. He worked with the developer's architect to prepare a proposal for submission to MassHousing and the Board. As part of that proposal he submitted a pro forma projecting the expected economic return and feasibility of the project.

For this appeal, the consultant prepared revised pro formas projecting the expected economic return and feasibility of the project as conditioned by the Board. He stated the pro forma was prepared in a standard manner typical of financial analysis of projects of this type, involving an assessment of the margin of profit in comparison with the total development

costs of the project, the Return on Total Costs (ROTC) method. He prepared the pro forma with the costs and revenues expressed in current values as of the time of the submission of his prefiled testimony. He stated that this method is the standard for assessing financial feasibility and economic return of for-sale condominium developments of this type at this stage of development, and is employed by a wide range of developers. He also stated it was prepared in a manner consistent with the analysis submitted to MassHousing as part of the original Housing Starts application for the project. Exh. 29, ¶¶ 36-39. See Exh. 16.

In preparing costs for certain items in the pro forma, the consultant used recently published guidelines, "Local 40B Review and Decision Guidelines: A Practical Guide for Zoning Boards of Appeal Reviewing Applications for Comprehensive Permits Pursuant to MGL Chapter 40B" (Massachusetts Housing Partnership and Netter, Edith M., November 2005) (the MHP Guidelines), Exh. 17. Exh. 29, ¶ 43. Based on the costs and revenues conforming to the 36-unit project described by the architect, he derived a projected loss of over $7.4 million (with total costs projected to be $28,027,456 and total revenues projected to be $20,605,800). Exh. 29, ¶ 64; Exh. 16.

He also prepared a second pro forma to evaluate the effect of adjusting upward the sales prices of upper floor market rate units if they were to achieve the top values in the Brookline condominium market. Although he stated he did not expect the building to achieve these prices, he evaluated the effect of including those revenues for the upper three floors in the alternate pro forma. The result of his alternative "sensitivity" analysis is to increase projected total sales to $21,932,850, reducing the projected loss to $6,224,600. Exh. 29, ¶¶ 66-67.

The consultant testified that developers normally seek developments at this scale with profit margins in at least the mid-teens and preferably closer to a 20 percent margin of revenues over costs. He stated that a widely held industry standard is that such projects should project a 15 percent margin or greater of profits above total development costs, noting that the MHP Guidelines set this as the recommended threshold. Exh. 29, ¶ 69.[7]

B. The Board's Response

The Board disagrees with the developer's submission in many respects. It supports a different design configuration for the project as it had been conditioned by the Board. The Board suggests that three additional units could be built on upper floors by expanding the upper floors to create a "wedding cake" design step up in the exterior facing Marion Street, rather than recessing the exterior wall to the building back from Marion Street above the fifth floor, as the developer's architect had proposed. The Board did not submit the testimony of an architect in this regard, but relied upon the cross-examination of the developer's architect, as well as that of the its witnesses, the Chief Planner in the Town's Planning and Community Development Department and the Board's financial expert. Board brief pp. 17-18.

The Town's Chief Planner has been a planner with the Town for almost 17 years and is a member of the American Certified Institute of Planners (AICP). As Chief Planner she assists in the oversight and facilitation of planning initiatives for Brookline and coordinates and facilitates the development of affordable housing. Exh. 31, ¶¶ 1-6. She stated that a drawing prepared under the direction of the Board's counsel and shown to Paragon's architect demonstrating a "wedding cake" design with story front setbacks from Marion

---

7. MassHousing's limited dividend requirements limit profits to 20 percent of total development

Street starting at the sixth floor and increasing for the seventh and eighth floors was more consistent with the Board's decision than the developer's architect's design. Tr. VI, 113.

The Board's expert witness on the economic issues is a consultant to private clients, municipal agencies and zoning boards in the review of housing development projects, including comprehensive permit applications and pro formas prepared in connection with them. As a consultant, he has worked with many zoning boards reviewing pro formas and auditing completed projects to determine compliance with applicable limited dividend requirements. He also has experience both in consulting and employment with companies in other industries in developing and reviewing financial pro formas, real estate acquisitions, and overseeing subcontracting construction of buildings, including writing construction specifications, awarding contracts and monitoring project performance. He has assisted zoning boards in their review of proposed Chapter 40B projects, including review of pro formas. He has also served as a member of the Bolton Zoning Board of Appeals and the Board of Selectmen. Exh. 32, ¶¶ 2-15.

The Board's economic expert testified that Paragon's 36-unit design ignores the option for a more gradual transition from eight to five stories, which could increase both marketable square feet and the number of units. He suggested that 40 units would be able to be included in the space because the ground floor fitness room could either be moved underground or eliminated, leaving that space for a residential unit on the first floor. He also

---

costs. Exh. 2C.

suggested that the increased space on the sixth and seventh floors would contribute to additional units, totaling 40.[8] Tr. VII, 52-57.

The total square footage of living area for the 36 units proposed by Paragon would be 43,555 square feet. Exh. 27, ¶ 36. The total square footage that could be achieved under the Board's scenario would be approximately 47,635 square feet, an increase of approximately 4000 square feet. Of that additional square fee, one unit would have to be designated as affordable. Tr. II, 56-57; IX, 21-46; Exh. 56. The parties agree that the affordable units are constructed at a loss to the developer.

The Board's economic expert also stated that the developer's architect has over-designed the parking garage because Condition 6 of the Board's Comprehensive Permit would require only 54, rather than 80 spaces. He therefore stated that there are 26 unnecessary parking spaces at a cost of $1.4 million, and that the space could be used more profitably as additional living space or common space with amenities such as a gym or rentable storage space. Exh. 32, ¶¶ 19-21. This witness analyzed the costs of a hypothetical 40-unit proposal, based on the possibility that Paragon could develop such a project under the conditions imposed by the Board's decision. Exh. 32, ¶ 22. Based on his analysis of a hypothetical 40-unit building, and utilizing his recommended Internal Rate of Return (IRR) methodology for assessing the margin of profit, he concluded that under either the 36-unit proposal or his 40-unit hypothetical, the project as conditioned would be economic, achieving, respectively, an internal rate of return of 22 percent for the 36-unit design and 28 percent for the 40-unit hypothetical. Using the MHP Guidelines' recommended ROTC

8. No evidence in the record indicates the expertise of the individual who prepared the "wedding

methodology, he stated the projected profit in these two scenarios would be 7 percent and 11 percent, respectively. Exh. 32, ¶¶ 56-58.

Paragon argues that the Board presented no expert testimony to support the feasibility of its 40-unit plan and therefore that plan should be entirely discounted. Paragon's architect also testified that it was uncertain that a residential unit could be put on the first floor because the amount of space necessary to accommodate the parking ramp was unknown. Tr. III, 127-128. Additionally, the architect stated that there was no practical way of reducing the size of the second level of underground parking to provide fewer than 64 spaces because the state building codes required two levels of parking to provide elevator access and two means of egress. Exh. 33, ¶¶ 9-12. He did acknowledge, though, that excess underground space could be used for other purposes.

The architect stated further that the average size of the units in the 68-unit proposal was +/- 1235 square feet, which he stated is consistent with market demands. He testified it would not be feasible to achieve this average unit size in a 40-unit building or any building in excess of 36 units. Exh. 33, ¶ 5.

The developer's architect's opinion regarding the design of a building that would conform to the requirements of the decision is based on his professional experience in the field and is more credible than that of the Board's planning and economic witnesses. On this record, the evidence is inadequate to determine that 40 units would be feasible on the site within the constraints of the Board's decision.

---

cake" sketch. See Exh. 36.

1. Methodology

The Committee has historically determined that the proper methodology to be used in analyzing the economics of ownership proposals is a Return on Total Costs (ROTC) analysis. See, e.g., *Sherborn, supra,* No. 03-24, slip op. at 4; *Rising Tide Development, LLC v. Lexington,* No. 03-05, slip op. at 11 (Mass. Housing Appeals Committee June 14, 2005) (*Lexington*).[9]

In its essence, the estimated ROTC involves only a simple calculation: the return is simply total sales less total development costs, or when calculated as a percentage, return divided by total development costs. *Sherborn*, No. 03-24, slip op. at 6. Additionally, the Committee would determine, once the ROTC was established for a particular proposed development, whether it was sufficient in the marketplace to induce the developer to invest its resources in pursuing the proposal. While 760 CMR 31.06(3)(b) refers to a reasonable return "as defined by the applicable subsidizing agency," the Committee noted as recently as 2005 that "subsidizing agencies have not defined such a return quantitatively," and therefore the determination of what level of return constituted a reasonable return should be made from the evidence as a factual matter. *Lexington,* No. 03-05, slip op. at 11.

More recently in *Sherborn,* No. 03-24, slip op. at 4-5 n.5, however, the Committee acknowledged the recent publication of detailed policy guidance concerning the use of this

---

9. In *Lexington,* the Committee discussed the relationship of this economic standard to the requirement in G.L. c. 40B, § 21 and 760 CMR 31.01(1)(a) that a developer be a limited dividend organization. Noting that 760 CMR 30.02 indicates that the developer must agree "to limit the dividend on invested equity," the Committee pointed out that this regulatory definition was added in 1986, prior to the advent of ownership affordable housing programs: "Since ownership housing is not held for investment, the specific terms used in the regulation are not meaningful in that context. Therefore, a different analysis must be undertaken—the Return on Total Costs analysis." *Lexington,* No. 03-05, slip op. at 11 n.8.

methodology in the form of the MHP Guidelines. The MHP guidelines were endorsed not only by the Massachusetts Housing Partnership, but also by the Department of Housing and Community Development (DHCD), the Massachusetts Housing Finance Agency (MassHousing), and the Massachusetts Development Finance Agency (MassDevelopment). See *id.*[10] The MHP guidelines were not considered in *Sherborn,* but the Committee there noted that, "In the future, however, it appears likely that the guidelines, though they do not have the force of law, will provide information, structure, or background which should simplify proof by expert witnesses of the economic issues that arise under the Comprehensive Permit Law." *Sherborn,* No. 03-24, slip op. at 4-5 n.5. The MHP Guidelines recommend the ROTC analysis for home ownership projects. Exh. 17, p. 17.[11]

The Board's economic expert stated that the application of a different methodology, Internal Rate of Return (IRR), more appropriately sets out the profitability of the proposed project. He testified that the IRR is "used to determine the rate of return of a future cash flow", and "takes into consideration the future value of money." Tr. VIII, 34-35. He testified that the problem with the ROTC analysis is that it fails to capture interest earned during the period that a project experiences a positive cash flow. Tr. VII, 61-62. He also stated that IRR by definition looks at a project over a multi-year period of time. Tr. VIII, 35-36.

---

10. The Appendix to the MHP Guidelines sets out standards for determining whether permit conditions make a 40B development uneconomic. It includes standards applicable to all developments, as well as provisions specific to either for-sale or rental projects. These standards also include criteria for determining components of development costs and project revenues. Exh. 17, pp. 13-20.

11. The MHP Guidelines may provide the subsidizing agency definition of the reasonable return, as noted in 760 CMR 31.06(3)(b). They specifically provide that "[a] for-sale project should be considered uneconomic if the Return on Total Cost is less than 15% (i.e., if projected sales proceeds exceed development costs by less than 15%)." Exh. 17, p. 17.

Previously the Committee stated, with regard to IRR, that "because of the preliminary and approximate nature of these projections it is not necessary to use the related, but slightly more sophisticated [IRR] analysis." *Sherborn, supra,* No. 03-24, slip op. at 6 n.7. In *Bay Watch Realty Trust v. Marion,* No. 02-28, slip op. at 11-12 (Mass. Housing Appeals Committee Dec. 5, 2005), the Committee noted, in the context of rental housing, that "[t]hough [an IRR analysis] is more sophisticated than the ROTC analysis in some respects, because much of the information that it is based on is approximate and because timing is important, it appears that at this preliminary stage of the development, this analysis adds little to the basic ROTC approach." *Id.* at 13-14.

In the absence of regulations setting forth the methodology and standards for determining whether conditions render a project uneconomic, we must rely on precedents of previous Committee decisions, expert testimony in the record of particular cases and industry standards, to the extent to which they exist. Here, past Committee decisions have made clear that the ROTC approach, based on current estimates, rather than projections into the future, are preferable. The MHP Guidelines, while not established in this record to be an "industry standard," do reflect the guidance of the four agencies that subsidize Chapter 40B projects. These guidelines recommend the ROTC approach as the preferred model for home ownership and suggest that before an alternative standard may be used, a zoning board or applicant should be able to demonstrate that the alternative standard is reasonable, consistent with industry norms, and has been used in practice for other developments with similar characteristics that have been successfully financed, built and sold. Exh. 17, p. 17. No such evidence exists in this record. Indeed, the Board, although submitting extensive testimony by

its economic expert, has not seriously argued for use of the IRR method in its brief. It only devotes one paragraph to that methodology, referring to testimony that lenders and investors would evaluate a project based on its performance over time. Board brief, pp. 18-19. Instead, it focuses in its brief on analyzing the economics of the project under the MHP Guidelines standard.

Finally, although during his cross-examination, the developer's economic expert acknowledged some corrections to his pro forma, on cross-examination, the Board's expert acknowledged repeated calculation errors, which were exacerbated by the efforts to rehabilitate him on redirect testimony. These effectively rendered his economic testimony less credible.

Accordingly, on this record the developer's expert's opinion that the ROTC method is the more appropriate to measure the economics of the project is consistent with our precedent and more credible. We see no basis to abandon our practice of requiring the ROTC method to evaluate whether a project is uneconomic.

2. Land Value

Paragon submitted a land value of $1,900, 000 based on an appraisal performed as of June 23, 2003. Exh. 19. To support this value for the current period, it submitted the testimony and appraisal of its witness that this appraisal, based on a fair market value assessment of the property, as well as the current use of the property was the best measure of the property's value. Paragon's consultant stated that while he would prefer to use a more recent appraisal, this appraisal was a valid measure, as fair market value is likely to have only increased. Paragon's witness testified that:

> [I]t is standard practice in all forms of the real estate industry that I'm familiar with to update your financial projections for a project. And particularly when asked to go through rigorous analysis of a project's economics for consumption by other people, you will in almost all circumstances move to the most current information that you can assemble.

Tr. III, 115. Also see Tr. III, 114-116; Tr. II, 93, 96-99.

The Board seeks to apply a different approach to the land value, relying on evidence concerning the purchase cost of the owners of the site. It also argues that the formula for determining the land value for a Housing Starts Construction loan application, as required by MassHousing's project eligibility letter, should govern the land acquisition value for determining development costs for this analysis. MassHousing's Acquisition Value Policy provides:

> The maximum permissible acquisition value which can be included in the Development Budget for a Housing Starts Construction Loan application will be limited to the **lesser** of:
>
> the "as is" appraised market value of the land and improvements, as estimated by the MassHousing Home Ownership Division at the time of loan commitment, and subject to confirmation by a MassHousing commissioned independent appraisal prior to loan closing;
>
> Or,
>
> the purchase price of the land and improvements in the last arm's length transaction, if any, within the last three years, plus (i) reasonable and verifiable costs of property improvements made subsequent to the above acquisition and/or (ii) reasonable and verifiable carrying costs related to the land and improvements, such as interest, taxes and insurance.

Exh. 2C (Exh. A). This policy also prohibits applying "the economic benefits of the comprehensive permit … to substantiate an acquisition cost that is unreasonably greater than the current appraised fair market value under existing zoning without a comprehensive permit in place." *Id.* See Tr. V, 86.

The Board appears to argue that the purchase price for the property should be used instead of a fair market value appraisal, suggesting that a purchase price in 1977 of $88,823.42 would be appropriate.[12] Board brief p. 3. However, this sale does not fall within the last three years, as specified in the MassHousing Acquisition Value Policy. In testimony, and obliquely in its brief, the Board suggested that evidence supported using $1.00 as the land value because it is the purchase price stated on the deed for the property in 1996 and the developer's principal stated that this sale was a "legitimate arm's length transaction." However, that witness went on to state that the actual consideration was $1,900,000. Tr. VI, 16, 18. It is not credible that the property's stated purchase price on the deed of $1.00 would represent an arm's length transaction.

This Committee has previously determined that the figure that is properly used in the pro forma is the appraised "as is" market value – the fair market value of the site excluding any value relating to the possible issuance of a comprehensive permit. *Atwater Investors, Inc. v. Ludlow,* No. 01-09, slip op. at 7-8 (Mass. Housing Appeals Committee Jan. 26, 2004); *Scippa v. Wayland,* No. 00-12, slip op. at 11 n.4 (Mass. Housing Appeals Committee July 17, 2002). Also see MHP Guidelines, Exh. 17, p. 13. The appraisal submitted by Paragon in this proceeding represents an impartial appraisal of the fair market value of the property under existing zoning without a comprehensive permit in place. Exh. 19. Therefore the $1,900,000 appraised value is the appropriate measure of land acquisition value to apply in this proceeding.

---

12. The 1977 purchase included the assumption of a mortgage. The developer's principal testified that the mortgage was in the principal amount of $270,000, but provided no documentation

3. Construction Costs

The original pro forma prepared for the application for MassHousing's project eligibility letter estimated construction costs for 88 units to be approximately $165 per square foot for the residential space and $120 per square foot for the garage and ground floor construction. During the hearing before the Board, in 2004, Paragon submitted another pro forma for 66 units, with total square footage of 147,455 compared to 151,871 for the 88-unit proposal. The 2004 pro forma contained the 2003 cost and revenues from the earlier pro forma. These pro formas use the ROTC methodology. Tr. II, 109-112; Exhs. 27, 29, 46-47.

For this appeal, Paragon's economic expert also submitted pre-filed testimony and two new pro formas for the 36-unit scenario using the ROTC methodology. These pro formas modeled the project as approved by the Board, including the conditions relating to the construction of the building, as prepared by the developer's architect. Based on the architect's opinion that the Board's decision resulted in a reduction of the project's residential square footage from 84,000 for 68 units to 43,555 for 36 units, the pro forma assumes a 36-unit building with a maximum of about 43,555 net residential square feet, with two floors of underground parking, totaling 80 parking spaces. Paragon's economic expert stated that as a result of increased setback requirements, the building would be very narrow and inefficient to build, as the same elevator core, mechanical systems, corridors and stairways must still be built to service a much smaller floor area. Exh. 29, ¶ 71. Also see Exhs. 16, 27, 33.

---

supporting that figure. The Board's expert stated he would include the value of an assumed mortgage in the price of a property. Tr. VII, 65.

Based on testimony of its architect and a general contractor, Paragon's consultant used a price per square foot of $219.31 in his pro forma. Exhs. 16, 29. Paragon's architect stated, based on his company's experience, that construction costs for a project with which his company had recently been involved ranged from $200 to $225 per gross square foot. Exhs. 27, ¶¶ 40-41; 43. The general contractor, who is experienced in high rise office and residential buildings and in estimating construction costs, testified that he was familiar with current construction costs for high rise residential projects in the greater Boston area. Exh. 35. He provided Paragon's architect with his cost estimates for the 36-unit project based conceptual drawings and specification sheets prepared by the architect. He estimated the cost of the 8-story building to be $227 per gross square foot and the cost for a 12-story building to be $217 per gross square foot. Exhs. 13; 27, ¶ 44. The developer's architect believed that the contractor's estimate was reasonable. Exh. 27, ¶ 45.[13] This estimate is based on opinions of the construction cost per square foot as of December 2005, the time at which Paragon submitted its pre-filed testimony on this matter. The developer's contractor testified that construction costs for projects similar to this 40B project have risen by close to 30 percent from April 2003 to April 2006, because of shortages of steel, concrete, and skilled labor. Tr. V, 12-13. He testified that construction that does not involve wood framing costs "well over" $200 per square foot. Tr. V, 14-15.

The Board proposes $165 per square foot, relying on two theories presented in the hearing: 1) that Paragon's pro forma submitted to MassHousing included $165 as the

---

13. Both parties submitted testimony about construction costs provided to their witnesses by other contractors. They both opposed the inclusion of estimates offered by those individuals who did not

construction cost as of 2003, and the MHP Guidelines recommend that all line items in the pro forma, including construction costs and sales proceeds, should be estimated in current dollars at the time of submission of the request for the project eligibility letter. Exh. 17, p. 15; and 2) that the constructions costs in the *RS Means* Study, a compilation of construction related costs, Tr. V, 13, support $165 per square foot as the appropriate construction costs as of 2005. The Board's economic expert testified that "*RS Means* is a tool that is used to estimate construction costs, it has been in business for about forty or fifty years, [and] it has over 250,000 users in the US who use this as a data base." Tr. VII, 86.

The developer's economic consultant, however, stated that *RS Means* was not reliable for construction cost estimates, particularly for the Paragon site, because the cost information in *RS Means* was too general to use for costing out a specific project, in particular one that is complicated. Exh. 34, ¶ 7. Rather, he believed that recent construction costs of comparable projects provided the most reliable source for estimating construction costs for a project such as this one. Exhs. 29, ¶ 47, 34, ¶¶ 8-9. Paragon's construction witness testified that contractors generally don't rely on *RS Means*. He also said he does not use it because it "can't be current." Tr. V, 14. He did acknowledge that he might rely on it for a component of construction costs that represented a small proportion of the total cost. Tr. V, 18. The *RS Means* cost estimates themselves indicate that "[c]osts are derived from a building model with basic components. Scope differences and local market conditions can cause costs to

---

appear as witnesses in this proceeding. Other than the estimate of the contractor who did testify, the contractor estimates were all excluded as evidence of actual construction costs.

vary significantly." Exh. 58. We find that the testimony of comparable costs is more relevant than the *RS Means* figures.

In comparison to the testimony of the Board's economic witness, we find the developer's consultant's testimony on the importance of updating cost estimates to be more credible. In previous Committee decisions, we have emphasized the importance of evaluating costs that are based at the same or comparable time periods and have left it to the parties to submit the evidence they consider the most relevant. See *Sherborn,* slip op. at 9 n.9:

> The most logical time to assess land acquisition value ... is when the developer first prepares its *pro forma* and submits a request to the subsidizing agency for a project eligibility determination pursuant to 760 CMR 31.01(2). Arguably, for the sake of uniformity, all estimates in the *pro forma* should reflect costs and values on that date. Of course, as the permit application proceeds through local hearings and possibly hearings before this Committee and the courts, those estimates become dated. But market conditions are so variable and difficult to predict with accuracy that we believe that the advantages of the clarity obtained by referring to a single date ... likely outweigh the disadvantages of using old estimates. As of yet, however, there is no definitive policy from the subsidizing agencies with regard to what date should be used, and thus, litigants have considerable flexibility in how they may present their cases. Policy guidance would be useful in this regard because there are many complex questions imbedded within this issue.

The developer's 2005 construction cost estimates are consistent with the testimony of the developer's economic expert that "it is standard practice in all forms of the real estate industry that I'm familiar with to update your financial projections for a project," Tr. III, 115; also see Tr. III, 114, 116. Paragon's consultant noted that MassHousing requires an updated pro forma at the time for the final eligibility letter. Tr. III, 117-119. He also testified that updating the pro forma was necessary to adjust for the changes from the original proposal to the project as conditioned. Tr. III, 124-125.

In this case, the evidence is clear that the original costs as of the time of the project eligibility letter are understated. The evidence in the record that construction costs have risen 30 percent since 2003 supports the use of the 2005 figures, supplied at the time the hearing commenced with the filing of the pre-filed testimony, two and one-half years after the submission of the project eligibility letter. The evidence here shows that the costs of the developer at the time of the original application to the subsidizing agency, while appropriate for review by zoning boards, are not as relevant as the costs as of the commencement of the hearing. Moreover, the 2005 cost figures are not projections into the future but represent actual costs. Therefore, we find the developer's construction cost estimates to be more credible. We find that a construction cost per square foot of $219 is a reasonable cost for the project as conditioned by the Board's decision.

The developer's consultant testified that requiring the finishes in the affordable units to be the same as the finishes in the market rate units would impose a "very significant cost," Tr. III, 50, 52, that "could easily be 30 to $40,000 per unit [in] unnecessary finishes." Tr. III, 153. Paragon's construction witness stated that the cost of providing lower end finishes to the affordable units would save between $200,000 and $300,000 for the nine affordable units. Tr. V, 11. While this cost differential alone is insufficient to render the project uneconomic, it is a factor to consider when examining the uneconomic standard.

4. Revenues from Sales

As part of its pro forma, Paragon incorporated the opinion of its real estate appraiser, who has over 30 years experience in real estate valuation. He stated that as of September 16, 2005, the sellout value of 27 market rate condominium units to be built on the site was $540

per square foot of living area. Exh. 28, ¶ 12. Also see Exh. 14. Paragon's economic consultant also provided an alternate pro forma that contained what he called a "sensitivity analysis," with the assumption that certain units in the upper stories could return a higher price per square foot. He testified that these potential additional revenues did not make the 36-unit project profitable or feasible. Exh. 16; 29, ¶ 67.

The Board disputes Paragon's computation of revenue in two respects: 1) it challenges the proper number of units or square footage to apply to the estimated sale price; and 2) it argues that the developer failed to incorporate the value of extra parking spaces.

On cross-examination, the Board sought to show that, under its "wedding cake" design, the price per square foot would increase. It suggests that the terraces available to the upper stories would more than make up for the decrease in value from the loss of a fitness center. The developer's appraiser testified that the $540 sale price per square foot includes the value added to the property from the fitness center. Tr. V, 103-105. He stated that, for those units that would have an added terrace, the increased value resulting from the terrace would outweigh the added value of a fitness center. He also indicated that the value of a first floor unit would be less than that of the upper floors. Tr. V, 108, 112. We cannot find from this evidence that the price per square foot would increase in the 40-unit configuration.

In any event, as we stated above, the Board has not shown that the hypothetical 40-unit project could be built under the constraints of the Board's decision. Thus, even if the Board's hypothetical would increase useable space by 4000 square feet (including at least

700 square feet for the required additional affordable unit sold at a loss), we cannot find increased revenue on this basis.[14] Tr. II, 56-57; Exh. 14.

The Board also suggested that the number of parking spaces available in the 36-unit project is excessive and the developer could add revenue through marketing the additional parking spaces. Paragon's appraiser had produced a report indicating that the median market value of individual parking spaces in Brookline was $33,000. Exh. 14. However, Paragon's economic consultant testified that the extra parking spaces were included in the sales proceeds in his pro forma, and noted that Paragon's appraiser's report indicated that ten of the extra parking spaces were tandem spaces, which diminishes their worth. He believed that the Board's decision required 54 spaces plus visitor and handicapped parking spaces. Exhs. 1, 14, 16; Tr. III, 56-58. He also testified that it would be a bad idea to open the garage to the public. He concluded that the market for the additional spaces would be limited to residents of the building seeking an additional parking space. Therefore he said there did not appear to be much value to the units other than as an amenity to help selling some of the units. Tr. III, 132-133.

Paragon's appraiser also said that in reaching his value of $540 per square foot he assumed 80 parking spaces were available for dwelling units, 70 that were optimal to include with the 36 units and 10 that were surplus, to be added into the sales. Tr. V, 113-115. If only 54 spaces were included, the price would go down to about $532 per square foot. Tr. V, 115. The value of parking spaces as included in units would be $10,000 for tandem spaces and $15,000 for other spaces. Tr. V, 117. However, after Paragon's appraiser revised his price

---

14. According to the developer's economic expert, increasing the number of units but not the square

per square foot to adjust for fewer required parking spaces, he concluded there would be eight extra spaces, available at $10,000 each for sale to the residents of the project. The incremental value of those spaces would adjust the revenue to $542.28 per square foot. Tr. V, 126-127; see Tr. V, 117-122. We will accept $542 as the revenue per square foot for the 36-unit project, but note that this does not significantly change the loss results of the pro forma for the 36-unit project.

C. Conclusion

The pro formas prepared by the developer's consultant showed a net loss resulting from the comprehensive permit as conditioned by the Board, under either the initial scenario, or the alternative pro forma, with the "sensitivity analysis" for potential higher value units in the upper floors. Exh. 16. Our findings in this decision do not alter that conclusion. Although the developer's economic witness modified some of his subsidiary numbers during cross-examination, even with these changes, the resulting difference between total revenues and development costs is negative using the ROTC method and the values accepted in this decision. We find his testimony and opinion to be credible.

Although the Board's economic expert submitted extensive testimony analyzing the MHP Guidelines, even with the 40-unit hypothetical, which has not been shown to be feasible, applying the construction costs, revenues and land values accepted in this decision, the Board has not shown that this scenario, as conditioned by the decision, would be economic.

---

footage, under the constraints of 40B, will result in a marginal loss of revenue. Tr. II, 57.

Finally, the Board argues that its economic expert applied the MHP methodology to show that the 68-unit proposal would also be uneconomic, and questions whether Paragon would propose a project that is uneconomic. It argues that this undermines the credibility of Paragon's expert on economic issues. It relies on testimony that suggested the construction cost per square foot for a 68-unit building would decrease to $209 and revenues would increase to $552 per square foot. Board brief, p. 16; Tr. III, 13; Tr. VII, 7-11; Exhs. 13, 14.

The developer argues that it believes that the 68-unit proposal is economically feasible and it would not have presented that proposal to this Committee for approval if it did not. In any event, whether the developer's 68-unit proposal is uneconomic is not relevant to our consideration of whether the project as conditioned is uneconomic. The evidence regarding the figures in the pro forma for the 68-unit proposal on which the Board relies was admitted for the limited purpose of impeachment. Tr. V, 82-83. Moreover, the Board's expert admitted errors in his sample calculations, changed his subsidiary numbers so often, and submitted so many revisions to his calculations, that his criticism is simply not credible in this instance.

Even if there were evidence in the record that the project Paragon seeks to approve does not meet the 15 percent profit threshold in the MHP Guidelines, which is the benchmark in this proceeding, a developer may choose to pursue a project that would return a lower profit, even though it is "uneconomic" within the meaning of Chapter 40B.

We therefore conclude that Paragon has demonstrated that the conditions in the Board's decision render the project uneconomic.

V. LOCAL CONCERNS

Once the appellant has demonstrated that conditions in the Board's decision would, in the aggregate, render the project uneconomic, the burden then shifts to the Board to prove first, that there is a valid health, safety, environmental, design, open space or other local concern which supports each of the contested conditions imposed, and then, that such concern outweighs the regional need for low and moderate income housing. G.L. c. 40B, §§ 20, 23; 760 CMR 31.06(7). See *Hanover v. Housing Appeals Committee*, 363 Mass. 339, 365, 294 N.E.2d 393, 412 (1973); *Princeton Development, Inc. v. Bedford,* No. 01-19, slip op. at 9 (Mass. Housing Appeals Committee Sept 20, 2005); *Hilltop Preserve LTD Partnership v. Walpole*, No. 00-11, slip op. at 4 (Mass. Housing Appeals Committee Apr. 10, 2002), citing *Hamilton Housing Authority v. Hamilton*, No. 86-21, slip op. at 11 (Mass. Housing Appeals Committee Dec. 15, 1988).

The conditions that are the major focus of the dispute between Paragon and the Board are those that involve the redesign of the building. See Conditions 2 through 9. See Exh. 1; Pre-Hearing Order, § 4, ¶¶ 7-8. Specifically, through these conditions, the Board raises concerns related to height, setbacks, open space, tree protection, traffic, parking, and consistency with neighborhood character and with the Brookline Zoning By-laws and Comprehensive Plan. The Board also raised specific concerns related to connection to the Town stormwater management system and the local need for rental housing. Board brief pp. 6-9, 33-36.

A. Density, Height and Open Space

The Board argues principally that the height of the proposed building is inconsistent with the character existing in the neighborhood and preferred by the Town for this part of Brookline, as expressed in the Zoning By-laws and Comprehensive Plan. The evidence shows that the proposed building height of 12 stories exceeds the maximum height permitted for the area. As a result, the Board conditioned its approval on a building limited to eight stories in the rear, transitioning to five stories at Marion Street to provide for a transition to the nearby residential neighborhoods and buildings. Exh. 1. The Board argues that other large buildings in the area either predated the regulations applicable to the project site, or, like the Marriott Hotel behind the project site, were built in a commercially zoned area. The Board also contrasts the hotel's open courtyard with Paragon's proposal for a building that would provide virtually complete coverage of the project site. The Board also argues that its requirement of increased side yard setbacks would improve the open space available on the site. Finally, the Board argues that the Floor Area Ratio (FAR) for the proposed project would greatly exceed the Town's maximum of 2.0 and the hotel's estimated FAR. See Exh. 1.

The Town's Chief Planner testified that construction of the proposed building would not be consistent with sound planning principles. She stated that the large buildings in the vicinity of the project site are anomalies to the prevailing residential building pattern that transitions in height and density away from the Coolidge Corner area. She also stated that the proposed building's FAR of 7.42 is not consistent with the density, height and massing of existing development. Exh. 31, ¶¶ 11-18. She testified that Brookline revised its zoning

bylaw to allow the Marriott Hotel to be built behind the site, and that it has a FAR of "about" 3.3. Tr. VI, 86-89; also see Tr. VI, 90-96. The proposed 12-story structure would have less open space than the hotel. Tr. VI, 106. The Planner testified that the proposed 68-unit building would impose shadows on the open space in the courtyard of the Marriott Hotel. Exh. 31, ¶ 18.

The developer's architect testified in detail concerning the relationship of the 68-unit building to the surrounding buildings on Marion, Beacon and Webster Streets. He stated that his design conforms to the dense, urban block in which the site is located between Webster Street and Marion Street, just off the main Coolidge Corner intersection. The site is located adjacent to a five-story commercial building consisting of approximately 130,000 square feet of space (the Verizon building). The building adjacent on the West is a 10-story multifamily residential structure (the Intercontinental building). The Marriott Hotel, located directly to the rear of the site is eight stories. A portion of the hotel's rear wall is approximately 1½ feet from the property line separating the site from the hotel. Nearby at 133 Park Street and 1373 Beacon Street is a 14-story multifamily residential building known as the Druker Building. Exh. 27, ¶ 18.

The developer's architect stated that the proposed 12-story building is consistent with other buildings in the area and there is no clear transition diminishing in height away from Coolidge Corner to the north side of Marion Street. Rather, the block on which the proposed building would be constructed "is a cluster of large scale buildings in height and/or volume... The actual anomaly is the existing 3.5 story building." Exh. 33, ¶ 2. The architect also contradicted the Planner's testimony about shadowing. He pointed out that his shadow

studies demonstrated that most of the shadowing of the hotel's courtyard is caused by the hotel itself and the proposed building will contribute minimally to the shadowing. Moreover, by allowing the hotel to be built at its site, where previously a farmers' market was operated, the Town significantly reduced the amount of open space in this neighborhood. The shadow studies prepared under the architect's direction show that no shadows are cast on Marion Street or any of the buildings on the South side of the street. There will be some incremental shadowing in the back yard of 49 Marion Street. Exh. 33, ¶ 3; Exh. 27, ¶ 21; Tr. I, 109-110.

The 68-unit proposal provides for total gross area of 145,469 square feet and net living area of 84,000 square feet. Although 12 stories in height, above the seventh floor it is designed to be recessed away from Marion Street for the first approximately 20 feet of depth to reduce the impact of the building's height. Also, because Marion Street is lower than Beacon and Webster Streets, the difference between the site's proposed 12-story structure and height of the hotel is reduced. In addition, the proposed variations in construction materials are designed to reduce the visual scale and mitigate the impact of the building. Even though the scale of the proposed building is much larger than that of buildings on the South side of Marion Street, the buildings in the block on the North side of Marion Street abutting the project site are generally large and imposing. Exh. 27, ¶¶ 14, 18, 19; Exh. 33.

The proposal has a rear setback of 5½ feet, a side yard set back on the West of 10 feet the length of the building at the lower two floors, a 10-foot setback for the entire height of the building for the first 75 feet from Marion Street, and a 5-foot setback above the second floor beginning 75 feet from Marion Street. A landscaped buffer is proposed. The massing of the front of the building is shifted toward the Verizon Building, but it was reduced in height to

create a more transitional relationship with the abutters. To accommodate the residential building to the West, there would be no balconies directly facing the residential building at 49 Marion Street. As proposed before the Committee, these plans provide for 17 affordable units and 80 parking spaces to be located in a two-story underground parking structure accessed from a steeply sloped ramp. Exh. 27, ¶ 16; Tr. I, 82. Although the FAR for the proposed building is 7.42, or 3.7 times the 2.0 FAR allowed in the M-2 zone, the proposed building is comparable in height and density to several buildings in the Coolidge Corner area. The FARs of other large buildings in the area significantly exceed the 2.0 permitted. The FARs of six buildings in nearby Coolidge Corner range from 4.0 to 7.4. Exh. 27, ¶¶ 24-27, Exh. 5, Sheet 2.

The Committee has stated that it is not sufficient in the context of the Comprehensive Permit Law to simply quantify density; rather, there must a more sophisticated analysis of the proposed design and its relation to the site and surrounding areas. *Princeton Development,* No. 01-19, slip op at 15, citing *Hastings Village, Inc. v. Wellesley,* No. 95-05, slip op. at 20-31 (Mass. Housing Appeals Committee Jan. 8, 1998), *aff'd* No. 98-235 (Norfolk Super. Ct. Nov. 12, 1999); *CMA, Inc. v. Westborough,* No. 89-25, slip op. at 27 (Mass. Housing Appeals Committee June 25, 1992); *Pyburn Realty Tr. v. Lynnfield*, No. 02-23 (Mass. Housing Appeals Committee, Mar. 22, 2004). We find that the developer's architect's characterization of the relationship of the proposed building to the neighboring buildings is clear and more credible than that of the Board's witness. Our evaluation of the evidence in the record leads us to conclude that rather than being inconsistent with buildings in the neighborhood and the general Coolidge Corner area, the proposed building conforms to the

character of the neighborhood. The proposed building fits well with the surrounding buildings on the north side of Marion Street, and does not exacerbate the difference between the North and South sides of the street. Given the dense, urban character of this area of Brookline, a building of the type proposed here is well suited, and offers a good example of infill construction of affordable housing. Therefore, the Board has not demonstrated that the height, setback and open space issues establish a valid local concern that outweighs the need for affordable housing.

B. Local Requirements and Comprehensive Plan

In addition to its By-laws, see Exhs. 9, 59, the Board also submitted exhibits regarding the Town's Comprehensive Plan 2005-2015, its master plan and zoning goals. Exhs. 21A, 21B, 22, 23; "Housing Units Created under the Affordable Housing Requirements of Zoning Bylaw," Exh. 24, "Housing Brookline, Affordable Housing Policy and Programs," Exh. 25 and "Design Guidelines, Coolidge Corner Interim Panning Overlay District." Exh. 26. Also see Exh. 20. The Town Planner testified extensively regarding the scope of the plan. See Exh. 31, Tr. VI, 76-144. She stated that the construction of this building would be inconsistent with the density and height goals of the Town's Comprehensive Plan, and pointed specifically to a provision concerning keeping affordable housing development in context with the character of a neighborhood. She also stated it was inconsistent with current zoning requirements, including building height, setback and FAR, as well as an inclusionary zoning by-law that requires developers of projects with "6+ units" to provide affordable units at no monetary cost to the Town. Exh. 9, Exh. 31, ¶¶ 17-24; Tr. VI, 77.

The Board has not introduced evidence that its Comprehensive Plan was in effect at the time of Paragon's application for a comprehensive permit. On this record, it appears that these plans and guidelines went into effect in late 2005 or early 2006, well after Paragon applied for a comprehensive permit in 2003. The Town's Planner testified that planning to implement the goals in the Comprehensive Plan has been ongoing for a number of years, but she acknowledges that the Interim Planning Overlay District was approved by Town Meeting in the fall of 2005, and that Interim Planning Design Guidelines were adopted in January 2006. Exh. 31, ¶ 22.

The Committee has long held that "any regulation not in effect at the time of the filing of the application [for a comprehensive permit] will not be applied to [the] project." *Weston Development Group v. Hopkinton*, No. 00-05, slip op. at 8-11 (Mass. Housing Appeals Committee May 26, 2004). Also see *Northern Middlesex Housing Associates v. Billerica*, No. 89-48, slip op. at 8-12 (Mass. Housing Appeals Committee Dec. 3, 1992); 760 CMR 31.07(1)(j). This rule is equally applicable to a comprehensive or master plan as it is to other local regulations put forth by the Board as justification for imposing conditions on the issuance of a permit. See *Meadowbrook Estates Ventures, LLC v. Amesbury,* No. 02-21, slip op. at 12 (Mass. Housing Appeals Committee Dec. 12, 2006).

Moreover, the Board has not demonstrated how the project is inconsistent with the comprehensive plan or the Town Inclusionary Zoning Bylaw. Exh. 9. As our discussion notes above, the proposed building fits into the dense, urban character of the Coolidge Corner neighborhood. The Town Planner also testified that the Town would prefer to maintain rental units as contained in the building currently on the site, possibly suggesting this as a

local concern. Exh. 31, ¶ 29. However, given that the Board's decision approved a condominium project on the site, it has not established that this project is inconsistent with the town goal of maintaining or increasing rental housing. See Tr. VI, 100. Also, this project will provide 17 units of affordable housing, replacing 16 rental units, which are not designated as affordable housing. We therefore conclude that the Board has not demonstrated a valid local concern with regard to the Town By-laws or Comprehensive Plan that outweighs the need for affordable housing.

C. Other Concerns Related to Building Design

Trees. The Town Planner expressed concern that the mass and scale of the project would cause the destruction of many trees on the property line and on the adjacent property near the boundary line. She also stated that street trees and other landscaping features must be integrated into every development of significance. Tr. VI, 106-108; Exh. 31, ¶ 19.

The developer's architect testified that construction of the site under any of the scenarios considered would likely result in loss of the existing trees. He said that tree loss is an "unfortunate result of creating buildings." Although he tries to design buildings to maintain as many of the existing trees as possible, the full width of the site is needed to construct the underground parking structure, even for the eight-story structure conditionally approved by the Board. The developer plans to plant street trees along the sidewalk adjacent to the property to perpetuate the green buffer. Exh. 27, ¶ 34; Tr. I, 94-98, 113-115.

The Town Planner acknowledged that the trees she was concerned about would die from damage from construction if they were not removed, even if the building were the size

approved by the Board. Tr. VI, 129. Therefore this issue raises no valid local concern that outweighs the need for affordable housing.

Open Space. In her direct testimony, in reference to open space issues, the Town Planner stated that the proposed building would shadow the "newly created public open space in the courtyard of the hotel." Exh. 31, ¶ 18. She did not discuss the extent of open space on the site itself. During the hearing, she stated that in a multifamily zone there should be "useable open space on the lot for property for residents to use and enjoy." Tr. VI, 107. She expressed concern about a project built on the property line with no light or air getting in. However, the Board has not submitted testimony or argument to suggest that the setbacks associated with the architect's 36-unit design would be inconsistent with the Board's decision. This location, near Coolidge Corner and containing multistory buildings in a dense configuration, is more suited than most to the limited setbacks and reduced open space associated with the developer's proposal. In addition, neither building configuration would provide meaningful open space as identified by the town by-laws. The developer's architect pointed out that setbacks of less than 15 feet do not qualify as useable open space under the by-laws. Exh. 27, ¶ 31. In any event, the difference in the amount of open space between the 36-unit layout and the 68-unit proposal is not significant enough to support a claim that useable open space represents a valid local concern that outweighs the need for affordable housing.

Parking. The Board argues that the parking offered in the project is inadequate to avoid overburdening Marion Street and other neighboring streets. Although the Town Planner submitted no testimony about parking in her direct pre-filed testimony, on redirect

she testified at the hearing that the parking space requirements exist to address safety issues including crime reduction and the facilitation of snow removal.

The Board's decision waived the requirement of two parking spaces for 1-bedroom market rate units, required one space per affordable unit, one space per 1-bedroom market rate unit and two spaces per market rate 2-3 bedroom unit. Tr. VI, 137-138. The proposed project would have 80 parking spaces, or approximately 1.18 spaces per dwelling unit, compared to the 2.0 required by the by-laws. Exh. 27, ¶ 32. The developer's consultant testified that the Brookline by-law requires five or six parking spaces to be designed and marked for visitors and trades people. Tr. V, 62; VI, 115; Exh. 9.[15]

The developer's architect testified that because this project is located in an urban neighborhood well served by public transportation, the proportion of the parking spaces for this proposal is appropriate and "exhibits a basic principal of smart growth: it is a housing development near public transportation, allowing residents transportation access without having to own vehicles." Exh. 27, ¶ 33. Given the proximity of the project site to the Coolidge Corner area, with public transportation nearby, we do not find that requiring the developer to increase the number of parking spaces is a valid local concern that outweighs the affordable housing need. We agree with Paragon's architect's testimony that the amount of parking available to residents is consistent with smart growth principles. Exh. 27, ¶ 33. To alleviate the Board's concerns about adequate parking, however, we will allow the Board to require the developer to include spaces for bicycle parking and a station for a "Zip Car" or other comparable pool car service.

---

15. If this is not the case, of course, more spaces would be available to residents.

Traffic. The Town Planner also testified that the planning board had concern that the project would increase traffic and jeopardize elderly pedestrians. Tr. VI, 117. However, the traffic department's memorandum referred to the "low volume of additional traffic" resulting from the project and stated that "the impact of this project on traffic flow and delay at the immediate adjacent intersections will be insignificant." Exh. 4; Tr. VI, 132-133. The Board has not demonstrated that this is a valid local concern that supports conditioning the project on height and setback limitations.

We find that the Board has not demonstrated that Condition 2's requirements are supported by local concerns that outweigh the need for affordable housing. Condition 2 is stricken.

D. Other Challenged Conditions

Other conditions challenged by Paragon do not specifically relate to the height and setback aspects of the building design. In the Pre-Hearing Order, Paragon identified the following additional conditions as imposing an improper condition subsequent, exceeding the Board's authority, or containing other unlawful requirements. Paragon asks the Committee to exercise its authority as articulated in *Peppercorn Village Realty Trust v. Hopkinton,* No. 02-02, slip op. at 16-17 (Mass. Housing Appeals Committee Jan. 26, 2004) and *Archstone Communities Trust v. Woburn,* No. 01-07, slip op. at 19-21 (Mass. Housing Appeals Committee June 11, 2003) to strike these conditions. Paragon also argues that the Board has failed to show that there is a valid health, safety, environmental or other local concern that supports compliance with additional conditions, and therefore they must be stricken.

The Board, argues, by contrast, that even if the Committee finds the Board's decision renders the proposal uneconomic, Paragon had the burden of showing that the imposition of these conditions rendered the project uneconomic, and that by not so demonstrating, it cannot argue for their removal. This argument, however, is not consistent with the law and Committee precedents, which state that the proper interpretation of G.L. c. 40B, § 23 and 760 CMR 31.06(7) and 31.08(1)(b) is that the conditions are to be reviewed in the 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. See, e.g., *Princeton Development, Inc. v. Bedford,* No. 01-19, slip op. at 9 (Mass. Housing Appeals Committee Sept. 20, 2005); *Walega v. Acushnet*, No. 89-17, slip op. at 7-8 (Mass. Housing Appeals Committee Nov. 14, 1990).[16]

In a number of provisions in its decision, the Board requires the developer to appear in the future -- either before itself or other municipal boards -- for further review and approval. In most instances, such a "condition subsequent" undermines the entire purpose of a single, expeditious comprehensive permit and is improper. *Peppercorn Village,* No. 02-02, slip op. at 22. Also see *Hastings Village, Inc.,* No. 95-05, slip op. at 33-34; *Owens v. Belmont*, No. 89-21, slip op. at 13-14 (Mass. Housing Appeals Committee June 25, 1992); 760 CMR 31.09(3). Some of the Board's conditions, however, merely require submission

16. The Committee has noted that even in the more difficult case in which it has determined the developer has not shown the project as conditioned would be uneconomic, it may engage in a limited review of the conditions. See *Peppercorn Village* \, No. 02-02, slip op. at 16 and cases cited. In *Peppercorn,* such a case, the Committee ruled that its review of the challenged conditions was limited to two sorts of analysis: first, a review of conditions "if the developer has introduced evidence that they involve local requirements that have not been applied equally to affordable housing and non-subsidized housing..." and, second, "a much more limited review of conditions to

and approval of additional plans concerning issues that were not addressed in the preliminary plans submitted with the comprehensive permit application, and require a review to determine consistency with applicable local regulation. Such requirements, so long as they do not require further hearing and approval by the Board, but rather entail only approval by the town official who customarily reviews such plans, are appropriate. *Peppercorn Village,* No. 02-02, slip op. at 22; *Owens,* No. 89-21, slip op. at 13-15.

Condition 1, providing that the comprehensive permit would be ineffective unless by July 19, 2004, Paragon had submitted "suitable and persuasive evidence that it established control of the site." For the reasons stated above in our discussion of site control, this condition is ineffective. We have concluded that the developer has demonstrated adequate site control to pursue the comprehensive permit. This condition is stricken.

Condition 2, setting height and setback requirements for the proposed building, and requiring the developer to address "the Project's unreasonable encroachment into side yards." Although the developer raises this condition separately from the uneconomic analysis, it clearly fits within the parameters of the local concerns related to open space addressed above. As discussed above, the Board has not demonstrated that local concerns underlying this condition outweigh the need for affordable housing. As we have stated above, this condition is stricken.

Conditions 3-5, requiring Paragon to submit revised designs of a smaller building, requiring that any revisions to its plans be reviewed by a design advisory board, and requiring delivery to the Board, Brookline Director of Planning and Community Development and the

---

ensure that they have some bona fide basis." *Id.* Also see *Archstone Communities Trust v. Woburn,*

Director of Engineering detailed site plans to allow the Director and Engineer to review them for compliance with the terms of the comprehensive permit and industry standards and precluding construction until the Board has approved the final site plans. These three conditions relate to the requirements of Condition 2 that the developer redesign its project. They are therefore stricken along with Condition 2.

Additionally, to the extent the Board would argue it seeks to conduct further review of the plans for the 68-unit proposal, these three conditions constitute improper conditions subsequent. Under the Comprehensive Permit Law, the developer need submit only preliminary site development plans and preliminary architectural drawings to the Board for approval. 760 CMR 31.02(2). Requiring subsequent review by the Board of the construction details, and setting general "industry standards" as the standard for such a subsequent review "undermines the... purpose of a single, expeditious comprehensive permit..." See *Peppercorn Village,* No. 02-02, slip op. at 22, and cases cited. In *Owens,* the Committee noted that we have consistently taken the position that:

> A board of appeals and all other local officials may have only one opportunity to review a proposal. The developer may include in its comprehensive permit application any aspect of the construction which it wants reviewed, whether that aspect requires a waiver of local restrictions or not. The board of appeals must consult with all other local officials, and once the comprehensive permit has been issued, those details described in the application may not be revisited.

Id. at 14. A condition may not require "full review and approval rather than simple examination of construction plans for compliance with the comprehensive permit, state codes, and undisputed local restrictions." *Id.*, citing *West Boylston Housing Auth. v. West*

No. 01-07, slip op. at 19-21 (Mass. Housing Appeals Committee, June 11, 2003).

Boylston, No. 88-22, slip op. at 4-5 (Mass. Housing Appeals Committee May 2, 1989). Also see 760 CMR 31.09(3).

All that may be required after issuance of the comprehensive permit is routine inspection during and after construction by the appropriate town official (or, if the Board so desires, its consulting engineers) for compliance with the comprehensive permit, the final written approval by the entity that issued the project eligibility letter, and applicable state and federal codes. 760 CMR 31.09(3). However, "the developer must comply with local requirements with regard to all details *not* included in the application." (Emphasis in original.) *Owens*, No. 89-21, slip op. at 14 n.9, and "the building inspector, the town engineer, or any other local official normally involved in issuing the building permit can of course consult with whomever he or she chooses." *Id.* at 15.

Condition 6, which waived parking requirements to the extent that the project must provide one space for one-bedroom units and 2 spaces for 2 bedroom units. As discussed above, the Board has not established a local concern with regard to the requirement of additional parking that outweighs the need for affordable housing. Therefore, this condition is stricken.

Conditions 7, which requires a loading dock. The Board has not established a local concern with regard to this condition that outweighs the need for affordable housing. It is therefore stricken.

Condition 8, which sets design criteria for the driveway. The Board has not established a local concern with regard to this condition that outweighs the need for affordable housing. It is therefore stricken.

Condition 9, requiring that affordable units be indistinguishable from market rate unites with respect to base finishes, fixtures and amenities. Paragon has shown that this condition contributes to the Board's decision rendering the project uneconomic. The Board has not established a local concern with regard to this condition that outweighs the need for affordable housing. It is therefore stricken.

Condition 10, which requires a lottery and specific rules to the extent they are inconsistent with the policies of MassHousing or DHCD with respect to local preference, and with respect to excluding relatives of the principals of Paragon from participating from the lottery. The record on this issue is too sparse in light of the emerging policy issues that are the subject of several appeals before the Committee. On this record it is premature to rule on a matter that should be addressed by the appropriate policymaking authorities. If the parties are unable to resolve this issue, they may apply to the Committee for further consideration.

Condition 11, which precludes the issuance of building permits until the execution of documents to ensure affordability and profit limitation, including a monitoring services agreement, and provides for the submission of the documents to counsel for the Town or the Board as well as the Director. The record on this issue is too sparse in light of the emerging policy issues that are the subject of several appeals before the Committee. On this record it is premature to rule on a matter that should be addressed by the appropriate policymaking authorities. If the parties are unable to resolve this issue, they may apply to the Committee for further consideration.

Condition 14, which requires Paragon to enter into a construction management plan approved by the Engineer prior to construction. To the extent this requires Paragon to

undergo a more rigorous management process than that required for unsubsidized housing, it would constitute an improper condition subsequent which undermines the purpose of a single, expeditious comprehensive permit. See note 5, *supra.* A condition may not require "full review and approval rather than simple examination of construction plans for compliance with the comprehensive permit, state codes, and undisputed local restrictions." *Owens,* No. 89-21, slip op. at 13-14. Also see *Peppercorn Village,* No. 02-02, slip op. at 22. This condition is modified to permit routine oversight in accordance with applicable local regulations. See *Owens*, No. 89-21, slip op. at 13-15.

Condition 17, which requires the approval of the Engineer of the project's stormwater treatment and management system prior to the start of construction. Paragon requested an exception from the Town stormwater management procedures in its application. See Tr. III, 147, Exh. 2F. The Board argues that the developer conceded that this condition was appropriate and that Paragon did not present the Board with a plan for connection to the Town storm water system even though the Town's review and input would be necessary. Board brief p. 7; Tr. III, 66; V, 64. Here, however, the developer's consultant testified that if the Board's condition regarding storm water management plans was limited to the proper size of the pipe and the nature and location of the connection to the water system, the developer would consider the condition acceptable. Tr. V, 91-92. This condition will be modified to require a review as agreed to by the developer consistent with the Committee's condition below regarding compliance with Department of Environmental Protection Stormwater Management Guidelines. See *Owens,* No. 89-21, slip op. at 13-15.

Condition 18, which requires the approval of the Engineer of an erosion control plan. The Board has presented no evidence on this issue. This condition is stricken to the extent it is more stringent that the Committee's condition below regarding compliance with Department of Environmental Protection Stormwater Management Guidelines.

Condition 19, which requires the submission of a tree management plan and landscape management plan for review by the Director and Town Tree Warden and Landscape Architect. The developer has testified that it will replace street trees following the construction. This condition will be modified to provide for the replacement of street trees.

Condition 20, which requires the submission of a lighting plan for review by the Director. The Board submitted no evidence with respect to this issue. This condition is modified to permit routine inspection of lighting by the appropriate town official consistent with applicable local regulations. See *Owens*, No. 89-21, slip op. at 13-15.

Condition 21, which conditions occupancy permits on construction of infrastructure, compliance with other specifications and notification by the Engineer to the Board, and release of occupancy permits by the Board. This condition specifically provides for further review by the Board. It is a condition subsequent which undermines the purpose of a single, expeditious comprehensive permit. See *Peppercorn Village,* No. 02-02, slip op. at 22. This condition is modified to permit routine inspection and oversight of the building in accordance with applicable local regulations to determine conformance with the plans and with state and local building codes as a condition of release of occupancy permits. See *Owens*, No. 89-21, slip op. at 13-15.

Condition 26, which requires that any change in management or ownership of Paragon be approved by the Board at a public meeting and that the comprehensive permit not be assigned without a public hearing. This condition shall be modified to provide for written approval of the Board or the Committee of a transfer of a comprehensive permit. See 760 CMR 31.08(5); *Delphic Associates,* No. 00-13, slip op. at 4.

V. CONCLUSION

Based upon review of the entire record and upon the findings of fact and discussion above, the Housing Appeals Committee concludes that:

1. The comprehensive permit shall conform to the permit issued by the Board and dated July 6, 2004, except as provided in this decision.

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

(a) The development shall be constructed as shown on drawings by Steffian Bradley Architects dated May 12, 2004. Exh. 5 (13 Sheets).

(b) Design and construction shall be in compliance with the state Department of Environmental Protection Stormwater Management Policy and Guidelines. Prior to the commencement of construction, the applicant shall submit to the Brookline Department of Public Works a stormwater management report prepared by the project engineer that demonstrates that the final plans meet the DEP Stormwater Management Policy.

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), this decision shall for all purposes be deemed the action of the Board.

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

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

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

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

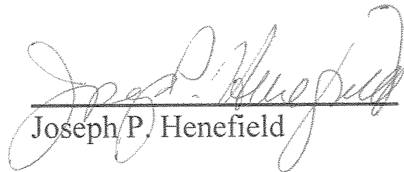
(d) No construction shall commence until detailed construction plans and specifications have been reviewed and have received final approval from the subsidizing agency, until such agency has granted or approved construction financing, and until subsidy funding for the project has been committed.

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

This decision may be reviewed in accordance with the provisions of G.L. c. 40B, § 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

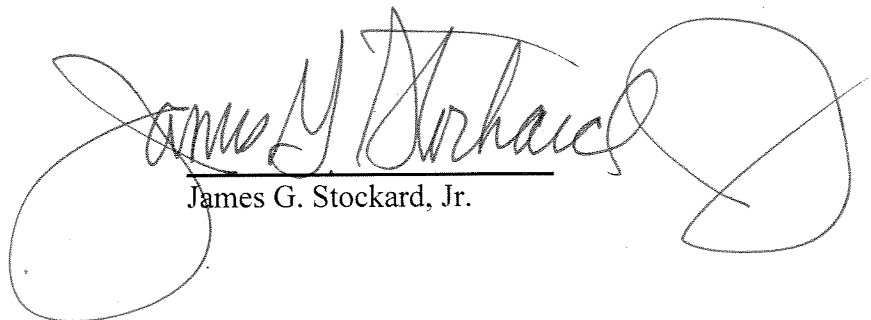
Issued: March 26, 2007



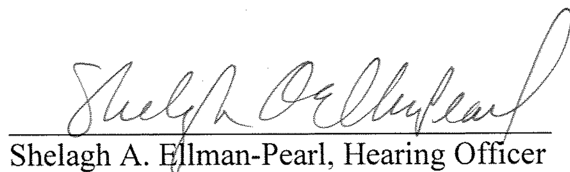
Joseph P. Henefield

Marion V. McEttrick

Christine Snow Samuelson



James G. Stockard, Jr.



Shelagh A. Ellman-Pearl, Hearing Officer

APPENDIX A

COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

PARAGON RESIDENTIAL PROPERTIES, LLC, Appellant	)	
v.	)	No. 04-16
BROOKLINE ZONING BOARD OF APPEALS, Appellee	)	

RULING ON PREHEARING MOTIONS

This is an appeal pursuant to G.L. c. 40B, § 22, and 760 CMR §§ 30.00 and 31.00, brought by Appellant Paragon Residential Properties, LLC (Paragon) of a decision of Appellee Brookline Zoning Board of Appeals granting a comprehensive permit with conditions with respect to property located at 45 Marion Street, Brookline. Three issues have been raised by motion. The Board has moved to dismiss this appeal alleging Paragon had not satisfied the jurisdictional requirement of site control specified in 760 CMR 31.01(1)(c) and (2). Paragon has moved for a determination that a comprehensive permit has been constructively granted, or in the alternative, that the Board's decision is in effect a denial of a comprehensive permit. In addition, an abutter, Jonathan Davis (Mr. Davis), has moved to intervene in the appeal.

I. PROCEDURAL HISTORY

On October 14, 2003, Paragon submitted an application to the Board for a Comprehensive Permit pursuant to G.L. c. 40B, §§ 20-23, for an 88-unit residential condominium development on 15,036 square feet of land located at 45 Marion Street,

Brookline, Massachusetts. Of the 88 units initially proposed, 22 would be offered as affordable. The plan was revised to provide for 68 total units, including 19 affordable units. The housing is to be subsidized by either the Massachusetts Housing Finance Agency under the Housing Starts Program or the New England Fund Program of the Federal Home Loan Bank of Boston.

The public hearing began on November 6, 2003, and continued on December 4 and 18, 2003, and on March 18, April 22, May 20 and June 10, 2004. A site visit was held on December 21, 2003. Paragon requested that the hearing be closed on May 20, 2004. The Board denied that request. On May 20, 2004, the Board issued an order stating that site control appeared to be deficient and ordering Paragon to provide "suitable and persuasive" evidence of site control within 60 days; otherwise the Board would dismiss the case or, alternatively, include site control as a factor in its decision. The Board closed the hearing on June 10, 2004, and deliberated on the application on June 17, 2004. On June 17, counsel for Paragon agreed that the Board could file its decision on or before July 9, 2004. On July 5, 2004 the Board issued its decision granting a comprehensive permit with conditions.

Among its findings, the Board determined that: 1) Paragon is substantially related to an entity known as Marion Properties Group, LLC (Marion Properties), which is the present owner of the Property; 2) Paragon proposes to purchase the property through a non-arm's length transaction; 3) Marion Properties and other parties are prohibited by a temporary restraining order (TRO) from conveying or encumbering the property; 4) the TRO prohibits the purchase "that would enable [Paragon] to claim site control;" 5) the comprehensive permit, as an encumbrance on the property is prohibited by the TRO; 6) Paragon has failed to satisfy the jurisdictional prerequisite of site control, and thus the Board does not have jurisdiction over the

permit application; 7) the Board gave Paragon a formal notice of this finding and provided Paragon sixty days to cure; and 8) Paragon has failed and refused "to cure this clear jurisdictional defect."

In addition, the Board's decision granting the Comprehensive Permit included as Condition 1:

> This Permit shall be ineffective unless, within sixty days from the Board's May 20, 2004 order (i.e. July 19, 2004), the Applicant submits suitable and persuasive evidence that it has established control of the site, as required by 760 CMR 31.01(1)(c). With submission of such evidence, the Applicant must request that the Board re-open the hearing, in compliance with all notice requirements to consider the Applicant's submissions. In the event that the Applicant does not provide evidence of site control by July 19, 2004, this permit shall be null and void.

On July 22, 2004, Paragon filed its appeal with the Housing Appeals Committee. On August 3, 2004, Mr. Davis moved to intervene in the appeal. The Committee held a Conference of Counsel on August 9, 2004.[1] On August 23, 2004, the Board moved to dismiss, alleging Paragon had not satisfied the jurisdictional requirement of site control. On September 10, 2004, Paragon filed a motion for a determination that a comprehensive permit has been constructively granted, or in the alternative, a motion for a ruling that the Board's decision is a *de facto* denial. Oppositions have been submitted to each motion, and the Board and Mr. Davis have filed replies to the oppositions filed by Paragon.

II. MOTION TO DISMISS

To be eligible to proceed on a comprehensive permit application before a zoning board, or to bring an appeal before the Housing Appeals Committee, an applicant must fulfill three jurisdictional requirements, including that "[t]he applicant shall control the site." 760 CMR 31.01(1)(c). Paragon has entered into a purchase and sale agreement with Marion Properties

---

1. The Committee's Chairman, Werner Lohe, has recused himself from this proceeding. The Committee's Counsel, Glenna J. Sheveland, presided at the Conference of Counsel.

with respect to the subject property. Paragon asserts that, according to 760 CMR 31.01(3), the agreement is "conclusive evidence of [its] interest in the site." It relies on 31.01(3) to argue that the MassHousing site approval letter also provides conclusive evidence of its interest in the site.

The Board claims that Paragon failed to establish it controls the site because the Superior Court has issued a TRO against Marion Properties and other defendants in a civil action, thus rendering Paragon's purchase and sale agreement ineffective. The Board claims that the TRO precludes a showing of site control either at the time of the application or within 60 days after notification of a deficiency as provided in 760 CMR 31.01(5), which it claims is the critical time period for jurisdictional purposes.[2]

The existence of Paragon's purchase and sale agreement creates a rebuttable presumption of "site control" within the meaning of 750 CMR 31.01(1)(c). Holding an "option or contract to purchase the proposed site" constitutes conclusive evidence of an applicant's interest in the site, 760 CMR 31.01(3), which in turn gives rise to a rebuttable presumption that an applicant has demonstrated site control for the purposes of G.L. c. 40B. 760 CMR 31.07(1)(b).[3] Absent evidence to the contrary, this agreement is sufficient to require the Committee to presume that Paragon controls the site. To counter that presumption, it was incumbent on the Board to submit contrary evidence in rebuttal. See *TBI, Inc. v. Board of Health of North Andover,* 431 Mass. 9, 12, 725 N.E. 2d 188 (2000).

---

2. Although the Board cites 760 CMR 31.01(2) in support of dismissal, it makes no argument on that basis in its initial or reply memorandum.

3. There is no need to reach the question whether the MassHousing site approval letter gives rise to a separate basis for the presumption.

The only evidence submitted was the TRO, without the underlying complaint. On the face of the TRO, Marion Properties is temporarily enjoined from conveying the property to Paragon. There is no indication whether the litigation involves a question of ownership of the property or simply concerns other issues for which the defendants are bound to retain assets pending the course of the suit.[4] There is no evidence that the temporary order will turn into a permanent order. The fact that Marion Properties is, at this time, prohibited from conveying to Paragon does not invalidate the agreement, which states that performance shall be no later than December 31, 2005, and provides for a 30-day extension beyond that date to perfect title. The existence of this TRO, without more, is insufficient to rebut the presumption of site control arising from the agreement.[5] *Stanley Realty Holdings, LLC v. Watertown Zoning Bd. of Appeals, et al.,* Misc. No. 293271 (Mass. Land Ct. July 21, 2004) does not require a different result. There the Land Court focused on questions of a leasehold interest supporting site control and also found that the memorandum of understanding submitted by the developer failed to contain all material terms including a sufficiently specific description of the location of the site. See *id.* at 8-10. Those deficiencies are not present here. The agreement is also *prima facie* evidence of site control. See *Mountain Street, LLC v. Sharon,* No. 04-01, slip op. at 4 (Housing Appeals Committee Ruling Sept. 24, 2004). Nor does the TRO render Paragon's application moot, as the Board suggests, relying on *Parker v. Black Brook Realty Corp.*, 61 Mass. App. Ct. 308, 311, 809 N.E. 2d 1086 (2004). The decision in *Parker,* permitting a

---

4. Paragon alleges, but submitted no evidence, that the complaint is in the nature of a partnership dispute involving eight properties including the site involved here and seeks an accounting of funds of the entity defendants, among other things.

5. There is no support for the Board's assertion that Paragon's two unsuccessful attempts to obtain relief from the TRO constitute a tacit admission that the TRO precludes a determination that it controls the site within the meaning of 760 CMR 31.01(1)(c).

planning board to require proof of land ownership for a subdivision application, does not apply to G.L. c. 40B cases and does not support the Board's contention.

The Supreme Judicial Court has provided guidance on this issue in *Hanover v. Housing Appeals Committee,* 363 Mass. 339, 377-78, 294 N.E.2d 393 (1973). In *Hanover,* the court considered the statute, and took a practical, rather than a hyper technical, view of a developer's potential interest in a site. See *id.* at 377. The court noted that the statute "does not explicitly state the requisite property interest necessary to qualify as an applicant for a comprehensive permit, and ruled that the statute does not require an applicant to establish present title. *Id.*

The Board also argues that changes to 760 CMR 31.00 make "site control" an express jurisdictional requirement, setting forth a more stringent standard for a developer to meet. In 1991, 760 CMR 31.00, *et seq*. was amended to include express jurisdictional requirements, and to identify evidence in 760 CMR 31.01(3) that establishes a rebuttable presumption. 760 CMR 31.07(1)(b). Although the rebuttable presumption provision of 31.07(1)(b) and the "conclusive evidence" language of 31.01(3) could have been drafted more clearly, this amendment provided that the evidence of an agreement, rather than being conclusive, may be rebutted.

To the extent the Board argues that the term "site control" in 760 CMR 31.01(1)(c) established a higher threshold for developers than the language "interest in the site" found in 760 CMR 31.01(3), it is mistaken. The regulatory changes must be read in light of the remarks in *Hanover* that the site control requirement protects against the "possibility of frivolous applicants who have no present or potential property interest in the site." *Id.* at 378 n. 25. See also *Delphic Associates, LLC v. Middleborough*, No. 00-13, slip op at 5 (Housing Appeals Committee July 17, 2002). Moreover, the *Hanover* court stated that "the Legislature intended to define the requisite property interest for a permit in terms of the selected financing agency's

property interest requirements." *Id.* at 377. Accord *An-Co, Inc. v. Haverhill,* No. 90-11, slip op. at 10 (Housing Committee June 28, 1994) ("[s]ite control … is a matter that is primarily of concern only to the subsidizing agency").

The Board may require full disclosure of an applicant's present or planned property interest, and look behind the purchase and sale agreement. See *Hanover* at 378; 760 CMR 31.01(1)(c). However, allegations or evidence that the Paragon principals are defendants in the Superior Court action, and that they failed to bring the TRO to the Board's attention, without more, are not sufficient evidence to rebut the presumption created by the agreement. Nor may the Board assume the responsibility that lies with the subsidizing agency, which is expected to conduct a thorough review of the site before final subsidy approval is given immediately before construction and to withhold final approval and authorization to begin construction until the developer establishes definitively that it controls the site. See *An-Co,* slip op. at 10-11. Here, a significant number of hurdles, including the conditions imposed in the comprehensive permit and whether the comprehensive permit remains in force, preclude Paragon from acting on the development plan at present. For this reason, the concerns raised that future recording of the comprehensive permit, deed riders and the regulatory agreement would work as potential encumbrances upon the property, or impair fundability or defeat the characterization of Paragon as a limited dividend organization are misplaced. As *An-Co* notes, questions about ownership of the land can be resolved before construction by imposition of a condition imposed on the comprehensive permit. See *id.* at 11. Mr. Davis' argument that this appeal should be dismissed because Paragon failed to comply with the Board's order that it cure the alleged

failures in site control similarly fails.[6] For the reasons stated above, these arguments are without merit.

Accordingly, the Board's motion to dismiss is hereby denied.

III. MOTION TO INTERVENE

The Housing Appeals Committee's standards for intervention, located at 760 CMR 30.04(2), provide that to intervene as a party in the whole or in any portion of the proceedings before the Committee, Mr. Davis must show that he will be substantially and specifically affected by the outcome of the proceedings before the Housing Appeals Committee and specifically that his harm would be related to the granting of relief from local regulation as requested by the developer in this appeal, that his harm is not a common harm which is shared by all the residents of the Town, and that the Board will not diligently represent those interests. *Weston Development Group v. Hopkinton,* No. 00-05, slip op. at 6-7 (Housing Appeals Committee May 26, 2004). "In determining whether to permit a person to intervene, the presiding officer shall consider only those interests and concerns of that person which are germane to the issues of whether the requirement and regulations of the city or town make the proposal uneconomic or whether the proposal is consistent with local needs." 760 CMR 30.04(2).

In his memorandum, Mr. Davis alleges that he is particularly concerned with the design of the proposed building, the density of the proposed development, and its impacts on air quality, light and shadows, traffic and open space. This initial allegation, without more, is not specific as to any direct impact upon Mr. Davis. Had Mr. Davis limited his request to his initial motion, rather than adding specific allegations in his reply memorandum, his request to intervene would have failed. However, in his reply memorandum, Mr. Davis raises specific

---

6. As noted, *infra,* this argument is beyond the scope of an intervener's participation.

factual allegations: that he will have an unimpeded view of the proposed structure from at least three rooms within his condominium unit on Park Street, and that the structure will block sunlight and air from entering the windows in these three rooms.

Mr. Davis also alleges that the Board doesn't share his interests because it granted a permit with conditions, including a reduction in height from 12 to eight stories, rather than denying the comprehensive permit. In its decision, the Board expressed its own concern about the impact of the proposed building on access to light and air in adjoining properties, and required additional setbacks to address this concern. It noted in particular an adverse impact on 49 Marion Street, but did not mention Mr. Davis' building. Because Mr. Davis argues that the Board should have denied, rather than granted, the comprehensive permit I conclude that the Board will not represent his interests sufficiently.

Accordingly, Mr. Davis has made sufficient specific factual allegations to entitle him to participate as an intervener. I hereby grant Mr. Davis' motion in part. Through counsel, Mr. Davis may participate in the hearing as an intervening party, but his participation is strictly limited to those matters by which he is substantially and specifically affected as he has specifically alleged. He may participate with regard to his allegation that the proposed structure will block sunlight and air from entering the windows of his condominium. He may not participate with regard to matters of concern to the residents of the neighborhood generally or matters of concern to the town generally, including jurisdictional issues.[7] Nor may he participate with regard to financial, programmatic, or monitoring concerns, which are within the province of the Board or the subsidizing agency.

---

7. Mr. Davis' argument that the Board's decision did not address all jurisdiction issues that he believes should be raised is beyond the proper scope of an intervener's role.

IV. MOTION FOR DETERMINATION OF CONSTRUCTIVE GRANT OR *DE FACTO* DENIAL

Paragon moves for a determination by the Committee that the Board constructively grant a comprehensive permit on the ground that the Board has not rendered a decision in this matter.[8] It contends that since the decision, by its own terms, became null and void in the event Paragon did not provide "suitable and persuasive" evidence of site control by July 19, 2004, the decision does not exist. It argues further that it could not obtain financing based on this decision. The Board argues in response that the Committee has no authority under Chapter 40B to issue constructive grants and that its actions were timely.[9] Alternatively, Paragon argues that the Board's decision is in effect a denial because the 16 conditions, taken together, require it to redesign the project. The Board asserts that its required changes do not contemplate a radical reduction in the number of units and that exhaustive findings support the required project alterations.

A. Constructive Grant

Chapter 40B does not explicitly give the Committee the authority to rule on a claim of constructive grant of a comprehensive permit. Section 22 of the statute provides that: "[w]henever an application [for a comprehensive permit] is denied, or is granted with… conditions…, the applicant shall have the right to appeal to the housing appeals committee… for a review of the same." Later provisions of § 22 variously refer to an "appeal" or a "petition for review" to the Committee. The constructive grant provision relied upon by Paragon is in G.L. c. 40B, § 21.

---

8. Paragon moved for leave to amend its motion for a determination of a constructive grant by withdrawing its argument that the Board's decision was not rendered within forty days of the close of the hearing. See G.L. c. 40B, § 21. That motion is granted.

9. Mr. Davis' arguments in opposition to Paragon's motion regarding a constructive grant are beyond the scope of his intervention.

In ruling on the question of a constructive grant in another proceeding, the Committee quoted from the Supreme Judicial Court's decision in *Student No. 9 v. Board of Educ.*, 440 Mass. 752, 762-63, 802 N.E. 2d 105 (2004) which stated that "[a]n administrative agency … has considerable leeway in interpreting a statute it is charged with enforcing, and regulations adopted by the agency stand on the same footing as statutes, with reasonable presumptions to be made in favor of their validity." See *Mountain Street,* slip op. at 5. The Committee has interpreted § 22 of the statute as establishing jurisdiction for it to review and determine whether an application has been granted constructively due to failure of the Board to meet one of the deadlines in § 21. This interpretation has been formally adopted as 760 CMR 31.08(8). *Mountain Street,* slip op. at 5.

Here, the Board acted on Paragon's application and issued a written decision. Characterizing the decision as null and void does not alter the fact that the Board rendered a decision. Compare *Mullin v. Planning Bd. Of Brewster,* 17 Mass. App. Ct. 139, 144, 456 N.E. 2d 780 (1983) (constructive grant of special permit under G.L. c. 40A would be appropriate only when board failed to take final action within required time period; subsequent invalidation of board's vote has no effect on finality of board's action). Similarly, in *Archstone Communities Trust v. Woburn,* No. 01-07, slip op. at 9 (Housing Appeals Committee June 11, 2003), the Committee determined that where the board had voted on the appellant's Chapter 40B application within 40 days after termination of the hearing, the delay in issuing the written decision did not require a finding of a constructive grant under G.L. c. 40B, § 21. Here there is no question that the Board has made a final decision on the application within the required time period. Accordingly, Paragon's motion for a determination of a constructive grant is hereby denied.

B. *De Facto* Denial

Paragon further argues that the Board's decision should be treated as a denial of a comprehensive permit, requiring the application of the burdens set out in 760 CMR 31.06(2) and (6). It argues that the reduction in building height and the requirement of redesign of the building and other conditions as set forth in the Board's decision demonstrate that the decision is not an approval of the project as proposed, but is instead an attempt by the Board to design an alternate project.

Paragon points in particular to Condition 2, which requires that the project not exceed eight stories, rather than the 12 stories described in the application. Condition 2 also requires a "substantially narrower above-grade building width" and requires Paragon to address "unreasonable encroachment into side yard setbacks." Moreover, Paragon argues, Condition 3 orders a "substantial change in the building design," requiring it to submit revised designs of a smaller building to the Board for its review and approval. Paragon claims that this is effectively a requirement to submit a new proposal. It argues that the decision offers no reasonable basis for the reduction from 12 stories to eight, or any requirement as to density or a basis for requiring a redesign of the project.

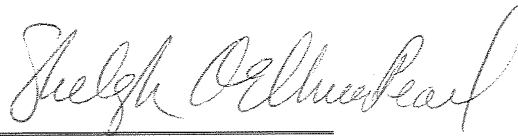
In reviewing the conditions imposed by the Board to determine if they constitute a *de facto* denial, the Committee must consider whether the Board's decision "manifests a reasonable basis" for the required change. See *Settlers Landing Realty Trust v. Barnstable*, No. 01-08, slip op. at 3-4 (Housing Appeals Committee Order Sept. 22, 2003). Furthermore, a Board may not redesign a Chapter 40B project from scratch. *Sheridan Development Co. v. Tewksbury*, No. 89-46, slip op. at 3 n.3 (Housing Appeals Committee Jan. 16, 1991). See *Hastings Village, Inc. v. Wellesley*, No. 95-05, slip op. at 10 n. 4 (Housing Appeals Committee Jan. 8, 1998) (no de *facto* denial where no fundamental redesign of proposal, no arbitrary limit

to number of housing units and decision responds to "real concerns" brought about by size and topography of site), aff'd, No. 00-P-245 (Mass. App. Ct. Apr. 25, 2002).

In this case the Board has not required a fundamental change of the proposed development. It has not changed the nature of the building proposed by Paragon. Moreover, the reasons recited in the Board's decision for imposing height and setback modifications, as well as parking space specifications, are based on local zoning requirements. Whether these restrictions constitute sufficiently valid local concerns is a question to be addressed in the *de novo* hearing before the Committee. It is enough for the purposes of this motion that the proposed changes do not constitute a fundamental change to the proposal, and the Board's explanations for its conditions are based on current zoning requirements. Accordingly, Paragon's motion for a determination that the Board's decision is *de facto* a denial of a comprehensive permit is hereby denied.

So Ordered.

Housing Appeals Committee



Date: December 1, 2004

Shelagh A. Ellman-Pearl, Esq.
Presiding Officer

Certificate of Service

I, Lorraine Nessar, Clerk to the Housing Appeals Committee, certify that this day I caused to be mailed, first class, postage prepaid, a copy of the within Ruling on Pre-Hearing Motions in the case of Paragon Residential Properties, LLC v. Brookline Zoning Board of Appeals, No. 2004-16, to:

Alan J. Schlesinger, Esq.
Schlesinger and Buchbinder, LLP
1200 Walnut Street
Newton, MA 02461

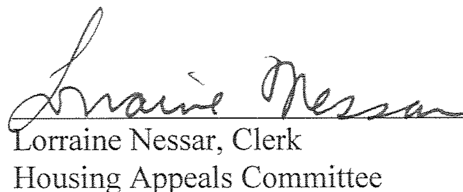
Walter C. Spiegel, Esq.
Nixon Peabody, LLP
100 Summer Street
Boston, MA 02110-2131

Daniel C. Hill, Esq.
Anderson & Kreiger, LLP
43 Thorndike Street
Cambridge, MA 02141-1764

Jason E. Talerman, Esq.
Kopelman and Paige, PC
31 St. James Avenue
Boston, MA 02116

David Lee Turner, Esq.
Brookline Town Counsel
333 Washington Street
Brookline, MA 02445

Dated: 12/01/04



Lorraine Nessar, Clerk
Housing Appeals Committee

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

PARAGON RESIDENTIAL PROPERTIES, LLC, Appellant	)	
v.	)	No. 04-16
BROOKLINE ZONING BOARD OF APPEALS, Appellee	)	

RULING ON MOTIONS FOR RECONSIDERATION

On January 21, 2005, Appellant Paragon Residential Properties, LLC (Paragon) moved to extend the time for filing the draft Pre-Hearing Order and to continue the Pre-Hearing Conference. Paragon sought the continuance to permit consideration of its motion for reconsideration of its motion for a ruling that the Appellee Brookline Zoning Board of Appeals' (Board) decision was a denial rather than a comprehensive permit grant with conditions. On January 25, 2005, I granted the requested extension and continuance. Subsequently, the Board submitted an opposition to Paragon's motion for reconsideration and its own motion for reconsideration of its motion to dismiss. The December 1, 2004 *Ruling on Preliminary Motions* had denied both parties' original motions.

1. Reconsideration Regarding *De Facto* Denial of Comprehensive Permit

Paragon's motion for reconsideration followed and relies on the Superior Court's ruling in *9 North Walker Street Development, Inc. v. Commonwealth*, Bristol Super. Ct. No. BRCV2003-0767 (Memorandum of Decision Dec. 28, 2004). In that case, the Bristol County

Superior Court applied a standard that appeared, on its face, to be stricter than the Committee's standard for determining whether a comprehensive permit grant with conditions was a *de facto* denial, as prescribed in *Settlers Landing Realty Trust v. Barnstable*, No. 01-08, slip op. at 3-4 (Mass. Housing Appeals Committee Ruling Sept. 22, 2003). Pending the Committee's motion for reconsideration in *9 North Walker Street*, I postponed the Pre-Hearing Conference in this matter and allowed the parties to file memoranda on the issue. By order dated May 12, 2005, the Superior Court remanded *9 North Walker Street* to the Committee for application of the *Settlers Landing* standard. To the extent that Paragon's motion for reconsideration relies upon *9 North Walker Street*, the remand of that case resolves the issue. The December 1 order denying Paragon's original motion to deem the comprehensive permit grant a denial has already applied *Settlers Landing* to this case.

Paragon's request for reconsideration also relies upon the *Affidavit of John R. A. Pears*, an architect. However, for the purposes of evaluating whether a grant of a comprehensive permit is actually a denial, the Committee examines the decision of the Board, without resort to external evidence, to determine whether that decision "manifests a reasonable basis" for the required change. *Settlers Landing*, slip op. at 3-4. As stated in the December 1 ruling, the Board's decision manifests a reasonable basis for the conditions challenged in Paragon's motion to deem the grant a denial. Accordingly Paragon's motion for reconsideration is denied.

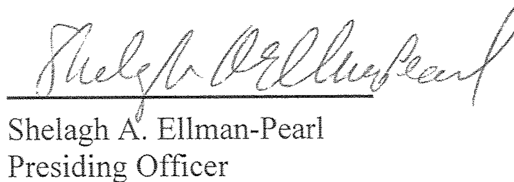
2. Reconsideration Regarding Dismissal for Lack of Site Control

The Board has moved for reconsideration of its motion for dismissal on the ground that Paragon does not "control the site" as required by 760 CMR 31.01(1)(c). In support of its motion for reconsideration, the Board renews its arguments that 1) revisions to 760 CMR 31.00 heightened the jurisdictional requirement of site control beyond those established by *Hanover v.*

Housing Appeals Committee, 363 Mass. 339, 377-78, 294 N.E.2d 393 (1973); 2) *Parker v. Black Brook Realty Corp.*, 61 Mass. App. Ct. 308, 311, 809 N.E. 2d 1086 (2004), a case concerning a subdivision application, should apply to a comprehensive permit application under Chapter 40B to determine whether Paragon controls the site; and 3) the issuance of a new Superior Court temporary restraining order (TRO) against the sale of the subject property further rebuts the presumption that Paragon controls the site.

These issues were addressed in the December 1 ruling on the Board's motion. The Board's arguments presented in support of reconsideration do not warrant a different result. Therefore the Board's motion for reconsideration is denied.

Housing Appeals Committee



Date: June 6, 2005

Shelagh A. Ellman-Pearl
Presiding Officer

Certificate of Service

I, Lorraine Nessar, Clerk to the Housing Appeals Committee, certify that this day I caused to be mailed, first class, postage prepaid, a copy of the within Ruling on Motions for Reconsideration in the case of Paragon Residential Properties, LLC v. Brookline Zoning Board of Appeals, No. 2004-16, to:

Alan J. Schlesinger, Esq.
Schlesinger and Buchbinder, LLP
1200 Walnut Street
Newton, MA 02461

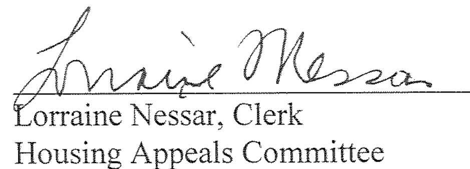
Walter C. Spiegel, Esq.
Nixon Peabody, LLP
100 Summer Street
Boston, MA 02110-2131

Daniel C. Hill, Esq.
Anderson & Kreiger, LLP
43 Thorndike Street
Cambridge, MA 02141-1764

Jason E. Talerman, Esq.
Kopelman and Paige, PC
31 St. James Avenue
Boston, MA 02116

David Lee Turner, Esq.
Brookline Town Counsel
333 Washington Street
Brookline, MA 02445

Dated: 06/06/05



Lorraine Nessar, Clerk
Housing Appeals Committee

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

PARAGON RESIDENTIAL PROPERTIES, LLC, Appellant v. BROOKLINE ZONING BOARD OF APPEALS, Appellee	)	No. 04-16

RULING ON BOARD'S EMERGENCY MOTION TO DIMSISS OR, IN THE ALTERNATIVE, TO STAY PROCEEDINGS BEFORE THE COMMITTEE

The Appellee Brookline Zoning Board of Appeals (Board) has filed an Emergency Motion to Dismiss or, in the Alternative, to Stay Proceedings before the Committee (Emergency Motion) because of pending bankruptcy proceedings involving Marion Properties Group, LLC (Marion Properties), the current owner of the property that is the subject of this appeal. Attached to the Board's motion and reply brief are a notice of Marion Properties' Chapter 11 bankruptcy proceedings filed September 18, 2005 in the U.S. Bankruptcy Court; correspondence between the Board's counsel and MassHousing, the subsidizing agency for the project; and Debtor's Schedules A, B, D-H.

The Board argues that these bankruptcy proceedings preclude Appellant Paragon Residential Properties (Paragon) from establishing the jurisdictional requirements of site control and fundability as required by, respectively, 760 CMR 31.01(1)(c) and 31.01(1)(b). Specifically, the Board argues that for the present and the foreseeable future, the conveyance to Paragon of the property, which appears to be the primary asset of Marion Properties, will not be able to proceed. The Board also argues that the pending bankruptcy proceedings preclude Paragon from obtaining funding from MassHousing. The Board requests dismissal of this

appeal on these grounds, or alternatively, a stay of this matter pending bankruptcy court approval of the conveyance of the property to Paragon.

I. SITE CONTROL

The issue of whether Paragon has established site control has already been visited twice in this matter. See *Paragon Residential Properties, LLC v. Brookline,* No. 04-16 (Mass. Housing Appeals Committee Ruling on Preliminary Motions Dec. 1, 2004); *Paragon Residential Properties, LLC v. Brookline,* No. 04-16 (Mass. Housing Appeals Committee Rulings on Motions for Reconsideration June 6, 2005). As noted in the Ruling on Preliminary Motions, "[h]olding an 'option or contract to purchase the proposed site' constitutes conclusive evidence of an applicant's interest in the site, 760 CMR 31.01(3), which in turn gives rise to a rebuttable presumption that an applicant has demonstrated site control for the purposes of G.L. c. 40B. 760 CMR 31.07(1)(b)." *Id.*at 4. The existing purchase and sale agreement provides such conclusive evidence. To counter that presumption, the Board must submit relevant evidence to the contrary. See *TBI, Inc. v. Board of Health of North Andover,* 431 Mass. 9, 12, 725 N.E. 2d 188 (2000).

The Board states that the Bankruptcy Court must undergo substantial proceedings before the purchase and sale agreement may be executed, and that court has supervisory authority over whether the sale will be allowed to go forward. The Board also argues that the agreement is not an arms-length transaction because Paragon and Marion Properties are substantially related entities, and that the Bankruptcy Court may disfavor the proposed sale for this reason. It claims that the Bankruptcy Court's required rigorous review of a property sale during bankruptcy proceedings and general disfavor toward related-party transactions rebut the presumption of site control.

These arguments contain similarities to those raised by the Board in connection with the existing Superior Court temporary restraining order (TRO) in the previous rulings on this issue. However, again, the Board has neither demonstrated that the purchase and sale agreement has been invalidated, nor that it will be annulled. Therefore, neither the existence of potentially complex bankruptcy proceedings nor the allegation that the purchase and sale agreement may be a related-party transaction, is sufficient to rebut the presumption of site control arising from the agreement. The Committee has "long held ... that to establish site control, the developer

need only establish a colorable claim of title, and that adjudication of complex title disputes or similar matters between private parties are best left to the expertise of the courts." *Bay Watch Realty Trust v. Marion,* No. 02-28, slip op. at 5 (Mass. Housing Appeals Committee Dec. 5, 2005) (lawsuit challenging purchase and sale agreement did not rebut presumption arising from purchase and sale agreements), and cases cited.

Whether the Bankruptcy Court will permit the sale to occur involves complex factual and legal issues that are not and should not be before the Committee. I find that site control has been established by the purchase and sale agreement, that there is no clear evidence to rebut the presumption, and the issue of the enforceability of the agreement should be left for resolution in the actions currently pending in the Bankruptcy Court or the Superior Court. See *Bay Watch Realty,* No. 02-28, slip op. at 6. The Board's renewed arguments that 760 CMR 31.01.(1)(c) sets forth temporal requirements for a showing of site control, and that Paragon's control of the site is too abstract to constitute a "present or potential property interest in the site," *Hanover v. Housing Appeals Committee,* 363 Mass. 339 378 n.25(1973), require no different result.

II. FUNDABILITY

The rebuttable presumption than an applicant has established the jurisdictional requirement of fundability is satisfied by "submission of a written determination of Project Eligibility (Site Approval) by a subsidizing agency...." 760 CMR 31.01(2). See 760 CMR 31.01(1)(b), 31.07(1)(a). Paragon has received a letter dated August 25, 2003 from MassHousing regarding project eligibility. Pre-Hearing Order, ¶ II. 9. The Board argues that the pending bankruptcy proceedings preclude Paragon from complying with the lending requirements of the subsidizing agency, MassHousing, and therefore the financing commitment should be terminated.

After learning of the bankruptcy case filing, the Board's counsel submitted a letter to MassHousing notifying it of the bankruptcy proceeding and requesting that MassHousing retract its determination of project eligibility. Emergency Motion, Exh. B. In its letter of response, MassHousing enclosed a copy of its "General Loan Conditions" and "General Closing Requirements," stating that it took no position on the parties' dispute and that unless otherwise indicated, the conditions in those documents must be satisfied at the time the loan closes. Emergency Motion, Exh. C. In arguing that the jurisdictional requirement of

fundability has not been met, the Board relies in particular on provisions in these General Loan Conditions that require the project to be free and clear of liens and encumbrances and that counsel provide an opinion with respect to bankruptcy.[1]

Absent good cause, Committee will not consider evidence about the fundability of a project, other than evidence concerning the status of the project before the subsidizing agency. 760 CMR 31.07(4)(a). MassHousing has not seen fit to withdraw its project eligibility determination at this time, but states instead that the loan conditions must be satisfied at the time the loan closes. Therefore Paragon's status before MassHousing remains unchanged. The Board has not rebutted the presumption established by the project eligibility letter.

Moreover, although 760 CMR 31.07(4) leaves room to hear certain evidence regarding fundability for good cause, the Board's legal arguments in this case, concerning MassHousing's determination of loan eligibility, fail to demonstrate good cause. In refusing to hear evidence regarding fundability from MassHousing representatives in *Farmview v. Sandwich*, No. 02-32, slip op. at 2 (Mass. Housing Appeals Committee Ruling May 21, 2004), the Committee noted that three potential issues typically have arisen in the context of project eligibility:

> First are health, safety, design, environmental, and planning concerns--the statutory "local concerns" -- which are at the heart of any comprehensive permit review. Second are legal issues within the subsidy program -- primarily matters of housing policy. Third are issues characteristically within the province of the subsidizing agency, such as financing arrangements, profit projections, the developer's qualifications, and marketability. These are "not intended to be reviewed in detail within the comprehensive permit [hearing] process ... [since they] clearly are not matters of local concern in the usual sense." *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 7 (Mass. Housing Appeals Committee Jun. 25, 1992).

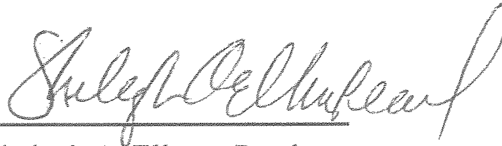
Id. at 2. The Board's arguments, concerning the availability of funds through MassHousing, fall under the third category. As *CMA* and *Farmview* explain, this consideration is not intended to be reviewed in detail within the comprehensive permit hearing. It is more appropriate for MassHousing to address this issue. In the context of its final approval as the subsidizing agency, MassHousing will examine Paragon's ability to meet its conditions, including those conditions raised by the Board.

---

1. Paragon argues that these conditions are not a barrier to its ability to obtain funding.

Accordingly, the Board's emergency motion to dismiss or, in the alternative, to stay proceedings is hereby denied.

Housing Appeals Committee



Date: January 23, 2006

Shelagh A. Ellman-Pearl
Presiding Officer

Certificate of Service

I, Lorraine Nessar, Clerk to the Housing Appeals Committee, certify that this day I caused to be mailed, first class, postage prepaid, a copy of the within Ruling on Board's Emergency Motion to Dismiss or, in the Alternative, to Stay Proceedings Before the Committee in the case of Paragon Residential Properties, LLC v. Brookline Zoning Board of Appeals, No. 2004-16, to:

Alan J. Schlesinger, Esq.
Schlesinger and Buchbinder, LLP
1200 Walnut Street
Newton, MA 02461

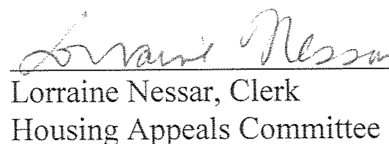
Walter C. Spiegel, Esq.
Nixon Peabody, LLP
100 Summer Street
Boston, MA 02110-2131

Daniel C. Hill, Esq.
Anderson & Kreiger, LLP
43 Thorndike Street
Cambridge, MA 02141-1764

Jason E. Talerman, Esq.
Kopelman and Paige, PC
31 St. James Avenue
Boston, MA 02116

David Lee Turner, Esq.
Brookline Town Counsel
333 Washington Street
Brookline, MA 02445

Dated: 01/25/06



Lorraine Nessar, Clerk
Housing Appeals Committee