COMMONWEALTH OF MASSACHUSETTS

HOUSING APPEALS COMMITTEE

WHITE BARN LANE, LLC

v.

NORWELL ZONING BOARD OF APPEALS

No. 2008-05

DECISION

July 18, 2011

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WHITE BARN LANE, LLC Appellant v. NORWELL ZONING BOARD OF APPEALS, Appellee	)	No. 2008-05

DECISION

This is an appeal pursuant to G.L. c. 40B, §§ 20-23, and 760 CMR § 56.00, brought by White Barn Lane, LLC (White Barn), from a decision of the Norwell Zoning Board of Appeals granting a comprehensive permit with certain conditions with respect to property located in Norwell, 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. Since our resolution of a number of technical issues will require the developer to modify its final plans from those submitted in this proceeding, a summary of the decision is appropriate.

As with any appeal of a decision granting a permit with conditions, we have first considered whether the decision renders the project uneconomic. Although the developer's economic evidence was relatively sparse, we find that it was sufficient to meet its burden and that the Board did not rebut this proof.

Regarding local concerns, the Board's decision not to waive nitrogen loading requirements was not adequately supported. However, the Board raised a valid concern regarding locally regulated isolated land subject to flooding potentially affecting flooding on adjacent properties which will necessitate revised plans to provide for compensatory flood storage under the local wetlands regulations. Although the developer's expert was of the opinion that this would not necessitate a change in the density of the project from that

proposed, we are mindful that the project will require re-design to some extent, potentially affecting the location, and perhaps even the number, of units. In most other respects, we find that the Board and Intervener have failed to demonstrate a local concern that outweighs the need for affordable housing.

We have addressed conditions imposed by the Board that exceed its authority at the end of the decision. We should note that even though this discussion takes place after the discussion of economics, our ruling on those conditions is in no way dependent on the Appellant's proof of its case with regard to economics. *Zoning Board of Appeals of Amesbury v. Housing Appeals Committee,* 457 Mass. 748 (2010). We are mindful that the conditions we have struck as outside the Board's authority were imposed before *Amesbury* was issued. However well-intentioned the conditions regarding compliance with the subsiding agency requirements may be, if they conflict with the required deferral to the subsidizing agency they are improper. With regard to post-permit conditions, we have struck those requirements for active Board participation and oversight beyond its role as a route of appeal in future disputes between the developer and a local board. As indicated below, some conditions are struck in their entirety; others are modified to remove the offending portions. Future decisions of zoning boards will have the benefit of the *Amesbury* decision.

Although our decision overturns the Board's decision and orders an amended permit, not all issues presented to us will be fully resolved by this decision, and the final outcome of this project remains subject to several constraints beyond the jurisdiction of the Board and the Committee. In particular, the developer will file with the Conservation Commission a Notice of Intent under the state Wetlands Protection Act (WPA) with regard to buffers to off-site state resources. Additionally, constraints of the Subdivision Control Law which are beyond our jurisdiction may affect the final plans for the project, as discussed below.

With regard to local post-permit review, White Barn must prepare and submit final plans for compensatory flood storage and stormwater management related to the locally designated isolated land subject to flooding. Since our decision leaves several matters unresolved, we encourage the parties to work together to ensure the design and development of a project that can move forward.

I. PROCEDURAL HISTORY

The Norwell Zoning Board of Appeals granted a comprehensive permit pursuant to G.L. c. 40B, §§ 20-21 to White Barn to construct 40 affordable townhouse condominiums off Circuit and Forest Streets in Norwell, Massachusetts. Exhs. 2, 5, 15. Construction of the housing development, to be known as White Barn Village, is proposed to be financed under the Housing Starts Program of Massachusetts Housing Finance Agency (MassHousing) or the New England Fund of the Federal Home Loan Bank of Boston (NEF). Pre-Hearing Order, § II, ¶ 3. After conducting multiple days of hearing, the Board closed the hearing on April 30, 2008, and issued a decision to grant a comprehensive permit for the construction of 40 units with no more than 90 bedrooms, which it filed with the Town Clerk on May 19, 2008. Pre-Hearing Order, § II. ¶ 1; Exh. 2, p. 1. In its decision, the Board imposed numerous conditions, which it has characterized as consisting of 12 general conditions, 7 affordable housing conditions, 10 marketing/lottery conditions, 1 construction commencement condition, 29 site development conditions, 36 additional general conditions and 4 conditions relating to legal requirements. Board brief, p. 3; Exh. 2.

On June 9, 2008, White Barn appealed to this Committee, asserting that certain conditions and refusals to waive local requirements rendered the project uneconomic or were otherwise beyond the Board's authority. After denying the Board's motion to dismiss and granting, in part, the motion to intervene of abutters Stephen and Deborah Schlueter and Andrea and Stephen MacDonald, the Committee's presiding officer convened a pre-hearing conference, and pursuant to 760 CMR 56.06(7)(d)3., the parties negotiated a Pre-Hearing Order. The presiding officer also denied the Board's late-filed motion to remand.[1] A *de novo* hearing was held, including prefiled testimony from 16 witnesses, a site visit, five days of evidentiary sessions to permit cross-examination of 10 of those witnesses, and the filing of post-hearing briefs.

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1. The Board's motion to dismiss claimed that the developer had failed to file an Environmental Notification form with the Secretary of Environmental Affairs required by 760 CMR 56.06(4)(h). The motion to remand argued that White Barn had failed to provide requisite information in the Board proceeding.

II. FACTUAL OVERVIEW

On June 18, 2007, White Barn submitted an application to the Board for a comprehensive permit to construct 44 condominium townhomes on approximately 9.5 acres with frontage on Circuit and Forest Streets in Norwell. The project site is comprised of three parcels which are part of a subdivision accepted by the Planning Board. The project site is surrounded by developed residential lots on Circuit Street to the west and north and Forest Street to the south. The site has access to Circuit Street, a public way, over White Barn Lane, a two-way unpaved private roadway. The project also has access to Forest Street. Exhs. 2, p. 1; 5; 14; 15(5).

During the hearing, White Barn voluntarily reduced the number of proposed units from 44 to 40 townhouse style condominium units with a total of 90 bedrooms to be built in 11 three- and four-unit buildings. Exhs. 2, p. 3; 5; White Barn brief, p. 4. White Barn received a determination of project eligibility from MassHousing under both its Housing Starts Program and the NEF. Exh. 1; Pre-Hearing Order, § II, ¶ 3.

The project is located in the Town's Residence A District and is partially located within Zone II of the Town's Aquifer Protection District, but is not within a State Department of Environmental Protection (DEP) Zone II. Exhs. 2, p. 3; 5, Sheet 2; 15(5). White Barn Lane, as well as a portion of the project site located off White Barn Lane, is within a subdivision known as "Old Farm Estates." The subdivision is subject to a written covenant executed on April 26, 1993 and recorded with a definitive subdivision plan dated September 23, 1992.[2] Exh. 14. White Barn Lane is approximately 12 to 14 feet wide ending in a cul-de-sac planted with trees. It is surfaced with a sandy gravel mix and is located within a 50-foot right of way. The project includes an internal roadway network connecting to White Barn Lane and Forest Street. Tr. I, 99-100; Exhs. 5; 15(5); 71-73.

For the project, the developer proposes to improve White Barn Lane, removing the trees and island of the cu-de sac, making stormwater management improvements, and paving and widening the roadway to 22 feet extending through the cul-de-sac to the development site. Tr. I, 98-101; III, 146; IV, 126; Exhs. 12; 71, ¶ 14. White Barn will fill the project site to construct an internal roadway system, with increases in elevation of as much as 8 to 12

2. The covenant requires, among other things, that a conservation plan be submitted for approval to the Norwell Planning Board prior to any roadway clearing. Exh. 14, ¶ 13.

feet in parts of the filled areas. White Barn proposes to install a Title 5 compliant on-site subsurface sewage disposal system with a common pressure dosed leaching facility capable of disposing of approximately 9,860 gallons per day of sewage. The developer also proposes to construct open and subsurface stormwater infiltration and detention basins to meet applicable Massachusetts Department of Environmental Protection (DEP) stormwater management regulations. Exhs. 5, Sheets 5-8; 60, ¶¶ 8, 11; 91, ¶¶ 5, 8, 14; White Barn brief, pp. 26-27; Board brief, p. 5.

The Interveners reside on White Barn Lane in single family homes. The Schlueter residence abuts the northern portion of the project site; it neither abuts nor has frontage on White Barn Lane. A driveway passing over a portion of the project site connects the Schlueter property and White Barn Lane. The Schlueters hold an easement allowing for this access. The MacDonalds' property abuts the project site, with frontage on White Barn Lane, next door to the Schlueters' property. White Barn Lane is the sole access for the Interveners to their homes. Exhs. 72, ¶¶ 5, 8; 73, ¶ 6.

III. PRELIMINARY ISSUES

A. Site Control

Since White Barn and the Board stipulated in the Pre-Hearing Order that "White Barn Lane, LLC, satisfies the project eligibility requirements set forth in 760 CMR § 56.04(1)," this issue is not in contention. See Pre-Hearing Order, § II, ¶ 4.[3] However, the Board has moved for dismissal on the ground that White Barn has not demonstrated it continues to maintain site control, a project eligibility requirement under § 56.04(1)(c). Even assuming the Board had not waived the issue by stipulating in the Pre-Hearing Order, its motion to dismiss on this ground fails.[4] The Board argues that the purchase and sale agreement for the project site expired by its terms on or about June 28, 2007. Board's brief, pp. 34-37; see Exh. 15(12); Tr. II, 59-63. The developer's principal, Mr. Sullivan, testified, however, that the closing date had been extended. Tr. II, 58. No evidence to the contrary was introduced

3. The Pre-Hearing Order did not identify proving the project eligibility requirements in the statement of the Appellant's case.

4. Although the Interveners' brief raises this issue, their arguments, even if different from those of the Board, are beyond the scope of their intervention in this proceeding, and do not merit consideration.

by the Board. We find, therefore, that the developer has established that it controls the site pursuant to 760 CMR 56.04(1)(c). See *Haskins Way, LLC v. Middleborough*, No. 09-08, slip op. at 4 (Mass. Housing Appeals Committee Mar 28, 2011) (when board has granted comprehensive permit, Committee typically would not expect control of development site to be in question).

B. Provision of Requisite Information

The Board requests that the Committee reconsider its prior motion to remand for failure to provide requisite information, and dismiss the appeal on the ground that White Barn failed to supply required information in the course of proceedings before the Board. See 760 CMR 56.05(2). Alternatively, it asks that the Committee order White Barn to file a Notice of Intent with the Norwell Conservation Commission under the unwaived local wetland protection bylaw and regulation, alleging that White Barn refused to acknowledge valid local concerns regarding the subject property. Board brief, p. 38.

In its earlier motion, the Board had argued that White Barn had failed to provide an accurate and complete description of wetlands on the project site and to submit a *pro forma* financial statement. As the presiding officer noted in her ruling, the earlier motion was untimely. In addition, the Board's arguments on the merits did not warrant a remand then and do not warrant dismissal now.

The Board had argued that insufficient wetlands information prevented it from determining appropriate waivers of local wetlands requirements and conditions to address local concerns, and that without a *pro forma,* it was unable to evaluate whether granting certain waivers would render the project uneconomic. However, the Board had required the developer to apply to the Conservation Commission to address state wetlands issues before the comprehensive permit hearing, improperly delegating the local wetlands issues to another local board, rather than addressing the issue itself. In refusing to grant White Barn any waivers from the Town's wetlands bylaw or regulations, the Board stated in its decision, "The applicant has refused despite repeated request to obtain approval from the Norwell Conversation Commission, acting in its capacity as the local approving authority for the DEP or under the local Wetlands Bylaw and regulations, relating to the wetlands line." Exh. 2, p. 31.

We agree with the presiding officer that requiring White Barn to obtain approval from the Commission before pursuing its petition before the Board was inconsistent with the Comprehensive Permit Law. The Board had no authority to require a determination of compliance with the WPA as a prerequisite since developers need not seek state approvals before applying for a comprehensive permit. 760 CMR 56.05(8)(c); *Transformations v. Townsend*, No. 02-14, slip op. at 10-11 (Mass. Housing Appeals Committee Jan. 24, 2004). With regard to review of local requirements, Chapter 40B is intended to provide a streamlined process, through which a developer may obtain one comprehensive approval from a zoning board of appeals, instead of piecemeal approvals from multiple local boards. See *Standerwick v. Zoning Board of Appeals of Andover*, 447 Mass. 20, 29 (2006). Also see 760 CMR 56.05(3). Requiring White Barn to apply separately to the Commission and in advance of the comprehensive permit proceeding violated Chapter 40B.

However, in light of our conclusions regarding locally jurisdictional wetlands on the project site, we will require White Barn to submit its plans for compensatory flood storage to the appropriate town entity or staff or designated consultant in compliance with 760 CMR 56.05(10)(b) and town practice as is customary with regard to similar unsubsidized housing, as discussed in Section V.B, *infra*. We also note that, although Chapter 40B does not require a developer to file with a conservation commission under the WPA or local wetlands requirements before applying to a board for a comprehensive permit, in instances in which the issues are complicated or likely to affect final design, developers may well benefit from doing so.

Finally, with respect to the issue of a *pro forma,* under 760 CMR 56.05(6), a Board may request to review the *pro forma* or other financial statements only after the occurrence of certain preconditions, including the Applicant's indication that the Board's proposed conditions would render the project uneconomic. There is no indication that these preconditions were met. The Board's brief provided no new argument on this issue to warrant reconsideration or dismissal and we therefore deny the request.

IV. ECONOMIC EFFECT OF BOARD'S DECISION

Pursuant to G.L. c. 40B, § 23, "If the committee finds … that the decision of the board [both] makes [the project] uneconomic and is not consistent with local needs, it shall order such board to modify or remove" the offending conditions and requirements. The

burdens of proof are set forth in the Committee's regulations. Initially, the developer has the burden of proving that "the conditions and/or requirements considered in aggregate, make the building or operation of the Project Uneconomic." 760 CMR 56.07(1)(c)1., 56.07(2)(a)3. Also see *Walega v. Acushnet*, No. 89-17, slip op. at 8 (Mass. Housing Appeals Committee Nov. 14, 1990). Specifically, the developer must prove that the conditions imposed make it "impossible ... to proceed and still realize a reasonable return...." 760 CMR 56.02 (definition of "uneconomic"); G. L. c. 40B, § 20. The developer and the Board acknowledge the MHP Guidelines' standard that a return of 15% is the minimum for determining whether a project is economic under the MHP Guidelines and Committee precedent. Board brief, p. 26; White Barn brief, pp. 16-17.[5] See *Autumnwood, LLC v. Sandwich,* No. 05-06, slip op. at 3 and n.2 (Mass. Housing Appeals Committee Mar. 8, 2010); Exh. 79. If the developer proves that the decision makes the project uneconomic, the burden then shifts to the Board to prove that there is a valid local concern which supports such conditions and that such local concern outweighs the regional need for affordable housing. 760 CMR 56.07(1)(c)2., 56.07(2)(b)3.

A. Appellant's Presentation

The Board's decision states that a permit is granted for the construction of 40 units, which is the number of units White Barn seeks to build. Exh. 2, Section V, p. 5. However, the developer argues that the decision's conditions and unwaived local regulations effectively reduce the number of units that could actually be constructed. It also argues that

5. During the hearing, White Barn requested that the Committee take official notice of the MHP Guidelines (Exh. 79(ID)), and the Board voiced its opposition. Tr. I, 19. The MHP Guidelines, entitled in full as "Local 40B Review and Decision Guidelines: A Practical Guide for Zoning Boards of Appeal Reviewing Applications for Comprehensive Permits Pursuant to M.G.L. Chapter 40B" (Massachusetts Housing Partnership and Netter, Edith M., November 2005), were endorsed by the Massachusetts Department of Housing and Community Development (DHCD), MassHousing (the Massachusetts Housing Finance Agency), the Massachusetts Housing Partnership (the Massachusetts Housing Partnership Fund), and MassDevelopment (the Massachusetts Development Finance Agency). See, e.g., *Autumnwood, LLC v. Sandwich, supra,* No. 05-06, slip op. at 3 n.3; *Haskins Way, LLC v. Middleborough, supra,* No. 09-08, slip op. at 18 n.20; *Webster Street Green, LLC v. Needham,* No. 05-20, slip op. at 4 n.6, 11 (Mass. Housing Appeals Committee Sept. 18, 2007); *8 Grant Street, LLC v. Natick,* No. 05-13, slip op. at 5 n.10 (Mass. Housing Appeals Committee Mar. 5, 2007). Also see *Bay Watch Realty Trust v. Marion,* No. 02-28, slip op. at 10-12 n.16 (Mass. Housing Appeals Committee Dec. 5, 2005). Both of these parties relied on the MHP Guidelines in their post hearing briefs, and we officially notice them in this proceeding. See 760 CMR 56.07(3)(h)2. (what constitutes a reasonable return is not a question of fact).

numerous conditions and requirements included in the decision will necessarily cause confusion and costly delay. It relies on both of these reasons in arguing that the decision renders the project uneconomic within the meaning of Chapter 40B. Specifically, in the Pre-Hearing Order, the developer claims that conditions and requirements governing the following areas, individually or in the aggregate, make the building or operation of the housing uneconomic under 760 CMR 56.02, 56.05(8)(d) and Committee precedents: 1) wastewater management; 2) wetlands bylaws and regulations; 3) Planning Board covenants; 4) conditions subsequent; 5) matters within the sole province of the subsidizing agency; 6) regulation of the means and methods of construction; 7) deposit of fees; and 8) traffic. Pre-Hearing Order, § IV, ¶ 3 and n.1.

1. Challenged Conditions and Requirements

In its brief, White Barn focuses its economic analysis on the Board's refusal to waive the Board of Health Bylaw and Regulations pertaining to nitrogen loading limitations as most easily demonstrating a significant economic impact. White Barn brief, p. 17 n.13. It argues that these requirements preclude the construction of more than 19 units (five affordable and 14 market rate units). Under the Board of Health bylaw, since the entire Town of Norwell is considered a nitrogen sensitive area for new construction, effluent flow on any site in the Town is limited to 440 gallons per day per 40,000 square feet. According to White Barn's engineer, Mr. McKenzie, this requirement would limit wastewater flow to approximately 4,300 gallons per day (gpd) for the approximately 9-acre site, resulting in a maximum of 19 units (19 x 2 bedrooms @110 gpd/unit = 4,180 gpd). Exhs. 55, p. 68; 58, ¶¶ 6-7; 60, ¶ 13; 2, p. 32; Tr. I, 152. See White Barn brief, pp. 5, 17 n.13.

White Barn argues that other conditions have a less obvious impact but will nonetheless prevent the developer from realizing a reasonable return on total cost and may even prevent the development altogether. Exh. 58, ¶¶ 13-22; Tr. II, 4-39; White Barn brief, pp. 34-37. It argues that the Board's refusal to waive the local wetlands bylaw restricts development of the site, although the impact is not readily ascertainable given the dispute over the extent of local jurisdictional wetlands present on the site. White Barn brief, p. 17 n.13. Regarding the Board's refusal to waive the Planning Board covenant, White Barn points out that the Board has taken the position that the 1993 Planning Board decision may restrict White Barn from proceeding with the development. It also notes that Article VI, ¶ 12

and Article X, ¶ 18, mandating respectively, $30,000 and $10,000 in fees, have a defined numeric impact. Tr. I, 190-191, 193. White Barn brief, p. 28.

Finally, White Barn argues, citing *Norwell Washington, LLC v. Norwell,* No. 06-07 (Mass. Housing Appeals Committee Mar. 13, 2007 Enforcement Order), that the sheer number of conditions, particularly those that require multiple submissions to various town boards and personnel, render the project *per se* uneconomic because the risk and uncertainty associated with the requirements could lead to work stoppages and delay that will cause incalculable damage to the project's finances. White Barn brief, p. 35; Exh. 58, ¶¶ 15-22; Tr. I, 207-209.[6] It argues that the conditions must be viewed in the aggregate, as required by the Committee's regulations, because otherwise "a town could block any project by imposing a laundry list of relatively inexpensive conditions, none of which alone would make the project uneconomic." *Walega v. Acushnet, supra,* No. 87-17, slip op. at 7-8. White Barn brief, pp. 34-37.

2. Return on Total Costs for Project as Conditioned

Based on Mr. McKenzie's opinion that the project would be limited to 19 units, White Barn's principal, Mr. Sullivan, prepared a *pro forma* financial statement summarizing the projected costs and expenses associated with such a project. He also testified regarding his concept of the 19-unit development that could be built on the site, including the elimination of particular buildings and interior roadways. Exhs. 3l; 58, ¶¶ 7-10; 58(B); 75, ¶ 8; Tr. I, 174-180; II, 117-120, 141-144. See Exh. 5(d). He assumed a 19-unit project including 4 affordable units and a total of 42,827 square feet of construction. Exhs. 3; 75, ¶ 4.

The p*ro forma* applied the Committee's historical methodology -- the Return on Total Costs (ROTC) analysis (total sales less total development costs, or when calculated as a percentage, total return divided by total development costs). See, e.g., *Rising Tide Development, LLC v. Sherborn,* No. 03-24, slip op. at 4 (Mass. Housing Appeals Committee

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6. On cross examination, Mr. Sullivan acknowledged he had not investigated the cost and expense of complying with a number of the conditions he claimed rendered the project uneconomic. See, e.g., Tr. II, 33-38. However he did express the opinion that the challenged conditions had some economic impact, even if it was not quantified, largely because of the prospect of delay described above. See discussion, *infra* at Section IV:C.

Mar. 27, 2006); *Rising Tide Development, LLC v. Lexington,* No. 03-05, slip op. at 11 (Mass. Housing Appeals Committee June 14, 2005); Exhs. 3; 58(B).

Mr. Sullivan testified that he has extensive experience in permitting, financing and constructing residential real estate developments in Massachusetts. Exhs. 58, ¶ 2; 58(A). To prepare the *pro forma,* he relied on assumptions of costs and revenues based on his own development experience as well as information provided by others. Exh. 58, ¶¶ 8-9. White Barn introduced a certified appraisal which determined that the property site acquisition cost was $1,550,000. Exhs. 3; 4; 58(B). Mr. Sullivan based his projected revenues in part on his own experience from the sale of similar townhouse condominiums at Washington Place in Norwell, a project he is developing. Tr. II, 43-47, 117. He estimated total revenue, based on market condition and comparable home sales contained in the appraisal, to be approximately $9,619,000. Exhs. 4; 75, ¶ 5. This total revenue of $9,619,000, or approximately $225-$255 per square foot, was accepted by the Board's financial expert, Ms. Sanders. Tr. II, 44-45, 164-166.

Mr. Sullivan testified in rebuttal and on cross-examination that he based his construction costs on costs associated with a similar project he is developing and industry standard unit costs. Tr. I, 179-187. He testified that total development costs are projected to be $10,131,000. To reach this total he assumed the elimination of particular buildings shown on Exhibit 5, Sheet 4 of the development plans. Exh. 75, ¶ 8. He projected a per square foot construction cost of $126, with overhead and profit, based on a raw per square foot construction cost of $105. Exhs. 3; 58(B); Tr. I, 181-182. The Board's financial expert, Ms. Sanders, acknowledged that $105 per square foot was feasible, and it was permissible to add overhead and profit to the number, subject to subsidizing agency requirements. Tr. II, 179-182. Assuming 42,827 square feet of construction, Mr. Sullivan's *pro forma* estimated total residential construction cost of $4,497,000. Mr. Sullivan added 14% builder's overhead and profit and a 5% contingency, to reach total construction costs of approximately $5,383,000. Exhs. 3; 58(B).

The developer's evidence regarding the other costs is less detailed; Mr. Sullivan stated he estimated $3,248,000 for the remaining costs, including site infrastructure costs, septic system construction cost and soft costs, but suggests that this estimate would have to off by almost 220% for White Barn to realize any profit in excess of 15%. Exh. 75, ¶ 11.

White Barns' financial consultant, Mr. Cusson, concurred that all of the cost assumptions generally reflect the costs he would expect to see incurred in developing a 19-unit project on the site. Exh. 59, ¶ 9. He also agreed that the expected return on total cost for a 19-unit project was likely to be a loss. Exh. 76, ¶ 8. However, he modified the treatment of certain related-party construction costs contained in Mr. Sullivan's first *pro forma,* Exhibit 3. Exh. 59, ¶ 10. Mr. Sullivan accepted the modification and incorporated it into his revised *pro forma,* Exhibit 58(B), which indicates the projections discussed here. Exh. 58, ¶ 11.

The total projected revenue of $9,619,000 minus total development costs of $10,131,000 yields a return on total cost of a loss of $512,000, or 5.1% of total development costs. Exh. 58, ¶ 11; Exh. 58(B).

3. Uneconomic Presumption

Alternatively, White Barn argues that under the Department of Housing and Community Development (DHCD) Comprehensive Permit Guidelines (DHCD Guidelines),[7] a 5% reduction in the number of units raises a presumption that a board's conditions render a project uneconomic. In this case, a reduction from 40 to 19 units, or a 52% reduction, far exceeds the triggering 5%. The DHCD Guidelines state:

> Reasonable Return -- means, with respect to building or operating a Project, profits and distributions actually realized by the Developer that are not less than the limitations set forth in Part IV.C. A condition imposed by the Board to decrease the number of units in a Project by 5% or more shall create a rebuttable presumption that the Developer will not be able to achieve a reasonable return. While rebuttable, this presumption shifts both the burden of producing evidence and the ultimate burden of persuasion from the Developer to the Board on both the "reasonable return" and "uneconomic" issues.

Exh. 80. We find that the presumption set out in the DHCD Guidelines was established by the developer's testimony of a reduction in project size to 19 units.

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7. White Barn also sought to admit the DHCD Guidelines (Exh. 80(ID)). Tr. I, 22. These guidelines are available on the Committee's web site and accessible to all parties. The Board's only argument against them is that they are not officially promulgated regulations. However, the Committee's regulations provide for the issuance of such guidelines. See, e.g., 760 CMR 56.04(4)(e); 56.04(8)(d). We consider the guidelines to be appropriate for official notice and hereby take official notice of them. See M.S. Brodin & M. Avery, *Massachusetts Evidence* § 2.8.1 (8th ed. 2007). The Interveners' arguments on this point are not considered since their participation in the proceeding does not include the economic issue.

B. Board's Presentation

The Board contends that White Barn has failed to meet its initial burden because 1) the developer did not quantify the economic impact of the various conditions challenged as rendering the project uneconomic; 2) the developer is not a financial expert, and hired no financial expert to prepare a *pro forma* financial statement; and 3) the developer has submitted no *pro forma* to show that the project as proposed was economic. For these reasons, it argues that the appeal must be dismissed.

1. Economic Impact of Conditions and Requirements

The Board argues that White Barn's evidence was inadequate to gauge the effect of any proposed conditions of approval including waiver of local Board of Health and Wetlands Bylaws and Regulations. Board brief, pp. 26-28. However, with regard to the impact of the local nitrogen loading requirements, the Board has not introduced evidence to contradict Mr. McKenzie's testimony that the decision effectively reduces the project size significantly. Rather, it focuses on arguing that the developer did not investigate alternate solutions to reduce the nitrogen impacts of the project and submit such information to the Board in its hearing. Board brief, p. 7.

The Board correctly points out that the developer's engineer, Mr. McKenzie acknowledged on cross-examination that alternate nitrogen reducing technologies could increase the number of units to between 22 and 26. Tr. III, 119-120. The Board's engineer, Mr. Chessia, stated that "nitrogen-decreasing alternatives might be designed and implemented at reasonable cost to allow for greater density with reduced impact." Exh. 63, ¶ 32. However, he offered no details regarding what density would be permitted in such a case; he stated that "without more information than is currently available in the files, [White Barn] cannot definitively state what density is permissible on the subject property to comply with Title V." Exh. 63, ¶ 33.[8] Although Mr. McKenzie stated it was possible that the project could be laid out more differently than proposed by Mr. Sullivan, no quantification of a related reduction in costs was offered. Tr. III, 66, 68. The most the Board could show was

8. It appears that this was an inadvertent reference to the state Title 5 standard, rather than the local bylaw, since it appears in the context of his testimony concerning the local nitrogen loading bylaw. Exh. 63, ¶ 33.

the possibility that the project could increase to 26 units. It has not argued a difference in the resulting economics based on such a project size.

The Board also argues that Mr. Sullivan had not investigated the cost and expense of complying with a significant number of the other conditions he claimed rendered the project uneconomic. Therefore it contends that it has not afforded a basis for conclusion concerning the ultimate economic nature of the proposed project with those conditions.

2. Adequacy of Appellant's *Pro Forma*

The Board agrees with White Barn and Committee precedent that the standard for a reasonable return is a minimum of 15%, under the MHP Guidelines. Exh. 79. However, it argues that White Barn's *pro forma* is based on inadequate evidence and that it improperly relied upon conclusions and opinion of its principal, Mr. Sullivan, rather than expert testimony regarding costs and revenues. It argues that even though Mr. Sullivan is a developer with construction experience, it is not reasonable to base a *pro forma* on a sketch, crossing out units and maintaining infrastructure. Therefore, it contends Mr. Sullivan's opinion is entitled to no weight and White Barn failed to sustain its burden.[9]

The Board's expert accountant, Ms. Sanders, criticized Mr. Sullivan's *pro forma* for not including supporting documentation detailing the basis for projected hard and soft costs, other than the appraisal, Exh. 65, ¶ 5, and for not providing supporting information about the developer/general contractors' actual overhead costs. Exh. 65, ¶ 7. Finally, the Board argues that although White Barn offered a *pro forma* for 19 units, it did not demonstrate that the project was economic as proposed. Board brief, p. 26.

C. Conclusion Regarding Economics

Since under Chapter 40B and 760 CMR 56.00, the conditions need only render the project uneconomic in the aggregate, we do not require each condition individually to render a project uneconomic to shift the burden to the Board; rather, if a condition has some economic effect, it contributes to the aggregate economic impact, which is then evaluated for its impact on the developer's profit.

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9. During the hearing, the Board moved to strike Mr. Sullivan's testimony on this point on the ground that the supporting details for his opinion were only submitted on rebuttal. Tr. IV, 93-97. The motion is denied.

The primary factor affecting the economics of the project, as presented by the developer, is unwaived Board of Health nitrogen loading rules that would require a reduction to 19 units. While alternative sewage treatment proposals might have allowed it to construct more units, the developer was not required to alter its wastewater management system to find a configuration that would produce more units, and, indeed, the Board has not rebutted White Barn's case by showing such a plan would have produced an economic project.

Mr. Sullivan described his previous experience in developing similar projects. Given the extent of his experience, we find his opinion of comparable costs of construction and the projected revenues to be credible. In addition, he relied on the appraisal prepared for the developer, and the testimony of the developer's professional engineer for an opinion of the maximum number of housing units that could be built under the conditions imposed by the Board's decision. Exh. 58, ¶¶ 7-9. Cf. *Haskins Way, LLC v. Middleborough, supra,* No. 09-08, slip op. at 15 n.19 (little weight given to conclusory opinion of developer's principal who had little housing development experience). Given the dramatic economic effect of the Board of Health nitrogen loading requirement, a more detailed demonstration of the effect of the reduction in units on site infrastructure costs, an important component of a *pro forma,* is not necessary in this case.

The Board's case largely was limited to criticizing the developer's evidence, but did not produce contradictory evidence that undermined the developer's case. While the evidence presented by the developer is not extensive, White Barn has presented sufficient evidence to support a finding that a 19-unit project would produce a loss. Indeed, the Board's accountant acknowledged on cross-examination that her ability to evaluate the developer's *pro forma* was hampered because she had not received necessary information from the Board, including, for example, Exhibit 3, the original *pro forma,* and White Barn's application to the Board, Exhibit 15. Tr. II, 158-164.

The reduction in units necessitated by the nitrogen loading requirements reduces the project by more than 50% according to the developer, and even under the Board's best case scenario, still reduces the size of the project significantly. Therefore we find that the developer has demonstrated that the decision has rendered the project uneconomic.

With respect to the remaining challenged conditions and failure to waive local requirements, we find that those requirements, even though most do not have a specific

adverse numeric economic value assigned to them in the record, would also have an adverse impact on the developer's profit.

The Board argues that failing to quantify the effect of those conditions exactly made it even more difficult to determine the ultimate economic nature of the proposed project as conditioned, but it has not argued or introduced evidence to show that the conditions in question categorically have no economic impact at all. Since White Barn has presented credible evidence that some adverse economic impact likely will occur, it is not necessary that it demonstrate for each condition the precise predicted value of the adverse impact, as long as the aggregate impact is shown to make the building or operation of the project uneconomic. Based upon Mr. Sullivan's testimony, we find that each of the challenged requirements has at least some adverse economic impact on the proposal; beyond that, the more significant task before us is to determine the magnitude of the impact of all of the conditions in aggregate. *Haskins Way, LLC v. Middleborough, supra,* No. 09-08, slip op. at 14 n.15. The uncontradicted evidence of costs and revenues demonstrates that the project as approved is uneconomic.

Finally, the Board suggests that the developer has not met its burden because it failed to demonstrate that the project was economic as proposed. Although in most cases it is logical to assume, and historically, the Committee's review has assumed, that a developer would not propose an uneconomic development, we have noted previously that under some unusual circumstances, a developer may choose to go forward with an uneconomic development. See *Rising Tide Development, LLC v. Sherborn, supra,* No. 03-24, slip op. at 16, n.16. In this case although the Board raised the issue, the Pre-Hearing Order identified this issue as the responsibility of the Board, not White Barn. Pre-Hearing Order, § IV, ¶ 7. Therefore, under the circumstances, the developer did not fail to meet its burden by submitting evidence only concerning the economics of the project as conditioned. Those facts show that the project would return a loss, and therefore the project as conditioned is uneconomic.

Finally, as argued by White Barn, the DHCD Guidelines issued in connection with the Comprehensive Permit Regulations, 760 CMR 56.00, provide that a 5% decrease in the number of units in a project establishes a presumption that the conditions render the project uneconomic and shifts the burden of proof on the issue to the Board. Therefore, on this

ground as well, the developer prevails on the question of whether the Board's decision renders the project uneconomic.

V. LOCAL CONCERNS

Since the developer has sustained its initial burden, the burden shifts to the Board to prove that there is a valid health, safety, environmental, design, open space or other local concern that supports each of the conditions and requirements imposed, and that such concern outweighs the regional need for low and moderate income housing.[10] 760 CMR 56.07(2)(a)3. and (b)3.

The burden on the Board is significant: The fact that Norwell does not meet the statutory minima regarding affordable housing establishes a rebuttable presumption that a substantial regional housing need outweighs the local concerns in this instance. Pre-Hearing Order, § II, ¶ 2. G.L. c. 40B, § 20; 760 CMR 56.07(3)(a); *Hanover v. Housing Appeals Committee,* 363 Mass. 339, 365, 367 (1973) (failure to meet statutory minimum housing obligations "will provide compelling evidence that the regional need for housing does in fact outweigh the objections to the proposal").

A. Local Wastewater Management Requirements

In its brief, White Barn challenges the Board's denial of waivers of the Board of Health Bylaw and Rules and Regulations primarily because the local bylaw and regulation designate the entire town of Norwell as a nitrogen sensitive area and would not allow the construction of the planned mounded septic system. White Barn brief, p. 15; Exhs. 5, Sheets 4-5; 15(15); 55, Part 2, §§ 8, 12; 60, ¶ 13.

The Board argues that it refused to waive the nitrogen sensitive district requirements for a sewage disposal system because White Barn did not provide it with an indication of the cost of the project or the cost to equip the project with alternative nitrogen loading mitigation. The Board argues that this restriction protects public health and private water supplies both in and outside the aquifer protection district. Part 2, § 8 of the Norwell Board of Health Bylaw and Rules and Regulations states:

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10. The Board and Intervener argue, erroneously, that the developer was also required to establish the *prima facie* case applicable to denials of comprehensive permits, by demonstrating that its proposal complies with federal or state statutes or regulations, or with generally recognized standards as to matters of health, safety, etc. See 760 CMR 56.07(2).

8. Nitrogen Sensitive District

Due to the number of on-site private water supplies both in and outside the aquifer protection district and other areas designated as nitrogen sensitive and based on the fact that a large portion of the town lies within the watershed to the North River:

For the purposes of septic system design, the entire town will be considered nitrogen sensitive for new construction as defined and described in 310 CMR 15.214 through 15.217.

Exh. 55, Part 2, § 8. The Board's engineer, Mr. Chessia, stated "To protect the Town's groundwater and its shallow wells that are the sole source of the Town's water supply and the many private wells that exist throughout the Town, the Board of Health regulations impose uniformly, nitrogen-loading requirements on all new construction within the Town. This regulation was adopted to address significant environmental and public health concerns...." Exh. 63, ¶ 30. The Board argues that absent some evidence that the implementation of such a nitrogen loading technology would create a hardship, it was justified in refusing to waive this requirement. Board brief, pp. 33-34.

This argument does not suffice to meet the Board's burden; instead it attempts to shift the burden to the developer. The existence of the local rule alone is insufficient to demonstrate that it represents a valid local concern, much less to indicate its importance in relation to the need for housing. As White Barn points out, the Board did not introduce any evidence to demonstrate site specific concerns about elevated levels of nitrogen or any other rationale that would support maintaining the application of the bylaw and the regulations to this project. See White Barn brief, p. 27. The general testimony of Mr. Chessia that "There is sufficient local concern in Norwell, based on recent water quality and supply issues as well as recent mandatory water use bans" is inadequate to meet this standard. Exh. 63, ¶ 34. The project site is not in a DEP Zone II or other nitrogen sensitive area under state law. Exh. 5, Sheet 2, General Note 4. Therefore, the Board has not presented sufficient evidence of a valid local concern that outweighs the need for affordable housing. See *Tiffany Hill, Inc. v. Norwell,* No. 04-15, slip op. at 15 (Mass. Housing Appeals Committee Sept. 18, 2007); *Herring Brook Meadow, LLC v. Scituate,* No. 07-15, slip op. at 26-27 (Mass. Housing Appeals Committee May 26, 2010).

Similarly, the Board provided no argument to support its refusal to waive other Board of Health requirements challenged by White Barn. The Board's attempt to shift the burden

of proof is insufficient to meet its own burden. Therefore, the Board has not demonstrated a valid local concern outweighing the need for affordable housing to warrant denial of the requested waivers of Board of Health Bylaws and Regulations. The comprehensive permit shall be MODIFIED to incorporate these waivers.

B. Local Wetlands Protection and Flooding Concerns

1. Background: State Wetlands Protection Act

Shortly before the evidentiary hearing in this case, the question of the existence of designated wetlands under the WPA was resolved. The Department of Environmental Protection (DEP) in its Superseding Determination of Applicability determined that the project site does not contain an area subject to protection under the WPA and its implementing regulation, 310 CMR 10.00. Exh. 56. However, the parties agree that portions of the project are within the 100-foot buffer zone to two off-site state wetlands resource areas and that White Barn will be required to file a Notice of Intent under the WPA with respect to activity in the buffer zones in connection with the project.[11] Exhs. 56; 57; 62, ¶¶ 2, 3; 74, ¶ 4; Tr. I, 9-15. See White Barn brief, p. 9 n.8; Board brief, pp. 11-12. Since the requirement for a Notice of Intent is a state law requirement we will treat it as we do other state requirements and require such compliance by condition. The Notice of Intent and subsequent proceedings under the WPA will address the effect of the project on the buffer zones to off-site wetlands.

2. Local Wetlands Requirements

The Norwell Town Wetlands Protection Bylaw and implementing regulations are more stringent than the WPA with regard to "Isolated Land Subject to Flooding" or "ILSF" and "Isolated Vegetated Wetlands." Exh. 54, §§ 8.3.0, 8.4.0. See Exh. 63, ¶¶ 13-14. The Board refused to waive the bylaw and regulations in its decision. It argues that it did so because White Barn refused to obtain a determination from the Norwell Conservation Commission as to whether there were any locally jurisdictional resource areas on the property proposed for the project. Board brief, p. 12; see Exh. 2, p. 31. The Board takes the position that it is for the Commission to determine whether locally jurisdictional wetlands are

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11. Of the two buffer zones on site, one is in the southern portion of the project site within 100 feet of a bordering vegetated wetland south of Forest Street; the other is an area in the northern portion of the site which is a buffer zone to an off-site pond. Exhs. 56; 63, ¶ 7; 62(B).

on the site, and then for the Board to determine whether to grant a waiver from any applicable bylaw or regulation. Board brief, p. 13, n.7.

This argument is another effort to shift the burden to the developer, as the Board attempts to argue that White Barn's failure to obtain a determination from the Conservation Commission is sufficient proof of a local concern. As we indicated above, the Board was in error in requiring such a preliminary step; White Barn's decision not to proceed as suggested by the Board does not support the denial of a waiver. In its hearing on the application, the Board was charged with acting for the Conservation Commission with regard to local wetlands issues. In the hearing before the Committee, it was incumbent on the Board to present affirmative evidence addressing the local wetlands issue. However, as discussed below, the evidence presented in this proceeding does support a finding of a valid local concern.

3. Isolated Land Subject to Flooding

The Board and Interveners argue that areas on the project site are locally jurisdictional isolated land subject to flooding (ILSF) under the local Wetlands Protection Bylaw and Regulations.[12] Exh. 63, ¶¶ 9-10. Section 8.3.0 of the Wetlands Regulation defines an ILSF as:

> ...an area, depression, or basin that holds at minimum one-eighth acre-foot of water and at least six inches of standing water once a year. The jurisdictional buffer zone for isolated land subject to flooding shall extend 100 feet from the highest extent of flooding, defined as the mean annual high water line.

Exh. 54. By comparison, state regulation 310 CMR 10.57(1)(b) requires an ILSF to have area double in size (1/4 acre/foot). Exh. 63, ¶ 14. Section 8.3.0 also provides:

> (1) Projects on land subject to flooding shall be permitted only in connection with such procedures determined by the Commission as not having the effect of reducing the ability of the land to absorb and contain floodwaters.
>
> (2) The Commission may require compensating or greater flood storage capacity in the same watershed if it permits any filling of land subject to flooding, and all filling of areas subject to flooding shall be strictly minimized....

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12. The Interveners' participation on this issue is limited to addressing whether a local concern affecting them arises from the existence of locally jurisdictional wetlands on the project site.

Exh. 54. In their briefs, the parties focus primarily on one potential local ILSF -- the depression in Area 4.[13] Tr. III, 79-99. White Barn plans to fill the on-site portion of the area in which the potential ILSF is located, but has not proposed to replicate the ILSF elsewhere. The Board and Interveners argue that the proposed fill in this area will displace this flooded area and cause flooding to the properties south of White Barn Lane and exacerbate flooding of the Schlueter and other properties.[14] See Exhs. 91, ¶ 5; 92, ¶ 6.

The Board's engineer, Mr. Chessia, stated that Area 4, in the northern portion of the site, met the local definition of an ILSF. He observed water to a depth in excess of six inches on the Schlueters' property in March 2010, bordering a contiguous area of flooding in Area 4 on the project site. He calculated a volume of greater than 10,860 c.f. (1/4 feet-acre) for the flooded area, including the observed area of the Schlueter property and visible portions of the project site which he had been permitted to access during the DEP proceeding. He concluded that at least 5,430 c.f. (1/8 feet-acre) of water was held over the ground surface of the two properties with the required depth to qualify as a locally jurisdictional ILSF. He also testified that, based on his observation and review of topographic plans, the watershed area extends as far as Main Street, beyond the contributory area determined by White Barn's expert, Mr. McKenzie. Exhs. 63, ¶¶ 9-12; 86-88; Tr. IV, 136-141, 149.

Mr. McKenzie agreed that the depression in Area 4 had sufficient volume to qualify as an ILSF, but disputed that the watershed contributing to Area 4 generated sufficient runoff to fill Area 4 with water to the required volume and six-inch depth at least once per year, based on his view that fill placed on the Schlueter and MacDonald properties during construction of their houses altered the watershed. He acknowledged that if the watershed area were different than he estimated, he would have to revise his stormwater management calculations. Exh. 74, ¶¶ 9-13; Tr. III, 79-98, 107-110; V, 53-57.

The Interveners' engineer, Mr. Houston, testified regarding an off-site survey conducted by Cavanaro Associates (Cavanaro survey) in connection with the DEP appeal which supports Mr. Chessia's opinion that the watershed contributing to Area 4 extends all

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13. Other areas were addressed in the course of testimony, but the developer's experts stated that none met the volume requirements to qualify. Exhs. 63, ¶ 13; 74, ¶¶ 7-9; Tr. III, 73-87; see Exh. 62(B).

14. The Board also points out that the Norwell Conservation Commission had issued an order to the owner of the project site concerning filling or altering portions of the site. Exhs. 30-33.

the way to Main Street. Although Mr. McKenzie did not go so far in response as to concede that the Cavanaro survey and Mr. Chessia's calculations prove the existence of an ILSF under the local bylaw, as the Board's and Intervener's witnesses contended, he acknowledged that he had not conducted an in depth study of abutting properties. White Barn's brief acknowledges the watershed "may be large enough to qualify Area 4 as an ILSF under the local bylaw," but reiterates that the area still fails to qualify as an ILSF under *state* law. White Barn brief, p. 12. Exh. 91, ¶ 9; Tr. V, 52-56, 92-95. Mr. McKenzie stated that if the project requires compensatory flood storage, he had not evaluated the extent it may alter the project plans, although he stated that it would not affect the density of the project. Tr. V, 49-51.

Based on the evidence, we find that this area does constitute an ILSF under the local bylaw and regulations. Under *Herring Brook Meadow, LLC v. Scituate, supra,* No. 07-15, to demonstrate a valid local concern, the Board must then go on to present evidence to justify the expansion of the state definition of a wetland resource by means of the local bylaw specifically with respect to the project site.

> Since the definition of [a wetland resource] exists only as a local, not state, requirement, the Board must show the local concern that warrants expanding the definition of protected resource areas beyond that identified by the WPA. The Board must also show how the concerns set out in the local regulation apply to the facts of this case – how the specific interests identified in the … bylaw are important at this site.

Id. at 26-27. The Board's and Interveners' evidence shows that in this circumstance, the ILSF is an area of concern because White Barn proposes to add fill to the site at the boundary line with the Schlueters' property, including the area of ILSF, without a provision for compensatory flood storage, thereby affecting off-site flooding.

The Board's engineer, Mr. Chessia, testified that, given the topography of this portion of the site, the anticipated fill will result in stormwater that enters the area from the contributory watershed backing into the Schlueter and other abutting properties, exacerbating flooding in areas where it is already a problem. Exh. 63, ¶ 12. Mr. Houston stated that the fill would result in an 83% reduction in available storage volume. He also stated that the fill will create a condition whereby standing water will be present on the Schlueter property for

as much as 579 hours, or 24 days, before emptying. He testified that this creates a health risk by providing an area for mosquitos to breed.[15] Exh. 91, ¶¶ 8, 15-18.

Mr. McKenzie acknowledged the hydrologic connection between the Schlueters' property and the project site. Tr. III, 34. The Interveners argue that this connection is significant because it impacts the drainage calculations of the entire project. Intervener brief, p. 23; Tr. IV, 148. Both the Board and the Interveners argue that the impacts of flooding projected by Mr. McKenzie are understated in part because of the failure to include this resource in White Barn's stormwater calculations. The Board and Interveners also argue that the infiltration basin to accommodate stormwater flow from the northeastern portion of the project site is undersized to accommodate the actual watershed, causing stormwater to overflow onto the Schlueter property, Tr. IV, 122, and because it is above the low point, it will not capture flow from the Schlueter property. Tr. IV, 117-119. Mr. McKenzie acknowledged that the project's design did not include compensatory flood storage. Tr. V, 49-50. When asked about the Cavanaro survey, he stated that if the information is accurate, the watershed area could be somewhat larger, and White Barn would probably revise the drainage calculations. Tr. III, 107-110; V, 53-57, 94.[16]

White Barn argues that neither the Board nor the Interveners have shown a local concern regarding stormwater management, wetlands or flood storage, and that the risk of mosquitos is insufficient to demonstrate a local need. It states that it will comply with DEP stormwater management requirements, and if good engineering practice dictates that compensatory flood storage is required for the fill placed in Area 4, it will provide such storage during the final design phase and it will not affect the density of the project. Tr. V, 50-51; Exh. 92, ¶ 3; White Barn brief, pp. 22, 27. Because compensatory storage is not required under the WPA, it suggests that this decision should be one for the discretion of the developer's engineer. It argues that any effect that filling might have on neighboring

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15. To the extent the Interveners' argument concerning "trespass" of stormwater onto their properties refers to the common law tort, we have previously stated that this is not an issue within the Committee's jurisdiction. *Tiffany Hill, Inc. v. Norwell, supra,* No. 04-15, slip op. at 3 n.4. Rather we examine the issue in the context of local needs under c. 40B, §§ 20, 23.

16. The Interveners also argue that the project as proposed violates DEP stormwater management policy and regulations. DEP compliance is a matter of state, rather than local concern. We need not address it, and in any event our decision by condition will require compliance with all applicable DEP stormwater management requirements.

properties is a private legal matter between White Barn and the abutters. White Barn brief, pp. 24-25.

We find the evidence presented by the Board and Interveners' witnesses concerning the watershed to Area 4 and the implications for flooding on the Interveners' properties to be persuasive, and more credible than the testimony of the developer's witness concerning the scope of the watershed of Area 4. Mr. McKenzie's opinion that the fill of their properties for the construction of the MacDonald and Schlueter homes disconnected the area up to Main Street from Area 4 is less credible in light of the Cavanaro survey results than that of Mr. Chessia and Mr. Houston. Tr. III, 97-98; V, 93- 97. In any event, his testimony indicates his agreement that it is good engineering practice to prepare in advance to compensate for such flooding.

Section 8.3.0(1) of the Town wetland regulations requires a determination by the Conservation Commission that work in flooded areas does not reduce the ability of land to absorb and contain floodwaters. Section 8.3.0(2) may require compensatory flood storage if land subject to flooding is permitted to be filled. We find that the proposed filling within Area 4 constitutes a local concern that must be addressed by the developer. Accordingly we will require that the developer provide "compensating or greater flood storage capacity in the same watershed" as required by § 8.3.0(2). Therefore we do not waive this provision.

The Town bylaw also prohibits certain activity within 100 feet of a locally defined resource area, such as an ILSF, without the filing of a Notice of Intent for the activity and without receiving and complying with an order of conditions from the Conservation Commission. Exh. 54, Bylaw, § 2.A. White Barn has not filed such a notice of intent. The Board requests that we require White Barn to file a notice of intent to and comply with conditions imposed by the Commission. However, the Board has not indicated what conditions, other than the provision of compensatory flood storage, it believes are required. White Barn will be required to file with the appropriate local entity or staff in compliance with 760 CMR 56.05(10)(b) and town practice as is customary with regard to market-rate subdivisions its revised proposed plans for compensatory flood storage for the ILSF, and accompanying plan modifications, including revised stormwater management plans, for review for consistency with the comprehensive permit. Alternatively, White Barn may submit a notice of intent to the Conservation Commission with respect to the fill of the ILSF

and the resulting stormwater management revisions, in conjunction with its filing under the WPA.

4. Isolated Vegetated Wetlands

The Board and White Barn also disagree regarding whether the site contains isolated vegetated wetlands protected under the Norwell wetlands bylaw and rules and regulations. Norwell's wetland protection regulations treat isolated vegetated wetlands of any size as jurisdictional and define them as "areas where soils are saturated and/or inundated such that they support predominance (greater than 50%, based on a standardized grid) of wetland indicator plants." Exh. 54, § 8.4.0. Under the regulation:

> The boundary of Vegetated Wetlands is the line within which 50 percent or more of the vegetational community consists of wetland indicator plants and saturated or inundated conditions exist. Wetland indicator plants shall include but not necessarily be limited to those plant species identified in the [WPA].

Id. Isolated vegetated wetlands are not considered a protected resource under the WPA and its implementing regulations, 310 CMR 10.00.

The Town's conservation agent, Ms. Hardy, testified that the site contains isolated vegetated wetland areas in some central areas of the site which had been disturbed by excavation and filling activities. Exh. 66, ¶ 13. Under the regulation:

> (3) Where an area has been disturbed (e.g. by cutting, filling, or cultivation), the boundary is the line within which there are indicators of saturated or inundated conditions sufficient to support a predominance of wetland indicator plants, or credible evidence from a competent source that the area supported or would support under undisturbed conditions a predominance of wetland indicator plants prior to the disturbance.

Exh. 54, § 8.4.0. Mr. Chessia also testified that the site contains isolated vegetated wetlands. Exh. 63, ¶ 13.

In 2007, White Barn's expert, Ms. White, had identified a locally defined isolated vegetated wetland in a small area just south of White Barn Lane that she had observed in a visit to the site in 2005. Exh. 66, ¶ 10; 66(B); 83. However, after her examination of the site in 2009, Ms. White determined there were no local jurisdictional areas, including the small area she had previously noted, since no water was found there and the vegetation was upland in nature. Exh. 62(B). She also stated that her earlier opinion had been based on an ambiguity in the local definition of an ILSF. Exhs. 62, ¶ 2; 78, ¶¶ 6-7; Tr. II, 208-209.

Both the Board's and the developer's experts agreed that the first requirement of wetlands, dominance of wetland indicator plants, was not in evidence. They reached separate conclusions from this, however. Ms. White, the wetlands expert, gave the opinion that the lack of such dominance, even if hydric soils were present, precluded a finding of isolated vegetated wetlands. Exh. 78, ¶ 5. Ms. Hardy, the conservation agent, stated that there was a large quantity of fill in the center of the site. She relied on the evidence of disturbance indicated by several areas of debris and fill on the site, and the presence of hydric soils to conclude that wetlands were located in the disturbed areas. Tr. III, 47-49; Exhs. 66, ¶ 13; 62(B); 78, ¶ 5, 8.

Even assuming that these areas are locally jurisdictional wetland resource areas, the Board must show how the specific interests in the local regulation are important to this site. On this record, the Board has not adequately demonstrated that the concerns set out in the local regulation apply to the facts of this case – how the specific interests identified in the bylaw are important at this site. See *Herring Brook Meadow, LLC v. Scituate, supra,* No. 07-15, slip op. at 26; Exh. 54, § 8.4.0. Therefore it has not demonstrated a local concern that outweighs the need for affordable housing with respect to this issue.

5. Conclusion Regarding Wetlands and Flooding

In conclusion, White Barn will be required to file a notice of intent under the WPA with respect to the buffer zones to off-site wetlands before proceeding on this comprehensive permit. As is typical in our decisions, we will require White Barn to comply with all applicable state law requirements, including applicable stormwater management requirements.

The existence of the locally jurisdictional ILSF with the history of flooding in Area 4 demonstrates a valid local concern that must be addressed as part of the housing proposal. However, while the requirement for compensatory flood storage represents a valid local concern that must be addressed under c. 40B, we do not consider all of the remaining requirements in the wetlands bylaw and regulations to outweigh the need for affordable housing. Therefore the decision of the Board shall be MODIFIED to waive all provisions of the wetlands protection bylaw and regulations except § 8.3.0(2) of the regulations. The review under § 8.3.0(2) will be to determine that White Barn's final plans, including any necessary revisions to stormwater management, site, and construction plans, comply with

this decision's requirement that it provide for "compensating or greater flood storage capacity in the same watershed" with respect to the ILSF in Area 4. Exh. 54, § 8.3.0(2). White Barn shall submit the proposed compensatory flood storage and revised stormwater management plans to the appropriate town entity or staff or, alternatively, may file a Notice of Intent with the Conservation Commission regarding the compensatory storage and revised stormwater management plans.

C. Planning Board Covenant

The developer plans improvements to White Barn Lane as part of the development. Exhs. 2, p. 33; 5; 15(8). The Interveners access their properties over White Barn Lane. Further, the Schlueters' driveway crosses over the project site. White Barn Lane and a portion of the project site are located within an approved subdivision entitled "Old Farm Estates in Norwell, Mass.," pursuant to a Definitive Subdivision Plan dated September 23, 1992, and revised February 24, 1993. The Norwell Planning Board voted to approve the definitive subdivision plan on March 8, 1993. The subdivision plan is referenced in a Town of Norwell Planning Board covenant by the owner of the subdivision premises. The covenant was recorded with the registry of deeds on June 1, 1993. Exh. 14.

The covenant contains a number of restrictions binding on the original owner and successors in title to the premises. For example, it restricts further subdivision of the lots that make up the project site. Exh. 14, ¶ 1. With regard to improvements to White Barn Lane, the covenant also requires that a conservation plan be submitted for approval to the Planning Board before any roadway clearing. Exh. 14, ¶ 13. It also restricts re-grading in areas adjacent to White Barn Lane "... except in conformity with a grading plan bearing an endorsement of approval by the [Planning] Board" which shall be granted upon the Planning Board's "finding that any proposed change in grade will not create or aggravate drainage problems on lands adjoining the "Grade Control Area."
Exh. 14, ¶ 11.

In letter to the Board dated October 1, 2007, the Planning Board recommended that the Board not waive the original subdivision covenant and conditions placed on the subdivision plan without acceptable roadway improvements in compliance with Planning Board Rules and Regulations §§ 7-11. Exhs. 34, p. 2; 52. The Planning Board acknowledged that Chapter 40B provided for the Board to act as the Planning Board would

have under the Subdivision Control Law when modifying such a subdivision covenant, citing *Woodridge Realty Trust v. Ipswich,* No. 00-04, slip op. at 23 (Mass. Housing Appeals Committee June 28, 2001). The developer's comprehensive permit application also advised the Board that it had this power. Exh. 15(8).

In its decision, the Board acknowledged that White Barn did not propose a subdivision, but it granted waivers of portions of the Norwell Subdivision Rules and Regulations, retaining the road construction provisions of §§ 7-11. Exh. 2, pp. 32-35. White Barn cites 760 CMR 56.05(7) to argue that since the project application does not request a subdivision approval, the Board improperly required it to comply with all unwaived Planning Board regulations. Section 56.06(7) does permit a board to "look to subdivision standards, such as requirements for road construction, as a basis for required project conditions, in which case the applicant can seek waivers from such requirements." However, as the developer points out, the Board has not raised any local concern that would necessitate enforcement of these particular subdivision regulations. See Exh. 52. Therefore, we will require the Board to remove these conditions from its comprehensive permit.

White Barn also complains that the Board failed to explicitly waive the Planning Board's covenant, even though the Board's decision acknowledges that it may restrict White Barn from proceeding with the development. White Barn suggests that since it must balance pre and post development runoff, a waiver of the covenant is warranted. White Barn brief, pp. 28-29.

Both the Board and Interveners contend, however, that White Barn is required to seek a modification of the covenant pursuant to the subdivision modification process set out in G.L. c. 41, § 81O, which provides that after the approval of a subdivision plan, the location and width of ways on such a plan cannot be changed without amendment of the plan pursuant to G.L. c. 41, § 81W. Section 81W provides for modification of a subdivision plan either on motion of the Planning Board or by petition of an interested person. It also provides, in pertinent part:

> No modification, amendment or rescission of the approval of a plan of a subdivision or changes in such plan shall affect the lots in such subdivision which have been sold or mortgaged in good faith and for a valuable consideration subsequent to the approval of the plan, or any rights appurtenant thereto, without the consent of the owner of such lots, and of the holder of the mortgage or mortgages, if any, thereon....

The Interveners point out that the Planning Board regulation provides that the procedure for the modification of a definitive plan pursuant to § 81W shall conform to the requirements for approval of an original Definitive Plan. Exh. 52, § 6.12.1.

Enlargement of the roadway appears to constitute a modification of a subdivision covenant under § 81O, and hence trigger § 81W's requirement of the consent of purchasers within the subdivision. To the extent the widening of White Barn Lane constitutes a modification under the Subdivision Control Law, the consent requirement is a matter of state law and beyond the authority of the Committee to waive. See *Zoning Board of Appeals of Groton v. Housing Appeals Committee,* 451 Mass. 35, 40-41 (2008) (Committee's authority to override requirements and regulations that might be imposed by local boards applies to limitations on an owner's use of his property not to the use of someone else's property); *Jepson v. Zoning Board of Appeals of Ipswich,* 450 Mass. 81, 85 n.9 (2007).

Our reading of § 81O is that while the Subdivision Control Law sets out requirements and procedures for Planning Board review of modification of subdivision plans, the decision whether to modify a covenant is a question under local law, and therefore appropriate for consideration by the Board under *Woodridge Realty Trust v. Ipswich, supra,* subject to the restrictions set out in *Groton, supra.* White Barn argues that the covenant contemplates a waiver if the Board makes a finding that any proposed change in grade will not create or aggravate drainage problems on adjacent properties. Exh. 14, ¶ 11. The Board has not made that finding, and on the record before the Committee, we do not make such a finding.

As discussed above, potential flooding on neighboring properties as a result of fill in the locally defined ILSF represents a valid local concern for which we have required the developer to provide compensatory flood storage and related stormwater management design modifications. And White Barn has stated that it must balance pre and post development runoff. Therefore we will retain the requirement of the covenant that re-grading in areas adjacent to White Barn Lane must be made in conformity with a grading plan that ensures that "any proposed change in grade will not create or aggravate drainage problems on lands adjoining the "Grade Control Area." Exh. 14, ¶ 11, but will modify the requirement for approval of the grading plan by the Planning Board to require that the plans be submitted to the appropriate town entity or staff in compliance with 760 CMR 56.05(10)(b) and town

practice as is customary with regard to similar unsubsidized housing. It is likely that the Notice of Intent under the WPA and/or the final plans with respect to the ILSF and stormwater management will address this concern. Furthermore, the requirement to submit a separate conservation plan to the Planning Board shall be waived, since the Board has not demonstrated a valid local concern with respect to that requirement.

Finally, the Board and Interveners question whether the developer has a sufficient property interest in White Barn Lane to request the subdivision roadway improvements sought as part of the proposal. In its application to the Board, White Barn stated that it has contracted to purchase the fee simple interest in White Barn Lane, subject to easements for the benefit of abutters. Exh. 15(5). During the hearing before the Board, the Planning Board suggested that a question existed concerning the legal ownership of White Barn Lane, in particular the legal rights of the abutters to the roadway. Exh. 34, p. 3. We need not reach the argument that White Barn failed to demonstrate adequate ownership rights to White Barn Lane to permit it to make the proposed roadway changes. This legal question is exactly the type of question the Committee typically leaves to the courts to address. See *Bay Watch Realty Trust v. Marion*, No. 02-28, slip op. at 5 (Mass. Housing Appeals Committee Dec. 5, 2005) and cases cited. It is not part of the site control analysis. *Id.*[17]

D. Roadway Safety on White Barn Lane

White Barn has challenged Article X, § 4 of the decision which requires the developer to provide two-way access to and from Circuit Street and to comply with American Association of State Highway and Transportation Officials (AASHTO) site distance standards. White Barn Lane is an unpaved two-way gravel roadway approximately 12 to 14 feet wide located within a 50-foot wide private right of way ending in a circular cul-de-sac planted with trees. Exhs. 5; 71, 72, 73; Tr. I, 99-100. The Interveners own and reside at properties located at 21 and 29 White Barn Lane respectively. This roadway is the only means of access and egress to their properties, and the only traffic on White Barn Lane is to and from their houses. Exhs. 5; 72, 73.

The developer proposes improvements to White Barn Lane, including removal of the island and trees in the cul-de-sac, stormwater management improvements, and paving and

17. It does not appear that the developer considered developing the site to have Forest Street as sole access and an undeveloped White Barn Lane available as emergency access.

widening the roadway to 22 feet, extending through the cul-de sac to the development site. Tr. I, 100-101; Exh. 71, ¶ 14; Exh. 12. White Barn Lane intersects Circuit Street approximately 700 feet to the south of the intersection of Circuit Street and Main Street (Route 123). Exh. 7.

The parties agree that the stopping sight distance on Circuit Street approaching White Barn Lane from the south does not meet the minimum requirements of Mass Highway and AASHTO. White Barn does not have the legal right to clear vegetation on abutting private property that would be necessary to increase the stopping sight distance. Exhs. 16; 61, ¶ 6; 64, ¶ 6. To mitigate this deficiency, White Barn proposes to restrict White Barn Lane to entrance only traffic for the project and to restrict egress from the project by two proposed "Do Not Enter" signs at the internal boundary of the project, thus requiring all traffic to exit the development at Forest Street. Exh. 61, ¶ 6. Tr. I, 85-87. Several of the Board's witnesses, including its traffic engineer, Mr. Morgan, and Norwell's planner, opined that this proposal would create a traffic safety hazard with the existing Schlueter and MacDonald residences because their traffic cannot be legally restricted and traffic entering Circuit Street will not expect to meet two-way traffic. The Board's traffic engineer also stated the proposed "Do Not Enter" signs might well be ignored by some drivers. Exhs. 64, ¶¶ 7-8; 67, ¶ 10; Tr. I, 139. White Barn's traffic expert responded that he has frequently recommended similar mitigation arrangements for proposed developments and that such directional signs are commonly used throughout the traffic engineering industry and are accepted by AASHTO as a means of traffic control. Exh. 77, ¶ 2; Tr. I, 85-87.

The Board presented no argument at all on this issue in the "Arguments" portion of its brief. Its only reference to traffic was contained in the "Summary of the Evidence" portion of its brief. Although the Board recited some of these facts in its brief, it made no argument in support of the condition imposed in the decision, except to state that the developer did not consider or evaluate the cost to comply with the condition. Reciting facts in a summary of evidence does not constitute sufficient argument, and an issue not adequately briefed is waived. See *An-Co, Inc. v. Haverhill,* No. 90-11, slip op. at 19 (Mass. Housing Appeals Committee June 28, 1994), citing *Lolos v. Berlin*, 338 Mass. 10, 13-14 (1958). Also see *Board of Appeals of Woburn v. Housing Appeals Committee,* 451 Mass. 581, 595 n.25 (2008); *Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85 (1995) and cases cited.

Even considering the Board's factual assertions in its summary, the Board has not met its burden on this issue and the condition is hereby STRUCK.

E. Interveners' Access to their Properties

The Interveners argue that construction of the project will obstruct their ability to enter and exit their homes during construction and permanently block the Schlueters' access to their property because White Barn has made no provision for ensuring access during construction or permanently. The Schlueter property does not directly abut White Barn Lane. A driveway connects the Schlueter property and White Barn Lane over a portion of the project site. Exhs. 5; 73. According to the Schlueters, they hold an easement allowing for this access. Exh. 73. Stephen Schlueter expressed concern that the Board's decision did not expressly provide for his family's continued use of their driveway over the project site to reach White Barn Lane and Circuit Street. Exhs.73, ¶ 6. The Intervener's engineer, Mr. Houston, stated that access would be obstructed because the Interveners had not consented to use of the private way for such construction, the proposed construction will extend to within and likely less than one foot of the Interveners' property lines, and methods for maintaining access are not addressed on the drawings. Exhs. 2, p. 6; 71, ¶¶ 11-12.

White Barn argues that the Interveners have not shown that restricted access will affect their health and safety. They argue further that easement rights cannot be determined in this proceeding, and, in any event, there will be no violation of access easement rights during construction. The developer's engineer, Mr. McKenzie, stated that the development's final plans will provide a detailed traffic control plan that will ensure continuous and safe access throughout the site construction phase of the project. Exh. 74, ¶ 25.

We will require a condition that the developer shall not restrict access of the abutters to their properties during construction, and that the development will not restrict the Schlueters' use of any existing easement they have.

F. Buffer between Project Site and Interveners' Properties

The Interveners and White Barn dispute whether the construction of the project will leave a sufficient buffer between their properties and the project. White Barn Lane ends in a cul-de-sac planted with trees. Exhs. 5, 71, 72; Tr. I, 99-100. The construction will require widening and paving of the road and removal of the trees in the cul-de-sac, thus altering the

views and buffering previously provided between the Interveners' property and the project site. Tr. I, 100-101; Exhs 5; 12; 71, ¶ 14. The Interveners argue that this change is poor site and building design in relation to the surroundings and does not preserve open spaces, in violation of G.L. c. 40B, § 20, and the Town Planning Board's Rules and Regulations which protect the safety, convenience and welfare of the Town's inhabitants and "ensuring ... in proper cases parks and open areas." Exh. 52, § 1.1.

White Barn argues that the Interveners have not shown that lack of buffering will affect their health and safety. White Barn will replace trees as part of construction. Its landscaping plan provides for a buffer of plantings along the northern and western boundaries of the project. Exh. 5, Sheet 9. In addition, the Board's decision requires White Barn to replace trees in this area. Exh. 2, Art. IX, ¶ 20. Given the developer's proposed mitigation, the Interveners have not demonstrated a valid local concern that outweighs the need for affordable housing with respect to buffering.

G. Construction Monitoring and Peer Review Fees

White Barn challenges the following construction related conditions as unsupported by local concerns. The Board has not addressed these conditions in its brief, but we will address them briefly in any case.

Article VI, ¶ 12, requires that the developer deposit $30,000 in escrow for peer review and construction monitoring prior to any ground disturbance. White Barn argues that this requirement is unreasonable and disproportionate to the cost for such services. The developer argues it should not be required to pay excessive peer review fees up front without any limitation on the scope of post-permit review and construction monitoring challenges. Pre-Hearing Order, § IV, ¶¶ 3-4. It argues that no local concern supports the Board's involvement in final plan approval.

This condition shall be MODIFIED to provide that White Barn may be assessed construction monitoring fees that shall not exceed the amount which could be assessed to a non-affordable housing subdivision or a project of a type and scale similar to the proposed housing, and may be required to place such fees in escrow to the extent consistent with construction of such similar unsubsidized housing.

Article IX (Site Development Construction Conditions), ¶ 19, requires as built plans prior to the use or occupancy of the final dwelling unit. White Barn argues that this

condition requires the submission of interim as-built plans prior to the issuance of building permits. However, that language does not appear in this provision. This condition is retained, but MODIFIED to remove the requirement of submission to the Board, and to require submission only to the appropriate town entity or staff or designated consultant in compliance with 760 CMR 56.05(10)(b) and town practice as is customary with regard to similar unsubsidized housing. See Section VI.B., *infra.*

Article IX (Site Development Construction Conditions), ¶ 20, addresses replacement of trees. The developer has indicated it is willing to replace trees and has not expressed the manner in which this condition seeks to require more than it had intended. This condition is RETAINED.

Article X, ¶ 11, addresses the terms of condominium documents for the project. This conditions shall be MODIFIED to conform to requirements applicable to unsubsidized housing.

VI. CONDITIONS CHALLENGED AS OUTSIDE BOARD'S AUTHORITY

Since the Board's power under Chapter 40B derives from, and is generally no greater than, that collectively possessed by other local boards, conditions relating to programmatic issues, such as project funding, regulatory and financial documents and sale of affordable units, as well as certain other requirements, may be reviewed by this Committee to determine whether they are beyond the power of a board to impose or otherwise intrude impermissibly into areas of direct programmatic concern to state or federal funding and regulatory authorities. The Committee has the authority to strike or modify conditions that fall outside G.L. c. 40B, § 21. *Zoning Board of Appeals of Amesbury v. Housing Appeals Committee, supra,* 457 Mass. 748, 762.

White Barn has designated numerous conditions as unlawfully extending beyond the Board's authority and otherwise violating Chapter 40B, §§ 20-23 and 760 CMR 56.00. Those challenges fall into several areas, discussed separately below.[18]

18. It should be noted that the Board's decision containing the conditions challenged as unlawful predated the Supreme Judicial Court's decision in *Amesbury, supra.*

A. Matters within Authority of Subsidizing Agency

In the Pre-Hearing Order, White Barn identified "any condition governing profit limitations, affordability, pricing of affordable units, construction of affordable units and any other matter that is the sole responsibility of MassHousing pursuant to 760 CMR § 56.04(8), specifically, Article VII, §§ 3, 4, 5; Article VIII; and Article X, §§ 18, 20, 33." Pre-Hearing Order, § IV, ¶ 4.a. In its brief, White Barn focuses on Article VII, ¶¶ 1-7 and Article X, ¶¶ 18, 21.[19] The Board did not address this issue in its brief. In *Amesbury,* the Court stated:

> ...although the board's condition-setting power under § 21 is not expressly confined to the four or five examples specifically mentioned in the section, that power is circumscribed in substance by those examples, and conditions imposed by the board must fit within the same kind or class of local concern or issue that the examples address. Accordingly, insofar as the ... conditions included requirements that went to matters such as, inter alia, project funding, regulatory documents, financial documents, and the timing of sale of affordable units in relation to market rate units, they were subject to challenge as ultra vires of the board's authority under § 21.

Id. at 757-758. Pursuant to the court's direction in *Amesbury,* we examine conditions that address matters within the province of the subsidizing agency carefully. However well-intentioned the conditions are, or however closely they may appear to follow the current requirements of the subsidizing agency, such conditions improperly encroach on the responsibility of the subsidizing agency and are therefore impermissible.

Article VII (Affordable Housing): The specified conditions in Article VII address in detail the marketing and lottery of affordable units, including any marketing plan, minority outreach, lottery process, buyer eligibility and pricing. Exh. 2. For the most part, the conditions in Article VII, even if generally consistent with subsidizing agency requirements, are beyond the authority of the Board. Since these issues will be handled by documents required by the subsidizing agency, the Board's effort to control the procedure and substantive requirements interferes with the role of the subsidizing agency.

Article VII, ¶ 1, which specifies the terms of affordability, imposes requirements that intrude on the subsidizing agency's authority regarding affordability. However, the Supreme

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19. Although some of these provisions were not specifically identified in the Pre-Hearing Order, the developer generally expressed concern in the Pre-Hearing Order and its brief regarding the Board's usurpation of the subsidizing agency's area of authority, such that these provisions may be considered. Moreover, the Committee has the authority to strike provisions in the comprehensive permit that impermissibly intrude on the subsidizing agency's authority.

Judicial Court recognized in *Zoning Board of Appeals of Wellesley v. Ardemore Apartments Ltd. Partnership,* 436 Mass. 811, 813 (2002) (if a comprehensive permit does not specify for how long housing units must remain below market, Chapter 40B requires an owner to maintain units as affordable for as long as housing is not in compliance with local zoning requirements) that requirements concerning the duration of affordability need not necessarily lie solely within the province of the subsidizing agency. See *Lexington Ridge Associates v. Lexington,* No. 90-13, slip op. at 23-25 (Mass. Housing Appeals Committee June 25, 1992) (approving condition requiring affordability in perpetuity). However, for these home ownership units, the subsidizing agency will provide for affordability in perpetuity in the required deed rider, and there is no need for such a requirement in this permit. See Article X, ¶ 21. Therefore, condition is STRUCK in its entirety. *Amesbury, supra* at 762.

Article VII, ¶ 2, Phasing-in of Affordable Units, imposes requirements for the timing of construction and certificates of occupancy of housing units. However, subsidizing agency procedures are in place to ensure that affordable units are constructed at the same time market-rate units are constructed. Determining how many units should be affordable (as well as ensuring their dispersal throughout the development) is a question similar to whether the affordable units should be sold or constructed coincident with development of market-rate units, and is within the sole province of the subsidizing agency. A condition to modify such subsidizing-agency policy or practices is beyond the authority of the Board. *Amesbury, supra* at 755-758, 764-765. See *Haskins Way, LLC v. Middleborough, supra,* No. 09-08, slip op. at 10. This condition is STRUCK in its entirety.

Article VII, ¶ 3, which sets prices for affordable units, intrudes impermissibly into areas of direct programmatic concern to the subsidizing agency, and is therefore STRUCK in its entirety. *Amesbury, supra.*

Article VII, ¶ 4, which specifies the requirements for a deed rider or affordable housing restriction intrudes impermissibly into areas of direct programmatic concern to the subsidizing agency, even though it is correct that affordable housing units must be sold subject to a recorded affordable housing restriction. In addition, this condition impermissibly requires that the Norwell Housing Authority approve written rules for the selection of buyers of affordable units. Such a condition is beyond the power of the Board to impose and this condition is therefore STRUCK in its entirety. *Amesbury, supra.*

Article VII, ¶ 5, which designates the Norwell Housing Authority as the monitoring agent for the project also intrudes impermissibly into areas of direct programmatic concern to the subsidizing agency, and is therefore STRUCK in its entirety. *Amesbury, supra.*

Article VII, ¶ 6, which governs resales and refinancing restrictions similarly intrudes impermissibly into areas of direct programmatic concern to the subsidizing agency, and is therefore STRUCK in its entirety. *Amesbury, supra.*

Article VII, ¶ 7, which requires all affordable units to be indistinguishable on the exterior from the market rate units, and requires construction specifications for the affordable units to be identical to the construction specifications of the market rate units, also improperly intrudes into the area of programmatic concern specifically left to the subsidizing agency which addresses these issues in detail. Therefore this article is STRUCK in its entirety. *Amesbury, supra.*

Article VIII (Marketing/Lottery): The conditions in this Article set out the marketing and lottery process in detail but state that they are intended not to override or supersede any applicable requirements of the subsidizing agency, DHCD fair marketing regulations, or requirements of other authorities with similar jurisdiction. The condition also provides that the Norwell Housing Authority will resolve disputes concerning income of qualifications, that it may direct the applicant to take additional steps, and requires that the deed rider contain all these provisions. These requirements are beyond the power of the Board to impose. *Amesbury, supra* at 755-758, 764-765. Article VIII is therefore STRUCK in its entirety as improperly reaching beyond the authority of the Board into the area of responsibility of the subsidizing agency. *Amesbury, supra.*

Article X (Additional Conditions), ¶¶ 12-13 and Article XI (Miscellaneous Legal Requirements), ¶ 3, address the ownership interests, fees and expenses of condominium units, as well as requirements for the Master Deed. These requirements encroach within the scope of programmatic oversight that will be provided by the subsidizing agency. These conditions are beyond the power of the Board to impose and they each are therefore STRUCK in their entirety. *Amesbury, supra.*

Article X, ¶ 18, addresses the profit limitation for the project and provides that the developer will pay for an independent auditor to review the subsidizing agency's audit of the project. It also requires White Barn to deposit $10,000 into the Board's consultant escrow

account to cover the Board's expenses for reviewing the audit. This condition similarly is beyond the Board's authority, and violates Chapter 40B, § 21. It is therefore STRUCK in its entirety.[20] *Amesbury, supra.*

Article X, § 21, limits the number of units, and contains miscellaneous requirements about affordability and the affordable units in relation to the market rate units. The requirements for the affordability of the affordable units and for treatment of the affordable units with respect to the market rate units impermissibly encroach on the area of responsibility of the subsidizing agency and are beyond the Board's authority. Therefore, the first sentence of this provision is RETAINED. All other portions of this provision are STRUCK. *Amesbury, supra.*

B. Conditions Subsequent Relating to Post-Permit Review

White Barn also challenges any condition that constitutes a "condition subsequent" or that otherwise requires it to return to the Board for further review and approval of its plans. Pre-Hearing Order, § IV, ¶ 4.b. White Barn challenges the following provisions: Article VI (General Conditions of Approval), introduction; Article IX (Construction and Submission Requirements); Article IX (Site Development Construction Conditions), ¶¶ 1, 2, 4,[21] 18 (a, b), 19, 21-29;[22] Article X, ¶¶ 1, 2, 6, 8, 10, 14, 18; Article XI, ¶ 1.

White Barn objects to these conditions to the extent they require review and approval by the Board in the post permit process. Exh. 58, ¶ 15-21. White Barn does not object if the review and approval of final plans is limited to review for consistency by the building inspector and a professional construction monitor. It requests that the Norwell building inspector should be the initial point of contact for all post permit review and construction monitoring, and that to the extent the building inspector does not have the expertise to perform certain of these functions, White Barn agrees to fund outside consultants to conduct

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20. As discussed *infra* in Section IV.A.1., White Barn also argues that these conditions also cause the project to be uneconomic because they will add to the uncertainty and consequent cost of the project, and that no local concern arises regarding matters within the subsidizing agency's jurisdiction.

21. White Barn also included in this category Article IX, ¶ 12(C), which does not relate to the role of the Board. Since White Barn made no specific argument regarding it, it is not addressed. We note that Mr. Sullivan indicated he was not opposed to this provision. Tr. II, 18.

22. The Board's comprehensive permit contains two sections designated as "IX," each with a different content heading. Exh. 2.

peer review and construction monitoring pursuant to a reasonable scope of services to be administered by the Norwell Building Department. White Barn brief, p. 35. The Board argues that during cross-examination Mr. Sullivan indicated he was not opposed to some of these conditions.[23]

Under Chapter 40B, the Board is to conduct a comprehensive hearing on the permit application. The statute does not permit the Board to conduct subsequent proceedings once the permit has been issued. The comprehensive permit is based upon preliminary plans; the final plans are subject to review and approval for consistency with the comprehensive permit by the person or entity that normally is responsible for conducting such a review for non-subsidized housing. 760 CMR 56.05(10)(b) states:

> A Comprehensive Permit ... shall be a master permit which shall subsume all local permits and approvals normally issued by Local Boards. Upon presentation of the Comprehensive Permit, subsequent more detailed plans (to the extent reasonably required relative to the local permit in question), and final approval from the Subsidizing Agency ... all Local Boards shall take all actions necessary, including but not limited to issuing all necessary permits, approvals, waivers, consents, and affirmative actions such as plan endorsements and requests for waivers from regional entities, after reviewing such plans only to insure that they are consistent with the Comprehensive Permit (including any Waivers), the final approval of the Subsidizing Agency, and applicable state and federal codes.

We agree that several provisions as written contain an improper "condition subsequent," inconsistent with § 56.05(10)(b) by requiring further review and approval by the Board, regardless of whether the Board is the local board or person charged with review of a particular submission. They are thus beyond the Board's authority. See *Attitash Views, LLC v. Amesbury*, No. 06-17, slip op. at 11-12 (Mass. Housing Appeals Committee Oct. 15, 2007), *aff'd*, 457 Mass. 748 (2010), and cases cited. Also see *Paragon Residential Properties, LLC v. Brookline,* No. 04-16, slip op. at 50-53 (Mass. Housing Appeals Committee Mar. 26, 2007). Certain other conditions properly provide for review by a local board or official with review by the Board to resolve disputes. See, e.g., Article VI, ¶ 1.

Accordingly the following conditions shall be modified:

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23. On cross examination, Mr. Sullivan acknowledged he did not object to the requirement of submissions to the building inspector, the Board's designated peer review engineer, counsel and other designated individuals or firms if the review was for consistency with the comprehensive permit. Tr. I, 198-200. See Article VI, ¶ 1.

Article VI (General Conditions), introductory paragraph, is MODIFIED to state in its entirety:

> Prior to commencement of construction the Applicant shall submit final construction plans to the appropriate town entity or staff or designated consultant in compliance with 760 CMR 56.05(10)(b) and town practice as is customary with regard to similar unsubsidized housing.

Article VI, ¶ 6: This condition requires provision of copies to the Board of most documents submitted to other state, federal or local authorities. This condition is MODIFIED to require the provision of copies to be made to the building department or other local board that would review and/or receive such a filing in connection with an unsubsidized housing project.

Article IX (Construction and Submission Requirements), final paragraph, provides that "the scope of the ZBA's review of the [construction management plan] shall be for completeness and for consistency with generally-accepted construction practices and for compliance with all the conditions of this Decision. The ZBA shall issue its decision on the CMP within 30 days after a complete submission from the Applicant." This provision impermissibly grants the Board the authority to conduct improper post permit review. This condition is MODIFIED to remove the requirement of review and approval by the Board and to require review and approval only by the appropriate town entity or staff or designated consultant in compliance with 760 CMR 56.05(10)(b) and town practice as is customary with regard to similar unsubsidized housing.

Article IX (Site Development Construction Conditions):

Paragraph 1: The first sentence is MODIFIED to delete "the Chair of the ZBA or his representative." However, since this initial pre-construction meeting is a public meeting, of course the Chair of the Board is welcome to attend.

Paragraphs 2, 4, 19: The conditions are MODIFIED to remove the requirement of submission to the Board, and to require submission only to the appropriate town entity or staff or designated consultant in compliance with 760 CMR 56.05(10)(b) and town practice as is customary with regard to similar unsubsidized housing.

Paragraph 18 (a, b): The condition is MODIFIED to remove the requirement of confirmation by the Board, and to require confirmation only by the

appropriate town entity or staff or designated consultant in compliance with 760 CMR 56.05(10)(b) and town practice as is customary with regard to similar unsubsidized housing.

Paragraph 21: The condition is MODIFIED to remove the requirement of submission to and approval by the Board and to require submission to and approval only by the appropriate town entity or staff or designated consultant in compliance with 760 CMR 56.05(10)(b) and town practice as is customary with regard to similar unsubsidized housing.

Paragraph 29: See Section VI.C.

Article X (Additional Conditions):

Paragraph 1: See Section VI.C.

Paragraph 2: See Section VI.C.

Paragraph 6: See Section VI.C.

Paragraph 8: The condition is MODIFIED to remove the requirement of acknowledgement or approval by the Board and to require acknowledgement or approval only by the appropriate town entity or staff or designated consultant in compliance with 760 CMR 56.05(10)(b) and town practice as is customary with regard to similar unsubsidized housing. This condition shall further be MODIFIED to provide that such conditions shall be treated as conditions precedent only to the extent such a condition precedent would apply to similar unsubsidized housing.

Paragraph 10: See Section VI.C.

Paragraph 14: The condition is MODIFIED to remove the requirement of acknowledgement or approval by the Board and to require acknowledgement or approval only by the appropriate town entity or staff or designated consultant in compliance with 760 CMR 56.05(10)(b) and town practice as is customary with regard to similar unsubsidized housing.

C. Other Conditions that Exceed Board's Authority

Article IX, ¶ 29, final paragraph: This condition impermissibly mischaracterizes the requirements for transfers of comprehensive permits under 760 CMR 56.05(12)(b) and is

therefore in violation of the regulation. Therefore the last sentence is STRUCK. See Article XI, ¶ 1 below.

Article X, ¶ 1: This condition mischaracterizes the requirements of 760 CMR 56.05(12) regarding finality and lapse of permits and is therefore in violation of the regulation. It also impermissibly requires completion of construction within three years of the issuance of the first building permit. This condition is STRUCK.

Article X, ¶ 2: This condition requires the developer to demonstrate evidence in the final approved project plans that it complies with DEP Stormwater Management Policy, DEP Guidelines and best management practices, and for the provision of an Operations and Maintenance Plan meeting Planning Board requirements. This condition is MODIFIED to provide:

> The Applicant shall submit to the appropriate town entity or staff or designated consultant in compliance with 760 CMR 56.05(10)(b) and town practice as is customary with regard to similar unsubsidized housing an operations and maintenance plan and evidence in the final approved project plans that it complies with applicable DEP Stormwater Management Policy, regulations and guidelines, best management practices and with the DEP Order of Conditions applicable to the off-site state resource areas.

Article X, ¶¶ 5, 6, and 10: These conditions mischaracterize the requirements of 760 CMR 56.05(11) regarding changes after issuance of a permit and are therefore in violation of the regulation. The conditions are STRUCK.

Article X, ¶ 7, which addresses the meaning of terms under G.L. c. 40A § 6 and the Norwell Zoning Bylaws is RETAINED.

Article XI (Miscellaneous Legal Requirements), ¶ 1: This condition impermissibly mischaracterizes the requirements for transfers of comprehensive permits under 760 CMR 56.05(12)(b). Therefore this condition is STRUCK and replaced with the following language:

> This comprehensive permit shall only be transferred or assigned in accordance with 760 CMR 56.05(12)(b).

VII. CONCLUSION AND ORDER

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

1. The amended comprehensive permit issued by the Board shall conform to the application submitted to the Board, as modified by White Barn during the Board's proceeding and the Board's original decision, as modified in this decision.

(a) The Board shall not include new, additional conditions.

(b) The developer is required to comply with all applicable local requirements that have not been waived.

(c) The Board shall take whatever steps are necessary to ensure that building permits and other permits are issued, without undue delay, upon presentation of construction plans, pursuant to 760 CMR 56.05(10)(b), that conform to the comprehensive permit and the Massachusetts Uniform Building Code.

(d) All Norwell town staff, officials, and boards shall promptly take whatever steps are necessary to permit construction of the proposed housing in conformity with the standard permitting practices applied to unsubsidized housing in Norwell.

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

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

(a) The development, consisting of 40 total units, including 10 affordable units, shall be constructed substantially as shown on plans entitled "Comprehensive Permit Plans, White Barn Village, Norwell, Massachusetts," dated June 12, 2007 (as revised) by McKenzie Engineering Group, Inc. (Exhibit 5, Sheets 1 through 15), and shall be subject to those conditions imposed in the Board's decision filed with the Norwell Town Clerk on May 19, 2008 (Exhibit 2), as modified by this decision.

(b) The developer shall submit final construction plans for all buildings, roadways, stormwater management system, and other infrastructure to Norwell town entities, staff or officials for final comprehensive permit review and approval pursuant to 760 CMR 56.05(10)(b).

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

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

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

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

(d) Design and construction shall be in compliance with the state Department of Environmental Protection stormwater management requirements.

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

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

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

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: July 18, 2011

Werner Lohe

Theodore M. Hess-Mahan

James G. Stockard, Jr.

Shelagh A. Ellman-Pearl, Presiding Officer