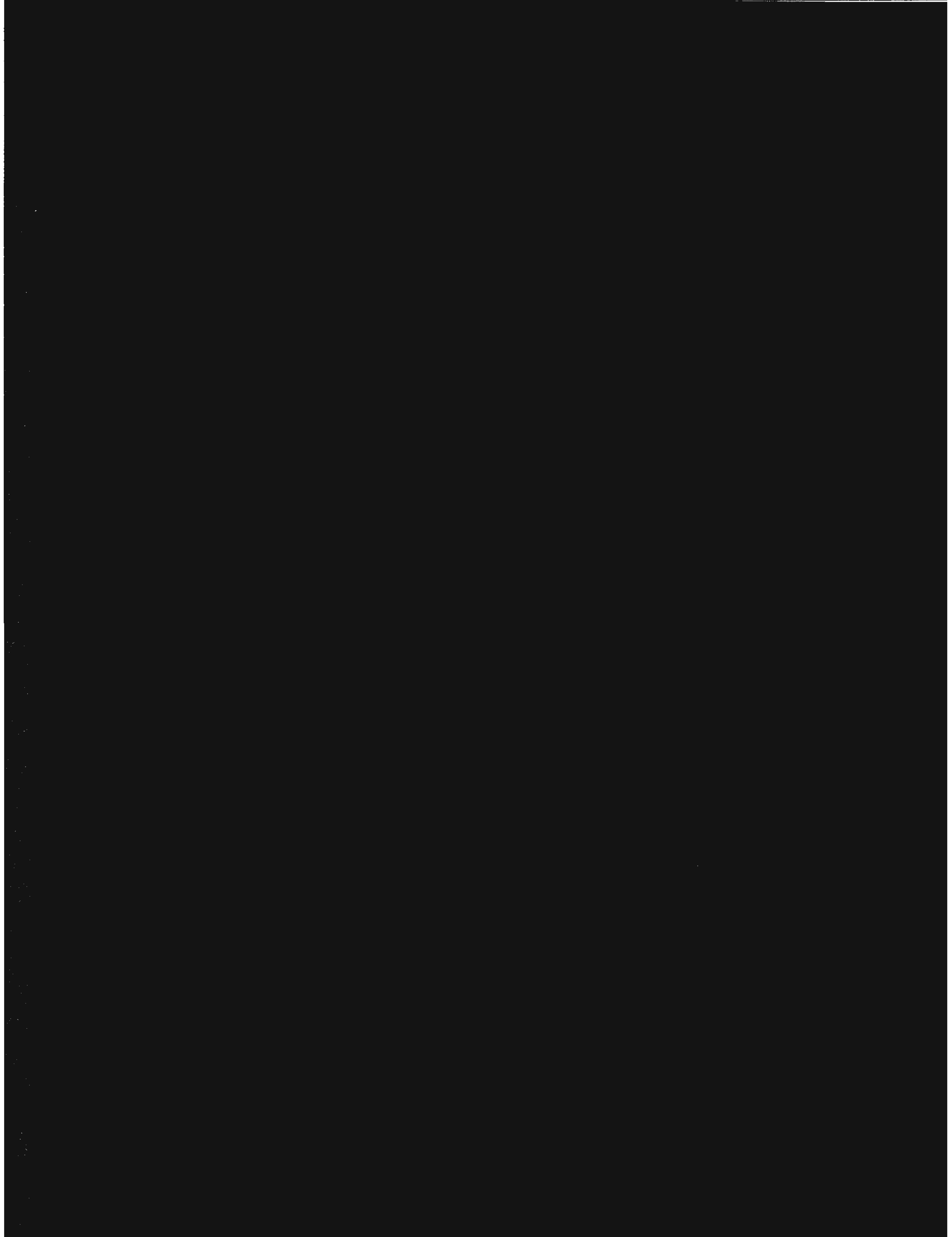

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Did the Land Court act properly in denying the Plaintiffs' Motion for Judgment on the Pleadings where the decision of the Housing Appeals Committee was supported by substantial evidence?

STATEMENT OF THE CASE AND PROCEDURAL SUMMARY

The City of Amesbury Zoning Board of Appeals (the "Board") brings this appeal from a decision of the Suffolk Superior Court denying the Board's Motion for Judgment on the Pleadings on an appeal brought by the Board pursuant to G. L. c. 30A, § 14 of a decision of the Housing Appeals Committee (the "HAC"). R.A. Vol. II, at 166-173. The HAC overturned a decision of the Board approving, with conditions, an application for a comprehensive permit filed by the defendant Attitash Views, LLC (the "Defendant"). R.A. Vol. 1, at 457-472. In its appeal to the HAC, the Defendant challenged numerous conditions imposed by the Board, claiming that said conditions rendered the project uneconomic, were beyond the Board's legal authority to impose, and/or were arbitrary and capricious. R.A. Vol. 1, at 2-8. The HAC issued a Summary Decision striking most of the conditions to which

the Defendant objected. R.A. Vol. 1, at 457-472. The Board filed a timely appeal with the Suffolk Superior Court pursuant to G.L. c. 30A, § 14. R.A. Vol. II, at 17-28. The Superior Court (Brassard, J.) upheld the decision of the HAC and denied the Board's Motion for Judgment on the Pleadings. R.A. Vol. II, at 166-173.

STATEMENT OF FACTS

On or about June 2, 2005, the Defendant filed with the Board an Application for a Comprehensive Permit (the "Application"). R.A. Vol. 1, at 458. On September 27, 2006, the Board filed its decision with the Amesbury Town Clerk approving the comprehensive permit, with ninety-four (94) conditions. R.A. Vol. 1, at 15. The Defendant was forced to appeal many of the ninety-four (94) conditions imposed by the Board as rendering the project uneconomic and/or unfundable. R.A. Vol. 1, at 1-40. On January 17, 2007, the Defendant filed a Motion for Summary Decision, with exhibits, challenging twenty-six separate conditions (or sub-sections of conditions) of the Board's decision. R.A. Vol. 1, at 59-61.

Among the exhibits submitted by the Defendant in its Motion for Summary Decision was a letter from MassHousing indicating that it would not provide the necessary funding for the project nor in the alternative grant the necessary Final Approval for the project unless certain conditions were modified or eliminated. R.A. Vol. 1, at 67-70. The Summary Decision materials also included a letter from the former Director of the Department of Housing and Community Development (the "DHCD") regarding the limited role zoning board's of appeal may have in the monitoring of comprehensive permit projects. R.A. Vol. 1, at 123-124. The basis of the Motion for Summary Decision was that many of the conditions imposed by the Board improperly infringed upon the role of the subsidizing agency in the comprehensive permit process, were beyond the authority of the Board to impose, and rendered the project uneconomic or incapable of obtaining funding. R.A. Vol. 1, at 87-103.

The Board filed its Opposition to the Defendant's Motion for Summary Decision on February 27, 2007. R.A. Vol. 1, at 202. On May 24, 2007, the Presiding Officer from the HAC submitted a letter

to Tina Brooks, Undersecretary of the DHCD and Thomas R. Gleason, Executive Director of MassHousing, soliciting their participation in the matter via the submittal of "what is in effect an *amicus* brief[.]" R.A. Vol.1, at 272. On June 14, 2007, Deborah Goddard, Chief Counsel for the DHCD responded to the HAC's request by submitting a Notice of Appearance to obtain Interested Person status. R.A. Vol. 1, at 273. On June 15, 2007, counsel for MassHousing submitted a letter to the HAC directing its attention to a brief submitted on a similar matter, and indicating that MassHousing rests on the arguments contained therein. R.A. Vol. 1, at 275-319. On July 3, 2007, the DHCD filed its Interested Person Memorandum of Law with the HAC. R.A. Vol. 1, at 321-325; 327-331.

On October 15, 2007, the HAC issued a Summary Decision granting, in part, the Defendant's Motion for Summary Decision, and removing the majority of the conditions to which the Defendant objected. R.A. Vol.1, at 457.

On November 16, 2007, the Board filed a Notice of Appeal of the HAC decision with the Suffolk Superior Court pursuant to G.L. c. 30A, § 14. R.A.

Vol. 2, at 17. The Board filed a Motion for Judgment on the Pleadings on July 10, 2008. R.A. Vol. 2 at 29-31. On January 7, 2009, the Suffolk Superior Court (Brassard, J.) held oral argument on the Board's Motion. R.A. Vol. 2, at 103. At the conclusion of the oral argument, Judge Brassard issued a decision from the bench denying the Board's Motion for Judgment on the Pleadings, and upholding the decision of the HAC. R.A. Vol. 2, at 102-103.

SUMMARY OF THE ARGUMENT

The HAC has the authority, pursuant to G.L. c. 40B, §§ 20-23 and the regulations promulgated thereunder, to review a comprehensive permit issued with conditions both when those conditions, in the aggregate, render the project uneconomic, and when individual conditions are arbitrary and capricious, illegal or beyond the authority of the board of appeals. (pp. 7-10). The decision of the HAC must be reviewed under the substantial deference standard contained in G.L. c. 30A. (pp. 10-11). When the decision of the HAC is supported by substantial evidence, it must be upheld. (pp. 11-13). By submitting the letter from MassHousing

unambiguously stating it will neither fund the project nor grant Final Approval for it, unless certain conditions of the Board's decision were eliminated or modified, the Defendant met its burden of proving the conditions rendered the project uneconomic pursuant to G.L. c. 40B, § 20 and 760 CMR 31.06(3). (pp. 13-15). The decision to remove improperly imposed conditions was consistent with the past practice of the HAC. (pp. 15-16). Additionally, the Defendant has met its burden of showing that MassHousing will not fund the project. (pp. 16-20).

The HAC acted properly in striking conditions improperly imposed by the Board, when such conditions were beyond the authority of the Board to impose. (pp. 20-27). The conditions to which the Defendant objected, and which the HAC struck or modified, were beyond the authority of the Board to impose, and improperly infringed upon the lawful jurisdiction of the subsidizing agency. (pp. 27-29). The HAC, and the Superior Court on appeal, properly struck or modified the improper and/or illegal conditions from the comprehensive permit. (pp. 29-50).

ARGUMENT

Statutory and Regulatory Background

Chapter 40B allows a qualified applicant to file a single application with the board of appeals of a municipality that has not met its minimum affordable housing obligation set forth in the statute. G.L. c. 40B, §§ 20, 21; Board of Appeals of Hanover v. Housing Appeals Comm., 363 Mass. 339, 366 (1973). Additionally, Chapter 40B prevents a local "board from relying on local requirements or regulations, including applicable zoning by-laws and ordinances which prevent the use of the site for low and moderate income housing, as the reason for the board's denial of the permit or its grant with uneconomic conditions." Id. at 367.

Upon appeal to the HAC of a denial of a comprehensive permit application, the issue before the HAC is "limited to the issue of whether . . . the decision of the board was reasonable and consistent with local needs." G.L. c. 40B, § 23. A condition is not "consistent with local needs" if it renders a proposed project uneconomic. G.L. c. 40B, § 22. A proposed condition is uneconomic if such condition (or conditions in the aggregate)

"makes it impossible for...a limited dividend organization to proceed and still realize a reasonable return in building or operating such housing within the limitations set by the subsidizing agency[.]" G.L. c. 40B, § 20. Furthermore, a condition or requirement will only be "consistent with local needs" if "such requirements are applied as equally as possible to both subsidized and unsubsidized housing." G.L. c. 40B, § 20.

Pursuant to its authority as the agency charged with the administration of Chapter 40B, the DHCD has promulgated regulations regarding the implementation of Chapter 40B. See, 760 CMR 30.00 and 31.00, *et. seq.*[1] According to the regulations, upon the approval of a comprehensive permit, with condition, the burden of proof rests upon the applicant to establish a *prima facie* case that "its proposal complies with federal or state statutes or regulations, or with generally recognized standards as to matters of health, safety, the environment,

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[1] Subsequent to the date of the HAC's decision, the DHCD promulgated new comprehensive permit regulations, contained at 760 CMR 56.00 *et. seq.* The new regulations are not applicable to this project.

design, open space, or other matters of local concern." See, 760 CMR 31.06(2). The applicant has the further burden of showing on an appeal of an approval with conditions, "the conditions imposed by the Board make it impossible to proceed in building or operating low or moderate income housing and still realize a reasonable return as defined by the applicable subsidizing agency[.]" 760 CMR 31.06(3)(b). The regulations go on to state that the applicant may show "alternatively, in either case, the conditions would result in a subsidizing agency refusal to fund." 760 CMR 31.06(3)(c). Additionally, "[i]n the case of either a denial or approval with conditions, the applicant may prove that local requirements or regulations have not been applied as equally as possible to subsidized and unsubsidized housing." 760 CMR 31.06(4).

Once the applicant has met its *prima facie* case, the burden shifts to the board to prove "first, that there is a valid health, safety, environmental, design, open space or other local concern which supports such denial, and then, that such concern outweighs the regional housing need."

760 CMR 31.06(6). If the board meets its burden of proof, the applicant may show in rebuttal that "preventative or corrective measures have been proposed which will mitigate the local concern, or that there is an alternative means of protecting local concerns which makes the project economic." 760 CMR 31.06(9).

Standard of Review

Pursuant to G. L. c. 40B, § 22, appeals of decisions of the HAC must be made "in accordance with the provisions of Chapter 30A." According to G. L. c. 30A, § 14(7), the decision of the administrative agency must be upheld unless it is:

> (a) In violation of constitutional provisions; or (b) In excess of the statutory authority or jurisdiction of the agency; or (c) Based upon an error of law; or (d) Made upon unlawful procedure; or (e) Unwarranted by facts found by the court on the record as submitted or as amplified under paragraph (6) of this section, in those instances where the court is constitutionally required to make independent findings of fact; or (f) Arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law."

See, Massachusetts Inst. of Tech. v. Department of Pub. Utils., 425 Mass. 856, 867-868 (1997) (stating that the court shall give deference to the decision

of the administrative agency and "shall uphold an agency's decision unless it is based on an error of law, unsupported by substantial evidence, unwarranted by facts found on the record as submitted, arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law."). See also, Zoning Bd. of Appeals of Wellesley v. Housing Appeals Comm., 385 Mass. 651, 657 (1982) ("[t]he decision of the HAC must be upheld if it is supported by substantial evidence. Substantial evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion.").

I. The Superior Court properly upheld the decision of the HAC where the HAC's decision was supported by substantial evidence

The appeal filed by the Defendant with the HAC was somewhat unique, in that it did not oppose any substantive conditions imposed by the Board regarding the design of the proposed project. R.A. Vol. 1, at 2-8. Instead, the Defendant's appeal focused upon a significant number of regulatory conditions which made it impossible to construct the project because of conflicts with other entities having regulatory authority over the

application. R.A. Vol. 1, at 2-8. The Defendant's burden of proof on summary decision pursuant to 760 CMR 30.07(4) was to show that "the record before the [HAC], together with the affidavits shows that there is no genuine issue at to any material fact and that the moving party is entitled to a decision in its favor as a matter of law[.]"

The Defendant met its summary decision burden of proof by providing unrebutted evidence that the conditions to which it objected were unreasonable, arbitrary and capricious, legally untenable and would render the project legally unable to proceed and/or uneconomic. The Board claims that the HAC does not have the authority to remove conditions issued by the Board that are illegal or beyond the scope of the Board's authority. The Board further claims that the HAC only possesses the authority, when reviewing a decision approving a comprehensive permit with conditions, to review whether or not such conditions render the project uneconomic pursuant to G.L. c. 40B, § 22. The Board's claim that the HAC does not have the authority to remove illegal or improper conditions is not consistent with the statute or regulations. Furthermore, the

Board ignores the unrebutted evidence submitted by the Defendant that clearly shows that the conditions imposed by the Board make it impossible for the project to proceed, a facial violation of G.L. c. 40B, § 20.

Because the HAC properly held that the Defendant met its burden of proof by showing that the conditions imposed by the Board were beyond the scope of the Board's authority to impose, and because the Defendant submitted unequivocal evidence that it could not proceed with the construction of the proposed housing unless such conditions were removed, the decision of the Superior Court upholding the HAC's decision was proper.

A. The Defendant sustained its burden of proof that the conditions imposed by the Board rendered the project "uneconomic'.

In support of its Motion for Summary Decision, the Defendant submitted to the HAC an affidavit of Theodore C. Regnante, Esq. which contained as an exhibit a letter dated January 16, 2007 from Phyllis Zinicola, as Director of Comprehensive Permit Programs at MassHousing, to attorney Regnante. R.A. Vol. 1, at 62-70. The letter from

Ms. Zinicola states unequivocally that if certain conditions from the Board's decision were not removed or modified, "we will be unable to issue Final Approval if funding were pursuant to the NEF Program and we will be unable to fund pursuant to the Housing Starts Program." R.A. Vol. 1, at 68. The Board submitted no evidence calling into question the statement that MassHousing will neither grant the necessary Final Approval or provide the necessary funding for the project unless the conditions it objected to were removed.[2]

The Board correctly notes that the Defendant's burden of proof at the HAC was to prove "that the conditions make the building or operation of the housing uneconomic." 760 CMR 31.06(3). As noted above, a condition is 'uneconomic' if it ""makes it impossible for...a limited dividend organization to proceed and still realize a reasonable return in building or operating such housing within the limitations set by the subsidizing agency[.]" G.L. c. 40B, § 20. The Board chooses to focus on the

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[2] The Board did file a Motion to Strike this exhibit, along with other exhibits, but the Motion was denied by the HAC. R.A. Vol. 1, at 203-205, 458.

reasonable return portion of the statute, but ignores the "impossible for...a limited dividend organization to proceed" language. The Defendant submitted clear and convincing evidence, from the Director of Comprehensive Permit Programs at MassHousing, that it will be impossible for the Defendant to proceed with the construction of the project unless the offending conditions are removed. R.A. Vol. 1, at 67-70. The Board provided no evidence to the contrary, therefore the HAC properly ruled that the Defendant met its summary decision burden.

B. The HAC has traditionally removed illegal conditions from comprehensive permit approvals

The Board claims that the HAC has a long-held position that it will not remove conditions unless such conditions can be shown to render the project uneconomic. The Board erroneously claims that this position was changed at the time of the HAC decision ultimately overturned in Board of Appeals of Woburn v. Housing Appeals Comm., 451 Mass. 581 (2008). However, as indicated in the HAC's decision, "[o]ver the years, it has been a matter of routine for this Committee not only to review

conditions imposed by local boards of appeals to ensure that they are consistent with the law, but also to remove from consideration matters improperly raised by the Board." R.A. Vol.1, at 461. The HAC cited a line of cases dating back to 1992, in support of its position. R.A. at 461. Accordingly, the Board's claim, while un-tethered to any substantive argument, misstates the HAC case law regarding elimination of illegal or improper conditions.[3]

C. The Defendant met its burden of proving MassHousing will not fund the project.

In support of its Motion for Summary Decision, the Defendant included as an exhibit the letter from Phyllis Zinicola plainly stating that MassHousing will neither fund the project nor issue Final Approval unless the conditions to which it objected were removed. The Board claims that this submittal was not sufficient to meet the requirements of 760 CMR 31.07(1)(f) which states that:

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[3] The purpose of this section of the Board's brief appears to be solely to establish the claim that the HAC ignored its own precedent in issuing its decision in the Woburn case that was ultimately overturned by the SJC. This claim, while ultimately irrelevant, is inconsistent with the HAC case law.

> "Proof that the subsidizing agency will not fund the project because of a condition imposed by the Board, that the applicant has requested a waiver of the subsidizing agency requirement that leads to this result, and that the subsidizing agency has denied a waiver, shall create a rebuttable presumption that the condition[s] of the Board make the project uneconomic."

The Board does not claim MassHousing's position regarding the waiver of the offending conditions is not clear; as if the letter from Ms. Zinicola were not sufficient evidence, the brief submitted by MassHousing on the related matter plainly states that the conditions in question were contrary to the programmatic role of MassHousing and would not be waived under any circumstance. R.A. Vol. 1, at 275-291. MassHousing plainly states that it will not agree to waive conditions "in conflict or inconsistent with the core programmatic approach to oversight obligations under the NEF Program" and that it is "unwilling to seek a DHCD waiver of any provision of the NEF Guidelines." R.A. Vol.1, at 279.[4]

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[4] The Board acknowledged in its brief that MassHousing identified conditions 23, 26, 28, 29, 38, 39, 43E, 43F, 43G and 43H as the conditions that must be eliminated or modified. Board's Brief at 14, FN 8.

The Board, seeking to elevate substance over form, argues not that the conditions in its decision won't result in MassHousing's refusal to fund the project (an unsupportable position), but that the Defendant has failed to comply with the mechanical requirements of the regulation because the Defendant purportedly did not make a specific request for MassHousing to waive its requirements. However, the HAC determined that the inquiry made by the Defendant to MassHousing, and the unequivocal response from MassHousing that it would neither fund the project nor grant Final Approval unless the offending conditions were removed, was sufficient to satisfy the regulation. R.A. Vol. 1, at 67-70; 461.[5] The decision of the HAC not to require the Defendant to specifically request a waiver of programmatic requirements once the subsidizing agency has stated it will not waive

[5] The HAC noted in its decision that MassHousing would not issue Final Approval not because the conditions would render the project uneconomic, but because they conflicted with the "core programmatic approach regarding [MassHousing's] oversight obligations." R.A. Vol.1, at 461. The HAC thereby implicitly acknowledged that in this circumstance a financial analysis is unnecessary, since inability to obtain Final Approval automatically renders a project uneconomic.

such requirements was proper, and is entitled to substantial deference by the court. Board of Appeals of Wellesley, 385 Mass. at 654; MCI Worldcom Communications, Inc., v. Department of Telecommunications and Energy, 442 Mass. 103, 112 (2004). Furthermore, the decision of the HAC "must be upheld if supported by 'such evidence as a reasonable mind might accept as adequate to support such a conclusion. Town of Middleborough v. Housing Appeals Comm., 449 Mass. 514, 527 (2007), quoting Hanover, at 376.

The Board's focus on whether or not the Defendant has met the mechanical requirements to create the rebuttable presumption contained in 760 CMR 31.07(1)(f) ignores the fact that the Defendant has submitted uncontroverted evidence that the conditions imposed by the Board make it impossible to construct the project. R.A. Vol. 1, at 67-70. Since the Board submitted no evidence to rebut the evidence submitted by the Defendant that MassHousing will neither fund the project nor grant Final Approval unless the offending conditions are eliminated, there is no issue of material fact in dispute regarding whether the project is

uneconomic. Thus, what is in issue is not a dispute over a rebuttable presumption that the project is uneconomic, but definitive, uncontroverted proof that the project cannot be built. The plain text of the statute states that a project is uneconomic if it "makes it impossible for...a limited dividend organization to proceed[.]" G.L. c. 40B, § 20. The HAC properly recognized that when the impossible to proceed portion of statute has been satisfied, there is no need to continue on and examine reasonable return. The Trial Court properly acknowledged this point by stating "nothing could be more uneconomic than trying to build a 40-unit condominium development without financing from a public agency with respect to low and moderate income housing." R.A. Vol. II, at 171. The decision of the Trial Court properly followed the express text of the statute in upholding the decision of the HAC.

II. The HAC properly struck illegal conditions imposed by the Board.

The Board claims that the HAC improperly struck from the Board's decision conditions which the Board claims were lawfully imposed. However,

this section of the Board's brief addresses not whether the conditions imposed by the Board were legal, but whether the HAC had the authority to review such conditions irrespective of their legality. It is clear from the statute and case law that the HAC possesses such authority.

According to G. L. c. 40B, § 23, the hearing before the HAC shall be limited "in the case of an approval of an application with conditions and requirements imposed, whether such conditions and requirements make the construction or operation of such housing uneconomic **and** whether they are consistent with local needs." (emphasis added). The definition of consistent with local needs requires review of whether such conditions are needed "to protect the health or safety of the occupants of the proposed housing or of the residents of the city or town, to promote better site and building design in relation to the surroundings, or to preserve open spaces[.]" G.L. c. 40B, § 20. Assuming, arguendo, that the Defendant had not proven its inability to obtain funding and Final Approval rendered the project uneconomic, the HAC still has the authority to

review whether or not conditions imposed by the Board are properly within its authority to impose.

The Board relies upon the Woburn case in support of its claim that, essentially, it can impose any condition upon a project so long as such condition (or conditions in the aggregate) do not render the project uneconomic. The Defendant acknowledges that the Woburn case states that unless there is a showing that the conditions imposed on a project render it uneconomic, "the board is not required either under the act or the department's regulations to demonstrate that its conditions are consistent with local needs." Board of Appeals of Woburn, at 591. However, the Woburn case dealt only with conditions which were within the clear authority of the Board to impose, no claim was ever raised in that case regarding unlawful conditions.

The dispute in this case is essentially a jurisdictional battle between the DHCD and MassHousing on one side, the Board on the other, and the Defendant unfortunately caught in the middle unable to proceed on its approved comprehensive permit. The jurisdictional issues

involved are whether the Board has the authority to instruct or limit the subsidizing agency regarding programmatic issues such as affordability restrictions, determinations of project eligibility, marketing of affordable units, calculation of profit limitation and selection of the monitoring agent. R.A. Vol. 1, at 458.

The HAC has (properly) determined that the Board does not have the authority to impose conditions regarding the above issues, stating that they are the exclusive jurisdiction of the subsidizing agency. R.A. Vol. 1, at 463, 465-467. However, the Board claims that "there is no statutory, regulatory, or judicial authority supporting a claim that MassHousing has exclusive authority with respect to project monitoring, cost certification, and other 40B components." Board's Brief, at 22.

The Board's claim that there is no authority for the position of the HAC is misplaced. First, the statute specifically states that reasonable return will be set "by the subsidizing agency[.]"

G.L. c. 40B, § 20.[6] Furthermore, in the Hanover case, the SJC specifically stated that "the question of standards of eligibility...is properly left to the appropriate state or federal agency." Board of Appeals of Hanover, 363 Mass. at 379. Thus, based upon both statutory and judicial authority, the HAC found that these programmatic issues are within the exclusive jurisdiction of the subsidizing agency. R.A. Vol. 1, at 461.

The Board claims that the decision of the HAC (and subsequently the Trial Court in upholding the HAC's decision) was improper because G.L. c. 40B, 21 "quite explicitly places no limitations on the scope of issues that the Board may address through appropriate conditions[.]" According to G.L. c. 40B, § 21, the Board:

> "shall have the same power to issue permits or approvals as any local board or official who would otherwise act with respect to such application, including but not limited to the power

[6] In fact, nowhere in either the statue of the regulations is there any mention of a profit limitation of twenty percent (20%). The Board's claims that it may substitute its determination regarding how a subsidizing agency administers what its sets as a reasonable rate of return for that of the agency essentially eliminates this exclusive authority reserved to the subsidizing agency by the statute.

> to attach to said permit or approval conditions and requirements with respect to height, site plan, size or shape, or building materials as are consistent with the terms of this section."

The Board places much emphasis on the common phraseology "including, but not limited to" to support its claim that the statute specifically places no limit on the Board's authority. However, in making this argument, the Board ignored the specific language in the same section limiting a board's power to act to that which any other local official would have. Furthermore, the Board ignores the limitation that the conditions imposed by it must be "consistent with the terms of this section." G.L. c. 40B, § 21. Accordingly, the Board's claim that Section 21 explicitly places no limitations on the scope of issues which it may address is simply inconsistent with the text of the statute.

When presented with the potential conditions which would under any circumstances be considered illegal (conditions which discriminate upon basis of race, religion or sexual orientation), the Board agrees that such conditions would be "void as

against public policy." Board's Brief, at 24. However, the Board suggests no means of eliminating such condition from the decision, if the HAC is not, as argued by the Board, authorized to review a decision and remove illegal conditions unless they render a project uneconomic.[7]

Because the HAC properly held that conditions imposed by the Board that infringe upon the proper jurisdiction of the subsidizing agency must be stricken, the decision of the Superior Court upholding the HAC's decision was proper.

III. The Superior Court properly upheld the HAC's order striking the illegal conditions imposed by the Board.

The Board cites the concern raised by the Superior Court that a local board cannot "so unnecessarily complicate the administration of a low and moderate income development as to make it unworkable." R.A. Vol. 2, at 169. The Board then

[7] In a footnote, the Board cites a number of cases where conditions have been found void as against public policy. Board's Brief at 25. However, the Board noticeably fails to note that each of the restrictions it cited was eliminated via a review and decision by a court of competent jurisdiction. Under the Board's view of the statute, there would be no agency or court with the jurisdiction to review such conditions if imposed upon a comprehensive permit (unless the permit was otherwise rendered uneconomic).

again relies upon the Woburn case to state that "absent a showing that conditions placed upon an approval render the project uneconomic, the committee is not empowered to review them under the denial standard." Board of Appeals of Woburn, 451 Mass. at 594. However, as noted above, the legality of the conditions imposed in the Woburn case was not challenged, the challenge was solely to the impact of such conditions upon the economic viability of the project. Id. at 585. Nothing within the Woburn decision suggests that the Board may, in violation of the specific language of the statute, impose upon the proper regulatory authority of the subsidizing agency. As noted previously, the subsidizing agency alone is charged with determining "reasonable return", which has been traditionally set at 20% for for-sale projects. G.L. c. 40B, § 20. The Board's claim that it may impose, over the objection of MassHousing, conditions which direct the subsidizing agency regarding issues pertaining to project monitoring, cost certification, affordability requirements, etc., is essentially a claim that the Board may set its own standards for reasonable return. Since both

the statute and the case law are clear that these issues are within the sole discretion of the subsidizing agency, the HAC decision striking these conditions was proper.

IV. The Conditions Imposed by the Board were unlawful and improper, and were properly stricken by the HAC.

The Defendant objected to a significant number of conditions imposed by the Board, and the HAC struck twenty-four (24) of these conditions (or sub-conditions). As noted by the Board in its Brief, the Superior Court grouped the conditions into two distinct areas, those identified by MassHousing as ones it would neither subsidize the project nor grant Final Approval unless they were removed (Conditions 23, 26, 28, 29, 38, 39, 43E, 43F, 43G, and 43H), and the fourteen (14) remaining conditions (Conditions 18, 19, 20, 40, 2, 43A, 43B, 43D, 43K, 43L, 43N, 43W and 59). The HAC properly struck all of these conditions, and the Superior Court properly upheld the decision of the HAC. R.A. Vol. 1, at 457-472, R.A. Vol. II, at 165-173.

The Board argues that even if the project had been found uneconomic due to refusal to fund or grant Final Approval by MassHousing, the remaining

conditions should not have been eliminated unless they too could be shown to have rendered the project uneconomic. Board's Brief at 30. The Board misinterprets the applicable regulations in arguing that the remaining conditions should not have been stricken even if the first group of conditions were properly found to have rendered the project uneconomic. Pursuant to 760 CMR 31.06(6), once the developer has submitted evidence meeting its burden of proof that the conditions in the aggregate render the project uneconomic, the burden shifts to the Board to show "first that there is a valid health, safety, environmental, design, open space, or other local concern which supports such conditions, and then, that such concern outweighs the regional housing need." The Applicant was not required to prove that each and every condition individually rendered the project uneconomic; once it proved the conditions in the aggregate rendered the project uneconomic, the burden shifted to the Board to provide evidence that said conditions were consistent with local needs. 760 CMR 31.06(6). The Board submitted no evidence at all in support of

its burden with regard to any of the remaining conditions.

A. The HAC properly struck Conditions 43F, 43G and 43H.

Conditions 43F, 43G, and 43H required the preparation of a Deed Rider, Monitoring Services Agreement and Regulatory Agreement "similar in form" to the documents required by MassHousing, but "revised in content as required for consistency" with the Board's decision. R.A. Vol. 1, at 24. The HAC properly struck these conditions as inconsistent with the proper authority of the subsidizing agency, and instead required the Deed Riders, Monitoring Services Agreement and Regulatory Agreement to be "in form and content as approved by MassHousing." R.A. Vol. 1, at 464. As previously noted, these conditions were among those which MassHousing would require to be eliminated or modified in order for it to either fund the project or grant Final Approval.[8] R.A. Vol. 1, at 67-70.

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[8] It is of utmost importance to note that the regulatory agreement is where the profit limitation (or reasonable return) is actually set. If the Board is allowed to substitute its own regulatory agreement over that required by MassHousing, it could theoretically set the limitation substantially lower than the 20% traditionally used

The HAC (rightfully) focused upon the proper role of the parties in the comprehensive permit process, ruling that "though the Board had primary responsibility for the local health, safety, and environmental concerns that are 'at the heart of any comprehensive permit review', other issues 'such as the financing arrangements, the profit projections, the developers qualifications, and marketability' are solely within the province of the subsidizing agency." R.A. Vol. 1, at 463. The HAC properly cites the decision of the Supreme Judicial Court in the seminal Board of Appeals of Hanover, 363 Mass. at 379, where the SJC stated with regard to limited dividend status that "the question of standards of eligibility . . . is properly left to the appropriate state or federal agency." The holding of the HAC is also consistent with the express language of the statute, which defines conditions that render a project "uneconomic" as ones which make it impossible "for

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by MassHousing (and other subsidizing agencies). Since the statute specifically designates the subsidizing agency as the entity which is authorized to determine reasonable rate of return, this attempt by the Board to state the terms of the regulatory agreement is in direct conflict with the statute. See, G.L. c. 40B, § 20.

a limited dividend organization to proceed and still realize a reasonable return in building or operating such housing within the limitations set by the subsidizing agency of government . . ." G. L. c. 40B, § 20. As noted above, this statutory language places the sole authority for regulating reasonable return for limited dividend organizations with the qualifying state or federal subsidizing agency. The statute provides no role whatsoever for boards of appeals in determining reasonable return, and, in fact (as discussed above), the statute expressly limits the authority of boards of appeals to only issue permits or approvals that any other local board would have otherwise had the authority to issue. Since no other local board has authority to regulate limited dividend issues, the Board's attempted usurpation of the authority of the subsidizing agency was properly rejected by the HAC.

The Board, in a footnote, disputes the propriety of the HAC's citation of the Hanover case, stating that "the reliance on Hanover is misplaced and the quotation is misleading." However, the HAC accurately and properly quoted the

Hanover case, and the HAC's conclusion that "issues 'such as the financing arrangements, the profit projections, the developer's qualifications, and marketability" are solely within the province of the subsidizing agency" is a natural interpretation of the ruling of the SJC in Hanover. R.A. Vol. 1, at 461. The Board claims that the next sentence in the Hanover decision "reaffirms the Board's authority to require regulatory compliance and completely undermines the HAC's position." However, the quoted language does no such thing, as it merely states that the Board may require "full disclosure of the [limited dividend] organization's legal status" and may require "compliance with pertinent statutory and regulatory requirements." Board of Appeals of Hanover, at 379. Nothing within the SJC's language is inconsistent with the ruling of the HAC that the Board may not impose conditions that conflict with the requirements imposed by the subsidizing agency with regard to limited dividend issues. Accordingly, the Superior Court's decision upholding the HAC's decision to strike conditions 43F, 43G and 43H was proper.

B. The HAC properly struck Conditions 23, 26 (partial), 28 and 29.

Conditions 23, 26, 28 and 29 were stricken by the HAC because they conflict with the Fannie Mae Affordable Housing Restriction required by MassHousing. R.A. Vol. 1, at 464-465. MassHousing stated specifically that Conditions 23, 26 (in part), 28 and 29 were not acceptable to MassHousing in its role as subsidizing agency and as Project Administrator. R.A. Vol. 1, at 67-70.

The Board again argues that the HAC lacked the authority to strike conditions that infringe upon the programmatic jurisdiction of the subsidizing agency. Additionally, the Board claims that "each of these conditions reflects the City's assessment of affordable housing needs, and each is supported by a valid local concern." However, the Board submitted no evidence to support its claim that these conditions were supportive to a valid local concern, and points to no such evidence in its Brief. Thus, the Board's sole defense to the decision of the HAC striking these conditions was that the HAC "lacks the authority to alter or delete these conditions." As shown above, this

claim is contrary to the statute and the case law, which clearly places such issues within the sole jurisdiction of the subsidizing agency.

C. The HAC properly struck Conditions 38, 39 and 40.

The HAC struck Condition 38 (which seeks to set the maximum allowable profit and to direct that excess profit be given to the town), Condition 39 (which seeks to set the acquisition value for the land subject to the comprehensive permit) and Condition 40 (which seeks to impose cost certification requirements upon the project).[9] R.A. Vol. 1 at 465-466.

As noted by the HAC regarding these issues, "[t]here is no area of policy analysis or project review that is more squarely within the expertise of MassHousing than the financial analysis of each

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[9] Condition 38 is yet another instance where the Board could have imposed a condition requiring a lower reasonable rate of return. That the Board did not, in this instance impose a rate of return lower than twenty percent (20%) does not change the fact that if it had, the Board is claiming that the HAC would have no power to remove such condition unless it rendered the project uneconomic. Of course, if reasonable return is defined down, the applicant will not be able to prove that such condition renders the project uneconomic. Thus the HAC must have the independent authority to strike such a condition.

project for which it provides funding." R.A. Vol. 1 at 465. The Board disagrees with the conclusion of the HAC, and points to investigations conducted by the Inspector General's office regarding oversight of Chapter 40B projects, in an attempt to establish that due to previous instances of lax oversight, the Board was justified in imposing conditions taking such oversight into its own hands. However, the administrative record contains no evidence of any project overseen by MassHousing, either under its Housing Starts Program or in its role as Project Administrator of New England Fund projects, in which MassHousing has been cited as having been lax in its oversight.

Since the Board has provided no evidence that suggests that MassHousing has ever been found to be lax in its oversight of any comprehensive permit project, the Board has provided no evidence of local concern in support of these conditions.

Conditions 38, 39 and 40 unlawfully impinge upon the regulatory authority of MassHousing, render the project uneconomic, provide an absolute barrier to commencing and financing the construction of the project, and are unlawful,

arbitrary and capricious, and are inconsistent with local needs. Accordingly, the decision of the HAC to strike these conditions was proper.

D. The HAC properly struck Condition 42 - Marketing

The HAC properly struck Condition 42 of the Board's decision, stating "marketing, particularly affirmative fair marketing, is also an area which state housing agencies have extensive experience and unique responsibility, and interference by the Board is unwarranted." R.A. Vol. 1, at 466. The Board offers no support for its inclusion of such a condition, relying instead upon its previously noted arguments regarding the authority of the Board to impose conditions.

The marketing of the affordable units is an issue wholly within the jurisdiction of the subsidizing agency, subject to the oversight responsibility of the DHCD, and the Board has no authority to insert itself into this process.[10] Furthermore, because the Board points to no local

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[10] In fact, the DHCD, in the Comprehensive Permit Guidelines that accompany the new regulations which went into effect on February 22, 2008, has reiterated the Affirmative Fair Housing Marketing responsibilities of Chapter 40B developments.

rule requiring marketing plans for non-subsidized housing, this condition violates the requirements of G. L. c. 40B, § 20, as the Board seeks to impose a requirement upon subsidized housing which is not applicable to unsubsidized housing in the town. As expressly provided in 760 CMR 31.06(4), rather than prove that a condition (or conditions) render a project uneconomic, an applicant may instead "prove that local requirements or regulations have not been applied as equally as possible to subsidized and unsubsidized housing." Since the Defendant has clearly met that burden, the HAC acted properly in striking Condition 42 - Marketing.[11] R.A. Vol. 1, at 466.

E. The HAC properly struck Condition 42 - Monitoring Agent

Condition 42 requires the Board's approval of the Monitoring Agent for the project. R.A. Vol. 1,

[11] Since the Board has placed such importance on the Woburn decision, it should be noted that the concurrence in this decision specifically stated that the HAC's decision would have been upheld if it had been based upon properly promulgated regulations. Board of Appeals of Woburn, at 598. Here, a validly promulgated regulatory provision exists that clearly provides authority to the HAC to review conditions that were not imposed equally upon subsidized and unsubsidized housing, irrespective of whether such condition[s] render the project uneconomic. 760 CMR 31.06(4).

at 22. The Monitoring Agent is responsible for overseeing the regulatory aspects of the project (subject to MassHousing's oversight), including the cost certification and the affordable housing restriction. The HAC again noted that these issues are within the sole jurisdiction of the subsidizing agency, and are outside of the authority of the Board to regulate. R.A. Vol. 1, at 466. Thus the HAC acted properly in striking this condition from the Board's decision. R.A. Vol. 1, at 466.

The Board once again cites the investigations of the Inspector General's office regarding the purported failure of monitoring agents to properly oversee comprehensive permit projects. However, the Board yet again fails to point out that none of the projects cited in the reports submitted by the Board were either funded or overseen by MassHousing. R.A. Vol. 1, at 233-250. In fact, all of the projects reviewed were so-called "Old NEF" projects over which MassHousing had no oversight authority whatsoever. R.A. Vol. 1, at 233-250. The lack of oversight of these "Old NEF" projects prompted the DHCD, well before the Inspector General's office ever investigated a single Chapter

40B project, to promulgate the regulations contained at 760 CMR 31.01(2)(g), which created the Project Administrator role granting oversight responsibility to MassHousing for so-called "New NEF" projects (the "Old NEF program having been previously eliminated).[12] There is no evidence in the record even remotely suggesting that MassHousing has not performed its oversight obligations with respect to monitoring agents both diligently and effectively. The Defendant's project will be subject to oversight by MassHousing, and approval of the monitoring agent is properly the function of MassHousing, not the Board. Accordingly, the HAC acted properly in striking Condition 42-Monitoring Agent.

[12] Essentially what the Board has done is submit the results of an investigation of a type of Chapter 40B project about which the DHCD had already known presented a problem, and which problem the DHCD had already adequately addressed. The fact that the Board was unable to present any evidence suggesting inadequate oversight of any Housing Starts project or any New NEF project over which MassHousing was serving as Project Administrator, strongly suggest that no such problem exists.

F. The HAC properly struck Condition 43E - Assignability

Condition 43E provides that the funding for the project must be provided by MassHousing pursuant to its Housing Starts Program. R.A. Vol. 1, at 466-467. Condition 43E further required that MassHousing must "assure compliance with the terms and conditions of this approval." R.A. Vol. 1, at 24. The Board expresses no local concern in support of the condition that funding must be provided by MassHousing through the Housing Starts Program. The Board's inability to articulate a local concern regarding this condition is not surprising, since, if the Defendant chooses to obtain funding through an NEF member bank (as it has indicated it intends to do), oversight for the project will still be conducted by MassHousing as the Project Administrator. 760 CMR 31.01(2)(g). There is no substantive difference in the oversight of the project if funding is from a source other than the Housing Starts Program. Since it serves no functional purpose, this condition is emblematic of the arbitrary and capricious nature of most of the Board's conditions (as will be discussed below).

Furthermore, since the town of Amesbury does not dictate how funding for unsubsidized housing must be provided, this condition also violates 760 CMR 31.06(4).

In addition to being arbitrary and capricious, this condition is well beyond the authority of the Board to impose. The Board has absolutely no authority to require that MassHousing assure compliance with the terms and conditions of the comprehensive permit. Such a requirement is beyond the Defendant's ability to control, and is unenforceable against MassHousing. Accordingly, since no local concern exists to support the imposition of Condition 43E, and since a local board has no right to require a state entity to "assure compliance" with its decision, the HAC acted properly in striking Condition 43E.

G. The HAC properly modified Conditions 18, 19 and 20.

The HAC properly modified Conditions 18, 19 and 20, which sought to require the Defendant's compliance with local rules and regulations which were in effect at the time of the Board's decision, rather than at the time of the Defendant's

comprehensive permit application to the Board. R.A. Vol. 1, at 19. The HAC modified these conditions, pursuant to the provisions of 760 CMR 31.07(1)(j), which states that "[t]he bylaws, regulations and other local requirements which apply in determining whether a comprehensive permit should be granted are those in effect on the date of the application to the board."

The Board claims in its Brief that "[n]othing in G.L. c. 40B requires, or provides authority for DHCD regulations or HAC decisions to 'trump' a condition imposed by a local board, where there is no evidence that the condition renders the project 'uneconomic' or that the condition is not 'consistent with local needs.'" Board's Brief at 43.

The authority of the DHCD to promulgate regulations governing consistency with local needs has been unequivocally addressed by the SJC in two recent cases, Zoning Bd. of Appeals of Canton v. Housing Appeals Comm., 451 Mass. 158 (2008) and Taylor v. Housing Appeals Comm., 451 Mass. 149 (2008). In both cases, the SJC found that a DHCD regulation which set the time for determining

whether a municipality had achieved its 10% minimum housing obligation set forth in Chapter 40B was a proper exercise of the DHCD's oversight of Chapter 40B. In Taylor, the SJC stated that the regulation adopted by the DHCD governing the time for measuring consistency with local needs was "consistent with the language of the act and is rationally related to its purpose." Taylor, at 151. Given the decision of the SJC in the Taylor case, it clearly follows that the DHCD also has the authority to determine at what point local rules are applied to a comprehensive permit application.

The Board chose not to address the Taylor and Canton cases, relying instead upon the Woburn case in support of its previously stated claim that the HAC cannot review a condition imposed by a board unless the applicant can first show the condition (or conditions) render the project uneconomic. However, the Board ignores the fact that the HAC based its decision upon a validly promulgated regulation, the validity of which has not been challenged by the Board. As noted in the Woburn case, "[i]n the absence of appropriate regulations, a local board remains free to impede the pace at

which affordable housing units urgently needed are constructed in the Commonwealth, even if a larger project would be entirely consistent with local needs." Board of Appeals of Woburn, at 598.

Because the HAC has relied upon a directly applicable regulation clearly stating that the local rules and regulations are to be determined as of the date of the comprehensive permit application, the decision of the HAC modifying conditions 18, 19, and 20 was proper.

H. The HAC properly struck and/or modified Conditions 43A, 43B, 43D, 43K, 43L, 43N, 43W and 59.

In its appeal to the HAC, the Defendant objected to a number of conditions imposed by the Board that require the Defendant to return to the Board for additional approvals. R.A. Vol. 1, at 97-98. Condition 43A requires a Final Review, including a Building Code review of the Final Plans. R.A. Vol. 1, at 23. Condition 43B requires the Board's approval for the Deed Restriction. R.A. Vol. 1, at 23. Condition 43D requires the approval of the Board and of the Board of Health and Conservation Commission of the roadway and utilities plans. R.A. Vol. 1, at 23-24. Condition

43K requires the Board's approval of final landscaping plans. R.A. Vol. 1, at 25. Condition 43L requires the Board to approve title documents. R.A. Vol. 1, at 25. Condition 43N requires additional landscaping approval (including, as noted by the HAC, "subsequent approval by an *ad hoc* tree preservation committee"). R.A. Vol. 1, at 25-26, and 468. Condition 43W requires roadway approval by the Amesbury Fire Chief. R.A. Vol. 1, at 27. Condition 59 requires a written "design theme" to be submitted to the Board for subsequent approval. R.A. Vol. 1, at 32.

As noted by the HAC, Conditions 43A, 43B, 43D, 43K, 43L, 43N, 43W and 59 are improper conditions subsequent, since they require "the developer to appear before the Board or other town official in the future for further review and approval." R.A. Vol. 1, at 467-469. In response, the Board reiterates its response from the previous section, stating "[n]othing in G.L. c. 40B requires, or provides authority for DHCD regulations or HAC decisions to 'trump' a condition imposed by a local board, where there is no evidence that the condition renders the project 'uneconomic' or that

the condition is not 'consistent with local needs.'" Board's Brief at 44.

Chapter 40B specifically states that requirements and regulations are not "consistent with local needs" if they are not applied equally to both subsidized and unsubsidized housing. G.L. c. 40B, § 20.[13] Not only does the Board's imposition of these conditions subsequent violate Chapter 40B, such conditions are also beyond the Board's authority to impose for non-comprehensive permit applications, since "a permit granting authority 'may not delegate to another board, or reserve to itself for future decision, the determination of an issue of substance[.]'" Barlow v. Planning Bd. of Wayland, 64 Mass. App. Ct. 314, 319 (2005); quoting Tebo v. Board of Appeals of Shrewsbury, 22 Mass. App. Ct. 618, 624 (1986).

[13] The Defendant does not, of course, concede that it has not proven that the conditions imposed by the Board render the project uneconomic. The Defendant has submitted ample evidence, via the letter from MassHousing refusing to fund and/or grant Final Approval, to shift the burden to the Board. R.A. Vol. 1, at 67-70. Once the burden shifted, the Board had the burden of proving its conditions were consistent with local needs. 760 CMR 31.06(7). The Board failed to put on any evidence to meet this burden.

Because the Board lacks the authority to impose conditions subsequent upon a comprehensive permit, the decision of the HAC to modify the Board's decision was proper.

I. <u>The HAC properly struck Condition 54</u>

Condition 54 requires that affordable units be "constructed and sold coincident with the development of market rate units." R.A. Vol. 1, at 31. The Defendant did not object to the reasonable condition that the affordable units be constructed coincident with the market-rate units, but did object to the condition requiring the affordable units to be sold at the same rate as market-rate units. R.A. Vol. 1, at 102. The HAC properly acted to strike the word "sold" from Condition 54, noting that the Board did not provide any evidence that such condition was supported by valid local concerns. R.A. Vol. 1, at 470. Because the Board failed to show that this condition was consistent with local concerns, the decision of the HAC modifying Condition 54 was proper.

J. <u>The HAC properly struck Condition 79</u>.

Condition 79 requires the Defendant to pay for the Board's legal fees for its construction

oversight. R.A. Vol. 1, at 35-36. This condition is contrary to well-established HAC precedent that a municipality may not require an applicant to pay for the legal fees for reviewing comprehensive permit projects. See, Pyburn Realty Tr. v. Board of Appeals of Lynnfield, No. 02-23, slip op. at 21-24 (Mass. Housing Appeals Comm., March 22, 2004). Furthermore, the Board has provided no evidence that it requires developers of unsubsidized housing to pay for the legal review of such developments, thus this condition constitutes unequal treatment in violation of G. L. c. 40B, § 20. The Board claims that "there is no basis in law" for the HAC's position that attorneys are not "outside consultants" and may not be paid from G. L. c. 44, § 53G accounts. Board's Brief at 48-49. However, the Board fails to provide any authority for its position that attorneys are "outside consultants" which may be paid from 53G accounts. Since the burden of proof rests with the Board to show that the HAC's decision was not in accordance with the law, and the Board has failed to meet that burden of proof, the decision of the HAC must be upheld.

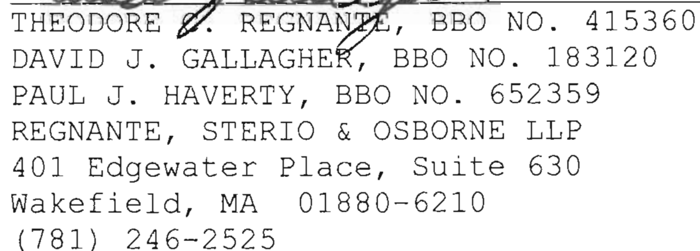
See, DSCI Corp. v. Department of Telecommunications and Energy, 449 Mass. 597, 603 (2007).

CONCLUSION

The decision of the Superior Court denying the Board's Motion for Judgment on the Pleadings and affirming the decision of the HAC was based upon substantial evidence, was made in accordance with applicable law, followed proper procedure and was neither arbitrary nor capricious. The Defendant respectfully requests that this Court uphold the decision of the Superior Court.

ATTITASH VIEWS, LLC

By its attorneys,



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CERTIFICATE PURSUANT TO MASS. R. APP. P. 16(k)

I hereby certify that the foregoing brief complies with the Rules of Appellate Procedure that pertain to the filing of briefs, including, but not limited to, Mass. R. App. P. 16(a)(6), Mass. R. App. P. 16(e), Mass. R. App. P. 16(f); Mass. R. App. P.16(h), Mass. R. App. P. 18, and Mass. R. App. P. 20.

DAVID J. GALLAGHER

CERTIFICATE OF SERVICE

I, David J. Gallagher, hereby certify under the penalties of perjury that I have this 20th day of August, 2009, caused two (2) copies of the foregoing document to be served on the attorneys for all parties, via first-class mail, postage prepaid, to:

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ADDENDUM

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COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

PYBURN REALTY TRUST

v.

LYNNFIELD ZONING BOARD OF APPEALS

No. 02-23

DECISION

March 22, 2004

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COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

JOHN B. WISE, Trustee of PYBURN REALTY TRUST, Appellant	
v.	No. 02-23
LYNNFIELD BOARD OF APPEALS, Appellee	

DECISION

This is an appeal by John B. Wise, Trustee of Pyburn Realty Trust, from a decision of the Lynnfield Zoning Board of Appeals, which granted a comprehensive permit subject to conditions, pursuant to G.L. c. 40B, §§ 20-23, for the construction of mixed-income affordable housing. According to Appellant, several of the conditions would make the project uneconomic and are not justified by local needs.

The conditions contested by Pyburn include requiring a decrease in the number of units from 20 to 16, requiring 6 instead of 5 affordable units, redesigning the project so that the buildings are on the opposite side of the property, requiring fire suppression sprinkler systems in all of the units, requiring looping of the water source, and requiring the market rate units to be owner occupied.

The Committee finds that the conditions imposed by the Board make the project uneconomic. However, the conditions requiring Appellant to include a sprinkler system and

looping of the water source are found to address valid health, safety, design, or other local concerns that outweigh the regional housing need. The Developer's proposal to move the buildings further away from the abutters' property lines effectively mitigates the local concern as to the overall design of the development. The Committee finds that there is nothing in the language of G.L. c. 44, § 53G, which supports a conclusion that "attorney fees" were intended to be included as "fees for the employment of outside consultants," and therefore does not have authority to require the payment of such fees.

I. PROCEDURAL HISTORY

On October 15, 2001, John B. Wise submitted an application to the Lynnfield Zoning Board of Appeals for a Comprehensive Permit pursuant to G.L. c. 40B, §§ 20-23, to build 20 attached townhouses in four buildings as part of a development to be known as Pyburn Mews. Of the 20 units, 5 would be affordable housing to be sold at 80% of the median income. The housing is to be financed under the Federal Home Loan Bank of Boston's New England Fund (NEF), in cooperation with its member bank, Century Bank. Exh. 3. After due notice, public hearings were held on November 6, and December 4, 2001, and continued on March 14, May 14, June 18, and July 9, 2002. On August 7, 2002, the Board approved the application for a comprehensive permit subject to 57 conditions. Exh. 3. Pyburn argues that several of the conditions would make the proposal uneconomic, and were not required by similar projects completed locally. Therefore, Appellant filed an appeal with the Housing Appeals Committee on August 27, 2002. In response, the Board asserts that the preventive or corrective measures are necessary to mitigate local concerns as they address fire safety and the limitations that the

dimensions of the property have on the layout of the structures and their interrelation with the surrounding neighborhood.

The Committee conducted a site visit, held a 5-day, *de novo* hearing, with witnesses sworn, full rights of cross examination, and a verbatim transcript. Witnesses for Pyburn included Peter Ogren, a licensed professional civil engineer and land surveyor; John B. Wise, Trustee of Pyburn Realty Trust; Patrick Sharkey, an architect; and Robert Engler, a housing and community development consultant. Witnesses for the Board included John C. Smith, chairman of the Lynnfield Zoning Board; David Comeau, a broker associate from Northrup Associates of Lynnfield; Brian Colpak, an abutter; Benjamin B. Smith, a professional civil engineer; Robert P. Mackendrick, assistant fire chief for the town of Lynnfield; Lynn Goonin Duncan, a landscape architect; and David Miller, a member of the Lynnfield Zoning Board. Following the presentation of evidence, counsel submitted post-hearing briefs.

A. Jurisdiction

To be eligible for a comprehensive permit and to maintain an appeal before the Housing Appeals Committee, three jurisdictional requirements must be met. The project must be fundable under an affordable housing program, the Applicant must be a limited dividend organization, and it must control the site. 760 CMR 31.01(1). The Board granted the permit based upon the Applicant having met these requirements. Exh. 3, pp. 4-5. In addition, the Board acknowledges that the Town of Lynnfield has not met any of the statutory minima defined in G.L. c. 40B, § 20 (e.g., that 10% of its housing stock is subsidized housing). 760 CMR 31.04; Exh. 3, p. 5.

B. Motion to Dismiss

On September 19, 2002, the Board filed a motion to dismiss arguing that failure to comply with a duly enacted "rule" of the Board for the conduct of its business pursuant to Chapter 40B and a "condition" of the decision granting the comprehensive permit forecloses Appellant's right to an appeal of that decision. The rule referred to by the Board is entitled "Application Review Fees" and was adopted on May 27, 1997. The rule basically states that the Board may charge an applicant a review fee for the reasonable costs incurred to engage outside consultants to assist with the review of an application or petition for a variance, special permit, or comprehensive permit. The rule also explains how funds received will be administered and allows an applicant the right to an appeal to the board of selectmen to exclude the use of any consultant that has a conflict of interest or does not meet the minimum required qualifications. Condition 57 of the Board's decision granting the current permit states that the applicant has ten days to pay all outstanding invoices for the consultants hired and that no building permit shall be issued if this condition is not satisfied. However, nothing in the rule or the condition states that failure to comply would result in the Appellant waiving its right to an appeal before this Committee.

In addition, the Committee directs the Board's attention to *Bloom v. City of Worcester*, 363 Mass. 136, 293 N.E. 2d 268 (1976). As stated in *Bloom*, a town may adopt a local *bylaw* to exercise any power or function which the general court has power to confer upon it, as long as it is *not inconsistent with* or repugnant to state law. *Id.* at 149-157. In the current instance, the basis of the Board's assertion of authority is even further removed, in that it is not based on a locally adopted bylaw but being found instead in an established rule and a condition in the

decision. Even if the Committee were to disregard this imperfection, the Board's adoption of a rule or regulation to preclude an applicant's right to an appeal as specifically authorized in G.L. c. 40B, § 22, would clearly be an exercise of power that is inconsistent with state law. For these reasons, the Committee denies the Board's motion to dismiss this appeal.

II. FACTUAL BACKGROUND

The project site consists of approximately 3.6 acres of land located at the end of Pyburn Road in the Residential-B (RB) District as defined by the Town of Lynnfield Zoning By-Law (bylaw). Exh. 4, 5 & 9. The RB District allows for a one family detached house on any lot. Exh. 4. Set backs within the RB District are 60 feet from the street center line, with a front yard depth of 40 feet, a side yard width of 20 feet, and a rear yard depth of 20 feet. Exh. 4. No building is allowed that exceeds three stories or 40 feet in height. Exh. 4. The bylaw does not contain regulations regarding multi-family housing. Exh. 4; Tr. II, 79, 133; Tr. III, 113; Tr. V, 26. The project as proposed would include the construction of 20 condominiums in 4 town-house style buildings. Exh. 3. Of the 20 units, 5 would be offered as affordable units. Exh. 3. Three of the affordable units would be 3-bedroom and two would be 2-bedroom. Exh. 3.

The property is presently unimproved and is bordered on the southerly side by Route 128 and on the westerly side by land owned by the City of Peabody and a 100-foot wide Massachusetts Electric Company easement. Exh. 9. The east side of the property is connected to the end of Pyburn Road by an existing road that is approximately 300 feet in length, which passes through a wetland area and over Hawkes Brook. Exh. 9. To the north are five single-family

homes that directly abut the property. Exh. 9. The project is to be served entirely by Town water connections and on-site septic. Exh. 9.

During the local hearing, the Board granted the comprehensive permit with conditions, of which several are argued by Appellant to make the project uneconomic. Amongst those raised by the parties as being in dispute are the reduction in the number of units to 16, increasing the number of affordable units to 6, changing the layout of the buildings so that they are on the south side of the property, requiring the market rate units be owner-occupied, limiting the maximum price of the affordable units to 70% of the median income, requiring residential sprinkler systems in each dwelling unit, requiring looping of the water system to maintain water pressure and for fire suppression, and requiring the payment of attorney fees for review of this project. Exh. 3.

III. APPROVAL WITH CONDITIONS

When a zoning board of appeals has granted a comprehensive permit subject to conditions, the burden is on the Appellant to first prove that the conditions "in aggregate" make construction and operation of the housing "uneconomic." 760 CMR 31.06(3); *Hastings Village, Inc. v. Wellesley Board of Appeals*, No. 95-05, slip op. at 10 (Mass. Housing Appeals Committee Jan. 8, 1998). Specifically, the developer must prove that "the conditions imposed...make it impossible to proceed... and still realize a reasonable return as defined by the applicable subsidizing agency...." 760 CMR 31.06(3)(b); see also G.L. c. 40B, § 20.

If the developer meets this burden, the burden then shifts to the Board to prove "first that there is a valid health, safety, environmental, design, open space, or other local concern which

supports the conditions, and then that such concern outweighs the regional housing need." 760 CMR 31.06(7). It is then the developer's burden to prove that there are preventive or corrective measures that have been proposed which will mitigate the local concern, or that there is an alternative means of protecting the local concern. 760 CMR 31.06(9).

A. Uneconomic

Appellant argues that the conditions decreasing the overall number of units while increasing the number of affordable units makes the project uneconomic. John B. Wise and Robert Engler offered credible testimony on the estimated costs and profit that would be expected for the original proposal of 20 units with 5 affordable units.[1] Tr. I, pp. 8-35; Tr. III, pp. 16-25; Exh. 14, 17. A report completed by an outside consultant for the Board found the financial projections for the project to be generally reasonable and within the normal industry range of costs. Exh. 16. The expected profit margin on the project was estimated to be approximately 10-11%. Tr. I, p. 115-116; Tr. III, p. 23-24. According to Mr. Engler's testimony, the profit margin is within the minimum amount of return that is typically considered financially feasible by the NEF. Tr. III, p. 23-24. In considering the economic feasibility of the project the Board proposal to decrease the overall number of units to 16 while increasing in the number of

1 The Board argues that these witnesses did not provide credible testimony, as they could not explain in detail the derivation of all of the figures on the proformas. Mr. Wise testified that the proformas were prepared under his direction and review, by his senior project manager. Tr. I, 108. A proforma, as presented in the initial phase of the comprehensive permit scheme, is a hypothetical financial statement showing the estimated costs and profits as based on the assumption that certain events will occur. As these are estimations, it is more important that the figures represented on the proforma are reasonable and in keeping with industry standards than it is to explain the step-by-step derivation of each and every figure.

affordable units to 6, Mr. Engler determined that the project would result in a loss to the Developer of approximately $227,225. Exh. 23, 24; Tr. III, p. 24.

The Board argues that each of the market rate homes could be sold for approximately $10,000 more than estimated by Appellant. Exh. 15. Taking that argument to be true, it would at most increase the overall profit for the 10 market rate units by $100,000, which would still result in a loss of $127,000 for the project as conditioned by the decision. The Board also argues that the Appellant's profit estimates for the sale of the affordable units are too low, but it did not provide any information that would allow the Committee to determine what additional profit would result by the increase in unit price. Furthermore, any difference derived from the use of higher estimates for the affordable units would be decreased by the Boards condition that restricts the sale of the affordable units to 70% of the median income. Based on the testimony and evidence provided, the Committee finds that Appellant has met its burden in demonstrating that the conditions make the project uneconomic.

B. Consistent with Local Needs

Since the Applicant has sustained its initial burden, the burden shifts to the Board to prove that there is a valid health, safety, environmental, or other local concern that supports each of the conditions imposed, and that such concern outweighs the regional need for housing. 760 CMR 31.06(7).

1. Design Concerns

Condition #2 includes two changes to the project as originally proposed by Appellant, specifically requiring a decrease in the number of buildings and a redesign of the building layout.

The layout change has been referred to as the "flip" and would require that the buildings abutting the northern property line be flipped around to the south side of the property.[2] Exh. 3. The Board argues compliance with this condition is necessary to decrease the negative impact the project will have on the adjacent neighborhood, improve the overall aesthetics of the design, to address problems with site density, and to allow for open space on the site. These concerns involve the related issues of density and intensity.

a. Intensity

According to the Board, it was necessary to condition the permit on a decrease in the number of units, as the project site is long and narrow and limited in use by the presence of wetlands and rock ledge, resulting in insufficient developable space to allow for adequate privacy and for useable open space for the future residents of the development. Tr. V, 20. In response, Appellant argues that the project is well within the range of densities that have been previously approved by the Committee, being no greater than 7.9 units per acre. Tr. II, 83. As the Board's arguments do not relate to density, but rather to the intensity of uses on the site, Appellant's response does not appropriately address the issue raised. Although closely related to density, intensity involves the functioning of the housing on the particular site, which includes questions such as the adequacy of open space and recreational space, the functionality of common areas, the provisions made for the privacy of the tenants, the accessibility of the site to and from other parts of the neighborhood, and related factors which look to whether the number of units are too large not for the surrounding area but for the particular parcel of land. See *Hastings Village, Inc. v. Wellesley*, No. 95-05, slip op. at 26 (Mass. Housing Appeals Committee Jan. 8, 1998).

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2 In addition, the condition requires that the footprints of the "flipped" buildings are no closer than 100

The site plan shows four closely spaced buildings facing on paved roadway and paved parking.[3] Exh. 19. There are two long narrow landscaped areas on the north and south side of the developed area, which appear to be no greater than 20 feet in width, and separate the development from Route 128 and the Fletcher Street neighbors. Exh. 19. The plan also shows two areas that are readily identifiable as open space on the east and west ends of the development. Exh. 19. The larger of the two areas is located on the east side of the project area and is predominately wetlands. Exh. 19. The other is a much smaller triangular area at the extreme western side of the project site and is shown as landscaped.[4] Exh. 19. The site is surrounded on three sides by private property and on the remaining side by Route 128. There is no immediate open space or recreational area that are accessible from the site and the nearest public playing field is almost a mile away. Tr. I, 80.

Despite the visual appearance of the plan, Appellant argues that the Board's expert witness agreed that at least 30.8 % of the property is definable as "usable open area." Exh. 36; Tr. IV, 52-53. The Board asserts that although there are areas of "open space" on the site, it is not the kind of open space that is suitable for the development of tot lots or for any form of active recreation and is therefore not really "usable."[5] Tr. V, 16-21. The Board also asserts that the

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feet from the northern property line.

3 Appellant has requested relief from the 20-foot side yard setback and the 150-foot lot frontage as required by § 10.8 of the Town of Lynnfield Zoning Bylaw. Exh. 3. The buildings as shown on the site plan are approximately 35 feet apart. Exh. 19; Tr. II, 89. The rear setbacks meet the minimum amount of distance for compliance with the local bylaw for single residence zoning, with the buildings being approximately 20 feet from the property line. Tr. II, 79.

4 This is a triangular area of land that measures 140 feet long by 100 feet at the base. The plan shows trees in the center of the triangle. Exh. 19. Moving the tree plantings to the outer edges and leaving the central portion open could provide an area for some types of outdoor recreation.

5 Some passive recreation would be possible, however, the project plans do not indicate any areas for either form of recreation.

proposed development contains excessive amounts of parking with unnecessary expanses of pavement that would add to run-off on the site and these areas could be put to better use for recreation or open space. Tr. V, 14. Although the units are designed to have decks in the rear, the Board argues that the decks would not afford privacy and would be too small in area to provide for any form of active recreation use because they are right up against the property line. Tr. V, 14. Additionally, there is no private usable space in front of the units. Tr. V, 14. According to the testimony provided by Appellant's architect, one of the groups expected to be interested in the purchase of units within the development are young married couples looking for "starter homes" that will allow them to have room to start a family. Tr. II, 92.

Although greatly restricted by the shape of the project area, the design of the proposed housing does not appear to make appropriate use of the space available. The buildings are situated too closely to the abutting properties and the amount of parking proposed is greater than necessary. However, it is also apparent that the space problem can be adequately addressed without having to require the proposed "flip" design. Appellant has suggested measures that would increase the amount of open space and provide for privacy.

The developer's civil engineer testified that there was room to move the buildings "pretty much consistently 10 feet or so" further away from the abutters in a southerly direction. Tr. V, 143-144. In addition, the design shows approximately 35 to 60 feet of space on the parking lot side of the buildings marked A, C, and D. Exh. 19. By eliminating the parking spaces[6] in front of Unit A and shortening the parking space available in front of the garages on the units directly

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[6] Condition #3 in the Board's decision limits the number of parking spaces to 48. Exh. 3. Appellant has not appealed that condition and is willing to adhere to a decrease in the number of parking spaces from the original proposal of 61. Appellant's Post-Hearing Brief, p. 16.

south of the abutters' property lines, it would be possible to move these three buildings at least an additional 10 feet to the south. These two modifications should double the distance from the buildings to the abutters' property lines from 20 to 40 feet or more.

The site plan does not show any landscaping along the property line with the abutters. Exh. 2. The Appellant admitted that no provision for landscaping along that line had been proposed. Tr. II, 104; Exh. 2. However, Appellant has not appealed Condition #5, which states "the landscaping shall, to the maximum extent feasible, provide screening between the neighboring dwellings and this project." Exh. 3. Compliance with this condition is necessary and will provide screening and privacy for the occupants of the proposed housing. The plants selected should be at least 8 to 10 feet in height and should be of a type to provide screening throughout the year.[7]

The Committee finds that the increase in the depth of the backyards and the vegetative screening will adequately ameliorate the Town's concerns as to intensity of uses on site.

b. Density

According to the Board, it was necessary to decrease the number of buildings and to change their layout, as they are too close to each other and to the abutters' property lines. As mentioned above, no landscaped screening or buffering has been proposed by the Developer to provide for privacy or to soften the visual impact on the abutters. The distance from the decks adjacent to three of the proposed buildings is approximately 13 feet from the property lines of the Fletcher Road abutters. Tr. V, 27; Tr. IV, 54. The Board contends that moving the structures further away would result in less of a visual impact on abutting property owners and would help

to mitigate the noise coming from Highway 128 for the Fletcher Road neighbors. In addition, the Board argues the "linear design" of the three northerly buildings is aesthetically unpleasing as it creates a wall-like or barracks-like effect. The Board argues that this will result in the Fletcher Road neighbors being faced with a wall of buildings, all of which will be longer and taller than their own. Tr. II, 68-69 Tr. V, 14. These are issues related to the density of the proposed development in relation to the surrounding area. "An analysis of density involves determining the impact of the development on factors ranging from municipal services and traffic to esthetics and overall livability of the surrounding neighborhood." See *Hastings Village*, No. 95-05, slip op. at 20.

In response, Appellant points out that from all indications on site, it would not be possible to flip the buildings to the opposite side of the project area as there are outcroppings of rock that would make placement of the septic on the south side of the project implausible, if not impossible. Tr. V, 144. In addition, the proposed change would result in the sewage system being on the uphill side of the site and if the parking lot were to be placed over it, then the lots would have a grade above the buildings. Tr. V, 144-145. The Board's expert witness also testified that outcrops are present in the area in which the septic would have to be located in order to comply with the condition requiring the buildings to be moved to the other side of the site. Tr. IV, 80. He could not state with any certainty that flipping the design was a viable option and testified that at the very least additional percolation tests would be necessary to determine if relocating the septic was possible. Tr. IV, 77. Furthermore, as part of the Board's peer review,

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White pine and arborvitae are two examples of plants that could provide appropriate vegetative screening.

no recommendation had been made by this witness to flip or reduced the number of buildings. Tr. IV, 84.

As a general matter, it is certainly permissible for a board to impose a condition that limits the size of a development when necessitated by the site or the surrounding area. *Hastings Village*, No. 95-05, slip op. at 10, n.4, aff'd No. 00-P-245 (Mass.App. Ct. Apr. 25, 2002). Here the Board has argued that due to the limited amount of space between the buildings and the neighboring properties, the reduction in the number of buildings and flipping the location of the buildings addresses a real concern brought about by the size and shape of the site.

However, a "board must review the proposal submitted to it, and may not redesign the project from scratch." *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 24 (Mass. Housing Appeals Committee June 25, 1992). There is no doubt that the Board has attempted to redesign the project from scratch in this instance.[8] In addition to reducing the number of buildings, the Board has changed the entire layout by proposing a flipping of the buildings to the opposite side of the property, despite information provided by the Developer that locating the septic system on the opposite side of the project area does not appear to be a feasible option.[9]

Appellant's proposed changes to deal with the intensity problems of the site design are also applicable to resolve the Board's concerns as to density. Moving the buildings further away from the private property lines and adding a vegetative screen along those lines, will increase the privacy for the neighbors and decrease the visual impact that the buildings will have on the

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8 The Board's engineer testified that for Appellant to comply with this condition, it would be required to re-engineer the site at a cost of at least $30,000 and $2,500 for the additional percolation tests. Tr. IV, 99.

surrounding neighborhood. Although the Board argues that the linear design of the buildings is esthetically unpleasing, it is comparable to the alignment of single family homes in this area. Tr. V, 128. The civil engineer also testified that slightly turning or angling the buildings could provide additional distance between the buildings and the abutting properties. This would also assist in addressing the linear design issue of the three northerly units. Tr. V, 142.

2. Looping of the Water System

Appellant requests flexibility to choose its preferred connection to the local water supply and has proposed three scenarios for connection. According to testimony for Appellant, the first possibility for water connection is at Pyburn Road. Tr. I, 64. This line comes down Salem Street through a ten-inch line and then to a six-inch line that is very old and probably tuberculated that runs up Pyburn Road. Tr. I, 62. The six-inch line is an old, poor piping system that provided flows of approximately 300 gallons a minute. Tr. I, 62-63. Appellant's civil engineer testified "there really was not a good water supply in that location." Tr. I, 64. In addition, the engineer stated that the flows on Pyburn Road were below what he "would want to see in any area for fire protection." Tr. I, 66. This option would require upgrading 1,100 feet of line from Salem Street and up Pyburn Road to the site with an eight-inch line. Tr. I, 66-67. The cost of the improvement is estimated to be approximately $110,000. Tr. I, 67. However, the Committee finds that the testimony provided by both parties strongly indicates that even with upgrades to the

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9 The Developer provided evidence that it is more likely than not, that the south side of the project area contains rock ledges that would make placement of the septic on that side of the project area impractical. Tr. I, 50-51; Tr. III, 111; Tr. IV, 80, 84, 103; Tr. V, 144-145.

pipe, a connection to Pyburn Road would create an unacceptable fire suppression problem that would outweigh the need for housing at this site.

The other options bring water in off of Fletcher Road, which has an eight-inch line that loops back to the line on Salem Street. Tr. I, 64. Bringing water in from Fletcher Road would require less than two hundred feet of line and would necessitate emplacement of a portion of that line through an existing easement. Tr. I, 68. The flows on Fletcher Road are in excess of 1,000 gallons a minute. Tr. I, 65; Tr. IV, 140. The water source along Fletcher Road is currently a loop. Tr. IV, 142. There are two options proposed for bringing in water from the line at Fletcher Road, which are either by looping a line from Fletcher Road over to Pyburn Road or by coming in off of Fletcher Road and dead-ending the piping in the development. Tr. I, 65. Looping from Fletcher Road to Pyburn Road, would provide for greater water quality and would significantly increase the flow of water for firefighting within the proposed development and for the adjoining neighbors on Pyburn Road. Tr. I, 65-66, 69-70; Tr. IV, 141. Although the exact cost of these two options was not provided, it was estimated that the looping option would be roughly $12,000 more than the dead end option. Tr. I, 73-75.

Of the three options, Appellant would prefer the option that would be the least expensive, specifically a dead end line coming in off of Fletcher Road. Tr. I, 134. However, Appellant expressed a concern that since another party[10] is questioning the use of the easement from Fletcher Road, it would like to maintain an option to upgrade the line from Salem Street through Pyburn Road. Tr. I, 134-135.

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10 The party was un-named, but is not a party in the current case.

In response, the Board offered the testimony of Assistant Fire Chief Robert Mackendrick that 1000 gallons a minute at 20 PSI is considered by the National Fire Professional Association and the Insurance Service Officer, as the minimal water pressure advisable for firefighting within *single family* residential areas.[11] Tr. IV, 114. Therefore, the water supply off of Pyburn Road would be far below the minimum residential requirements for fire suppression. Tr. IV, 138. This witness also testified that proposal for connecting from the system at Pyburn Road would not be adequate to meet these minimum requirements for fire suppression. Tr. IV, 139-140. Furthermore, adding 20 additional units within the development would further degrade the flow rates of the water system along Pyburn Road. Tr. IV, 147.

According to Mr. Mackendrick's testimony, flow rates from Fletcher Road are adequate for firefighting needs, however, a dead end line could result in both flow and maintenance problems. Tr. IV, 140. If a break in the pipe should occur at or along that line, there would be no water for domestic use or for fire suppression. Tr. IV, 142. Although the flow rates along Pyburn Road would not be adequate for fire suppression, looping to that road would still provide some water for domestic use and for fire suppression if water became unavailable from Fletcher Road. Tr. IV, 144.

The evidence provided by the parties supports a finding by the Committee that it is necessary to loop the water system from Fletcher Road to Pyburn Road, as it is the only option that adequately addresses the Town's legitimate local concern that there be at least a limited amount of water supply for fire safety and domestic use should a break in the line occur on the Fletcher Road side of the development. 760 CMR 31.06(7).

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11 According to Mr. Mackendrick, the necessary water pressure for multifamily units is usually

3. **Sprinkler System**

Condition # 33 of the Board's decision requires a residential sprinkler system in each dwelling unit. Appellant argues that the cost of such a system for 20 units would be between $45,000 to $90,000, and is not required by the state building code. Tr. I, 134; Tr. II, 88; Appellant's Post-Hearing Brief at 11. According to Appellant, the state building code does not make sprinkler systems a requirement in multiple single-family dwellings as long as a two-hour rated firewall separation assembly is provided and each unit has an independent means of egress. Tr. II, 84-86; Exh. 21. In addition, the witness testified that there is adequate separation between the buildings that would not require the installation of sprinkler systems. Tr. II, 89.

The Board argues that even if the state building code does not require a sprinkler system, it is still necessary in the current instance. According to the assistant fire chief, the recommendations made by the local fire department were based on an understanding that sprinklers would be installed in all of the units. Tr. IV, 115-133. Without the sprinkler system the fire department would have required better access around the buildings, the water pressure to be based on the size of the structures and the separation of the buildings, the turning circle to be larger, and possibly even greater distance between the buildings. Tr. IV, 115, 123-124, 132.

The Town has made the inclusion of sprinkler systems a primary focus regarding any new construction of any size. Tr. IV, 120-121. The assistant fire chief testified that the Town has required sprinkler systems in the other 40B project in town, the elderly housing developments, the schools, all commercial buildings over 7,500 square feet, the proposed senior center, and two residential homes that had less than adequate driveway access. Tr. IV, 121-123.

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determined by the size of the structure and separation of the buildings. Tr. IV, 115.

In addition this witness testified that requiring a residential sprinkler system in the current development could significantly assist in fire suppression where response time for a fire occurring at night or on the weekends could be as long as eight minutes. Tr. IV, 129. Nationally accepted figures indicate that 97.2 percent of all fires are extinguished by properly installed sprinkler systems. Tr. IV, 130. Residential sprinklers provide for safety of both the occupants and firefighters in case of a fire, as well as saving lives and property. Tr. IV, 122, 128. The assistant fire chief also testified that although the alternative fire safety requirement calls for the installation of two-hour firewalls, it does not mean that such walls will keep the fire out for two hours. Tr. IV, 127. The fire could spread across the roof, under the wall, or through walls damaged by inappropriate installation of cable, wiring, plumbing or door. Tr. IV, 127.

Even if the project as proposed meets the stated minimal requirements of the building code, the structures within this development are in aggregate very closely spaced together, increasing the danger that fire could spread from one structure to another. Only one access into the development has been proposed, and fire suppression vehicles will have limited access to the sides and no access to the back of the buildings. The local fire department reviewed the proposal with the understanding that sprinklers would be included in the units and allowed the project to be held to a lesser standard than it normally would have in reviewing such a project without a sprinkler system. Therefore, the Committee finds that based on the facts as presented in the current case, the condition requiring sprinkler systems in the units addresses valid fire safety concerns and those concerns outweighs the regional housing need.

4. Remaining Conditions (Conditions 2, 23, 25, 29 & Snow removal)

As the Applicant met its burden of proving that the conditions required by the decision of the Board would make the project uneconomic, the burden of proof was on the Board to show that there is a valid health, safety, environmental, or other local concern that supports compliance with the portion of Condition # 2 that would require an increase in the number of affordable units and Condition 23 requiring all of the units to be owner occupied. As the Board has failed to meet this burden, these conditions will be stricken given there is no evidence to support the Board's position.[12] See 760 CMR 31.06(6); see also *Hanover v. Housing Appeals Committee*, 363 Mass. 339, 365, 294 N.E.2d 393, 413 (1973); *Hamilton Housing Authority v. Hamilton*, No. 86-21, slip op. at 11 (Mass. Housing Appeals Committee, Dec. 15, 1998). Appellant did not pursue its initial objections regarding wetlands protection (Condition 29) and the condition requiring snow removal in all instances. According to testimony for the Board, the snow removal condition was intended to mean that snow should be plowed, shoveled or otherwise cleared and not that it was necessary to remove the snow from the premises. Tr. III, 138. Condition 25(c) assures a "window" of affordability, in that the maximum sale price for affordable units shall be the maximum purchase price for which a household with an income that is 70% of the median family income for the applicable Standard Metropolitan Statistical Area can qualify, based on standard bank underwriting practices. According to Mr, Engler, who testified on behalf of the Appellant, that although it is permissible to go to 80%, almost every town he has worked with asks for 70% and that is now the standard practice as it allows for a window of affordability. Tr. III, 29.

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12 Further, by not briefing these issues or presenting evidence, it is arguable that the Board waived these claims. See *An-Co, Inc. v. Havehrill Board of Appeals*, No. 90-11, slip op. at 19 (Mass. Housing Appeals Committee June 28, 1994) (citing *Lois v. Berlin*, 338 Mass. 10, 13-14 (1958)).

Furthermore, Mr. Engler used the 70% median income in reviewing the developer's proforma. Tr. III, 28-29. Appellant did not pursue this issue in its post-hearing brief and therefore it is deemed waived.

5. Payment for Outside Consultants – Payment of Attorney Fees.

G.L. c. 44, § 53G, states "Notwithstanding the provisions of section fifty-three, any city or town that provides by rules promulgated under . . . section 21 of chapter 40B . . . for the imposition of reasonable fees for the employment of outside consultants may deposit such fees in a special account." According to the Board, they have promulgated such rules for the collection of reasonable fees for outside consultants. The Board also notes that the collection of such fees is in keeping with the Housing Appeals Committee's Model Local Rules, Section 4.00, entitled "Review of Applications and Review Fee."

However, the Board's adaptation of this rule goes further than the Model Rules by listing the types of services for which the Board may require payment by the comprehensive permit applicant. According to Rule 14, promulgated by the Town of Lynnfield and entitled "Application Review Fees (Variance, Special Permit, Comprehensive Permit)," the Board may require that the applicant pay a "review fee" consisting of reasonable costs incurred by the Board for the employment of outside consultants to assist in the review of a comprehensive permit application. In addition, Rule 14 states "in hiring outside consultants, the Board may engage engineers, planners, *lawyers*, urban designers or other appropriate professionals who can assist

the Board in analyzing a project to ensure compliance with all relevant laws, ordinances/bylaws, and regulations."[13]

Appellant does not challenge the engineering fees of $9,010.94, the financial consultant fee of $2,362.50, or the fee for the traffic study consultant amounting to $1,500. Appellant, however, states that it believes that there is "some manifest unfairness and unreasonableness" in requiring an applicant to pay for the Town's attorney fees,[14] which in the current instance amount to $19,423.50.[15] The Committee agrees.[16] Nothing in G.L. c. 44, § 53G, G.L. c. 40B, § 21, or Section 4.00 of the Model Local Rules, suggests that the payments of attorney fees is considered as part of "outside consultant review fees."

As noted above, G.L. c. 44, § 53G, implies that "rules promulgated under section 21 of chapter 40B," can include the imposition of reasonable fees for the employment of outside

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13 As written, Rule 14 is problematic. Stating that the purpose of the consultants is to ensure compliance with local ordinances, bylaws and regulations, is not in keeping with the purpose of G.L. c. 40B, which provides relief from local zoning bylaws and practices which might inhibit construction of low and moderate income housing. See *Zoning Bd. of Appeals of Greenfield v. HAC*, 15 Mass. App. Ct. 553, 555, 446 N.E.2d 748, 750 (1983). Furthermore, the applicant does not have to *ensure compliance* with state law as part of the initial comprehensive permit application process. Even on appeal the "applicant need only provide sufficient evidence to prove that the project as proposed, "complies generally" with state and federal requirements or other generally recognized design standards." See *Transformations, Inc. v. Townsend*, No. 02-14, slip op. at 11 (Mass. Housing Appeals Committee Jan. 26, 2004).

14 Requiring the applicant to pay for the Town's legal counsel raises professional ethical considerations, specifically involving conflict of interest, and such an arrangement could routinely run afoul of Rule 1.7 and 1.8(f) of the Massachusetts Rules of Professional Conduct.

15 The Board cannot succeed in arguing that the attorney acted as an "expert on 40B" and not as an attorney. Ms. Netter was listed as counsel for the Town during the proceedings before the Committee and all of the invoices submitted for verification of her services stated, "for legal services rendered."

16 This Committee has previously stated that we have grave doubts about the enforceability of any unilaterally imposed requirement that attempts to shift the town's legal expenses to the applicant, and we do not approve of it. See *John Owens v. Belmont*, No. 89-21, slip op. at 16 (Mass. Housing Appeals Committee June 25, 1992).

consultants.[17] "Statutory language is the primary source of legislative intent." *National Lumber Co. v. United Cas. and Sur. Ins. Co.*, Inc. 440 Mass. 723, 727, 802 N.E.2d 82, 86 (2004). Therefore, it is necessary to look at the wording of section 21, to establish whether or not attorney fees could be included as a fee for outside consultants. There are two portions of section 21 that are relevant. Section 21 states, "the board of appeals shall adopt rules, not inconsistent with the purpose of this chapter, for the conduct of its business pursuant to this chapter and shall file a copy of said rules with the city or town clerk." The Board argues that it has met this requirement in promulgating Rule 14. However, a rule that requires the applicant to pay the majority of the cost for the initial application review by paying for both the technical review and legal services, could be cost prohibitive to the development of low and moderate income housing. Requiring an applicant to pay the town's attorney costs could deter some developers from applying for a comprehensive permit, particularly for projects involving a small number of units. The Committee therefore finds requiring the developer to pay the Town's attorney fees to be inconsistent with the purpose of the statute.

In addition, it seems reasonable to review the statute for guidance as to what is meant by the word "consultant." There is one direct reference to consultants in Section 21, "the board of appeals, in making its decision on said application, shall take into consideration the recommendations of the local boards and *shall have the authority to use the testimony of*

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17 However the Court in *TBI, Inc. v. Board of Health of North Andover*, 431 Mass. 9, 18, 725 N.E.2d 188, 195 (2000), indicated that the language of "General Laws c. 44, s. 53G, does not authorize a local board to assess a supplemental fee, but only authorizes a local board to deposit any fees collected in a special account." The Court further stated that G. L. c. 111, s. 31 (as mentioned in 53G), does not authorize a board of health to assess technical assistance fees, since that statute only authorized that board to adopt reasonable health regulations. However, G. L. c. 40B, s. 21, allows a board of appeals to adopt rules for the conduct of its business that is not inconsistent with the purpose of the statute.

consultants." Although this language may not be immediately enlightening, read in conjunction with the entire section, and specifically the preceding sentence which discusses height, site plans, size or shape, and building materials, it is clear that consultant as used in the statute are to provide "testimony" or "explanation" on technical aspects of the proposed project to assist the board in making an informed decision as to whether the project is consistent with local needs.

That consultants are to provide *technical* verification of the proposed project is further supported by the provisions of § 53G, requiring that the consultant meet the minimum qualifications of "an educational degree in or related to the field at issue or three or more years of practice in the field at issue or a related field," which is also reflected in Section 4.00 of the Model Local Rules. Section 53G does not require professional licensing, certification, or admission to the bar. "Where the language is plain and unambiguous, it is conclusive of the Legislative purpose." Id. The Committee cannot "read into the statute a provision which the Legislature did not see fit to put there, whether the omission came from inadvertence or of set purpose." Id.

The Committee finds nothing in the language of either statute to support the Board's conclusion that a reasonable consultant fee can be interpreted so broadly as to include payment of the Town's attorney fees. Consequently, the Committee finds that G.L. c. 44, § 53G, and G.L. c. 40B, § 21, allows the Town to collect $12,873.44 from Appellant for reasonable consultant fees for technical review of the original application, but not for reimbursement of attorney fees.[18]

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18 Massachusetts generally follows the "American Rule" which denies recovery of attorney's fees absent a contract or statute to the contrary. See *Preferred Mut. Ins. Co. v. Gamache*, 426 Mass. 93, 95, 686 N.E.2d 989, 991 (1997). "Underlying the rule that the prevailing litigant is not entitled to collect his attorney's fees from the loser is the principle that no person should be penalized for defending or prosecuting a lawsuit." See *Police Comm. of Boston v. Harris*, 429 Mass. 14, 705 N.E.2d 1126 (1999).

IV. CONCLUSION

Based upon review of the entire record and upon the findings of fact and discussion above, the Housing Appeals Committee affirms the granting of a comprehensive permit by the Lynnfield Board of Appeals. Further, the Committee concludes, pursuant to G. L. c. 40B, §23, that certain of the conditions imposed in the Board's decision render the project uneconomic and are not consistent with local needs. The Board is directed to issue an amended comprehensive permit as provided in the text of this decision and the conditions below.

1. The comprehensive permit shall conform to the application submitted to the Board except as provided in this decision, and specifically Conditions 2, 23, 25, and 45 of the comprehensive permit (Exhibit 3) shall be deleted. Condition 57 is limited to consultant fees and excludes attorney fees.

2. The development shall be constructed as shown on Sharkey Design Company Site Plan for "Pyburn Mews" dated May 8, 2001 (Exhibit 19). The permit will be for the construction of 20 units of mixed-income affordable housing, with 5 units being sold as affordable units according to the guidelines established by the funding agency and in compliance with HUD guidelines.

3. At least an additional 20 (twenty) feet of space must be added to the north side of buildings marked A, C, and D, on the Pyburn Mews Site Plan. This should increase the distance from the buildings to the abutters' property lines from 20 to 40 feet or more. The buildings

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Moreover, as mentioned in the text above, the threat of having to pay an opponent's costs might unjustly deter those of limited resources from prosecuting or defending suits. See *Fleishmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967). If the Town is asserting that the bylaw constitutes a written agreement or contract between the Town and the Developer, then it will be necessary for the Town to bring a suit for breach of that contract in another forum, as it would be outside of the authority of this agency to adjudicate.

should be slightly turned or angled to provide additional distance between the buildings and the abutting properties and to address the linear design of buildings marked A, C, D. Landscaping shall, to the maximum extent feasible, provide screening between the neighboring dwellings and this project.

4. The water system is to be a looped system from Fletcher Road over to Pyburn Road.

5. Residential sprinkler systems are to be installed in each dwelling unit and shall be subject to review and approval by the Lynnfield Fire Chief.

6. All plans will have the required stamps affixed to them.

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

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

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

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

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

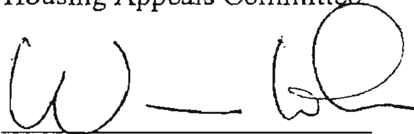
(d) No construction shall commence until detailed construction plans and specifications have been reviewed and have received final approval from the subsidizing agency, until such agency has granted or approved construction financing, and until subsidy funding for the project has been committed.

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

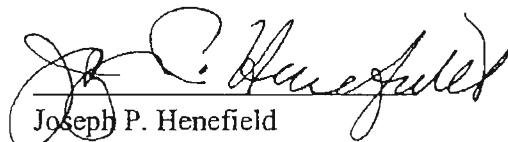
This decision may be reviewed in accordance with the provisions of G. L. c. 40B, §22 and G. L. c. 30A by instituting an action in the Superior Court within 30 days of receipt of the decision.

Housing Appeals Committee

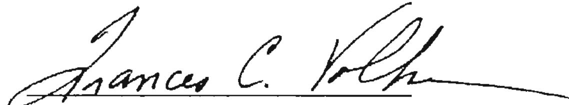
Date: March 22, 2004



Werner Lohe, Chairman



Joseph P. Henefield



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