COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

HASKINS WAY, LLC

v.

MIDDLEBOROUGH ZONING BOARD OF APPEALS

No. 09-08

DECISION

March 28, 2011

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COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

HASKINS WAY, LLC, Appellant	)	
v.	)	No. 09-08
MIDDLEBOROUGH ZONING BOARD OF APPEALS, Appellee	)	

DECISION

I. PROCEDURAL HISTORY

In a decision filed with the Middleborough Town Clerk on July 14, 2009, the Middleborough Zoning Board of Appeals granted a comprehensive permit pursuant to G.L. c. 40B, §§ 20-21 to Haskins Way, LLC to construct 97 affordable single-family homes on a 158-acre site on Spruce Street in Middleborough. Exh. 2. Construction of the housing development, to be known as Crimson Estates, is proposed to be financed under the Housing Starts Program of Massachusetts Housing Finance Agency (MassHousing) or the New England Fund of the Federal Home Loan Bank of Boston. In its 34-page decision, the Board imposed 98 conditions (some with numerous subparts), and on July 23, 2009, the developer appealed to this Committee, asserting that certain of those conditions rendered the project uneconomic, were requirements that the town does not impose on market-rate housing, or were otherwise beyond the Board's authority. The Committee's presiding officer convened a Pre-Hearing Conference, and pursuant to 760 CMR 56.06(7)(d)(3) the parties negotiated a Pre-Hearing Order, which was issued January 5, 2010. A *de novo* hearing was then conducted, including prefiled

testimony from five witnesses, a site visit, two days of evidentiary sessions to permit cross-examination of witnesses, and filing of post-hearing briefs. A Proposed Decision was issued pursuant to 760 CMR 56.06(7)(3)(9) on March 1, 2011.

The Board raises two preliminary grounds for dismissal of the appeal—that the town of Middleborough was certified as having achieved safe harbor status by producing affordable housing under its Housing Production Plan pursuant to 760 CMR 56.03(1) and that the developer failed to establish site control—and also argues that in its case in chief the developer failed to establish that the conditions imposed by the Board render the development uneconomic. We find for the developer on all issues.

II. FACTUAL OVERVIEW

The development site and the housing proposed on it raise few of the concerns often associated with affordable housing projects proposed under Chapter 40B. Single-family homes will be built in a "Residence-Rural" zoning district on lots that are generally one half-acre (or somewhat smaller) in a wooded upland area that overlooks and is in common ownership with family-owned commercial cranberry bogs.[1] See Exh. 3-2; 24, ¶¶ 1-2. The housing will be served by town water, underground electric and

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1. Exhibit 5 shows the proposal placed before this Committee in its *de novo* hearing; it is entitled "Crimson Estates, Comprehensive Permit Plan for H.A.C. Appeal," dated September 9, 2009 (with no revisions), by Outback Engineering, Inc. It is a very slightly revised version of Exhibit 4, which is the proposal that the Board approved. Tr. I, 84-89. Among other minor changes are two in the number of housing units.

First, though the original proposal was for 30 affordable units and much of the testimony during the hearing assumed that there would be 24 affordable units, the current plan in fact, by designating the appropriate lots with the letter "A," shows 25 affordable units—one more than the 25% of total units required under the Comprehensive Permit Law. Exh. 5. This change is not substantial pursuant to 760 CMR 56.07(4) since the number of affordable units in the development is not a local concern, but rather is a matter of policy to be addressed by subsidizing agency as a matter of state affordable housing law and policy. See *Zoning Board of Appeals of Amesbury v. Housing Appeals Committee*, 457 Mass. 748 (2010).

Second, Exhibit 5 shows 96 house lots, a reduction from the 97 originally approved. Cf. Exh. 4, 5. The total number of units is generally a local concern, and of particular interest if the developer proposes more units and greater density than permitted under existing zoning. But since the number of units has been reduced in this case, that change also reduces any local concern, and therefore is insubstantial. See 760 CMR 56.07(4)(d)(1); *Rising Tide Development, LLC v. Sherborn*, No. 03-24, slip op. at 32 (Mass. Housing Appeals Committee Mar. 27, 2006); *Cloverleaf Apartments, LLC v. Natick*, No. 01-21, slip op. at 5 (Mass. Housing Appeals Committee Dec. 23, 2002, *aff'd* No. 03-0321 (Suffolk Super. Ct. Jan. 28, 2005).

communication utilities, and on-site septic systems. *Id.* There will be a single entrance roadway, with emergency access provided near the cranberry bogs. See Exh. 5. The lack of controversy surrounding the physical features of this proposal is reflected not only in the Board's having granted a comprehensive permit, but more explicitly in the Board's having presented no specific environmental, design, open-space, or similar local concerns either in evidence or in its brief.

II. PRELIMINARY ISSUES

A. Planned Production Safe Harbor

The Board first argues that this appeal must be dismissed because Middleborough has achieved "safe harbor" status under the "planned production" regulations of Department of Housing and Community Development (DHCD). Board's Brief, pp. 7-9 (filed Jan. 18. 2011); also see Motion to Dismiss (filed Jul. 20, 2010). That is, pursuant to 760 CMR 56.03(4), a municipality may submit a Housing Production Plan to DHCD for review and approval. After approval, if the town meets certain "planned production" goals, it may apply to DHCD for certification that it is in compliance with the Housing Production Plan. 760 CMR 56.03(4)(f). If, as of the date that a developer applied to the Board for a comprehensive permit, the town is so certified, then this Committee is obligated as a matter of law to uphold the Board's subsequent decision with regard to that application. 760 CMR 56.03(1)(b); *In the Matter of Hanover and Hanover Woods, LLC*, No. 10-02, slip op. at 5 (Mass. Housing Appeals Committee Interlocutory Decision Regarding Safe Harbor Jun. 21, 2010); *In the Matter of Dighton and Stoney Ridge Estates, LLC*, No. 10-01 (Mass. Housing Appeals Committee Interlocutory Decision Regarding Safe Harbor Jun. 21, 2010).

The only evidence that the Board offers in support of its position is the Project Eligibility letter received by the developer from MassHousing (Massachusetts Housing Finance Agency). That letter states, "[Middleborough] is listed by [DHCD] as having an approved Planned Production Plan [sic]. [If the Board denies or approves with conditions a comprehensive permit application], such denial or approval with conditions shall be consistent with local needs. DHCD certifies compliance annually, and [the developer]

may wish to confirm compliance with DHCD prior to.... submission of an application...." Exh. 1.

This statement by MassHousing is not authoritative since that agency has no official role in the approval or certification process of the planned production program. But what is more significant is that by its own terms, the letter indicates only that Middleborough has an approved Housing Production Plan. It does not state that the town has been certified in compliance with the plan; on the contrary, it suggests that the developer "may wish to confirm compliance." This is plainly insufficient to establish that the town is within the protections of the safe harbor provisions of the regulation.[2] The motion to dismiss is denied.

B. Site Control

Typically, since the Board granted a comprehensive permit, we would not expect the question of whether the developer controls the development site to be in question. See Exh. 2, p. 12 § III-3. In this *de novo* proceeding, however, the Board has put the developer to its proof in this regard. See Pre-Hearing Order, § IV-2(a) (Jun.23, 2010); 760 CMR 56.07(2)(a)(1). At the time of the local hearing site control was based upon options to purchase the land, which is sufficient to establish site control.[3] 760 CMR 56.04(4)(g). The Board points out, however, that one of the options expired over two years ago. Board's Brief, p. 10; see Exh. 3-7, ¶ 4. One of the developer's principals testified, however, that the option had been extended. Exh. 24, ¶ 5; Tr. I, 31, 32, 47, 52. No evidence to the contrary was introduced by the Board. We find, therefore, that the developer has established that it controls the site.

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2. If Middleborough were in fact certified at the time of the developer's application, one must question why the Board did not introduce evidence from DHCD to that effect. See developer's Motion in Limine (filed Oct. 29, 2010).

3. The purpose of the site control project eligibility requirement is to provide boards of appeals, before they invest considerable time in the local hearing and review process, with "protection against the unlikely possibility of frivolous applicants who have no present or potential property interest in the site." *Board of Appeals of Hanover v. Housing Appeals Committee*, 363 Mass. 339, 378, n.25 (1973). Based upon this, the Committee's interpretation of the site control requirement, particularly in its own hearings, has been liberal. See, e.g., *Paragon Residential Properties, LLC v. Brookline*, No. 06-14, slip op. at 11 (Mass. Housing Appeals Committee Mar. 26, 2007), *aff'd* No. 07-00697 (Norfolk Super. Ct. Feb. 17, 2010), *appeal docketed*, No. 10-P-1468 (M.A.C. Aug. 20, 2010).

IV. SUBSTANTIVE ISSUES

The Developer has challenged 47 of the 98 conditions imposed by the Board. Pre-Hearing Order, §§ IV-3, IV-4. It challenges them on several different grounds, and it challenges most on more than one ground. It asserts that certain conditions are beyond the Board's authority to impose, in conflict with state housing policy, or otherwise improper under the Comprehensive Permit Law. It challenges others as requirements that have been applied unequally, that is, as not having been applied to market-rate housing in Middleborough. And finally, it challenges conditions as either being unsupported by legitimate local concerns or being supported only by local concerns that are insufficient to outweigh the regional need for affordable housing. We will address conditions that must be struck on legal grounds first, and then the remaining conditions.

A. Conditions Challenged on Legal Grounds (and Listing of All Conditions[4])

Since the power of the local Board derives from, and is generally no greater than, that collectively possessed by other local boards, conditions relating programmatic issues such as project funding, regulatory and financial documents, sale of affordable units, and so on may be reviewed by this Committee to determine whether they are beyond the power of the board to impose or otherwise intrude impermissibly into areas of direct programmatic concern to state or federal funding and regulatory authorities. *Zoning Board of Appeals of Amesbury v. Housing Appeals Committee*, 457 Mass. 748, 756, 758, 762 (2010).

1. Conditions 1-5 (Project Eligibility Requirements) - Conditions 1 through 5 restate the law found in our regulations with regard to project eligibility requirements, although in certain minor details, they elaborate on the law inaccurately. For instance, there is no requirement in the law that the developer execute a Regulatory Agreement within ten days of the Board's decision. See Condition 1. In fact, such a requirement is onerous or, more likely, impossible to comply with, and entirely unnecessary. The proper procedure—that the Regulatory Agreement be executed prior to construction—is stated in

4. For convenience, all conditions in the Board's comprehensive permit are listed and cross-referenced in this section, even if they are not discussed in this section.

the Board's Condition 5. Therefore, Condition 1 is STRUCK in its entirety.

Similarly, Conditions 2 and 3 appear to require the developer to demonstrate, to the Board, continuing compliance with the project eligibility requirements, even though the purpose of these requirements is to protect the Board from frivolous applications—that is, to protect the Board at the *beginning*, not the end, of the local hearing process. The Supreme Judicial Court has stated, "The board's and the committee's power… to grant conditional permits that do not become operative until the applicant has satisfied the funding agency's property interest requirements, provide ample protection against the unlikely possibility of frivolous applicants who have no present or potential property interest in the site." *Board of Appeals of Hanover v. Housing Appeals Committee*, 363 Mass. 339, 378, n.25 (1973). This envisions a condition exactly like Condition 5 (discussed above), which prevents the permit from becoming operative until a Regulatory Agreement is signed. Further protection is provided by 760 CMR 56.04(7), which requires the subsidizing agency to issue "final written approval" of the project, addressing exactly the issues the Board is concerned about. Therefore, Conditions 2 and 3 are superfluous. Conditions 2 and 3 are STRUCK in their entirety.

The purpose and effect of Condition 4, which "relat[es] to the jurisdiction of the Housing Appeals Committee" with regard to the Planned Production safe Harbor, are unclear, and in any case the issue is addressed in section II of this decision. Condition 4 is STRUCK in its entirety.

Condition 5 is RETAINED.

2. **Conditions 6-14** - Unchallenged; RETAINED.
3. **Condition 15** - STRUCK - See section IV-B(2)(a), below.
4. **Condition 16** - Unchallenged; RETAINED.
5. **Condition 17** - STRUCK - See section IV-B(2)(b), below.
6. **Conditions 18-22** - Unchallenged; RETAINED.
7. **Condition 23-A** - Unchallenged; RETAINED.
8. **Condition 23-B** - STRUCK - See section IV-B(2)(c), below.
9. **Condition 24** - STRUCK - See section IV-B(2)(a), below.
10. **Condition 25** - STRUCK - See section IV-B(2)(b), below.

11. Condition 26 - STRUCK - See sections IV-B(2)(d), IV-B(3)(c)(a) below.

12. Conditions 27-28 - Unchallenged; RETAINED.

13. Condition 29 (Increased Affordability) - Condition 29 requires that 30% of the housing units constructed by the developer be sold as affordable units, rather than the minimum of 25% required by state policy. We recognize that in some cases the Board may negotiate with a developer for increased affordability, but it may not be required by condition.[5] Determining how many units should be affordable (as well as ensuring their dispersal throughout the development) is a question similar to whether the affordable units should be sold or constructed coincident with development of market-rate units, and is within the sole province of the subsidizing agency. See *Zoning Board of Appeals of Amesbury v. Housing Appeals Committee*, 457 Mass. 748, 765 (2010)(striking of condition 54 concerning sale and construction of units upheld).

Condition 29 is MODIFIED to read in its entirety:

> 29. A minimum of 25% of the total number of housing units shall be affordable as determined by the policy and practices of the subsidizing agency. Unless the subsidizing agency provides different direction, the affordable units shall be dispersed throughout the development as shown on the Comprehensive Permit Plan, Exhibit 5.

Also see section IV-B(2)(e), below.

14. Conditions 30-32 - Unchallenged; RETAINED.

15. Condition 33 (Town Approval of Restrictions) - Condition 32, although unnecessary because programmatic oversight will be provided by the subsidizing agency, properly requires that affordable housing units be sold subject to a recorded affordable housing restriction. But Condition 33 requires that the form of that restriction be approved by the town of Middleborough, and suggests that the town may require that it be modified substantively. Such a condition is beyond the power of the Board to impose. *Zoning Board of Appeals of Amesbury v. Housing Appeals Committee*, 457 Mass. 748, 764-765 (2010). Condition 33 is STRUCK.

16. Condition 34 - Unchallenged; RETAINED.

17. Condition 35 - RETAINED - See sections IV-B(2)(f) and IV-B(3)(b), below.

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5. In fact, in this case the developer's proposal is that 25 of the 96 units—or 26%—be affordable. See Exh. 5.

18. Conditions 36-38 - MODIFIED - See sections IV-B(2)(f) and IV-B(3)(b), below.

19. Conditions 39-45 (Profit and Marketing) - Conditions 39 through 45 concern regulation of profit and marketing of housing units. It is beyond the Board's authority to impose conditions with regard to these matters. *Zoning Board of Appeals of Amesbury v. Housing Appeals Committee*, 457 Mass. 748, 765 (2010). Conditions 39 through 45 are STRUCK.

20. Condition 46 (Miscellaneous) - Condition 46 contains thirty-six subparts, many of which are improper, repetitive, or obscure. We address them briefly below.

21. Condition 46-A - This condition is an improper "condition subsequent," requiring further submissions, review, and approval by the Board, and thus is beyond the Board's authority.[6] It is MODIFIED to state in its entirety:

> 46-A. Prior to commencement of construction the Applicant shall submit final construction plans to the appropriate town staff in compliance with 760 CMR 56.05(10)(b) and town practice as is customary with regard to market-rate subdivisions.

22. Condition 46-B - It is beyond the power of the Board to impose a requirement that the developer place a conservation restriction (pursuant to G.L. c. 184, § 31) on parts of the site. Condition 46-B is STRUCK. Also see section IV-B(2)(g), below.

23. Condition 46-C - Condition 46-C is MODIFIED to state in its entirely:

> 46-C. The Applicant shall post a bond or surety consistent with practice in the town of Middleborough with regard to market-rate subdivisions.

Also see section IV-B(3)(c), below.

24. Condition 46-D - This condition is an improper "condition subsequent," requiring further submissions, review, and approval by the Board, and thus is beyond the Board's authority. Condition 46-D is STRUCK.

25. Conditions 46-E through 46-H - These conditions concern funding and programmatic documents that are within the province of the subsidizing agency.[7] Conditions 46-E through 46-H are STRUCK.

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6. See *Attitash Views, LLC v. Amesbury*, No. 06-17, slip op. at 11-12 (Mass. Housing Appeals Committee Oct. 15, 2007), *aff'd*, 457 Mass. 748 (2010), and cases cited.

26. Condition 46-I - STRUCK - See section IV-B(2)(a), below.

27. Condition 46-J - STRUCK - See section IV-B(2)(a), below.

28. Condition 46-K - Condition 46-K is RETAINED.

29. Condition 46-L - This condition is a "condition subsequent" requiring further submissions, review, and approval by the Board and town counsel, and thus is beyond the Board's authority. Condition 46-L is STRUCK.

30. Conditions 46-M and 46-N - Conditions 46-M and 46-N are RETAINED.

31. Condition 46-O - STRUCK - See sections IV-B(2)(f) and IV-B(3)(b), below.

32. Condition 46-P - The first sentence of Condition 46-P is MODIFIED to state:

> 46-P. A construction schedule indentifying the sequence and approximate dates of all key stages of construction shall be submitted to the appropriate member of the town staff.

The remainder of Condition 46-P (sub-subparts i. through x.) is RETAINED.

33. Condition 46-Q - STRUCK - See section IV-B(2)(h), below.

34. Condition 46-R - STRUCK - See 760 CMR 56.07(5)(c).

35. Conditions 46-S through 46-V - Conditions 46-K through 46-V are RETAINED.

36. Condition 46-W - This condition is a "condition subsequent" requiring further submissions, review, and approval by the fire chief of aspects of the design that appear on the approved plans, and thus is beyond the Board's authority. Condition 46-W is STRUCK.

37. Condition 46-X - Condition 46-X is RETAINED.

38. Conditions 46-Y through 46-DD - STRUCK - See section IV-B(2)(i), below.

39. Conditions 46-EE through 46-GG - These conditions are "conditions subsequent" requiring further submissions, review, and approval by the Board and the fire chief, and thus is beyond the Board's authority. Conditions 46-EE through 46-GG are STRUCK.

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7. See *Zoning Board of Appeals of Amesbury v. Housing Appeals Committee*, 457 Mass. 748 (2010).

40. Conditions 46-HH through 46-JJ - Condition 46-HH through 46-JJ are RETAINED.

42. Conditions 47-48 - Unchallenged; RETAINED

41. Condition 49 - This condition is MODIFIED to state in its entirety:

> 49. Prior to commencement of construction the Applicant shall submit final construction plans to the appropriate town staff in compliance with 760 CMR 56.05(10)(b) and town practice as is customary with regard to market-rate subdivisions.

43. Conditions 50-52 - Unchallenged; RETAINED[8]

44. Condition 53 (Supervision of Construction) - The first sentence of Condition 53 is ungrammatical and therefore largely unintelligible. Nevertheless, the requirements of this condition seem unexceptional except to the extent that they might be interpreted to prevent the current applicant from selling the permitted development to another entity to complete construction. Such a transfer is explicitly permitted pursuant to 760 CMR 56.05(12)(b). Condition 53 is RETAINED, with the understanding that it cannot supersede 760 CMR 56.05(12)(b).

45. Conditions 54-56 - Unchallenged; RETAINED

46. Condition 57 (Construction and Sale of Housing Units) - Condition 57 imposes a complex system for the timing of construction and sale of housing units. However, subsidizing agency procedures are in place to ensure that affordable units are constructed at the same time market-rate units are constructed. A condition to modify such subsidizing-agency policy or practices is beyond the authority of the Board. *Zoning Board of Appeals of Amesbury v. Housing Appeals Committee*, 457 Mass. 748, 765 (2010)(striking of condition 54—a condition concerning sale and construction of units very similar to the condition in this case—upheld). Condition 57 is STRUCK.

47. Condition 58 - Unchallenged; RETAINED[9]

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8. Although Condition 52 was not placed in issue in the Pre-Hearing Order, the developer raised the concern in its brief that fencing might be required on each individual house lot during construction. Condition 52 does not express with any clarity exactly where fencing should be placed. We trust that in compliance with the "equal application" provision of G.L. c. 40B, § 20, any fencing requirements imposed by the Middleborough building inspector or other town officials will not be more onerous than similar requirements imposed on market-rate subdivisions.

48. Condition 59 - Unchallenged; RETAINED

49. Condition 60 - Unchallenged; RETAINED[10]

50. Conditions 61-74 - Unchallenged; RETAINED

51. Condition 75 (Consultant Review Fees) - Condition 75 contains little specificity, and depending upon how it is interpreted could exceed the authority of the Board. For example, costs incurred for legal fees, independent appraisals, or other independent studies are not fees that may be assessed against the developer. It is therefore MODIFIED to state in its entirety:

> 75. Prior to issuance of any building permit, the developer shall pay to the town all consultant review fees due to that date pursuant to 760 CMR 56.05(5).

52. Conditions 76, 77, and 84 (Fees for Monitoring Construction) - These conditions concern monitoring of construction after the issuance of the comprehensive permit. Our regulations, in 760 CMR 56.05(5), address review fees assessed prior to the issuance of a comprehensive permit. They do not address construction monitoring fees after the comprehensive permit has been issued. Typically, towns are reimbursed for the costs of such monitoring by the quite substantial building-permit fees assessed for all construction. Since the Board has not waived any part of such fees in this case, the developer will, of course, pay those fees. It is possible that in Middleborough additional fees are also normally assessed for large, market-rate subdivisions. If so, commensurate fees can be assessed for this development. But assessment of higher than normal fees is prohibited by the "unequal application" provision of G.L. c. 40B, § 20. Neither the developer nor the Board has introduced evidence with regard to town practices, however.[11] See Developer's Brief, p. 13; Board's Brief, pp. 23-26. Therefore, Conditions 76 and 77 are MODIFIED to state in a single condition, in its entirety:

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9. Although Condition 58 was not placed in issue in the Pre-Hearing Order, the developer expressed concern in its brief the condition might be interpreted as a "condition subsequent," requiring further substantive review and approval by local officials. We trust that it will be interpreted in conformity with the Comprehensive Permit Law, regulations, and this decision.

10. Condition 60 was not placed in issue in the Pre-Hearing Order.

11. Although the developer's expert did not testify with regard to Condition 76, he did state that the requirements in Condition 84 are not imposed on conventional subdivisions. Exh. 26, ¶ 39. This testimony, however, focused on legal fees, which the law clearly prohibits the Board from

> 76. Inspections, testing, and monitoring of construction shall be conducted in a manner consistent with practices applied to subdivisions under the Middleborough Subdivision Rules and Regulations. The developer shall pay to the town fees to reimburse the town for costs of such activities, if any, in a manner consistent with and not in excess of fees that would be assessed for a subdivision of similar size.

Condition 84 is STRUCK as duplicative.

53. Condition 78 - STRUCK - See section IV-B(3)(c), below.

54. Conditions 79-81 - STRUCK - See sections IV-B(2)(f) and IV-B(3)(b), below.

55. Condition 82 - STRUCK - See sections IV-B(2)(j) and IV-B(3)(d), below.

56. Condition 83 - Condition 83 duplicates Condition 46-Q *verbatim*. It is therefore STRUCK. See section IV-A(33), above, and IV-B(2)(h), below.

57. Condition 84 - STRUCK. See section IV-A(52), above.

58. Condition 85[12] - Unchallenged; RETAINED.

59. Condition 86 - STRUCK - See sections IV-B(2)(k) and IV-B(3)(e), below.

60. Conditions 87, 88 - Unchallenged; RETAINED.

61. Condition 89-91 - Unchallenged; RETAINED.

62. Condition 92 - STRUCK - See sections IV-B(2)(l) and IV-B(3)(f), below.

63. Conditions 93-94 - Unchallenged; RETAINED.

64. Condition 95-97 - STRUCK - See section IV-B(3)(c), below.

65. Condition 98 - The intended effect of Condition 98 is unclear. It appears to attempt to impose subdivision control requirements. But a comprehensive permit issued pursuant to G.L. c. 40 B, §§ 20-23 supersedes subdivision requirements and a recorded Comprehensive Permit stands in place of a recorded Subdivision Plan. See *Mahoney v. Winchester*, 366 Mass. 288 (1974); also see n.24, below. Condition 98 is STRUCK.

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recovering from the developer. See 760 56.05(5)(a)(last sentence); also see section IV-A(51), above. The developer has also requested an order from this Committee that the Board repay $40,000 in fees paid during the local hearing. See Exh. 24, ¶ 4; Developer's Brief, pp. 16-17; Developer's Objections to Proposed Decision, p. 2 (filed Mar. 14, 2011). We decline to issue such an order.

12. Conditions 85, 87, 88, and 93 were put into issue in the Pre-Hearing Order, but the developer presented neither evidence nor argument regarding them.

B. Conditions Challenged as Unsupported by Local Concerns or Applied Unequally

Pursuant to G.L. c. 40B, § 23, "If the Committee finds… that the decision of the board [both] makes [the project] uneconomic and is not consistent with local needs, it shall order such board to modify or remove" the offending conditions. Burdens of proof are explicated in our regulations. Initially, the developer has the burden of proving that the conditions, in aggregate, render the project uneconomic. 760 CMR 56.07(1)(c)(1), 56.07(2)(a)(3); also see *Walega v. Acushnet*, No. 89-17, slip op. at 8 (Mass. Housing Appeals Committee Nov. 14, 1990). Specifically, the developer must prove that the conditions imposed make it "impossible… to proceed and still realize a reasonable return…." 760 CMR 56.02 (definition of "uneconomic"); G. L. c. 40B, § 20. If the developer proves this, the burden then shifts to the Board to prove that there is a valid local concern which supports each condition and that that local concern outweighs the regional need for affordable housing. 760 CMR 56.07(1)(c)(2), 56.07(2)(b)(3). Alternatively, even if the Board introduces evidence to support the conditions/, the developer may prevail on an independent ground by going on to prove that local requirements[13] have not been applied as equally as possible to subsidized and unsubsidized housing.[14] 760 CMR 56.07(2)(a)(4); also see G.L. c. 40B, § 20.

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13. "Local Requirements and Regulations," as referred to in our regulations and the statute are defined broadly in our regulations. See 760 CMR 56.02 ("Local Requirements and Regulations"). In addition to local legislative and regulatory actions, they include "other actions" as well, and thus include requirements that are simply stated as conditions in a comprehensive permit.

14. One of the clearest examples of unequal application of local requirements is if a condition is not based upon some local legislative or regulatory requirement, but rather is based on concerns not previously regulated. See *Green View Realty, LLC v. Holliston*, No. 06-16, at 10 (Housing Appeals Committee Jan. 12, 2009), *aff'd* No. 393326 (Land Court Permit Session Jun. 24, 2010), *appeal docketed* No. 2010-P-1964 (Mass. App. Ct. Nov. 5, 2010); and cases cited. There may, however, be a small number of issues have not been regulated by formally promulgated bylaws or regulations, but rather by longstanding land-use-approval practices. For instance, parking of construction vehicles (Condition 87) may have been regulated in Middleborough by longstanding practice, and thus a condition in that regard may be appropriate even in the absence of a formally promulgated requirement.

1. Economic Effect of the Conditions

a. The Developer's Presentation

As noted above, the developer has challenged nearly half of the 98 conditions imposed by the Board. Certain of these conditions have an obvious effect on the developer's profit. For instance, the requirement in Condition 29 that 30% of the units be sold as affordable, rather than 25% as normally required (and proposed by the developer) clearly reduces the developer's revenues; this is fairly easy to quantify. Similarly, the requirement in Conditions 36, 37, 38, and 80 that all roadways and infrastructure be maintained by a homeowners association rather than by the town of Middleborough will impose a cost on homeowners that results in corresponding reductions in the sale values of the homes and revenue to the developer; this is more difficult to quantify. The developer's financial expert was able to quantify six additional costs. See below. The financial impacts of most, if not all, of the remaining conditions are much more difficult to quantify.[15]

After quantifying these costs, the developer's expert calculated the economic effect of the conditions by preparing two *pro forma* financial statements, one based upon the development as approved by the Board ("with conditions") and one as proposed by the developer ("without conditions).[16] Exh. 14;[17] 25, ¶ 13 (second subparagraph). These

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15. Though the testimony of the developer's financial expert does not address the challenged conditions in numerical order, it is clearly his opinion that each of them has some economic impact, however difficult to quantify. See, e.g., Exh. 25, ¶¶ 12, 13 (sixth subparagraph). Though the Board certainly argues that the economic impact of certain conditions is not as great as claimed by the developer, it has not argued nor introduced evidence to show that there are conditions that categorically have no economic impact at all. Based upon this, we find that each of the challenged conditions has at least some economic impact on the proposal; beyond that, the more significant task before us is to determine the magnitude of the impact of all of the conditions in aggregate.

16. The Board challenges the financial expert's credibility based upon the fact that his consulting firm's eligibility to act as lottery agent for the sale of homes in Comprehensive Permit developments has been suspended by MassHousing due to questions raised about the sale of house to the son of a person with a financial interest in the development. See Exh. 23; Tr. I, 64; Board's Brief, pp. 11- 21. We have considered this evidence in weighing the credibility of the witness' testimony. But it does not disqualify him from giving expert testimony with regard to the finances of the proposed development, nor does it cast significant doubt on his financial analysis.

pro forma financial statements use methodology that is standard for analyzing the financing of affordable housing developments. The "with-conditions" analysis includes eight specific, quantified line items reflecting the cost of the eight most easily quantified of the challenged conditions. See Exh. 14, p. 2 ("Unusual ZBA Conditions"[18]). The total of these costs is $1,597,500. As a result, the "with-conditions" analysis shows a profit to the developer of only 1.99% as compared to the "without-conditions" profit of 7.35%. Exh. 14, pp. 5, 11; 25, ¶ 13 (second subparagraph). It is upon this that the expert based his opinion that the conditions render the project uneconomic.[19] Exh. 25, ¶¶ 12,13.

b. The Board's Presentation

The Board has taken an approach to presenting its case that is quite unusual in two respects. First, it focuses (in 12 pages of its brief) on presenting *argument* about the *thoroughness* of the developer's expert's analysis, rather than presenting *evidence* to refute the *accuracy* of that analysis. Second, in presenting its own case (on which the Board places much less emphasis, dedicating less than four pages to it), it has chosen not to present testimony from a financial expert of its own, but rather to rely only on testimony from a civil engineer and on points made on cross-examination of the developer's expert. See Board's Brief, pp. 11-22, 23-26. The probative value of the engineer's testimony with regard to finances is quite limited, and little was elicited on cross-examination.

Using this unorthodox strategy, the Board has effectively challenged only two aspects of the developer's financial analysis: the land acquisition value carried in both *pro forma* financial statements and the cost of requiring maintenance of roads and infrastructure by a homeowners association, which is one of the eight additional costs

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17. The "with-conditions" *pro forma* appears at pages 1 through 6 of Exhibit 14, and the "without-conditions" *pro forma* appears at pages 7 through 11.

18. The eight items are: additional fill ($192,000), street lights ($75,000), change in Cape Cod berm ($59,500), additional cover over utilities ($170,000), 30% instead of 25% affordable units ($195,000), excessive town fees ($48,000), Board legal fees ($30,000), maintenance of private ways ($828,000). Exh. 14, p. 2.

19. This result was supported by the much more conclusory opinion of one of the developer's principals. However, since she has little housing development experience, we ascribe little weight to her opinion. See Exh. 24, ¶ 7; Tr. 56.

presented by the developer.

(1) Land Acquisition Value – The land acquisition value used in the developer's financial analysis is $3,800,000. Exh. 14, pp. 1, 2, 5, 7, 8, 11. In its brief and through extensive cross-examination of the developer's expert, the Board has repeatedly challenged this value. See, e.g., Board's Brief, p. 4, n.5, 12-13. But nowhere does the Board state, much less introduce evidence to prove what it believes the proper value is. The implication most readily drawn from the Board's brief and cross-examination is that it believes that the proper value is $5,000,000. See, e.g., Board's Brief, p. 12, Tr. I, 129. This is illogical, though, since a higher acquisition cost would result in higher total development costs in the financial analysis, and lower profit, making it easier for the developer to meet its burden of proof. In fact, at one point during cross-examination counsel for the Board elicits from the developer's expert that the $3,800,000 is conservative since he still believes that $5,000,000 would be a more appropriate figure. Tr. I, 174. The Board's Brief does mention a figure of $2,700,000 in passing, but does not argue that this is the proper figure. See Board's Brief, p. 4, n.5. And there was considerable testimony with regard to that figure, showing that it was low because the appraiser mistakenly excluded part of the development site. See, e.g., Tr. I, 132-134; Tr. II, 25-28; 53. There is nothing in the record before us to suggest that any figure other than the $3,800,000 used in the developer's financial analysis is more accurate. The amount of $3,800,000 is the best evidence of land acquisition value available on this record, and we accept its use as one of the many underlying variables used by the developer's expert in preparing his financial analysis and arriving at his conclusion with regard to the economics of the proposal.

(2) Road Maintenance – The developer's expert used a rather arcane method of estimating the cost of the Board requiring maintenance of roads and infrastructure. Starting with the current real estate tax rate in Middleborough, he estimated that a fifth of that revenue was used by Middleborough officials for infrastructure maintenance, and from that, using the average sales price of homes, he estimated that the town services that will have to be provided by a neighborhood association in the new development would be valued by the owners at $65 per month. Exh. 14, p. 6; 25, ¶¶ 13 (ninth and tenth

paragraphs). He converted this to a current capital cost of $11,500 per unit, for a total cost of $828,000. *Id.* On cross-examination, however, it became clear that his estimate that 20% of the Middleborough property tax levy is spent on road and infrastructure maintenance was not based upon any research done with regard to the town of Middleborough, but rather upon only on his general experience, and also that he was unsure of the town's property tax rate. Tr. I, 99-103. No further clarification was offered in his redirect examination. See Tr. II, 4-42. Thus, the evidence presented is little more than conjecture, and insufficient to prove this particular aspect of the developer's case. For that reason, we will exclude the $828,000 maintenance cost from our analysis.

(3) Miscellaneous Items – The Board also raised superficial questions about other items among the eight quantified by the developer's expert. See Board's Brief, pp. 18-20. But a financial expert—particularly one with extensive experience in construction as well—is entitled to draw upon his own experience and that of other members of the development team to assemble cost estimates. See, e.g., Tr. I, 153 (consultation with engineer concerning fill). Though the evidence with regard to any one of these items, viewed in isolation, is limited, overall, the analysis of the developer's expert is comprehensive and sound. See Exh. 14, 25. The Board did not attempt to refute any of the eight quantified costs with its own estimates, and has not cast doubt on them through cross-examination or argument.

c. Conclusion with regard to Economics

To estimate the developer's profit, that is the return on total cost (ROTC), total market sales are subtracted from total development costs. In this case, the developer's expert estimated total hard costs at $26,087,305 and total soft costs at $6,833,410 for total development costs at $32,920,715. Exh. 14, pp. 2, 3. As indicated above, however, we have found that $828,000 of the additional hard costs that the expert attributed to conditions imposed by the Board are unsubstantiated. Thus, total hard costs should be reduced to $25,259,205 and total development costs to $32,092,715. Total sales of $33,574,800 remains constant, and subtraction yields a total profit estimate of $1,482,085. This profit, divided by total development costs ($1,482,085 divided by

$32,092,715) is 4.6%. Pursuant to policy stated in the MHP Guidelines,[20] a for-sale proposal is considered uneconomic if its projected profit is less than 15%. Exhibit 17, p. 17. Therefore, the proposal as conditioned by the Board is clearly uneconomic.[21]

Although neither party has raised the issue, we must note that the development as proposed is also uneconomic, although this does not alter the outcome of our analysis. That is, although in most cases it is logical to assume that the developer would not propose an uneconomic development, as we have noted previously, under some circumstances, a developer may choose to go forward with an uneconomic development. *Rising Tide Development, LLC v. Sherborn*, No. 03-24, slip op. at 16, n.16 (Mass. Housing Appeals Committee Mar. 27, 2006)("...developers are frequently forced to accept lowered profits for developments that are subject to protracted litigation"). This is such a case, and therefore raises a further legal issue. Typically, in order to meet the standard of proving that conditions imposed by the Board render a project uneconomic, the developer need only show in a hearing before this Committee that the development as approved by the Board is uneconomic. But in a case like this, to sustain its burden the developer must also establish that its profit (return on total costs) is such that the project is significantly more uneconomic than the development it proposes to build. See *Avalon Cohasset, Inc. v. Cohasset*, No. 05-09, slip op. at 12-13 (Mass. Housing Appeals Committee Sep. 18, 2007); also see *LeBlanc v. Amesbury*, No. 06-08, slip op. at 11 (Mass. Housing Appeals Committee May 12, 2008); *Cozy Hearth Community Corp. v. Edgartown*, No. 06-09, slip op. at 10 (Mass. Housing Appeals Committee Apr. 14, 2008).

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20. The formal title of the MHP Guidelines is "Local 40B Review and Decision Guidelines: A Practical Guide for Zoning Boards of Appeal Reviewing Applications for Comprehensive Permits Pursuant to M.G.L. Chapter 40B" (Massachusetts Housing Partnership and Netter, Edith M., November 2005). These guidelines were endorsed by the state Department of Housing and Community Development, MassHousing (the Massachusetts Housing Finance Agency), the Massachusetts Housing Partnership (the Massachusetts Housing Partnership Fund), and MassDevelopment (the Massachusetts Development Finance Agency). See *Webster Street Green, LLC v. Needham*, No. 05-20, slip op. at 4, n.6, 11 (Mass. Housing Appeals Committee Sep. 18, 2007); *8 Grant Street, LLC v. Natick*, No. 05-13, slip op. at 6, n.10 (Mass. Housing Appeals Committee Mar. 5, 2007); *Bay Watch Realty Trust v. Marion*, No. 02-28, slip op. at 11 (Mass. Housing Appeals Committee , Dec. 5, 2005).

21. Further evidentiary support is found for this conclusion in the testimony of the developer's expert that in his opinion the project is uneconomic even if his $828.000 cost item for roadway and infrastructure maintenance is disallowed. Tr. I, 158.

Here, the undisputed profit projection for the development as proposed is 7.35%. Exh. 14, p. 10; 25, ¶ 13 (second subparagraph). Based upon the estimates here—a profit of 7.35% as proposed by the developer and a profit of only 4.6% with the conditions imposed by the Board—we conclude that the conditions make the development significantly more uneconomic.

2. Local Concerns

Since the developer has sustained its initial burden, the burden shifts to the Board to prove that there is a valid health, safety, environmental, or other local concern that supports each of the conditions imposed, and that such concern outweighs the regional need for low or moderate income housing. 760 CMR 31.06(7), 56.07(2)(b)(3). To do so, the Board introduced testimony from its expert engineer. See Board's Brief, p. 23; Exh. 28, ¶¶ 5-26.

a. Conditions 15, 24, 46-I, 46-J (Wetlands) - These conditions, requiring compliance with "the Middleborough Wetland Bylaw," fail for several reasons. First, Middleborough has no local wetlands bylaw, but only an informal "policy." Exh. 26, ¶ 9; Exh. 26-D. Since the town has no power to regulate wetlands in the absence of a bylaw passed by Town Meeting, this constitutes independent grounds for voiding any condition imposed based upon local wetlands requirements. Second, the Board introduced only the most general testimony in support of its position—no facts at all that would establish that the proposed development raises local concerns, much less that there are concerns that outweigh the regional housing need. See Exh. 28, ¶ 6; cf. Exh. 26, ¶ 9. The Board has not met its burden of proof, and therefore Conditions 15, 24, 46-I, and 46-J are STRUCK in their entirety.

b. Conditions 17, 25 (Board of Health) - As a preliminary matter, we note that in relation to Board of Health requirements, wetlands concerns (above), and subdivision regulations (below), the Board has included conditions that do not impose specific, substantive requirements. Rather, the "conditions" attempt to describe the legal effect of the comprehensive permit, but in fact they create ambiguity, repetition, and confusion. Further confusion is caused by a separate section of the Board's decision, section II, which describes the hearing process and lists more than eight pages of waivers (granted or

denied) from local requirements. See Exh. 2, pp. 2-11. That section was not referred to in the Pre-Hearing Order, nor did either party refer to it in its brief. We therefore rule that section II of the Board's decision is merely descriptive; the only substantive requirements in the comprehensive permit issued by the Board, that is, conditions placed on the grant of the developer's application, are contained in the 98 conditions in section III of the Board's decision.[22]

With regard to the Board of Health requirements in specific, the Board, in section II of its decision, under "Middleborough Board of Health Rules and Regulations," lists four waivers "Denied" and one waiver "Granted." Exh. 2, pp. 9-10. In section III of the decision (the section containing the conditions), Condition 17 states, "The Project shall comply with the rules and regulations of the Middleborough Board of Health…" Exh. 2, p. 14. Later, in Condition 25, the Board states, "Except as waived by this Decision…, this Project shall comply, in all respects, with the rules, regulations, filing and permit requirements and certifications of the Middleborough Board of Health…." Exh. 2, p. 15.

To the extent that Condition 17 requires compliance with all substantive Board of Health rules and regulations, no evidence was introduced in support of those requirements, and it is therefore STRUCK. See Exh. 28, ¶¶ 4-26; cf. Exh. 26, ¶ 10.

Condition 25, even though because of its generality it has little or no meaning as a condition, is a correct statement of the law. It reiterates the law as it is already properly stated in Condition 8 (unchallenged): "Except as otherwise specified in this Decision, the Project must substantially conform to the Comprehensive Permit Plans entitled 'Comprehensive Permit Plans'[sic]…."[23] Exh. 2, p. 13. That is, it is the plans, together

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22. Of course, the developer is required to file—with its application to the Board—a "list of requested Waivers" of local requirements. 760 CMR 56.05(2)(h). But that list need not be part of the Board's decision. In our view, the best practice is for the Board to define the approved development in its decision by referring to site plans and imposing conditions, as anticipated by the statute. Should the Board choose the more complicated approach of also listing all waivers requested by the developer, then to avoid confusion it should clearly cross-reference that section of its decision to the conditions imposed. In cases of ambiguity, the conditions will be controlling.

23. Condition 8 referred to the plans submitted at the local hearing, Exhibit 4. As indicated in note 1, above, because the developer presented very slightly modified plans in the *de novo* hearing before this Committee, it is now Exhibit 5, not Exhibit 4 that defines the approved development proposal.

with the developer's application to the Board, that define the proposed project. In approving that proposal or application, the Board may impose specific, substantive conditions. But Condition 25 (like Condition 24 concerning wetlands and Condition 23-B concerning subdivision control) contains no substantive requirement, and is repetitive of Condition 8. This condition might possibly be interpreted as a reminder to the developer that, even though no further substantive approval by the Board of Health is necessary, it must nevertheless submit the normal applications and construction plans to the local public health official for ministerial review and approval. To the extent that that is the case, the condition is superfluous, since such technical review is required by law in 760 CMR 56.05(10)(b). Therefore Condition 25 is STRUCK.

c. Conditions 23-B (Subdivision Control) - Like Conditions 24 and 25, Condition 23-B simply states the law—noting that the developer must comply with aspects of Middleborough Subdivision Rules and Regulations that are not waived by the comprehensive permit.[24] To the extent that it might be read to impose substantive requirements, the evidence presented by the Board merely restates the condition, and fails utterly to establish specific local concerns that outweigh the regional need for affordable Housing. See Exh. 28, ¶ 9. Condition 23-B is unsupported, superfluous, and subject to misinterpretation, and it is therefore STRUCK.

d. Condition 26 (Fertilizer) - Condition 26 is a proper, substantive condition. But the only evidence of a local concern supporting this condition is the short statement of the Board's expert that "[c]onditions stipulating that only organic and/or slow-release fertilizers may be used are common stipulations in water resource protection districts.

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24. Under the Comprehensive Permit Law, review and approval of all matters arising under the subdivision rules and regulations is conducted by the Board of Appeals, rather than the Planning Board. See *Mahoney v. Winchester*, 366 Mass. 288 (1974). Since the Planning Board is unfamiliar with approved project, for recording purposes the most widely accepted practice is that the Board of Appeals endorse the "Comprehensive Permit Plan" in a form similar to the "Subdivision Plan" that would have been endorsed by the Planning Board if this development were a subdivision. That is, we would expect the Board to endorse the plans for recording in a form similar to the following:

> "Approved under the Subdivision Control Law by the Middleborough Zoning Board of Appeals acting for the Middleborough Planning Board pursuant to the power granted by G.L. c. 40B, § 21. This plan is subject to the conditions contained in the comprehensive permit ordered by the Massachusetts Housing Appeals Committee on March 28, 2011."

These aim to protect drinking water supplies from increased nitrogen levels." Exh. 28, ¶ 10. A broad statement concerning practices in water resource protection districts in general, with no specific, scientific evidence that relates to the particular housing site in Middleborough, is not evidence of a local concern. Cf. *Telemos, Inc. v. Chelmsford*, No. 88-23, slip op. at 26-29 (Mass. Housing Appeals Committee Oct. 12, 1989)(detailed scientific evidence supports a finding that the controlled application of fertilizer on the Project site poses no significant risk of contamination). Condition 26 is STRUCK.

e. Condition 29 (Increased Affordability) - As noted above, Condition 29 is MODIFIED as being beyond the power of the Board as imposed. It is also MODIFIED on the independent ground that the Board introduced no evidence of local concerns that support it. See section IV-A(13), above.

f. Conditions 35-38, 46-O, 79-81 (Roadway and Infrastructure Maintenance and Related Issues) - The developer has accepted the requirement that a homeowners association be formed, not challenging Condition 35. But it challenges requirements that the developer "assume responsibility to maintain and repair the dwelling units and all areas under the control of the homeowners association and associated infrastructure, including the stormwater management system, landscaping, [road]ways, and other improvements..., including snow removal, spring clean-up, repair, and resurfacing [of roadways], [maintenance and replacement] of plants, shrubs, and other landscaping,... trash disposal, [and] street lighting...." Exh. 2, pp. 16-17.

Once again, however, the testimony of the Board's expert simply refers to practices in other towns, states his "understand[ing]" of practices in Middleborough, and opines that these conditions should not render the development uneconomic. Exh. 28, ¶ 11. Without specific, scientific or practical evidence that relates to the proposed development, this is insufficient to prove that there is a local concern in this regard that outweighs the regional need for affordable housing.

Condition 35 is RETAINED; Conditions 36 through 38, 46-O, and 79 through 81 are STRUCK.

g. Condition 46-B (Conservation Restriction) - Evidence to support the need for a conservation restriction (pursuant to G.L. c. 184, § 31) has not been proven by the Board. Condition 46-B is STRUCK.

h. Condition 46-Q (Indemnification) - The Board introduced no evidence to support, nor did it argue in defense of, Condition 46-Q. See Exh. 28, ¶¶ 16-17; Board's Brief, p. 24. (It is also likely that this requirement is not applied to market-rate subdivision, though the developer introduced no evidence in this regard.) Condition 46-Q is STRUCK.

i. Conditions 46-Y through 46-DD (Road Construction, Stormwater, and Lawns) - It appears that these conditions do not impose any requirements beyond those already required by the state Department of Environmental Protection (DEP) under the Wetlands Protection Act. See section IV-B(2)(l), below. Further, the Board introduced evidence only with regard to Conditions 46-CC and 46-DD, and that testimony does not contain any facts showing specific local concerns regarding the development site or the proposed design. Exh. 28, ¶¶ 19, 20. The Board has not met its burden of proving local concerns supporting these conditions that outweigh the regional need for affordable housing, and therefore Conditions 46-Y through 46 are STRUCK.

j. Condition 82 (Build-Out Time Limit) - The Board introduced no evidence to support, nor did it argue in defense of, Condition 82. See Exh. 28, ¶¶ 24-25; Board's Brief, pp. 23-26. Condition 46-Q is STRUCK. Also see section IV-B(3)(d), below.

k. Condition 86 (Continuous Construction) - The Board evidence introduced by the Board was not sufficiently specific to prove a local concern that outweighs the regional need for affordable housing. See Exh. 28, ¶ 25. Condition 86 is STRUCK.

l. Condition 92 (Stormwater Management) - It is unclear whether the intent of Condition 92 is simply to ensure that the developer complies with existing state law by meeting stormwater management standards applied under the Wetlands Protection Act or to impose additional requirements. If it is the former, this condition is unnecessary. If it is the latter, testimony that the design "should comply with DEP Stormwater Standards" obviously states no local concern. Exh. 28, ¶ 26. Condition 92 is STRUCK.

3. Unequal Application

As noted above, if the developer meets its burden of proving that the conditions imposed by the Board render the proposed housing uneconomic, it may go on to challenge a condition by affirmatively proving that it has not been applied equally in the town to subsidized and unsubsidized housing.

a. Condition 26 (Fertilizer) - Condition 26 has been STRUCK based upon a finding that the Board did not sustain its burden of proof. See section IV-B(2)(d), above. It is also STRUCK on the independent ground that the developer proved that this requirement has not been applied as equally as possible to subsidized and unsubsidized housing. Exh. 26, ¶ 14; 26-B; Tr. II, 84.

b. Conditions 35-38, 46-O, 79-81 (Roadway and Infrastructure Maintenance and Related Issues) - All but one of these conditions has been STRUCK based upon a finding that the Board did not sustain its burden of proof. See section IV-B(2)(f), above. With regard to these issues, the developer's expert did not provide as much detail as we would like to see, but he did testify clearly that the conditions "are not required on conventional market-rate subdivisions in the Town of Middleborough." Exh. 26, ¶ 15. Moreover, with regard to the most critical issue—whether the roads should remain private—his testimony was confirmed by cross-examination of the Board's expert. Tr. II, 85-86. Therefore, Conditions 36 through 38, 46-O, and 79 through 81 are also STRUCK on the independent ground that the developer proved that private ownership and maintenance of roadways and infrastructure has not been required of unsubsidized housing subdivisions in Middleborough.

c. Conditions 78, 95-97 (Performance Guarantee) - The clear inference of the testimony of the developer's expert is that Condition 78 requires a performance guarantee in a form that is not required of market-rate housing. Exh. 26, ¶ 35. The Board presented no evidence (or even argument) to rebut the developer's evidence. See Exh. 28, ¶¶ 24-25; Board's Brief, pp. 23-26. In any case, Conditions 78 and 95 through 97 are largely duplicative of Condition 46-C. See section IV-A(23), above. Therefore, Conditions 78 and 95 through 97 are STRUCK.

d. Conditions 82 (Build-Out Time Limit) - The developer's expert testified that a three-year limitation on completion of all roadway and utility construction is not required of conventional subdivisions in Middleborough. Exh. 26, ¶ 38. The Board presented no evidence (or argument) to rebut the developer's evidence. See Exh. 28, ¶¶ 24-25; Board's Brief, pp. 23-26. Therefore, Condition 82 is STRUCK.

e. Conditions 86 (Continuous Construction) - Though by its terms, Condition 86 requires only that construction progress "as continuously… *as possible*," it is nevertheless challenged by the developer. The testimony of the developer's expert with regard to this condition is weak, but an inference can fairly be drawn that this requirement is not imposed on market-rate subdivisions in Middleborough. Exh. 26, ¶ 40. The testimony of the Board's expert is even more general, and is not sufficient to rebut the developer's evidence. See Exh. 28, ¶ 25. Therefore, Condition 86 is STRUCK.

f. Conditions 92 (Stormwater Management) - The testimony of the developer's expert is sufficient to establish that conventional subdivisions in Middleborough are not required to comply with stormwater requirements in excess of the state Wetlands Protection Act. Exh. 26, ¶ 41. The Board's evidence does not rebut this. See Exh. 28, ¶ 26. Therefore, Condition 92 is STRUCK.

V. CONCLUSION

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

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

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

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

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

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

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

(a) The development, consisting of 96 total units, including 25 affordable units, shall be constructed substantially as shown on plans entitled "Crimson Estates, Comprehensive Permit Plan for H.A.C. Appeal," dated September 9, 2009 (with no revisions), by Outback Engineering, Inc. (Exhibit 5), and shall be subject to those conditions imposed in the Board's decision filed with the Middleborough

Town Clerk on July 14, 2009 (Exhibit 2), as modified by this decision.

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

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

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

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

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

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

(e) 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.

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

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

Housing Appeals Committee

Date: March 28, 2011

Werner Lohe, Chairman

Joseph P. Henefield

Theodore M. Hess-Mahan

Marion V. McEttrick

James G. Stockard, Jr.

LPc\m