COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

CIRSAN REALTY TRUST

v.

WOBURN BOARD OF APPEALS

No. 01-22

DECISION ON PROJECT CHANGE

April 23, 2015

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COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

CIRSAN REALTY TRUST, Appellant	)	
v.	)	No. 01-22
WOBURN BOARD OF APPEALS, Appellee	)	

DECISION ON PROJECT CHANGE

I. PROCEDURAL HISTORY

In October 2000, the Cirsan Realty Trust submitted an application to the Woburn Zoning Board of Appeals for a Comprehensive Permit pursuant to G.L. c. 40B, §§ 20-23 to build mixed-income affordable rental housing off Main Street in Woburn, financed under the New England Fund (NEF) of the Federal Home Loan Bank of Boston. By decision filed with the city clerk on October 11, 2001, the Board denied the permit, and the developer appealed to the Housing Appeals Committee. The Housing Appeals Committee overturned the decision of the Board, and the Committee's decision was upheld by the Appeals Court in an unpublished memorandum and order pursuant to Appeals Court rule 1:28. *Woburn Board of Appeals v. Housing Appeals Committee*, 66 Mass. App. Ct. 1109 (2006). In 2011, a successor-in-interest to the original developer, Woburn 38 Development, LLC, proposed changing the design of the 168-unit rental development from one six-story building to four three-story buildings and a clubhouse. On October 19, 2012, the Board issued a decision denying the modification, and that denial has now been appealed to this Committee. The Committee opened its hearing, and the developer filed a motion for summary decision, which was denied by the presiding officer on May 17, 2013. The parties filed a joint motion to clarify certain issues with regard to the presentation of evidence, and the presiding officer

issued a ruling on September 20, 2013. Pursuant to 760 CMR 56.06(7)(d)(3), the parties negotiated a Pre-Hearing Order, which the presiding officer issued January 7, 2014. The parties presented prefiled testimony from nineteen witnesses.[1] In November 2014, the Committee conducted a site visit and two days of oral hearing to permit cross-examination of witnesses. Following the presentation of evidence, counsel submitted post-hearing briefs.

II. FACTUAL BACKGROUND

The developer originally proposed to build a six-story, 168-unit apartment building on a 9-acre site at 1042 Main Street (Route 38) in Woburn. The current proposal is for the same number of units in four three-story buildings with a single-story clubhouse building.

The following facts were found in the original appeal in this matter, and have not been disputed. The housing is proposed for the top of a portion of a steep, hilly ridge. The ridge is north of Main Street, which runs parallel below it. The site is zoned mostly for two-family residences (R-2), though a small area is zoned for single-family residences (R-1). In relatively flat locations immediately adjacent to Main Street, before the hill begins to rise, there are existing one- and two-family houses, typically on quarter-acre and larger lots. The developer owns 188 feet of frontage along the street, and the much larger area of the ridge above and behind the existing houses. He proposes to build a winding roadway to the top of the ridge, alter that area significantly by means of blasting, and construct the apartment buildings. Though the highest existing point on the hill is about 130 feet above Main Street, the foundations of the proposed buildings will be about 80 feet above Main Street.

Both the original, approved development proposal and the current proposal would require a great deal of blasting of ledge, and removal by truck of rock, glacial till, subsoil, and topsoil. This would require many truck trips over many days. (The developer has proposed to process the rock on site before removal—that is, to crush the rock into smaller sizes suitable to be taken off site and sold for other construction projects—which would

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1. Sixty-nine documents were admitted into evidence (Exhibits 1 through 66 and 94 through 96). A large number of documents were also admitted into evidence in this case during the hearing in 2002, and many of these have the same exhibit numbers. Only the exhibits admitted in 2014, however, will be considered in this decision. To avoid any possible ambiguity in the record, all of the 2014 exhibits have "2014" written in front of the exhibit number.

In addition, each item of prefiled testimony has been assigned an exhibit number—from 67 through 93—for ease of reference.

reduce its volume somewhat.) Each of these amounts was estimated by the developer, and, as shown below, all of the amounts are about twice as great for the current proposal as for the original proposal.[2]

	Original Proposal	Modified Proposal
Ledge removed for construction	118,825 cu. yd.	249,591 cu. yd.
Ledge removed total	133,225 cu. yd.	263,691 cu. yd.
All material removed/processed	199,866 cu. yd.	357,632 cu. yd.
All material removed/unprocessed	230,528 cu. yd.	418,281 cu. yd.
Truck trips/processed	7,303	13,332
Truck trips/unprocessed	9,251	16,511
Time/processed (60 truck trips/day)	122 days	233 days
Time/unprocessed (60 truck trips/day)	155 days	276 days

III. DISCUSSION

A. Burden of Proof Concerning the Denial of a Change after Issuance of a Permit

Under our regulations and precedents, when a change in a permit has been denied, the burden is initially upon the developer to prove that the denial makes the project uneconomic, that is, that the original, approved proposal is both uneconomic and significantly more uneconomic than the developer's current proposal.[3] *511 Washington Street, LLC v. Hanover*, No. 06-05 (Mass. Housing Appeals Committee Jan. 22, 2008), *aff'd* 17 LCR 243 (Land Court No. 381349, Apr. 2, 2009); *Avalon Cohasset, Inc. v. Cohasset*, No. 05-09, slip op. at 8 (Mass. Housing Appeals Committee Sep. 18, 2007), citing *Drumlin Development, LLC v. Sudbury*, No. 01-03, slip op. at 3 (Mass. Housing Appeals Committee Sep. 27, 2001); *Shamrock Construction and Dev. Corp. v. Whitman*, No. 96-02, slip op. at 2 (Mass. Housing Appeals

2. See Developer's Brief, pp. 4-6, ¶¶ 20-25; also see Exh. 81, ¶¶ 10-14. The Board has not contested these amounts. See Board's Brief, e.g., pp. 23, 25.

3. If the Board conceded that the current proposal is economic (that is, profitable at an acceptable level), it would be sufficient for the developer to prove that the original, approved project is uneconomic. But, as is common in these cases, the Board argues in the alternative. First, it claims that the approved project is not uneconomic, and therefore its denial of the change should be upheld. But, second, if the Committee disagrees and finds that the approved project *is* uneconomic, it argues that the modified project is not substantially less uneconomic that the original project. Board's Brief, p. 2.

Committee Sep. 26, 1996); *Cooperative Alliance of Massachusetts v. Taunton*, No. 90-05, slip op. at 7 and n.11 (Mass Housing Appeals Committee Apr. 2, 1993); also see *Maritime Housing Fund, LLC v. Medway*, No. 06-14, slip op at 8 (Mass. Housing Appeals Committee Apr. 25, 2007); also see 760 CMR 56.07(2)(a)(3); also see Pre-Hearing Order, § IV-2.

If the developer sustains its burden, the burden shifts to the Board to prove that there is a valid local concern—in this case, construction noise—that supports the denial of the change, and that this concern outweighs the regional need for affordable housing.[4] 760 CMR 31.06(7); also see Pre-Hearing Order, § IV-3. If the Board sustains that burden, its denial of the change will be upheld.

Proof with regard to the developer's initial burden—to show that the denial makes the project uneconomic—can be complex. For that reason, the parties filed a Joint Motion for Clarification prior to submission of prefiled testimony, and the presiding officer issued a detailed ruling. See Ruling *in Limine* on Joint Motion to Clarify (Sep. 20, 2013). The full Committee has reviewed that ruling and hereby adopts it, restating or summarizing parts of it here for easier reference.[5] Specifically,

> The denial of a project change makes the proposal uneconomic when that denial makes it impossible... for the developer to proceed and still realize a Reasonable Return.... G.L. c. 40B, ¶ 20. "Reasonable Return"... was... explicitly defined for the first time in amendments to the regulations promulgated by DHCD on April 13, 2012.
>
> With regard to rental housing, the regulatory definition reinforces the common understanding that reasonable return encompasses two sorts of profit that may be realized by the developer: one-time development fees from the initial construction of the project and ongoing returns from operating revenues....
>
> Of these forms of profit, development fees are the simpler....
>
> The second form of profit, ongoing returns from operating revenues, is more

4. The Pre-Hearing Order misstates, or at least obfuscates, the burdens of proof in this case. When an appeal involves either the grant of a permit with conditions or the denial of a modification, the developer has no burden to prove "that its proposal complies with federal or state statutes or regulations, or with generally recognized standards as to [local concerns]." See 760 CMR 56. 07(2)(a)(2); c.f. Pre-Hearing Order, § IV-3. The confusion resulted from difficulties in preparing the Pre-Hearing Order during the somewhat contentious preparatory stages of this hearing. But nothing in that order can change the law found in our regulations and precedents. As the presiding officer noted in a letter to counsel on November 26, 2013 and on the Pre-Hearing Order itself, while the order "is a bit unorthodox..., its purpose is to define and limit the issues presented... not to settle questions of law...."

5. Much explanation and many citations in the ruling have been omitted here.

> difficult to analyze.... But recent cases have followed the [MHP] Guidelines,[6] and have used the ROTC [Return on Total Cost] approach.[7]
>
> [It is also important to consider the] date [for] measuring reasonable rate of return. [And proof in that regard] can be complicated. At the most basic level, it involves not fixed quantities, but rather projections of future costs and revenues. In addition, expert witnesses may use different approaches—both in making their projections and in analyzing them. And finally, housing development—particularly development pursued under a comprehensive permit—plays out over a significant period of time, adding further uncertainties.
>
> Proof concerning economics is usually presented with reference to competing *pro forma* financial statements. Analysis of this evidence is difficult unless projections within each *pro forma* are based upon a consistent date—a "snapshot" of the finances of the proposal at a particular time. ...[W]henever possible the date of the snapshot and other assumptions should be consistent....
>
> ,... the Committee has indicated on several occasions that the best date to use is typically "the time of the hearing." ... [Therefore] we will apply our traditional "time of hearing" benchmark, that is, the date upon which the Pre-Hearing Order is issued and the evidentiary portion of the hearing begins.

The ultimate question is whether the projected ROTCs for the approved and modified proposals fall short of the minimum reasonable return found in the MHP Guidelines. See *Autumnwood, LLC v. Sandwich*, No. 05-06, slip op. at 3 (Mass Housing Appeals Committee Decision on Remand Mar. 8, 2010), *aff'd* No. 07-462 (Barnstable Super. Ct. Jan. 23, 2012); *511 Washington Street, LLC v. Hanover*, No. 06-05, slip op. at 13-16 (Mass. Housing Appeals

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6. The formal title of the MHP Guidelines, which were admitted in to evidence as Exhibit 24, 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), *aff'd* No. 07-P-1372 (Mass. App. Ct. Oct. 10, 2008).

7. Use of ROTC is also supported by a recent change in the DHCD Comprehensive Permit Guidelines (Dec. 2014). We do not rely on those changes in any way, however, since they were issued after the date of hearing in this case. (Added to the guidelines were six new defined terms—Amount, Applicable 10-Year U.S. Treasury Rate, Minimum Return on Total Cost, Net Operating Income (NOI), Return on Total Cost (ROTC), and ROTC Threshold Increment—and Appendix I.1.)

Committee Jan. 22, 2008), *aff'd* 17 LCR 243 (Land Court No. 381349, Apr. 2, 2009). A proposal is uneconomic if the projected ROTC is not "at least 2½%... above current yield on 10-year [U.S.] Treasury notes." MHP Guidelines, Appendix, § C, p. 19 (2005). The parties' experts agreed that the Treasury rate on the applicable was 2.75%, and the ROTC threshold in this matter is 5.25%. Exh. 68, ¶ 64; 76, ¶ 14.

To summarize, the developer must prove that, calculated as of the date of hearing in this matter, November 22, 2013,[8] the ROTC for the originally approved proposal was less than 5.25%, and also significantly less than the ROTC for the current proposal. If the developer sustains this burden, the Board must prove that construction noise is of sufficient concern to outweigh the regional need for affordable housing.

B. Economics: The Developer's Presentation

To meet its burden, the developer presented testimony from Edward Marchant, an experienced affordable housing financial consultant. He prepared an analysis of the finances of the proposals using *pro forma* financial statements based upon various revenue and cost projections. Exh. 68, ¶¶ 14-15. To obtain estimates of rental income, operating costs, and certain soft costs, he worked with the project manager for the development, John O'Connor.[9] See Exh. 68, ¶ 18; Exh. 71. Rent schedules, based partly on nearby rental developments, are described in Mr. O'Connor's prefiled testimony. Exh. 71, ¶¶ 12-64. To estimate site preparation costs and construction costs, he worked with estimators from Callahan, Inc. Site preparation estimates were provided by a civil engineer, Robert Sanda, and included in his prefiled testimony. See Exh. 68, ¶ 19; Exh. 69; 69-1. Construction cost estimates were provided by Callahan's chief estimator, Frank DiCenso, with assistance from Mr. O'Connor, and also made part of the record. Exh. 68, ¶ 20; Exh. 70; 70-1.

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8. The parties stipulated to a date slightly before the Pre-Hearing Order was actually signed. Joint Motion… (filed Nov. 18, 2013; granted Nov. 18, 2013). We note again the importance of establishing a single effective date for estimates in conducting a review of *pro forma* financial statements. During the local hearing, that date is normally be "at the time of submission of the request for a Project Eligibility Letter…." MHP Guidelines, § II-D and Appendix A ("General"), pp. 7, 15 (Exh. 24); also see DHCD Comprehensive Permit Guidelines, § IV-B(1)(May 2013). During the hearing before the Committee, it is the date of the hearing, that is, the date the Pre-Hearing Order is signed, or another date, if agreed to by the parties.

9. The current developer, Woburn 38 Development, LLC (which is the successor to the original developer, Cirsan Trust), has entered into an agreemtn to sell the project to the Dolben Company, Inc. Mr. O'Connor is the New England regional project manager for Dolben.

For the original proposal, Mr. Marchant estimated the effective gross income as $3,271,553. Exh. 68. ¶ 25; 68-1, p. 3. He calculated operating expenses and replacement reserve as $1,176,000, which, when subtracted from effective gross income left net operating income (NOI) of $2,095,553. Exh. 68, ¶¶ 26, 27; 68-1, p. 2. He then estimated total hard costs of $48,610,850 and soft costs of $5,956,213, which when added to site acquisition costs of $150,000 totaled $54,717,063. Exh. 68. ¶¶ 41, 51, 53; 68-1, p. 1. He calculated developer's fee and overhead to be $5,659,206. Exh. 68, ¶ 55; 68-1, p. 1. Thus, total development cost was $60,376,269. Exh. 68, ¶ 57; 68-1, p. 1.

ROTC (Return on Total Cost) is calculated by dividing NOI by Total Development Cost. MHP Guidelines, Appendix, § C, p. 19 (2005). Thus, Mr. Marchant's estimated ROTC for the original proposal was $2,095,553 divided by $60,376,269 or 3.47%. Exh. 68, ¶ 61; Exh. 68-3.

For the current proposal, Mr. Marchant estimated the effective gross income as $3,194,357, with the primary difference from the original proposal being the lack of income from leasing of garage parking spaces. Exh. 68, ¶¶ 30, 31; 68-2, p. 3. He calculated operating expense and replacement reserve as $1,117,200, which, when subtracted from effective gross income left net operating income (NOI) of $2,077,157. Exh. 68, ¶¶ 32, 33; 68-2, p. 2. He then estimated total hard costs of $33,800,480 and soft costs of $4,653,352, which when added to site acquisition costs of $150,000 totaled $38,603,832. Exh. 68, ¶¶ 49, 52, 54; 68-2, p. 1. He calculated developer's fee and overhead to be $4,047,883. Exh. 68, ¶ 56; 68-2, p. 1. Thus, total development cost was $42,651,716. Exh. 68, ¶ 58; 68-2, p. 1.

For the current proposal, the estimated ROTC was $2,077,157 divided by $42,651,716 or 4.87%. Exh. 68, ¶ 62; Exh. 68-3.

C. Economics: The Board's Response and Our Findings

In a manner somewhat parallel to the developer's approach, the Board presented testimony from its own experienced affordable housing financial consultant, Richard Heaton, which was based in turn upon the work of a real estate appraiser (Jonathan Avery), a construction cost estimator (Bruce Sanford), a site civil engineer (Joseph Henderson), and a construction site manager (John Saunders). Based upon this, the Board challenges several aspects of the developer's case.

1. Project Income (the Original Project's Rental Rates) - The first argument made by the Board is that the developer's expert, Mr. O'Connor, underestimated rental income for the originally approved proposal.[10] Board's Brief, pp. 4-7. It argues that Mr. O'Connor's testimony is "not credible" for two reasons.

First, it argues that Mr. O'Connor both "arbitrarily change[d] the floor areas of... units, [and] also changed the price per square foot projections for these units between 2013 and 2014." Board's Brief, p. 5. Second, it argues that "Mr. O'Connor's explanation for why he changed the floor area figures between his 2013 testimony and his 2014 testimony was erratic." Board's Brief, p. 6.

We note at the outset, that the direct testimony of both Mr. O'Connor and Mr. Avery with regard to their market studies is somewhat perfunctory. On January 10, 2013, Mr. O'Connor prepared an affidavit, to which he attached a reasonably thorough market study, listing nine separate comparable properties in detail, as well as the sizes and rents of apartments (described as styles A, B, C, and D) in the modified proposal. Exh. 12, ¶¶ 20, 21, 27, 28; 12-A. On the same date, a simple table listing apartment styles for the original, approved design was prepared as part of a full *pro forma* financial statement; this showed more styles (styles A, A1, A2, B, C, and D), and different sizes and rents for the apartments. Exh. 14, p. 3; Tr. VII, 113. But when Mr. O'Connor filed his testimony in February 2014, however, he provided very little detail for yet another set of figures for the original design. He mentioned that the market study was updated, and that he focused on Kimball Towers as a comparable, but he did not attach a copy of the revised market study. Exh. 71, ¶ 12; 90 ¶ 5.

Similarly, Mr. Avery stated in his February 2014 testimony that his analysis was "based on information from November 2013 and includes comparable, similar projects in Woburn and the adjacent communities of Burlington and Reading," but he provided no specifics with regard to the comparables, simply listing his own estimates.[11] Exh. 79, ¶¶ 3, 4[sic].

In his rebuttal testimony, Mr. O'Connor elaborated a bit. He stated in a conclusory manner that Kimball Towers, in terms of design and operation, best represents the original

10. It does not challenge the rent estimates for the modified proposal.

11. Mr. Heaton, in his testimony on behalf of the Board, states, "Mr. Avery concluded that the developer had underestimated its rental income." Exh. 76, ¶ 20. That is not literally true; Mr. Avery simply provided his own, alternative estimate. Exh. 79.

proposed development. Exh. 90, ¶ 5. He also noted, as he had in his direct testimony, that he believed that in 2013 the size of apartments had been calculated improperly—measuring units based upon the outside of their walls rather than the inside of walls. Exh. 90, ¶7; 71, ¶ 15. He argued that Mr. Avery's use of these larger, incorrect figures originally supplied by the developer accounts for Mr. Avery's estimated rents being higher than his, and that if Mr. Avery's per-square-foot rate is applied to the proper sizes, the resulting rents are more similar to his estimates.

On cross-examination, Mr. O'Connor acknowledged the two premises of the Board's argument. First, the accepted way to approach the size of apartments is to measure from the interior of the walls, that is, to use net square footage.[12] Tr. VII, 116-118, 125, 143; Exh. 90, ¶37; also see Tr. VIII, 68. Second, Mr. O'Connor agreed with the Board that rents are properly estimated by first determining the typical per-square-foot-per-month rent in the market, and then multiplying that by the size of the apartment. Tr. VII, 112-113. Working from these premises, Mr. O'Connor failed to explain why all of his per-square-foot-per-month rates rose approximately 15% to 20% from 2013 to 2014. See Tr. VII, 123-124. Cross-examination focused on apartments with one bedroom, one bathroom, and a den, for which Mr. O'Connor's rate rose from $1.74 to $2.11 (20%). But his rates for two bedroom apartments (styles A, C, and D) also rose—from a range of between $1.52 to $1.62 to a range of between $1.76 to $1.86 (15%). Exh. 14, p. 3; 90, ¶¶ 13, 22, 26, 30, 34.

The Board argues that "the market price per square foot that Mr. Avery used… is almost identical to the price... that Mr. O'Connor used in his new [2014] market analysis." Board's Brief, p. 5. Mr. O'Connor also acknowledged that if Mr. Avery had used the proper size for the apartments, their estimates would be more similar. Exh. 90, ¶¶ 14, 19, 23, 27, 31, 35, 36. In fact, while neither expert's per-square-foot-per-month rate is well documented, Mr. O'Connor's failure to explain the change in rate casts doubt upon his testimony. Therefore, we find that the most reliable means of estimate rents for the original proposal—given the evidence presented to us—is to use Mr. Avery's dollars-per-square-foot rate with the apartment sizes that the parties ultimately agreed was the proper size. Since Mr. Avery did not have these sizes available when he filed his testimony, this requires recalculation.

12. We express no opinion as to whether apartments should be measured from the interior, exterior, or center line of their walls.

The Committee's recalculation follows, and is based upon the format used by Mr. Marchant (the developer's expert) in his prefiled testimony (Exh. 68-1, p. 3 (Sched. A)) and the simple rental recalculation provided by Mr. O'Connor in his rebuttal testimony:

		Developer's Calculation		Committee's Recalculation		
Market Units						
Type	Units	Rent/Mo.	Ann. Rent	Rent/Mo.		Ann. Rent
B	38	$1,575	$ 718,200	$1,533	(Exh. 90, ¶ 12)	$ 699,048
A1	7	$1,675	$ 140,700	$1,753	(Exh. 90, ¶ 16)	$ 147,252
A2	8	$1,850	$ 177,600	$1,693	(Exh. 90, ¶ 21)	$ 162,528
A	52	$1,875	$1,170,000	$1,712	(Exh. 90, ¶ 25)	$1,068,288
D	15	$1,850	$ 333,000	$1,690	(Exh. 90, ¶ 29)	$ 304,200
C	6	$2,025	$ 145,800	$1,953	(Exh. 90, ¶ 33)	$ 140,616
Affordable Units						
all	42	various	$ 650,664			$ 650,664
Subtotal			$3,335,964			$3,172,596
Vacancy 5%			$ 166,798			$ 158,630
Subtotal EGI			$3,169,166			$3,013,966
Parking			$ 98,787			$ 98,787
Late Fees			$ 3,600			$ 3,600
Effective Gross Income			$3,271,553			$3,116,353

2. Project Development Costs (Original Project) - The Board also challenges a number of aspects of the costs estimated by the developer for the original project.

a. Methodology - The Board argues that after preparing one estimate of construction costs for the original project effective December 5, 2012, the developer inflated its estimate prepared as of November 22, 2013. Board's Brief, p. 8; 89, ¶ 11. In the December 5, 2013 estimate (which was attached to its January 10, 2013 *pro forma* financial statement), the developer showed construction costs of $25,945,470 plus garage construction of $5,031,856 for a total of $30,977,326. Exh. 14. For his prefiled testimony, the developer's estimator prepared an entirely new estimate effective November 22, 2014, which showed construction costs of $27,900,007 plus garage construction costs of $6,665,000 for a total of $34,565,470. Exh. 70-1; 70, ¶ 31. This is an increase of 12%.

The Board's estimator, Mr. Sanford, prepared an estimate as of March 2, 2013 of $25,985,475 plus $4,987,180 for a total of $30,972,655, which is nearly identical to the developer's first estimate. Exh. 77-B, p. 2. Later, in his prefiled testimony, he updated that estimate to November 22, 2013 by applying an inflation factor based on the Construction Cost Index published by the Engineering News Record of 1.8%. Exh. 77, ¶¶ 12-13. This resulted in a new total cost of $31,530,165. The Board argues that using industry-wide measures is appropriate, noting that both the MHP Guidelines and the DHCD Comprehensive Permit Guidelines make reference to such standards. Board's Brief, p. 9. This is true up to a point. The DHCD Comprehensive Permit Guidelines, §§ IV(B)(3)(a)(1) and IV(B)(3)(c) indicate that "no detailed review of line items is necessary during cost certification if the overall construction cost is within industry norms (e.g., within 110% of RS Means data)," but if 110% of that standard is exceeded, the developer is required to provide further documentation. Similarly, in the context of *pro* forma review by the local board, the MHP guidelines state, "Real estate industry and affordable housing industry standards should be the basis for reviewing *pro forma* line items. Many of these standards are listed in this Appendix." Exh. 24, p. 15, pp. 7-8 ("Principle #7"). But it is also noteworthy that the specific reference to RS Means standards is in the context of cost certification by state agencies after construction has been completed. As the developer's financial expert, Mr. Marchant, noted, "the state [subsidizing agencies] needed some benchmark to evaluate whether or not costs are reasonable." Tr. VIII, 75. We do not disagree that industry-wide

data has a place in cost estimation, but in our hearing process actual itemized estimates are more reliable than a broad inflation factor. See Tr. VIII, 21-23, 74-79. Both experts initially did very detailed itemized estimates, analyzing scores of individual costs. Exh. 77-B; 89, ¶ 16; 89-A. But only the developer's estimator did that sort of analysis for the November 22, 2013 date. Further, he testified that his later, item-by-item estimate reflected labor and materials costs increases during 2013 resulting from a significant economic recovery from the recent recession as well as increased construction activity in the Boston area. Ex.89, ¶¶ 13-15, 63-64; Tr. VIII, 15, 21-22; also see Exh. 87, ¶25-26, 32. And, it was based upon contemporaneous bids from subcontactors. Tr. VIII, 14, 15, 31, 40-41. We accept his figures and find those to the appropriate costs to use in our analysis.

b. Developer's Fee - The Board argues that a "fictitious" developer's fee and overhead cost item should be eliminated from the construction costs for the original proposal since it was listed as a "waived" cost. Board's Brief, pp. 10-12. The Board's financial expert, Mr. Heaton, testified that the "Developer Fee and Overhead is an allowable cost, if it is actually taken,... [but in this case] it is being waived, and the only reason the developer is including it... is to artificially inflate its development costs...." Exh. 76, ¶¶ 30-31. This, however, reflects an unfortunately all-too-common misunderstanding of policy and practice under the Comprehensive Permit Law. It is standard practice to include the developer's fee and overhead—usually referred to as "deferred developer's fee" or "developer's fee loaned"—among funding sources, showing that the developer is contributing its right to collect this fee and overhead as part of its required equity contribution. Depending on the future economic performance of the development, the developer may or may not recover this amount from cash flow or sale proceeds. Thus, the notation that the fee and overhead is "waived" is not a waiver of the developer's right to collect this fee, and therefore the amount is properly included as a development cost. See Exh. 87, ¶¶ 61-67.

c. Site Preparation Costs - The Board also argues that site preparation costs for the original project should be reduced from $6,100,000 to $3,601,000 based upon an estimate provided by its civil engineer. Board's Brief, p. 10; Exh. 76, ¶ 24. More specifically, it presents a somewhat cursory argument that during the local hearing the developer said that costs of ledge excavation would be assumed by the ledge subcontractor in exchange for the commodity value of the resulting rock, and that its engineer estimated the value of the rock "to be $1,461,750, which more than offsets the costs of processing (crushing)... [of] $485,600." Board's Brief, p. 10. It is far from clear, based on this argument alone, how a profit of approximately one million dollars accounts for a cost reduction about two and a half million dollars. And, the developer's environmental engineer, in his prefiled rebuttal testimony, contradicted the testimony concerning representations made at the local hearing, though ultimately, exactly what was said at that hearing remains unclear. Exh. 92, ¶¶ 14-21; 92-1; Tr. VIII, 49-51, 54-57. In addition, the developer's civil engineer, who prepared the estimate, included the value of the rock in his calculations. Exh.69, ¶¶ 21-25. And, he presented a rebuttal to the Board's position, noting, among other things, that he believed that the Board's estimate omitted 25 specific cost items, totaling $848,540. Exh.88, ¶ 18-20. On balance, we find the estimate for site preparation costs presented by the developer to be the more credible.

d. The Committee's Finding

As described in section III-B, above, the developer's calculation of Return on Total Cost for the original proposal was as follows:

Gross Income	$ 3,271,553
Operating Expenses and Replacement Reserve	− $ 1,176,000
Net Operating Income (NOI)	$ 2,095,553
Hard Costs	$48,610,850
Soft Costs	$ 5,956,213
Acquisition Costs	+ $ 150,000
Subtotal	$54,717,063
Developer's Fee and Overhead	+ $ 5,659,206
Total Development Cost	$60,376,269

ROTC (Return on Total Cost) is calculated by dividing NOI (Net Operating Income) by TDC (Total Development Cost). Thus:

ROTC = $2,095,553 / $60,376,269 = 3.47%

In sections III-C(2), above, we have found that the developer's cost figures are credible, and therefore in calculating ROTC we need only substitute the Gross Income figure (in bold) as adjusted based on the Committee's finding above with regard to the proper dollar-per-square-foot-per-month rate. Thus the calculation of Return on Total Cost for the original proposal is as follows:

Gross Income	**$ 3,116,353**
Operating Expenses and Replacement Reserve	− $ 1,176,000
Net Operating Income (NOI)	$ 1,940,353
Hard Costs	$48,610,850
Soft Costs	$ 5,956,213
Acquisition Costs	+ $ 150,000
Subtotal	$54,717,063
Developer's Fee and Overhead	+ $ 5,659,206
Total Development Cost	$60,376,269

ROTC (Return on Total Cost) is calculated by dividing NOI (Net Operating Income) by TDC (Total Development Cost). Thus:

ROTC = $1,940,353 / $60,376,269 = 3.21%

Thus, we find that the ROTC for the original housing proposal is 3.21%. As noted at the beginning of section III-B, above, the developer proved—and the Board did not contest—that the ROTC for the current, modified proposal is 4.87%. Both of these figures are below the ROTC Threshold of 5.25%, and thus both proposals are uneconomic (see section III-A, above).[13] We find that that the original proposal, having an ROTC 1.66% lower than that of the current proposal, is significantly more uneconomic, and therefore that the developer has sustained its burden of proof. See Exh. 68, ¶¶ 64-65; 87, ¶¶ 77-82.

D. Concerns about Construction Noise

When the developer has sustained its burden of proof with regard to economics, the burden shifts to the Board to prove that there is a valid local concern that supports the denial of the project change, and that that concern outweighs the regional need for affordable housing. In this case, however, the Board first interposes a separate argument.

1. **State and Federal Law** - The Board's first substantive argument is that construction noise from "the modified project violates federal and state regulatory standards relative to noise and air pollution."[14] Board's Brief, p. 16, 16-26. As a practical matter, the

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13. As we have noted before, under some circumstances a developer may proceed with a proposal that under the Comprehensive Permit Law definition is uneconomic. See *Haskins Way, LLC v. Middleborough*, No. 09-08, slip op. at 18 (Mass. Housing Appeals Committee Mar. 28, 2011); *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"); also see *Avalon Cohasset, Inc. v. Cohasset*, No. 05-09, slip op. at 12-13 (Mass. Housing Appeals Committee Sep. 18, 2007); *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).

14. The Board makes this argument in the context of its incorrect claim that the developer has a burden to establish a *prima facie* case that its proposal complies with state or federal standards. See section III-A, n.4, above. As laid out in detail in section III-A, above, there is no such burden when the Board has already granted a permit and a modification is requested. To the extent that the Board would make the novel argument (which does not appear in its brief) that some project changes might be so dramatic as to require an exception to this rule, this is not such a case. That is, the operations and the noise created by rock removal for the modified development are no different from those for the development already approved—although construction will continue for twice as long. Ex. 81, ¶¶ 5, 6; Tr. VII, 86. And even if the burden were on the developer, the extensive evidence presented by the developer with regard to noise is clearly sufficient to establish a *prima facie* case, particularly since such a case "may be established with a minimum of evidence." Exh. 72, generally and ¶ 72; *100 Burrill Street, LLC v. Swampscott*, No. 05-21, slip op. at 7 (Mass. Housing Appeals Committee Jun. 9, 2008), quoting *Canton Housing Authority v. Canton*, No. 91-12, slip op. at 8 (Mass. Housing Appeals Committee Jul. 28, 1993); also see *Tetiquet River Village, Inc. v. Raynham*, No. 88-31, slip. op. 9 (Mass. Housing Appeals Committee Mar. 20, 1991).

Board has not pursued any argument with regard to dust or other pollutants (or with regard to vibration from blasting),[15] but limits its concern to noise. Board's Brief, pp. 16-26.

The Board's argument has no merit. We have long noted that state and federal requirements are not within the jurisdiction of the Housing Appeals Committee. *Green View Realty, LLC v. Holliston,* No. 06-16, slip op. at 9-10 (Mass. Housing Appeals Committee Jan. 19, 2009), *aff'd* 80 Mass. App. Ct. 406 (2011), *F.A.R. den.* No. FAR-20182 (Nov. 3, 2011) ("...nothing in Chapter 40B suggests that we should consider environmental issues raised under state and federal law. On the contrary, the Committee has no authority to hear a dispute as to whether a developer is adhering to state or federal law."); *O.I.B. Corporation v. Braintree*, No. 03-15, slip op. at 6-7 (Mass. Housing Appeals Committee Mar. 27, 2006)(holding that it is not "the role of either the Board or this Committee to adjudicate compliance with state standards"), *aff'd* No. 2006-1704 (Suffolk Super. Ct. Jul. 16, 2007); *Northern Middlesex Housing Assoc. v. Billerica*, No. 89-48, slip op. at 4 (Mass. Housing Appeals Committee memorandum on remand Oct. 13, 1993), *aff'd* No. 93-0067-D (Suffolk Super. Ct. May 17, 1994) ("...ensuring that remediation is performed 'in accordance with applicable federal and state hazardous waste regulations' is not within [the Committee's] jurisdiction.").

"It has long been held that it is unreasonable for a board to withhold approval of an application for a comprehensive permit when it could condition approval on tendering a suitable plan that would comply with State standards. *Board of Appeals of Hanover* [*v. Housing Appeals Committee*], 363 Mass. [339,] 381 [1973]...." *Zoning Board of Appeals of Holliston v. Housing Appeals Committee*, 80 Mass. App. Ct. 406, 415-416 (2011), *F.A.R. den.* No. FAR-20182 (Nov. 3, 2011). Thus, the developer must simply comply with all state and federal requirements. Construction of the development will not go forward unless it is in compliance with those requirements. See section IV(5)(b), below. Local officials may, of course, make routine inspections at the construction site, and refer possible violations to state and federal officials to enforce the requirements. See *Zoning Board of Appeals of Amesbury v. Housing Appeals Committee*, 457 Mass. 748, 765, n.21 (2010) (requirements to ensure

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15. The developer presented evidence that it would conduct dust surveillance and seismic monitoring programs during construction, and comply with applicable requirements. Exh. 75, ¶¶ 29, 52, and generally.

compliance with state law are not beyond the Board's authority and a process for "routine inspection" is appropriate); also see *GPH Cohasset v. Trustees of Reservations*, 85 Mass. App. Ct. 555, 559 (2104) (condition requiring a study after construction of a wind turbine was "sufficient to address any noise concerns and to ensure compliance with the ten dBA threshold"); also *D'Acci v. Rochester Board of Appeals*, Land Court 12 Misc. 460188 (Land Court Mar. 18, 2104) (condition permitting enforcement by zoning enforcement officer reasonably addresses noise concerns since "no final or accurate determination of compliance with State noise regulations would be possible until [an asphalt plant] is in operation").

2. **The Local Noise Ordinance** - As noted above, the ultimate question in this case is whether construction noise will violate any local ordinance, and if so, whether that violation is a local concern that outweighs the regional need for affordable housing. In that context, the last argument in the Board's brief is that construction of the project "will create a loud cacophony of noise that would rise to the level of 'noise pollution' under ... Woburn's ordinance...." Board's Brief, p. 28.

The Woburn noise ordinance is found in Title 9-2.[16] Exh. 81-C. It provides that noise pollution is sound that "increases noise levels [10 dBA] or more above background noise levels...."[17] Exh. 81-C, § 9.2(C)(10). The Board maintains that average sound levels from construction will range from 61 to 80 dBA (decibels A-weighting) at certain locations along the property boundary, and that maximum sound levels will reach 92 dBA. Board's Brief, pp. 29-31.

Each party hired a professional acoustics expert, and each did a thorough sound study. See Exh. 72, 72-1, 81. As is not uncommon, they disagreed on a number of assumptions and conclusions, including their conclusions as to whether the construction will conform to legal

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16. The Board also refers to section 5.2 of the Woburn Zoning Code. Board's Brief, pp. 31-31. It provides no citation to any document admitted into evidence, however. We will not consider ordinances, bylaws, or other local requirements that have not been introduced into evidence. See *Bay Watch Realty Trust v. Marion*, No. 02-28, slip op. at 4, n.6 (Mass. Housing Appeals Committee Dec. 5, 2005), citing *Perry v. Medeiros*, 369 Mass 836, 842 (1976)(provisions of municipal building code required to be admitted in documentary form). In any case, as a zoning ordinance, such a provision presumably applies to ongoing uses, not construction noise. We reject the Board's contention that the project is an ongoing quarrying operation masquerading as an affordable housing development.

17. The code also provides for the granting of permits by the local board of health to exceed these levels in cases of hardship. Exh. 81-C, § 9.2(G)(1).

sound limits. See Exh. 72-72; 81, ¶ 35; also see, e.g., Exh. 91, ¶¶ 16-20, 30, 32,41, 42, 51, 64, 67; 93, ¶¶ 6, 8-20; also see Board's Brief, p. 19 (ambient noise levels), 20-22 (placement of sound monitors), 24 (usage factors). Where they agreed, however, is that the local requirement is the same as the state requirement—that noise must be no greater than 10 dBA above ambient sound levels. Exh. 72, ¶¶ 16-18, 31; also see Exh. 81, ¶ 13. The Board's expert testified explicitly, "The City of Woburn does not impose restrictions upon residential construction that are more stringent than the requirements contained in 310 CMR 7.10 and the DEP [Massachusetts Department of Environmental Protection] Noise Policy." Exh. 72, ¶ 32. This resolves the dispute. As already noted, the developer *must* comply with state requirements. It will therefore be in compliance with local requirements, and no waiver of any local noise regulation under the Comprehensive Permit Law is necessary. See *O.I.B. Corp. v. Braintree*, No. 03-15, slip op at 8 (Mass. Housing Appeals Committee Mar. 27, 2006), *aff'd* No. 2006-1704 (Suffolk Super. Ct. Jul. 16, 2007) ("Since all local requirements [with regard to blasting] will be complied with fully, no local concern has been raised...."); also see *Green View Realty, LLC v. Holliston,* No. 06-16, slip op. at 10-11 (Mass. Housing Appeals Committee Jan. 19, 2009), *aff'd* 80 Mass. App. Ct. 406 (2011), *F.A.R. den.* No. FAR-20182 (Nov. 3, 2011) (if the municipality "has distinct regulations that are more strict than the parallel state law, issues raised under the local requirements are considered local concerns under the Comprehensive Permit Law.").

As with enforcement of state law, discussed in section III-D(1), above, local officials may—and certainly should—take any action that they would normally take to enforce the Woburn noise ordinance. This is particularly important because it is clear from the expert testimony that predicting sound levels in advance is difficult. This construction project will be loud and unusually lengthy, and the impact that it will inevitably have on abutters must be minimized. See Board's Brief, pp. 28-31. The developer proposed barriers to mitigate the noise. Exh. 72, ¶¶ 65, 69; 72-1, § 6.2 (p. 23); Tr. VII, 38. In response to growing concerns, additional mitigation was proposed.[18] Exh. 72, ¶ 73; 91 ¶ 34-35, 43-44. Though from the testimony of the developer's acoustics expert it appears that this additional mitigation will be

18. Additional mitigation includes constructing additional barriers or sound walls, enlarging the 25-foot-high kidney-bean-shaped stockpile around the crushing plant, using portable barriers around semi-stationary equipment, and using quieter construction equipment, including rubberized chutes. Exh. 91, ¶¶ 35, 44; Tr. VII, 81.

sufficient to comply with the law, it remains possible that his estimates are incorrect. In that case, the developer will be required by state and local officials to provide even more mitigation to safeguard the abutters. See Tr. VII, 79.

IV. CONCLUSION

Based upon review of the entire record and upon the findings of fact and discussion above, the Housing Appeals Committee concludes that the decision of the Woburn Board of Appeals filed with the city clerk on October 11, 2012 is not consistent with local needs. The decision of the Board is vacated and the Board is directed to permit the change in the comprehensive permit as requested by the developer as provided in the text of this decision and subject to the following conditions.

1. The comprehensive permit shall comply (except where obsolete, as indicated) with the conditions imposed by the Housing Appeals Committee in its June 11, 2003 decision, namely:

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

"(a) [condition obsolete]

"(b) A separate maintenance plan for the emergency access roadway shall be submitted to New England Fund monitoring agent for approval prior to construction, with enforcement of the requirements of that plan available under zoning or similar local procedures and by the monitoring agent.

"(c) [condition obsolete]

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

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

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

"(b) The subsidizing agency may impose additional requirements for site and

building design so long as they do not result in less protection of local concerns than provided in the original design or by conditions imposed by 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 the subsidizing agency, the standards of such agency shall control.

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

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

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

(a) The development shall be constructed as shown on drawings entitled "Site Development Plans for Ledges at Woburn," dated 1/27/012, revision C 7/27/12 (sheets C-1 to C-12, P-1, P-2, D-1 to D-7, A-1 to A-14, prepared by Allen & Major Associates, Inc. (Exhibit 21).

(b) All construction shall comply with all Massachusetts and federal regulations and requirements concerning noise and vibration, and with similar local requirements, that is, Woburn Municipal Code, § 9-2. Local officials and residents may take whatever actions are normally taken to ensure enforcement of such requirements.

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

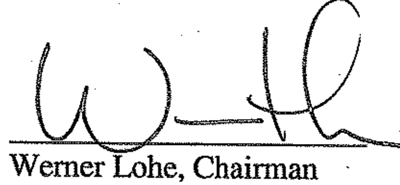
(d) This comprehensive permit is subject to the cost certification requirements of 760 CMR 56.00 and DHCD guidelines issued pursuant thereto.

(e) The Board shall not issue any further decision that imposes further conditions.

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

Dated: April 23, 2015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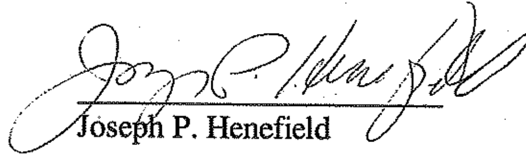
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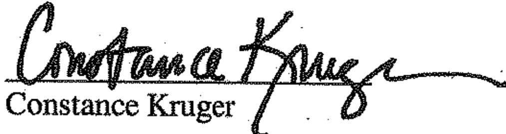
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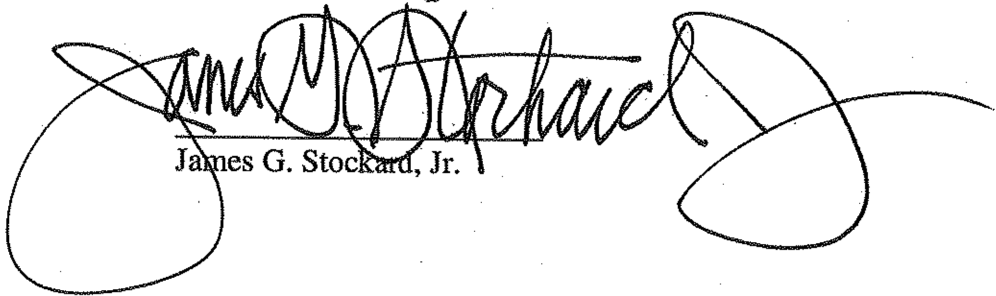
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