COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

AUTUMNWOOD, LLC

v.

SANDWICH ZONING BOARD OF APPEALS

No. 05-06

DECISION ON REMAND

March 8, 2010

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Appellant's Counsel
Michael E. Scott, Esq.
Scott E. Erlich, Esq.
Sarah A. Turano-Flores, Esq.
Nutter, McClennen & Fish, LLP
155 Seaport Boulevard
Boston, MA 02210

Board's Counsel
Jason R. Talerman, Esq.
Blatrnan, Bobrowski & Mead, LLC.
2 Milliston Road, Suite 2G
Millis, MA 02054

Appellant's Witnesses
Joseph M. Clancy, Real Estate Appraiser
Robert Engler; Housing and Financial Consultant; SEB, LLC
Richard P. Fenuccio, Jr., Architect
Edwin H. Gless, Jr., Land Surveyor
Mark W. Wisentaner; Principal and Manager; Autumnwood, LLC

Board's Witnesses
Thomas C. Garrahan, Real Estate Appraiser
Richard H. Heaton, Jr.; Housing and Financial Consultant; H&H Associates, LLP
Joseph D. Peznola, P.E.
James Weaver; Senior Engineer; NSTAR

COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

AUTUMNWOOD, LLC, Appellant	)	
v.	)	No. 05-06
SANDWICH ZONING BOARD OF APPEALS, Appellee	)	

DECISION ON REMAND

I. PROCEDURAL HISTORY

On March 5, 2004, Autumnwood, LLC filed an application for a comprehensive permit with the Sandwich Zoning Board of Appeal to build nearly three hundred housing units on a 47.5-acre site near Kiah's Way, not far from Quaker Meetinghouse Road in Sandwich. Construction of the housing would be financed under either the Housing Starts Program of Massachusetts Housing Finance Agency (MassHousing) or the New England Fund (NEF) of the Federal Home Loan Bank of Boston. The Board granted the developer's application subject to thirty-five conditions, filing the decision with the town clerk on February 15, 2005. The conditions of the Board's permit included provisions that prevented seventy percent of the land from being developed, and required within the remaining developable area that single family housing be built on lots no smaller than one third of an acre. The decision also questioned the use of Kiah's Way and two other roads, Discovery Hill Road and Pin Oak Drive, for access to the development.

The developer appealed the Board's decision, a hearing was held, and this Committee issued a decision on June 25, 2007 vacating the Board's decision and directing it

to issue a comprehensive permit. During the hearing, burdens of proof had been allocated based upon the presiding officer's ruling that the Board's decision should be deemed a *de facto* denial of the developer's permit application. But the Committee's decision was appealed to the Barnstable Superior Court, and during the appeal, it became clear that the Committee's approach was improper under the Supreme Judicial Court's subsequent ruling in *Board of Appeals of Woburn v. Housing Appeals Committee*, 451 Mass. 581, 593-594 (2008). Therefore, the parties and the Committee agreed that the matter should be remanded to the Committee to permit an "analysis of the economic impact of the conditions." *Sandwich Zoning Board of Appeals v. Housing Appeals Committee*, BACV 2007-00462 (Barnstable Super. Ct., Joint Motion... to Remand..., allowed Jul. 2, 2008).

On remand, the parties initially explored the possibility of settlement, but were unsuccessful. The Committee, therefore, through its presiding officer, issued a second Pre-Hearing Order on July 31, 2009, prefiled testimony was received from seven witnesses, two days of cross-examination were conducted on November 4 and 5, 2009, and post-hearing briefs were filed on January 28, 2010.

The factual issues concerning the local concerns which the Board put forth to support its position were addressed in great detail in our June 25, 2007 decision, and need not be reconsidered or restated here.

II. ECONOMIC EFFECT OF THE CONDITIONS

When the Board has granted a comprehensive permit with conditions, the central question before the Committee is whether the decision of the Board is consistent with local needs.[1] Pursuant to the Committee's procedures, however, there is a shifting burden of proof. The Appellant must first prove that the conditions in aggregate make construction of the housing uneconomic. See 760 CMR 56.07(2)(a)(3); *Walega v. Acushnet*, No. 89-17, slip op. at 8 (Mass. Housing Appeals Committee Nov. 14, 1990). Specifically, the developer must prove that the conditions imposed make it "impossible to proceed... and still realize a reasonable return." 760 CMR 56.02 (definition of "uneconomic"); G. L.

1. The developer also alleged that several conditions imposed by the Board are illegal, inconsistent with the Comprehensive Permit Law, or otherwise improper. Pre-Hearing Order, § IV-4 (issued Jul. 31, 2009). These are discussed in Section IV, below.

c. 40B, § 20. For this purpose, a reasonable return is a minimum 15%.[2] Exh. 72 (MHP Guidelines[3]), p. 17; Exh. 67, ¶¶ 6-7; Exh. 70, pp. 14 (¶ 3(a)), 16 (¶ b). The issue before us on remand, thus, is whether, under the most accurate financial projections available, the project at the reduced scale approved by the Board will realize a return of 15%. As will be seen below, we conclude that development approved by the Board will not do so and is therefore uneconomic.

A. The Developer's Presentation

The specific conditions upon which the developer relies to prove that the approved project is uneconomic are the conditions restricting the development to 30% of the site, restricting density to three units per acre on that 30% of the site, restricting use of certain roadways, and denying waivers of fees and certain roadway construction requirements. Pre-Hearing Order, § IV-3 (conditions 1, 3, 2, and 7)(issued Jul. 31, 2009).

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2. The phrase "reasonable return" is used in another way as well. That is, after a comprehensive permit is issued, the subsidizing agency is required to enforce upper "limitations on profits," which are also described in terms of "reasonable return." See 760 CMR 56.04(8). Such profit limitations are further defined in the Comprehensive Permit Guidelines as 20% of total development costs. Exh. 73 (Comprehensive Permit Guidelines (Department of Housing and Community Development Feb. 22, 2008, Jul. 30, 2008)), § IV-C(1). In whichever sense the phase is used—whether in the context of determining whether conditions render it uneconomic or in the context of cost examination or cost certification after a permit is issued—the proper methodology for determining reasonable return for an ownership development is a Return on Total Cost (ROTC) analysis. See *Rising Tide Development, LLC v. Lexington*, No. 03-05, slip op. at. 11 (Mass. Housing Appeals Committee Jun. 14, 2005); Comprehensive Permit Guidelines, § IV-C(1) (Department of Housing and Community Development Feb. 22, 2008). Further, although the figure to be used for reasonable return depends on the context, the methodology is the same. That methodology was first reduced to writing in 2005 in the MHP Guidelines, and more recently, in 2008, elaborated upon in the Comprehensive Permit Guidelines, particularly § IV-B.

3. 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).

In preparation for this hearing, the developer's principal, an experienced builder and developer, with the help of a team of consultants, analyzed the economics of the housing development at the reduced scale. See Exh. 66, especially ¶¶ 9-13. He first engaged a professional engineer and land surveyor to review the Board's decision and develop a new plan showing how many housing units can be constructed under the conditions imposed. Exh. 63, ¶ 4. That expert concluded that using the most reasonable interpretation of the decision, 33 single-family houses can be built.[4] Exh. 63, ¶¶ 8, 9; 63-B; also see Exh. 66, ¶ 19.

A certified real estate appraiser, Joseph Clancy, had already prepared an appraisal of the site for MassHousing (Massachusetts Housing Finance Agency) in 2003 prior to that agency's issuance of a Project Eligibility determination. Exh. 64, ¶ 4; 64-B, pp. 1, 5. Assuming that a 27-unit "Village Cluster Development" was the highest and best use under existing zoning, he determined that the market value of the site, effective July 1, 2003, was $2,850,000. Exh. 64, ¶ 6; 64-B, pp. 6, 24; also see Exh. 66, ¶ 20; also see Exh. 31A, § 4400, *et seq.* (cluster development bylaw). He also performed a market study and estimated the market value of the market-rate houses proposed in the new development at $293,000 each. Exh. 64, ¶ 8-10; 64-C, p. 2; also see Exh. 66, ¶ 20.

Through a construction company that the developer's principal controls, site development and construction costs for the development were estimated. Exh. 66, ¶ 16-18. Detailed breakdowns of these costs were admitted into evidence. See Exh. 66-A, 66-B. The construction cost estimates were reviewed on behalf of the developer by a licensed architect, who concluded that they were "fair, reasonable, and consistent with current construction costs for similar new single-family homes" in the area. Exh. 65, ¶ 7.

Finally, the developer's housing and financial consultant prepared a *pro forma* financial statement for the 33-unit project. Exh. 67, ¶¶ 5, 9. Basing his work on the estimates provided by the other experts, his analysis showed total development costs of $14,645,999, gross revenues of $8,978,426, and a loss of $5,667,571 or 39%. Exh. 67-A.

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4. This is consistent with the position taken by the Board. Appellee's Stipulation, (filed Oct. 23, 2009); Board's Brief, ¶ 21 (filed Jan. 27, 2010). The argument presented in the developer's Brief that only three units can be built is based upon an unrealistically literal reading of the Board's decision.

This, he testified, obviously shows that the approved project is uneconomic. Exh. 67, ¶ 9, 13, 14. The developer's principal also testified that the *pro forma* was accurate and that the approved project is uneconomic. Exh. 66, ¶ 21.

B. The Board's Response and Our Findings

1. Project Size – In rebuttal, the Board prepared its own analysis. It hired its own experts, including a professional engineer, Mr. Peznola. Exh. 68, ¶¶ 7. He considered how a development might be laid out under different scenarios. Some of his testimony indicates that " a maximum of six total lots may be built as a matter of right...." Exh. 68, ¶ 11. Other of his testimony supports that of the developer's engineer that a site layout of 33 units is reasonable.. Exh. 68, ¶ 12. But he also located three additional housing lots that could be permitted as of right—three "Approval Not Required" (ANR) lots on Kiah's Way.[5] Exh. 68, ¶¶ 9-11; 68-A. And, he noted that the developer's assumption of 33 units is problematic since 25% of the units must be affordable, and that figure must be rounded upwards. See Exh. 68, ¶ 12. That is, if 33 units were built, the calculated figure of 8.25 units would be rounded upwards, and nine of the units would have to be affordable. This is the same number of affordable units that would be required of a 36-unit development, and the larger development would be more feasible financially since there would be three additional market-rate units to provide internal subsidy.

We find that the testimony of the developer's witness with regard to project size to be credible, and to be supported by that of the Board's witness. We also find the Board's witness' testimony with regard to the three additional units to be credible, and therefore conclude that the most reasonable assumption of project size for the required economic analysis is 36 units—the 33 units agreed upon by both witnesses plus three ANR lots. Also see more detailed discussion of zoning in Section II-B(2)(b), below.

2. Land Acquisition Cost – The greatest part of the Board's argument has focused on the value of the development parcel, asserting that it is only $460,000, a current value based upon a highest and best use of six single-family house lots. Board's

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5. Testimony was also provided by a senior engineer from NSTAR. His testimony primarily addressed rights to use the roadways that cross the site, which we will not address here since they were addressed in our original decision. The new testimony does not contradict the testimony that three ANR lots can be developed.

Brief, p. 22. As proof, it presented a real estate appraiser, Thomas Garrahan, who testified that the fair market value of the property under existing zoning as October 11, 2009 is $460,000. Exh. 71, ¶ 6; Exh. 71-B, pp. 3, 36; also see Tr. II, 3-75. His disagreement with Mr. Clancy's figure of $2,850,000 is based on several factors:

a. Type and number of units - Most significant, Mr. Garrahan prepared his appraisal for the town of Sandwich for use in this hearing, and the town explicitly required him to assume that the highest and best use of the site is for six single-family house lots.[6] Exh. 70, ¶ 5; 71-B, pp. 3, 10, 25-26; Tr. II, 13-15. He did not consider a larger, cluster development as the highest and best use, and he questioned whether 27 units was an accurate estimate of the number of cluster units that could be built, though he offered few specifics and did not suggest his own figure. See Exh. 71, ¶¶ 8(a), 8(b).

Other witnesses also addressed the question of what use and number of units should be considered in appraising the property. The Board's financial expert, Mr. Heaton agreed with Mr. Garrahan's six-unit assumption, and said that appraisals under the Comprehensive Permit Law should consider by-right zoning "without any variances or special permits." Exh. 70, ¶ 9(a)(vi)(2) But even Mr. Garrahan disagreed with that formulation, stating that fair market value should be based upon the highest and best use that is "reasonably probable." Exh. 71-B, p. 24; Tr. II, 11-13. The latter interpretation is consistent with the DHCD Comprehensive Permit Guidelines, which state that "the

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6. Why the Board gave such instructions is not entirely clear. Most likely it is because the Board continues to argue that "the Appellant cannot presently produce even a 'minimum of evidence' that the securing of access rights is probable." Board's Brief, p. 21. And, if one were to assume that access is limited, then one might well accept the opinion of the Board's engineer that "a maximum of six total lots may be built as a matter of right on the subject property." Exh. 68, ¶11. But we laid this issue to rest in our earlier decision in this matter:

> [Although] there are in fact serious questions about access rights,... the developer has presented extensive evidence of its claims....We need not address this matter in more detail, since we have long held that ... where... access... is at issue, the developer need only establish a colorable claim of title, and that the adjudication of the complex title or other issues will be left to the expertise of the courts. (citations omitted.)

Autumnwood, LLC v. Sandwich, No. 05-06, slip op. at 4-5 (Mass Housing Appeals Committee Jun. 25, 2007). We reiterate: in both this decision and our earlier decision, we have assumed that the developer has—or can establish—rights of access sufficient to build a significant development on the site. All of our analysis is based on this assumption.

appraisal may ... take into account the probability of obtaining a variance, special permit, or other zoning related relief." Exh. 73, § IV-B(1).

As noted above, the Board's engineer, Mr. Peznola, also testified that "a maximum of six total lots may be built as a matter of right..." Exh. 68, ¶ 11. But he was careful to qualify this testimony, noting that it was based on the assumption that the developer does not have the right to improve roadways to provide access. Exh. 68, ¶ 7(b). In a peer-review memorandum commissioned by the Board in 2004, Mr. Peznola presented his own opinion of the highest and best use, rather than relying on someone else's assumption, and he indicated that approximately 27 to 30 units could be built under the town's cluster development bylaw. Exh. 43, p. 9, items 4441, 7820.

Finally, Mr. Garrahan's testimony is undercut dramatically by an earlier appraisal of his own that came to light only during cross-examination. In an appraisal dated February 2, 2003, he assumed a 26-unit development (close to Mr. Clancy's 27-unit development), and he valued the land, as of October 23, 2002, at $1,925,000. Exh, 74, p. 4; Tr. II, 25-26.

Based upon consideration of all of the testimony of the witnesses and our own review of the Sandwich zoning bylaw itself, we find that an accurate appraisal in this case should have been based upon a cluster subdivision, not the six-unit development assumed by Mr. Garrahan. See Exh. 31-A, § 4400, *et seq.* (Protective Zoning Bylaw: Cluster Development).

b. Date of valuation - As noted above, Mr. Garrahan prepared his appraisal on October 11, 2009, and his valuation was as of that date. Exh. 71-B, p. 11. He argued that Mr. Clancy's appraisal was flawed since "[t]here is no dispute among appraisers... that land values in general in this area of Sandwich ... have decreased since 2003." Exh. 71, § 7. In fact, however, the proper date for valuation is 2003, which is when the developer applied to MassHousing for a project eligibility determination. Under "Standards for Determining Whether Permit Conditions Make a 40B Development Uneconomic," the 2005 MHP Guidelines (see n.3, *supra*) state clearly: "The allowable acquisition value... is the fair market value at the time of submission of the request for a project eligibility

letter plus reasonable and verifiable carrying costs...."[7] Exh. 72, p. 13; also see *Rising Tide Development, LLC v. Sherborn*, No 03-24, slip op. at 9, n.9 (Mass. Housing Appeals Committee Mar. 27, 2006).

c. Unit size - Mr. Garrahan also suggested that Mr. Clancy failed to consider that in a Village Cluster, each house is limited to two bedrooms. Exh 71, ¶ 8(c). The record is unclear, however, as to exactly what size units Mr. Clancy considered, and what, if any distinctions he drew between a standard cluster development and a Village Cluster development. He presumably was aware of the distinction, however, since he testified that he reviewed the Zoning Bylaw, and the Village Cluster Regulations (which he attached as an exhibit to his appraisal) clearly state that houses are limited to two bedrooms. Exh. 64-B, p. 32. We find that this argument is based on speculation by Mr. Garrahan, and therefore not convincing.

d. Mr. Garrahan also challenged other aspects of Mr. Clancy's appraisal. For instance, he argues that the comparable sales used by Mr. Clancy are not truly comparable. Exh. 71, ¶ 8(d). He also suggests that Mr. Clancy failed to note that the Cape Cod Commission "would likely require at least 3 out of the 27 lots be restricted" as affordable housing. Exh. 71, ¶ 8(e). And, he suggests that Mr. Clancy's discounted cash-flow analysis is flawed since it does not account for approximately one year which would be lost in the permitting process and that roadway extensions and upgrades will be

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7. This state policy articulated in the MHP Guidelines, which fixes land value at one point in time, and permits it to change only based upon carrying costs over time, has been reaffirmed in the 2008 DHCD Comprehensive Permit Guidelines (DHCD Feb. 2, 2008). Exh. 73, § IV-B(1).

Even if the proper valuation date were not so clearly established by the state guidelines, use of a 2009 appraisal would have been in error. Since this matter is on remand, so far as possible we must establish the facts as they were at the time of the original hearing. Under our regulations, our hearing is open from the initial Conference of Counsel until the filing of briefs. 760 CMR 56.06(7)(d)(1), 56.06(7)(e)(9). For evidentiary purposes, our practice is to consider the "date of hearing" to be the date on which the Pre-Hearing Order is issued. See *Avalon Cohasset, Inc. v. Cohasset*, No. 05-09, slip op. at 18, n.21 (Mass. Housing Appeals Committee Sep. 18, 2007). To eliminate any possible confusion, the Pre-Hearing Order on remand established that, "for evidentiary purposes, the date of the hearing in this matter—both originally and in these remand proceedings—shall be deemed to be the date that the original Pre-Hearing Order was issued, June 30, 2006." Pre-Hearing Order (on remand), § II-1 (Jul. 31, 2009). Also see *Paragon Residential Properties v. Brookline*, No. 04-16, slip op. at 33 (Mass. Housing Appeals Committee Mar. 26, 2007), *aff'd* No. 07-0697 (Norfolk Super. Ct. Feb. 17, 2010) ("we have emphasized the importance of evaluating costs that are based at the same or comparable time periods...").

necessary. Exh 71, ¶ 8(f). None of these, in our view, significantly undercuts the credibility of Mr. Clancy's appraisal.

We find that the proper land acquisition value to be considered in evaluating the economics of the housing proposal is $2,850,000.

3. Road Construction Costs – The Board's engineer also testified with regard to construction costs. The only disagreement that he noted is his belief that road construction would cost only $200 per linear foot.[8] Exh. 68, ¶ 13. Based upon an estimated 2,000-foot roadway, in his opinion the proper costs to be carried in the financial analysis is would be $400,000 rather than the developer's estimate of $715,390. See Exh. 66-B. Even though the developer did prepare its estimate based on itemized costs, neither party has supplied us with a significant amount of background to assist us in making a finding on this issue. We are concerned, however, that even though Exhibit 66-B contains the heading "Road Construction Cost Estimate," the testimony of the developer's principal about the $715,290 line item referred to "site development costs, which... also include utilities, landscaping, and... municipal requirements." See Exh. 66, ¶ 17. This appears to address *all* site development costs, while the *pro forma* financial statement lists three separate line items under "site development:" "roads" at $715,390, "on-site septic" at $277,200, and "landscaping and driveway" at $337,788. The inconsistency between the exhibit and the testimony undercuts the witness' credibility, and therefore, although we accept the figures in the *pro forma* for "septic" and

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8. Based upon this witness' testimony that a two-building, 32-unit condominium was feasible, the Board also makes a one-paragraph argument at the end of its brief that "it was incumbent upon the Appellant to demonstrate that it could not construct a viable project under any reasonable application of the Board's conditions of approval." Board's Brief, p. 23; also see Board's Brief, ¶ 46. But such a development bears almost no resemblance to the small-lot, "walking" community originally proposed by the developer. Cf. Exh. 2 and Exh. 68-B; Tr. I, 73, 77-78. That the developer need not pursue such an option is abundantly clear in the Board's own decision: "[T]he Applicant may *choose* to build either a subdivision of single-family detached homes or multi-family condominium buildings." Exh. 1, § IV-3 (condition 3)(emphasis added). Further, the Board's argument conflicts with this Committee's long held view that the board must review the proposal submitted to it, and may not redesign the project from scratch. See *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 24 (Mass. Housing Appeals Committee Jun. 24, 1992); *Hastings Village, Inc. v. Wellesley*, No. 95-05, slip op. at 17, n.15 (Mass. Housing Appeals Committee Jan. 8, 1998).

landscaping, we find that the $400,000 estimate of the Board's witness is more credible with regard to road construction cost.

4. Building Construction Costs – The Board also argues that the developer's "projected costs of construction have increased at a rate that is higher than industry norms," citing a preliminary *pro forma* financial statement that the developer submitted to MassHousing in 2003. Board's Brief, ¶ 42(a); p. 22; see Exh. 70-L. The Board's financial expert, Mr. Heaton, testified with regard to this exhibit, Exhibit 70-L (although he refers to it as a 2004 document).[9] Exh. 70, ¶ 9(b) (p.9). He compares this early estimate to the developer's construction estimates presented through testimony, which are $188,160 for each affordable unit and $237,322 for each market-rate unit. Exh. 70, ¶ 9(b)(i) (p. 9); see Exh. 66-A. He assumes, without comment, that the developer's estimates are current as of 2009, and provides a complex comparison using RS Means Residential Construction Cost Data (RS Means) that shows that average costs rose 11.5% from 2004 to 2009, while the developer's figures rose 50% during roughly the same period. Exh. 70, ¶¶ 9(b)(iii), 9(b)(v) (pp. 7, 8). This, he argues, proves that the developer's figures are inflated.

It is difficult to compare the cases presented by the two parties. And neither is entirely accurate. For instance, both assume that the proper figures to use in the *pro forma* analysis are 2009 figures. In fact, since we are considering this on remand, the better date would be the date of the original hearing, June 30, 2006. See Pre-Hearing Order, § III-1 (Jul. 31, 2009) and n.7, above. This three-year discrepancy, however, makes little difference since the board's exhibit showing changes in construction costs clearly indicates that construction costs were rising in 2006 and 2007, but began to fall in 2008, so that average costs in 2006 and 2009 were roughly equal. Exh. 70-B.

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9. This witness presented lengthy prefiled testimony, covering many issues and sub-issues. It is difficult to follow, not only because of its complexity, but also because it uses a complicated, numbered outline system, which appears to contain a number of errors. More important, many of the points made in the testimony have not been argued in the Board's brief. We consider all such arguments waived because they have either not been briefed either at all or have not been briefed sufficiently to permits us to consider them in a meaningful manner. *Lolos v. Berlin*, 338 Mass. 10, 13-14 (1958); *Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85 (1995); *Hollis Hills, LLC v. Lunenburg*, No. 07-13, slip op. at 35, Mass. Housing Appeals Committee Dec. 4, 2009); *An-Co, Inc. v. Haverhill*, No. 90-11, slip op. at 19 (Mass. Housing Appeals Committee Jun. 28, 1994).

One weakness in Mr. Heaton's challenge to the developer's estimates is that without further evidence, it is very difficult to determine what significance should be attached to the developer's 2003 preliminary *pro forma*. It appears as a barely legible document attached to Mr. Heaton's testimony, with little or no other testimony to explain the context in which it was prepared, reviewed, and presumably revised. See Exh 70-L.

In addition, Mr. Heaton's figures do not actually undermine the developer's estimates, but only indicate a difference in judgment. Mr. Heaton makes a complex argument concerning various grades of construction considered in RS Means data. He states that there are four grades: economy, average, custom, and luxury, noting that the last does not apply to this development. Exh. 70, ¶ 9(c)(ii) (p. 8). He then quotes the RS Means average costs for units comparable to those proposed here at the economy, average, and custom grades as $50,793, $180,620, and $233,065 respectively. Exh. 70, ¶ 9(c)(iii)(6) (p. 10). Although we understand that his argument is that it is the *economy* and *average* costs that are relevant, the *average* and *custom* figures are in fact quite close to the developer's figures, and are some indication that the developer's costs for affordable and market-rate units of $188,160 and $237,322 are not entirely beyond the cost range that might be expected.

On balance, after evaluating the credibility of the witnesses and their testimony, we find the simpler, commonsense estimates provided by the developer, which rely on his business experience and are supported by the testimony of an architect, to be more credible than those of the Board's witness.

As noted above, the proper project size to be assumed in our economic analysis is 36 units—9 affordable units and 27 market-rate units. Simple calculation shows that 9 units sold at $188,160 plus 27 units at $237,322 yield total estimated construction cost of $8,101,134.

5. Soft Costs – The Board did not challenge the figures carried in the *pro forma* financial statement for soft costs, and we therefore accept those provided by the developer.

6. Sales Prices – There is no serious challenge to the estimated sales prices provided by the developer. There is only passing reference to the fact that "[i]n the revised *pro forma*," the selling price of homes appears to have increased by 5%. Exh. 70, ¶ 2(b) (or ¶ 10(b)) (p. 12). Later, there is a similar reference to the possibility that

the sales price of affordable units used by the developer could be too high (which, surprisingly, would argue in favor of the developer since using a lower sales price would reduce his profit). See Exh. 70, ¶ 5(c)(i)(2) (or 13(c)(i)(2)) (p. 19). In any case, this issue was not briefed by the Board and is therefore waived. (In fact, the Board appears in its brief to accept the developer's figure. See Board's Brief, ¶ 48(d).)

As noted above, the proper project size to be assumed here is a development of 9 affordable units and 27 market-rate units. We find the evidence presented by the developer to be credible, and simple calculation shows that 9 units sold $216,270 plus 27 units at $293,000 yield estimated gross revenues of $9,857,430.

C. Synthesized *Pro Forma* Analysis

As indicated above, the *pro forma* prepared by the developer's expert used standard methodology, and was critiqued by the Board's expert. We have reviewed the areas of agreement and disagreement ourselves above, and provide a synthesized analysis here in the same format:

1. Development Costs

Hard Costs			
Acquisition	2,850,000	developer's figure	§ II-B(2)[10]
Site Development			
roads	400,000	Board's figure	§ II-B(3)
on-site septic	277,200	developer's figure	§ II-B(3)
landscaping & driveway	337,788	developer's figure	§ II-B(3)
Construction	8,101,134	calculation	§ II-B(4)
Hard Cost Contingency @ 10%	911,612	calculation[11]	
Sub-Total Hard Costs	12,877,734	calculation	
Soft Costs			
Sub-Total Soft Costs	2,204,504	developer's figure	§ II-B(5)
Total Development Costs	15,082,238	calculation	

Thus, we find that a fair estimate of the total development cost for the 36-unit development approved by the Board is $15,082,238.

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10. The citations in this column refer to sections in this decision, above.

11. The hard cost contingency is 10% of site development and construction costs; that is, it excludes acquisition cost.

2. Projected Sales Proceeds

As noted above, estimated gross revenues are $9,857,430.

3. ROTC

Using the standard analysis, the return on total cost (ROTC) is projected sales proceeds minus total development costs, and if this is less than 15% of total development costs, the proposed development is uneconomic. Exh. 72 (MHP Guidelines), p. 17; also see Board's Brief, ¶ 45(b), p. 20. In this case, the projected sales proceeds of $9,857,430 minus total development costs of $15,082,238 yields an ROTC of a loss of $5,225,208, which is a loss of 35% of total development costs.[12] Therefore, we conclude that the developer has met its burden of proving that the conditions imposed by the Board make construction of the housing uneconomic.[13]

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12. Casual consideration of this figure might lead one to ask whether this development can be profitable even at the size proposed by the developer. The short answer is that the developer estimates that it will sell market-rate units for about $70,000 more than their construction cost, and therefore if fixed costs—acquisition cost, site development costs, and soft costs—are spread over enough units, it will realize a profit.

Further, under some circumstances, a developer may chose to proceed even if the economic analysis done in the context of an appeal to this Committee is unfavorable. See *Avalon Cohasset, Inc. v. Cohasset*, No. 05-09, slip op. at 12-13 (Mass. Housing Appeals Committee Sep. 18, 2007); also see Exh. 67, ¶ 14. Based upon the *Avalon Cohasset* case, the Board argues, in a short concluding paragraph that if the developer's "own costs and revenues" were applied to its 272-unit proposal, it would "suffer a 16% loss." Board's Brief, pp. 23-24, also ¶ 48. This argument is not adequately briefed. *Lolos v. Berlin*, 338 Mass. 10, 13-14 (1958); *Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85 (1995); *Hollis Hills, LLC v. Lunenburg*, No. 07-13, slip op. at 35, Mass. Housing Appeals Committee Dec. 4, 2009); *An-Co, Inc. v. Haverhill*, No. 90-11, slip op. at 19 (Mass. Housing Appeals Committee Jun. 28, 1994). More important, it was not adequately raised prior to the hearing so as to put the developer on notice that it would be required to present a defense on this issue; if it had been, the issue would have been included in the Pre-Hearing Order. See Pre-Hearing Order, § IV (Jul. 31, 2009). And, finally, even if the Board's assertion is true—that the developer's proposal shows a 16% loss—the development approved by the Board, with a 35% loss, is still significantly more uneconomic than the developer's proposal, and that loss would therefore be sufficient to satisfy the developer's burden of proof. See *Avalon Cohasset, Inc. v. Cohassset, supra.*

13. We understand our statutory obligation to be to examine the economics of a proposal before us in as much technical detail as is possible given the evidence put before us by the parties. Thus, as described above, our conclusion is based on specific findings, which are based in turn on the evidence and testimony presented to us—much of it conflicting—and result from both our analysis and our determinations with regard to the credibility of the witnesses. But it is difficult to resist doing our own "back-of-the-envelope" calculation. That is, since sales proceeds are $10 million, even if we were to assume that the developer acquired the land for free, and if we were to reduce its construction costs by a third, then total development costs would still be $9.2

III. CONCLUSION

In our original hearing in this matter, we deemed the Board's decision a denial of a comprehensive permit, and therefore considered, pursuant to 760 CMR 31.06(6),[14] whether the Board had met its burden of proving local concerns which supported its decision and that any such concerns outweighed the regional housing need. The local concerns that it relied on involved density and access from local roads. *Autumnwood, LLC v. Sandwich*, No. 05-06, slip op. at 7 (Mass. Housing Appeals Committee Jun. 25, 2007). In the decision that we issued on June 25, 2007, we concluded that the Board had not met this burden. Today, on remand, the central issues of local concern have not changed. See § II-A (p. 7), above. But, because of the court's decision in *Board of Appeals of Woburn v. Housing Appeals Committee*, 451 Mass. 581, 593-594 (2008), we have revisited the case, viewing the Board's decision as a grant of a comprehensive permit with conditions. That is, we have considered, pursuant to 760 CMR 56.07(2)(a)(3), whether the developer has met its burden of first proving that the conditions imposed to address the local concerns make the building of the project uneconomic. We have concluded that the developer has met its burden. In such a case—an approval with conditions when the developer has proven that the conditions make the project uneconomic—the Board has the same burden as it did when it originally presented its case to us. That is, it must prove local concerns which support its decision and that any such concerns outweigh the regional housing need. 760 CMR 56/07(2)(b)(3).[15] Since the burden is the same, we need not re-examine the review of local concerns that we completed over two years ago.[16] Rather, relying on our previous findings of fact and application of the law to them, we again conclude that the decision of the Sandwich Zoning Board of Appeals was not consistent with local needs. The decision of

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million, leaving it with a profit of $0.8 million or only 9%. (Also contributing to such a low profit, presumably, are unchallenged, legitimate soft costs already incurred.) While our findings and conclusions are not based on these rough calculations, they do give an indication of how financially unrealistic a 36-unit development is.

14. This provision now appears in our regulations at 760 CMR 56.07(2)(b)(2).

15. This provision previously appeared in our regulations at 760 CMR 31.06(7).

16. This conforms with the burdens of proof established in the Pre-Hearing Order, § IV-5 (Jul. 31, 2009).

the Board is vacated, and the Board is directed to issue a comprehensive permit as provided in our decision of June 25, 2007.

IV. REVIEW OF CONDITIONS IMPOSED BY THE BOARD

Of the many conditions imposed by the Board in granting the comprehensive permit, several were not the subject of testimony in the Committee's hearing on remand. Instead, after the Pre-Hearing Order was issued, the developer filed a Motion for Summary Decision pursuant to 760 CMR 56.06(5)(d). It states that while the primary conditions which render the proposal uneconomic will be litigated during the hearing in chief, several of the Board's conditions are not disputed factually and yet "are ambiguous, cause excessive delays, and are improper, illegal, or otherwise beyond the Board's authority." Motion for Summary Decision, p.1 (filed Oct. 26, 2009). It asks us to overturn or modify these conditions.

Initially, the Board argues that this Committee must make individual findings with regard to the economic effect of each of these conditions, or else, under the holding in *Board of Appeals of Woburn v. Housing Appeals Committee*, 451 Mass. 581 (2008), we have no authority to consider the conditions. We believe that this is an overly broad reading of *Woburn*. In that case, the Committee made a determination that the developer had "not proven that the conditions [made] the housing... uneconomic," and yet went on to consider whether the conditions were consistent with local needs. *Archstone Communities Trust v. Woburn*, No. 01-07, slip op. at 19 (Mass. Housing Appeals Committee Jun. 11, 2003), *rev'd* 451 Mass. 581 (2008). It was this that the Supreme Judicial Court ruled was improper.[17] *Woburn*, 451 Mass. at 591, 596. In the current case, however, we have found (in Section III, above) that conditions imposed by the Board have rendered the proposal uneconomic.

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17. In *Woburn*, the Supreme Judicial Court also rejected that Committee's argument on appeal (based up the ruling of the Superior Court) that certain decisions of local boards could be considered *de facto* denials of comprehensive permits. *Woburn*, 451 Mass. at 591-594. It is because of this secondary holding that the parties agreed to remand of the instant case for further proceedings.

We believe that we have the authority to consider the challenged conditions for a number of reasons. First, over the years, it has been a matter of routine for this Committee to review individual conditions imposed by the Board to ensure that they are consistent with the law. See, e.g., *Owens v. Belmont*, No. 89-21 (Mass. Housing Appeals Committee Jun. 25, 1992).

Second, there are a number of circumstances under which the logic of the Comprehensive Permit Law demands that we, as the administrative body charged with its oversight, ensure that the Board's actions are consistent with the law. For instance, in *Attitash Views, LLC v. Amesbury*, in an unusual case in which the matter in issue was only the developer's claim that the conditions imposed were improper as a matter of law, in which the subsidizing agency had indicated that only these conditions stood in the way of final subsidy approval, and in which the Board had presented no local concerns to support the conditions, we concluded that that normal requirement that the developer prove that the conditions imposed render the proposed development uneconomic was not applicable. *Attitash Views, LLC v. Amesbury*, No. 06-17, at 5 (Mass. Housing Appeals Committee Summary Decision Oct. 15, 2007), *aff'd*, No. 2007-5046 (Suffolk Super. Ct. Jan. 7, 2009), *transferred from the Appeals Court*, No. SJC-10637 (S.J.C. Dec. 28, 2009); also see *Whitcomb Ridge, LLC v. Boxborough*, No. 06-11 (Mass. Housing Appeals Committee Jan. 22, 2008). The motion for summary decision before us is very similar.

Finally, and most important, our regulations make it clear that we have such authority in the current case. Specifically, our regulations require that our initial review of the economics of the conditions is a review of them *in aggregate*. 760 CMR 56.07(1)(c)(1). In any case before us it would be a simple matter for the developer to place all of the conditions in issue by simply alleging that it is all of them that render the proposal uneconomic. If the developer, in order to provide for a more efficient hearing, voluntarily limits its economic proof to those that have the greatest economic impact, and challenges only the legality of others, that does not limit our power to review the latter. Any other result would require us to consider the economic effect of each of the challenged conditions. There is no regulatory support for such a procedure, and it would be counter to the intent expressed in requiring economic review in aggregate.

We have reviewed each of the conditions questioned by the developer, and we find that since they are stated clearly in the Board's decision, there is no material dispute of fact before us. The issues raised are legal issues, and not, as the Board suggests in its brief, ones for which an affidavit or other evidence would be helpful in establishing whether they "impinge on the autonomy of MassHousing."[18] See Appellee's Opposition, p. 5, (filed Dec. 4, 2009). We will consider these conditions in the order in which they are presented in the developer's brief.

A. Condition 14 - 25% Affordable Units

Condition 14, which states that "one out of every four units purchased during initial sale... must be affordable," is ambiguous because it paraphrases the usual formulation of the requirement that 25% of all housing units be affordable. The language of the condition can be interpreted in at least two ways. First, it may simply require that when all units have been sold, 25% have been sold as affordable units. This—the most logical reading—is less strict than the typical MassHousing procedure, which is that all of the affordable units be designated prior to construction, that affordable units be included in all construction phases, and that one affordable unit be built for each three market-rate units built. A second interpretation would require that as sales progress, at least one affordable unit be sold for every three market-rate units. This interpretation makes little sense since affordable units normally sell more quickly than market-rate units, and even if that were not the case, no harm would be done if in fact a few affordable units remained vacant longer than market-rate units. We see no harm in leaving Condition 14 in place, but to resolve any ambiguity, we require that it be interpreted to conform to the policies of MassHousing, the subsidizing agency.

B. Condition 15 - Profit Limitation

This condition, limiting profit to 20%, also seems to merely reformulate rather than conflict with MassHousing policy. To the extent a conflict exists, there is, as we noted previously, no area that is more squarely within the expertise and province of the

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18. During the hearing, counsel appeared to be in agreement that these issues would be most efficiently addressed by motion for summary decision, which is permitted with or without supporting affidavits. 760 CMR 56.06(5)(d). Since the Board now takes the contrary position, it is incumbent upon it, at a minimum, to demonstrate or at least assert with regard to each specific condition exactly what material fact is in dispute. It has not done so.

subsidizing agency than the intricacies of profit calculation. See *Attitash Views, supra,* at 9; also see 760 CMR 56.04(8). Therefore, Condition 15 shall remain in place, but shall be interpreted to conform to MassHousing policies.

C. Condition 16 - Independent Audit

As the Board notes in its brief, this condition imposes requirements in order to permit the Board to "conduct an independent audit" at the developer's expense, and thus is closely related to the profit limitation addressed in Condition 15. It is not just the establishment of the profit limitation and calculation methodology, however, that are the primary responsibility of the subsidizing agency, but in addition, "[t]he subsidizing agency shall be solely responsible for the monitoring and enforcement of such limitations, subject to [its] right to delegate such functions..." 760 CMR 56.04(8)(a). Further, existing policy gives the municipality access not only to MassHousing's financial examination, but also to the developer's financial records and the pre-qualified certified public accountant's "work papers." See 40B Cost Certification: Notice Regarding 40B Cost Certification Materials for Home Ownership Projects, Posted 8/7/07, Revised Process, ¶ 4, https://www.masshousing.com/portal/server.pt?mode=2&uuID= %7B6BAFEAA8-0A18-4DF7-9767-B413B7B7B1B7%7D. Therefore, Condition 16 is unnecessary and overbroad, and it is replaced with the following: "The applicant shall comply with all cost-certification requirements imposed by the Comprehensive Permit Law, regulations, and guidelines." This modification of Condition 16 shall not be interpreted as attempting in any way to limit any rights the Board may have under the Comprehensive Permit Law or to limit any recovery of damages that may be available resulting from wrongdoing that might be exposed by an audit.

D. Condition 17 and 18 - Monitoring and Deed Riders

These conditions require approval by the Board of the monitoring services agreement and monitoring agency, and approval by town counsel of the deed rider (affordable housing restriction). As with the previous conditions, the Board has attempted to take control of programmatic aspects of the development that are solely within the province of the subsidizing agency. See *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 6-7 (Mass. Housing Appeals Committee June 25, 1992). As explained in detail in *Attitash Views, supra,* at 6-8, consistent with the suggestion offered by the

Supreme Judicial Court in *Hanover v. Housing Appeals Committee*, 363 Mass. 339, 379, (1973) and more recent precedents of this Committee (e.g., *Groton Residential Gardens, LLC v. Groton*, No. 05-26, slip op. at 13 (Mass. Housing Appeals Committee Ruling Aug. 10, 2006), *appeal pending*, C.A. No. 06-03793 (Suffolk Super. Ct), we find that the Board has exceeded its authority in doing so. Conditions 17 and 18 shall be replaced with a single condition, as follows: "The applicant shall execute a Regulatory Agreement and a Monitoring Services Agreement for the development and Deed Riders (or Affordable Housing Restrictions) for individual units, all in form and content as approved by MassHousing either as Subsidizing Agency under the Housing Starts program or as Project Administrator under the NEF."

F. Condition 6 - Final Plans

Condition 6 requires that the developer submit "final, detailed site plans" to the Board for approval prior to applying for building permits. This is the classic "condition subsequent" of which we have long disapproved. See *Attitash Views, supra*, at 11-12; also see *Peppercorn Village Realty Trust v. Hopkinton*, No. 02-02, slip op. at 22 (Mass. Housing Appeals Committee Jan. 26, 2004); *Hastings Village, Inc. v. Wellesley*, No. 95-05, slip op. at 33-34 (Mass. Housing Appeals Committee Jan. 8, 1998), *aff'd* No. 00-P-245 (Mass.App.Ct. Apr. 25, 2002); *Owens v. Belmont*, No. 89-21, slip op. at 13-14 (Mass. Housing Appeals Committee Jun. 25, 1992). Pursuant to 760 CMR 56.05(2)(a), the comprehensive permit is to be based on preliminary plans, and after it is issued, the proper procedure under our precedents and 760 CMR 56.05(10)(b) is for final plans to be subject only to the normal technical review provided by town staff prior to issuance of building permits, and not to further review by the Board. Condition 6 also requires submission of a "construction mitigation plan," however, and this a perfectly reasonable requirement. Therefore, Condition 6 shall be replaced by the following: "Prior to issuance of building permits, the Applicant shall submit to the zoning enforcement officer a construction impact mitigation plan, which shall include a fill delivery schedule, dust control measures, and other reasonable, related matters."

G. Condition 28 - Fees

This condition requires payment, before certificates of occupancy are issued, of both costs and fees of town counsel, the Board's engineer, and other consultants of the Board. It appears that this is intended to apply to both costs already incurred and fees that may be incurred in the future. First, generally, legal fees may not be properly charged to the developer. *Attitash Views, supra,* at 14 ; *Page Place Apts., LLC v. Stoughton*, No. 04-08, slip op. at 18-20 (Mass. Housing Appeals Committee Feb. 1, 2005); *Pyburn Realty Tr. v. Lynnfield*, No. 02-23, slip op. at 21-24 (Mass. Housing Appeals Committee Mar. 22, 2004). Second, consultant fees are governed by 760 CMR 56.05(5), but the regulation provides only for assessment of fees for work performed during the review of the comprehensive permit application. This is consistent with our "condition subsequent rule," which prohibits on-going review of the proposal after the permit is issued. Because fees are addressed by regulation, a condition such as this is largely unnecessary. In this particular case, the Board has not established that there are specific fees which warrant an exception to the general rules. See Appellee's Opposition, p. 12 (filed Dec. 4, 2009). Therefore, Condition 28 is stricken, and if there are fees that were properly assessed under 56.05(5) during the review process that remain unpaid, the Board may apply to the Committee for further relief by motion (which the presiding officer has the authority to rule upon).

H. Condition 30 - Legal Effect of the Permit

Condition 30 provides that the conditions imposed by the Board supersede all other documents or agreements concerning the development. The Board presented no argument on this issue, and it is therefore waived. *An-Co, Inc. v. Haverhill*, No. 90-11, slip op. at 19 (Mass. Housing Appeals Committee Jun. 28, 1994), citing *Lolos v. Berlin*, 338 Mass. 10, 13-14 (1958). The condition is best stricken since it is broad, over-reaching, and vague, even though the sentiment it expresses—that the comprehensive permit supersedes other documents relating to the development—is undoubtedly the law in a number of circumstances.

I. Condition 33 - Pre-Existing Nonconforming Structures

This condition states that homes constructed under the permit will be "non-conforming and not subject to any grandfathering protection," and suggests that changes may never be made in the future. Though ambiguous, the thrust of this condition appears

to be to clarify the expectation that absent unusual circumstances, no modifications to the development will be permitted, and to perhaps to state the Board's view of the law in this regard. Though this would seem largely unnecessary, if it is deemed helpful, it should be done more simply and accurately. Condition 33 is replaced by the following: "After construction is completed, each building approved under this permit shall be considered a pre-existing, nonconforming structure under G.L. c. 40A, § 6, first para."

J. Condition 5 - *Cul de Sac* on Pin Oak Drive

To lessen ambiguity, Condition 5 shall be modified as follows: "The Applicant shall reconstruct the *cul de sac* at the terminus of Pin Oak Drive in accordance with the rules and regulations of the Sandwich Planning Board and reasonable requirements of the Sandwich Department of Public Works."

K. Condition 9 - Wastewater Permits

The developer argues that this condition requires it to proceed under duplicative state and local groundwater discharge permitting processes. We do not believe that the condition can fairly be read to impose such a burden, and therefore Condition 9 will remain in effect—with the clear understanding that the developer need comply with only one of the regulatory schemes. It shall comply with either the state Department of Environmental Protection Groundwater Discharge Permit process or the local Title 5 process, as determined under the applicable jurisdictional requirements.

L. Condition 20 - Local Preference Lottery

This condition is acceptable in requiring that preference in the purchase of affordable homes be given to local residents (and others) to the extent permitted by law and state policy. With the second sentence of the condition, however, the Board attempts to exert control over the form of the lottery used to allocate the local-preference housing. This is improper since the quite complex lottery procedures are a programmatic aspect of affordable housing development within the expertise and sole province of the subsidizing agency (or the delegated monitoring agent). See 760 CMR 56.02 (definition of

"affirmative fair marketing plan"); *Attitash Views, supra*, at 10. While lottery procedures may be varied in some cases at the request of the town, overall control should remain with the state to ensure compliance with affirmative fair marketing policies and fair housing law. Therefore, the second sentence of Condition 20 is stricken.

This decision may be reviewed in accordance with the provisions of G.L. c. 40B, § 22 and G.L. c. 30A in the matter currently stayed before the Barnstable Superior Court.

Housing Appeals Committee

Date: March 8, 2010

Werner Lohe, Chairman

Joseph P. Henefield

Theodore M. Hess-Mahan

Marion V. McEttrick

James G. Stockard, Jr.

LPc\s