COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

511 WASHINGTON STREET, LLC

v.

HANOVER ZONING BOARD OF APPEALS

No. 06-05

DECISION

January 22, 2008

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COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

511 WASHINGTON STREET, LLC, Appellant	)	
v.	)	No. 06-05
HANOVER BOARD OF APPEALS, Appellee	)	

DECISION

I. PROCEDURAL HISTORY

This case involves a completed development of affordable, mixed-income, rental apartments that has experienced financial difficulties. On January 21, 2003, the Hanover Board of Appeals granted a comprehensive permit pursuant to G.L. c. 40B, §§ 20-23 to 511 Washington Street, LLC to build a 74-four-unit, age-restricted[1] development on a 3.9-acre site on Route 53 in Hanover. Pre-Hearing Order, § II-1 (Mar. 23, 2007). Construction of the development—called North Pointe—was completed, and rental of individual units began in February 2005. Tr. I, 55. On August 5, 2005, the developer filed a notice of project change seeking to change the development to age-restricted condominium units. Pre-Hearing Order, § II-3. By decision filed with the town clerk's office on April 5, 2006, the Board denied the change, and the developer appealed to this Committee on April 18, 2006. Pre-Hearing Order, §§ II-6, II-7. While the appeal was pending, the developer filed an alternative notice of project change, requesting that it be permitted to change the development to non-age-restricted rental housing, and the Board

1. Occupancy of the units would be limited to households with one member over 55 years of age.

denied this request as well. Pre-Hearing Order, §§ II-8, II-10. In the current appeal, the developer has chosen to pursue only the second change, and therefore the only issue before us is whether the second denial was proper, that is, whether the developer should be permitted to change the development from age-restricted rental apartments to non-age-restricted rental apartments.[2] Tr. I, 11-12.

Pursuant to the Committee's regulations, after the hearing was opened, the parties then negotiated a Pre-Hearing Order, which was issued by the presiding officer; prefiled testimony was submitted; a site visit and two days of hearings to permit cross-examination of witnesses were conducted; and post-hearing briefs were filed.[3] A proposed decision was issued December 12, 2007 pursuant to 760 CMR 30.09(5)(i), and the parties filed objections and arguments, which were presented to the Committee for its consideration along with the rest of the record. We conclude that the Board's decision to deny the change in the development must be overturned.

II. FACTS

The Board granted a comprehensive permit for construction of 74 age-restricted, rental units in two buildings in January 2003. Pre-Hearing Order, § II-1. The developer had proposed and the permit confirmed that the construction was to be financed under the MassHousing (Massachusetts Housing Finance Agency) 80/20 Rental Program or a similar MassHousing tax credit program with 40% of the units, or 30 units, to be rented to households at or below 80% of median income. Exh. 1, p. 3, ¶ 5(b) and p. 4, ¶ 8; Exh. 69; Tr. II, 18. At that time, MassHousing noted that "[w]hile the [two] LLC managing

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2. The developer raises no general challenge to the Board's power to impose an age-restriction. Thus, we have not considered the broader question of whether such a restriction might be enforced in perpetuity. Cf. *Lexington Ridge Associates v. Lexington*, No. 90-13 (Mass. Housing Appeals Committee Jun. 25, 1992); *Zoning Board of Appeals of Wellesley v. Ardemore Apartments Ltd. Partnership*, 436 Mass. 811, 767 N.E. 2d 584 (2002).

3. The parties stipulated that the developer has satisfied the three requirements contained in 760 CMR 31.01(1)(limited dividend status, fundability, and site control), and that the town of Hanover has not satisfied any of the statutory minima set forth in the second sentence of the definition of "consistent with local needs" in G.L. c. 40B, § 20. Pre-Hearing Order , §§ II-12 to II-15.

members… have considerable experience with complex single-family and commercial real estate development transactions, they have no prior… multifamily rental development experience." Exh 69, p.1; Tr. I, 73-74. It therefore suggested that the development team be "strengthened" by the addition of a consultant or LLC manager with multi-family rental experience. Exh. 69, p. 1.

MassHousing had also expressed concerns about the financial feasibility of the development. In January 2002, it reviewed the developer's application and noted that proposed rents appeared realistic, but that was "a preliminary assessment, based on limited data. Subject rents estimated at later application stages might be different…. [The age] restriction will greatly limit the market potential of the subject and possibly affect achievable rent levels." Exh. 66, p. 2. In May 2003, it noted, "While the current design appears to be traditional multifamily housing with limited amenities and elderly services, MassHousing staff expects that ongoing market research may dictate design changes… that will better position the development to appeal to the target 55-and-over market." Exh. 69, p. 2.

Construction of the development began during the summer of 2003. Exh. T-4, ¶¶ 34, 57.

In August 2003, a Residential Market Analysis was prepared by Byrne McKinney & Associates, Inc. for a potential lender to the development. Exh. 71. The developer was aware that this report had been prepared, but did not review it, and only received a copy "much later." Tr. I, 77. The report predicted that market-rate units would lease up at an absorption rate of "approximately 5 apartment units per month." Exh. 71, p. 44.

In the spring of 2004, in response to MassHousing's suggestion that the development team be strengthened, the developer hired a well known real estate management firm as marketing agent, Peabody Properties, Inc. (Peabody). Exh. T-2, ¶ 15; T-3, ¶ 4; Tr. I, 74, 93. As part of its responsibilities, in August 2004, Peabody prepared a market study to determine what other similar age-restricted rental housing was available in the market area. See Exh. 36. The purpose of this was to determine what developments would compete with North Pointe, to help set rental rates, and to identify sources of potential tenants. Exh. T-3, ¶ 10. This was incorporated into a June 2004

Marketing Plan. Exh. 22. This marketing study and plan was considerably less "formal" than the market analysis prepared by Byrne McKinney & Associates. Tr. I, 80. It indicated that "[a]bsorption rates are anticipated to be on the higher side," and that at "the absorption rate of 8 to 12 units per month," lease-up would be achieved within six to nine months of completion of construction. Exh. 22, pp. 4-5.

In late April or early May 2004, when construction was approximately one third complete, the developer requested a change in the development's financing to the New England Fund (NEF) of the Federal Home Loan Bank of Boston and a reduction in the number of affordable units to 19, or 25% of the total number of units. Exh. T-4, ¶ 57. The Board opened a hearing on the request on May 12, 2004, and approved the request on August 10, 2004. Exh. 2; T-2, ¶ 13.

An advertising campaign began in November of 2004, and a Peabody employee began to work exclusively on marketing the development. Exh. 24, pp.1-2, 50; T-2, ¶16.

Construction of the development was completed, and rental of apartments began in February 2005.[4] Tr. I, 55; Exh. T-2, ¶ 15.

The Peabody employee maintained an office in the development which was open seven days per week. Exh. T-2, ¶ 16; T-3, ¶ 8. In March 2005, an addendum to the Marketing Plan was prepared. Exh. T-3, ¶ 22; see Exh. 4. In June, it became clear that few people were interested in renting the market-rate units, and an additional 90-Day Marketing Plan was prepared. Exh. T-3, ¶ 23; see Exh. 5. Though it originally budgeted $55,000 for marketing, the developer spent over $90,000 on marketing, including $30,000 on advertising. Exh. T-2, ¶ 17; T-3, ¶11; 22-A. Marketing efforts were extensive, including not only advertising and flyers, but also promotional efforts such as offering free cruises and other incentives to new renters and conducting a flu vaccination clinic on the premises to attract older people. Exh. T-3, ¶¶ 27-30; Tr. II, 60.

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4. There is inconclusive testimony indicating that the first tenants may not have occupied their units until April or perhaps May 1. Tr. II, 51-52.

At the beginning of July 2005, the developer asked Peabody and a second real estate firm to prepare market studies to assess the value of the North Pointe units as condominium units. Exh. 9, 10; Tr. I, 61-64.

On August 5, 2005, all 19 of the affordable units but only 11 of the 55 market-rate units had been rented. Exh. T-2, ¶ 18.

On August 5, 2005, the developer filed a notice of project change seeking to change the development to condominium units, and it became publicly known that the developer was attempting to change the development to a condominium. Pre-Hearing Order, § II-3; Tr. I, 61, 65-66, 99.

All the while, the developer was experiencing a "negative cash flow." Exh. T-2, ¶ 20. Not only did apartments remain vacant, but in addition, because costs of heat and hot water are included in the rent, "increases in energy costs have [had] a particularly significant impact on the economics of the project." Exh. T-2, ¶ 21.

At the end of November 2005, Peabody ended its work as rental agent, and there was no full-time rental agent until January 2007. Exh. T-3, ¶ 33; Tr. I, 57.

In April 2006, the Board denied the change from rental to condominium units, and the developer appealed to this Committee. Pre-Hearing Order, §§ II-6, II-7.

By August 2006, only one additional market-rate unit had been rented. Exh. T-2, ¶ 18.

In September 2006 the developer filed a request with the Board to be permitted to eliminate the age-restriction on the housing, that is, to change the development to non-age-restricted rental housing, and in December 2006 the Board denied this request as well. Pre-Hearing Order, §§ II-8, II-10.

III. PRELIMINARY LEGAL ARGUMENTS

A. Approval of the Change by the Subsidizing Agency or Project Administrator

As a preliminary matter, the Board has contended that in order to maintain its appeal, the developer must prove that the subsidizing agency or project administrator has approved the requested change. See Pre-Hearing Order, § IV-4. The Board not only has cited no authority for its position, but did not brief the argument, and it is therefore waived. *Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85 653 N.E.2d 595, 598 (1995). Further, the Board itself accepted the request for a change and rendered a decision, and therefore it is appropriate that we review that decision. See 760 CMR 31.03(3).

B. Waiver by the Developer

The Board also argues that the developer should not prevail since the age restriction was not a condition imposed by the Board, but rather "a fundamental element of the project proposed by the developer."[5] Board's Brief, p. 17; Tr. I, 54. This argument is related to the issue included in the Pre-Hearing Order of whether the failure to appeal a condition in the original permit bars the developer from later requesting a change related to that condition. See Pre-Hearing Order, § IV-5. But however this issue is framed, we find no merit in it. A considerable amount of time usually passes between issuance of a permit and the beginning of construction (or in this case the end of construction and lease-up), and changed circumstances during that time are common. As a result, our regulations clearly permit the developer to petition for changes without regard to whether the permit conditions or design parameters were imposed by the Board, negotiated, or proposed by the developer. 760 CMR 31.03(3).

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5. Framed in this manner, the motives or intentions of the parties would come into question, and we would be put in the position of having to ascertain whether age restriction was truly voluntary or put forward as the result of direct or indirect pressure from local officials or groups. In most cases, this would be a difficult determination for us to make, but more important, we do not believe that a weighty question such as who should be permitted to live in the housing, which has significant ramifications for the long-term economic health of the development, should turn on motives and intentions. We assume that no pressure was brought to bear on the developer in this case, but even so, our charge under § 31.03(3) and the Comprehensive Permit Law is not to consider the parties' intentions, but rather to review the substantive issues of the developer's economic needs and the town's local needs to ensure a result consistent with the public interest.

C. The Developer's Responsibility

The argument pressed most strongly by the Board is that the age restriction should not be lifted because the developer's economic difficulties are primarily the result of its own actions. The facts do show that the developer bears some responsibility for the current situation. To begin with, as indicated in the facts in section II, above, the developer did not review the Byrne McKinney & Associates market analysis, which predicted that market-rate units would lease up at an absorption rate of approximately 5 units per month. Exh. 71, p. 44. The later Peabody market study did not address the absorption rates for affordable units and market-rate units separately. It simply indicated that the rate of lease-up for all units would be "on the higher side," and even though that should be adjusted downward slightly to account for beginning lease-up during the winter, full occupancy would be achieved "over a 6 to 9 month period." Exh. 22, p. 4, 5. It estimated an absorption rate of "8 to 12 total units per month." Exh. 22, p. 5. That is, though it indicated no specific absorption rate for the market-rate units, by any calculation the estimated absorption rate for those units was 8 or more units per month.[6]

Thus, the developer, relying on the advice of its agent, significantly underestimated the time required for lease-up. Exh. T-4, ¶¶ 16, 24. With lease-up beginning in February 2005, at what turned out to be the accurate estimate—the 5-units-per-month absorption rate predicted by Byrne McKinney & Associates—full occupancy would not be anticipated until the end of December 2005.[7] But, apparently unaware of

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6. Absorption of all 74 units at the slower estimated rate of "over a… 9 month period" results, by calculation, in an overall rate of 8 units per month, and "it is presumed that the affordable apartment homes will lease at a faster pace than those being leased a the market rate." Exh. 22, p. 5.

7. The Board's expert testified that that the developer should have been prepared for a lease-up period as long as 16 months, that is, until the end of May, 2007. Exh. T-4, ¶¶ 26, 28. He also pointed to a number of other factors that support our conclusion. For instance, he testified that the Peabody market study is not "a thorough, objective market analysis," that it is "not a detailed market study for the project such as that which would be prepared by a professional appraiser or market analyst." Exh. T-4, ¶ 25; Tr. II, 5-9; also see Tr. II, 38-40. He testified that North Pointe "has minimal amenities compared with other options available to active adults, which is certain to have affected the leasing results." Exh. T-4, ¶ 18. He testified that as a result of the change from a MassHousing subsidy program using tax-exempt bonds and housing tax credits to bank financing under the Federal Home Loan Bank of Boston's New England Fund, the development "became significantly more exposed to market risk…." Exh. T-4, ¶¶ 29, 31, 35, 29-38; T-4-F. In

that analysis, the developer relied on the less formal Peabody estimate, that is, a rate of 8 units or more per month, and thus, expected full occupancy by the end of August 2005. As a result, in early July, it began to consider converting the development to a condominium, and these plans became public knowledge by early August. There is no quantitative evidence as to the effect on lease-up of public awareness that the developer was attempting to change the development to a condominium. But although the developer's own, lay opinion is that it had no effect, his expert testified on cross-examination that this would be "an important factor" to potential renters. Tr. I, 66; see Exh. T-7, ¶ 5. This confirms the commonsense understanding that awareness of the possible change would have weakened the development's position in the market.

But the fact that the developer, via its agent, overestimated the absorption rate of market-rate units, and that this was a significant factor resulting in the development being uneconomic does not end the matter.[8] The losses incurred here due to poor marketing judgment are exactly the sort of risk that justifies the relatively high projected profit margins that are carried in the early budgeting for a development such as this. Certainly some risks—e.g., market risks of increased construction material prices or slumps in the rental market—are entirely outside of the developer's control. But miscalculations,

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addition, this financing change resulted in or at least was accompanied by an increase in the proposed rents from market units from November 2002 to August 2004 of 32%. Exh. T-4, ¶ 36. At the same time, the Board's expert also acknowledged that other factors, such as a declining rental market and increasing construction costs, affected the economics of the development. Exh. T-4, ¶¶ 61, 62.

8. The consequences of keeping the age restriction in place are uncertain. At the end of June, 2007, the development had shown no significant financial improvement. Tr. I, 90. Nevertheless, the opinion of the Board's expert is that the development can be fully leased if rents are lowered and additional amenities are provided so that it is "properly positioned in the marketplace." Tr.II, 29; T-4, ¶ 69. That is, he suggests that the developer absorb short-term losses and take a long-term approach, adding services for older residents or amenities such as a swimming pool. Tr. II, 31. A market feasibility study commissioned by the developer in March 2007, however, is less optimistic. See T-9, ¶¶ 10, 19-21. The opinion of that expert is that "aggressive marketing…, even coupled with a reduction in rents, is unlikely to result in significantly increased occupancy…." Exh. T-9, ¶ 21. This conclusion is based on having found a pool in the five towns surrounding Hanover of only 175 older, one- or two-person households with incomes between $50,000 and $200,000 who are likely to be renters. Exh. 7-9, ¶ 19. His opinion is that none of the 735 such households in the nine towns in the more distant secondary market are likely to be attracted from the greater distance. Exh. T-9, ¶ 20.

whether at the construction phase or at the marketing phase are also normal risks.[9] No developer should be automatically protected from such risks any more than it should be automatically protected from market risks. The purpose of the Comprehensive Permit Law is not to guarantee an economic return to the developer. But, where there is no allegation of fraud or other misconduct, neither should a developer be prevented from making a change in a development that has become uneconomic unless the Board has established that there are countervailing local concerns. As will be seen in section V, below, the Board has not done so in this case.

IV. BURDEN OF PROOF

At issue in this case is the denial of a request, pursuant to 760 CMR 31.03(3), to change the housing development from age-restricted housing to non-age-restricted housing.

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

Under our precedents and regulations, when a change in a permit has been denied, the burden is initially upon the developer to prove that the denial makes the proposal uneconomic. *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 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 31.06(3); also see Pre-Hearing

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9. We note that the Board, in overseeing the entire permitting process, also bears some responsibility for the outcome here. As a local board, it may have been well suited to have scrutinized market conditions more carefully itself, or at least to have requested that the developer do so. Similarly, the Board as well as the developer will bear some responsibility for the long-term success or failure of this development. A failed development is no more in the interest of the town and its residents than it is in the interests of the developer.

Order, § IV-3. Typically, the developer can meet this burden simply by proving that the project as approved by the Board—without the change—is uneconomic.

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

B. The Standard if Causality is in Question

In this case, the Board raises an additional argument—that its decision not to permit the change is not the sole cause of the development being uneconomic, and that therefore the developer must go beyond satisfying its burden by the usual method. This argument is similar to one we accepted in our recent decision in *Avalon Cohasset, Inc. v. Cohasset*, No. 05-09 (Mass. Housing Appeals Committee Sep. 18, 2007). Perhaps because the Board could not have been aware of that decision, it makes the argument more implicitly than explicitly, but in any case it clearly alleges that there are reasons for the development's poor financial performance other than the fact that the development is age-restricted. See, e.g., Board's Brief, pp. 11, 16, 16-28. We construe this as an argument that under the circumstances presented here, the developer's burden is not simply to prove that the development is uneconomic, but also that it is the Board's refusal to permit the change that *makes* the development uneconomic. Also see Pre-Hearing Order §§ IV-8. We agree with the main thrust of this argument, though ultimately, as will be seen, it is of little import in this case.

The Comprehensive Permit Law and our regulations state that what is at issue in our hearings is whether "conditions and requirements *make* the construction or operation of… housing uneconomic…." G.L. c. 40B, § 23; 760 CMR 31.06(3) (emphasis added). To meet this standard, typically the developer need only show in a hearing before this Committee that the development as approved by the Board is uneconomic. That is, in most cases it is logical to assume that the developer would not propose an uneconomic development. As we have noted previously, however, under some circumstances, a developer may choose to go forward with an uneconomic development. *Rising Tide*

Development, LLC v. Sherborn, No. 03-24, slip op. at 16, n.16 (Mass. Housing Appeals Committee Mar. 27, 2006)("...developers are frequently forced to accept lowered profits for developments that are subject to protracted litigation"). Or there may be intervening factors that render a development uneconomic.

We addressed these possibilities in *Avalon Cohasset, Inc. v. Cohasset*, No. 05-09, slip op. at 12-13 (Mass. Housing Appeals Committee Sep. 18, 2007). In that case, where the developer's proposal was *already* uneconomic, the Board argued that since logically nothing could *make* a development uneconomic, any change at all could properly be denied. We accepted this argument only in part—our ruling was more limited. We noted that the intent of the statute is not to give the Board free rein, but only to prevent undue burdens from being placed upon the developer, and we therefore ruled that to sustain its burden the developer was required to establish not only that the development without the requested change was uneconomic, but also that that development was significantly *more* uneconomic than the development would be with the requested change.

The case before us, however, is somewhat different. The Board did not allege that the development with the requested change—that is, the non-age-restricted development—would also be uneconomic.[10] Instead, its first argument is that the developer was mistaken and in fact the age-restricted development *is* economic. Board's Brief, pp. 21-26. Thus, there is no need as there was in *Cohasset* for us to impose the additional burden on the developer to establish for the sake of comparison—in order to show that it was the Board's action that *made* the development uneconomic—that the amount of profit for the non-age-restricted development. Rather, we will first simply consider whether the developer met its burden of proving that the age-restricted development is uneconomic, and whether the Board was successful in rebutting the developer's proof.

10. The developer presented evidence that without the age restriction the development "could readily lease up the market-rate units at market based rents to a normal vacancy rate." Exh. T-9, ¶ 24.

V. DISCUSSION

A. The Age-Restricted Development is Uneconomic

1. The Developer's Presentation

As noted above, the burden is initially upon the developer to prove that the denial of the requested change makes the proposal uneconomic. Since neither the Comprehensive Permit Law nor our regulations definitively prescribe how the economics of a rental housing proposal are to be analyzed, several methodologies are available to the developer. We have indicated in previous cases that the preferred methodology is the Return on Total Cost (ROTC[11]) approach. *Paragon Residential Properties v. Brookline*, No. 04-16, slip op. at 24-27, (Mass. Housing Appeals Committee Mar. 26, 2007), *appeal docketed* No. 07-00697 (Norfolk Super. Ct.); *8 Grant Street, LLC v. Natick*, No. 05-13, slip op. at 5 (Mass. Housing Appeals Committee Mar. 5, 2007); *Bay Watch Realty Trust v. Marion*, No. 02-28, slip op. at 13-14 (Mass. Housing Appeals Committee Dec. 5, 2005), *aff'd* No. 06-00007-B (Plymouth Super. Ct.. Jun. 19, 2007), *appeal docketed* No. 07-P-1372 (Mass. App. Ct.). It is a commonly accepted method for evaluating the rate of return for a rental project and is consistent with guidelines endorsed by the four Massachusetts state agencies that subsidize affordable housing. Exh. T-1, ¶ 21; "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), p. 19 (hereafter, the "MHP Guidelines"). Therefore, as we have done in the past, we will rely on the ROTC approach.

The developer introduced testimony of a financial expert and *pro forma* financial statements for the age-restricted development. The expert conducted his analysis at three different rent levels.[12] Those *pro formas* and the analysis that they represent, which the developer's financial expert explained in detail, show ROTCs for the development of

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11. In some of the testimony in this case ROTC is referred to as "Return on Total Assets" or "Return on Total Asset Cost."

12. Much of his analysis includes a comparison to figures prepared by a consultant that the Board employed in early 2006 during the local hearing. Exh. T-1, ¶ 11; 34. We need not consider those figures since the Board did not rely on the work of that consultant in its Brief, but rather on the analysis of a new expert witness. See Board's Brief, p. 4, 10-17, 20-26.

5.4%, 5.9%, and 6.7%. Exh. T-1-B; T-1-C; T-1-D; T-1, ¶¶ 16-24. He testified that the MHP Guidelines, in addressing what constitutes a reasonable return on investment, indicate that an ROTC of at least 2½% above the current yield on 10-year U.S. Treasury notes is generally required to fairly compensate the investor. Exh. T-1, ¶ 13. He then testified that the current yield was approximately 5%, and therefore a minimum ROTC of 7½% was required for the development to be economic. Exh. T-1, ¶14. He concluded that the development as approved is uneconomic.[13] Exh. T-1, ¶ 27.

2. The Board's Presentation

As noted above, the Board argues that the age-restricted development is not uneconomic. It makes a number of complex, interrelated, and esoteric arguments.[14] The Board's own financial expert analyzed every aspect of the development in great detail, and made minor modifications to the assumptions used by the developer's expert. Then, he not only presented his own alternate *pro forma*, but also, based on various historical documents and his own extrapolations, prepared seven different *pro formas* for comparison. See Exh. T-4-G.

Despite all the complexities considered by the Board's expert, the heart of his argument that the development is not economic is that a return that is only 1½% above current treasury rates is a reasonable return rather than one 2½% above treasury rates as specified in the MHP Guidelines. He argues that "1% of the margin above treasury is attributable to permitting and construction risk," and that that risk is not relevant here

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13. The developer also argues that "[b]y any measure, the project is uneconomic," as shown by the fact that at the time of the hearing, it was losing $50,000 per month. Developer's Brief, p. 6; Exh. T-7, ¶ 11. The response of the Board's expert is that "the developer in this case has not lost any money, he just has not make any yet." Exh. T-4, ¶ 69. That is, he argues that over time the development may well perform satisfactorily. While it is hard not to view the distress of monthly losses as supporting the developer's position, we agree with the Board since our practice is to view the economics of a development according to the technical ROTC analysis, rather simply considering cash flow at a particular point in time.

14. For instance, it argues that the ROTC of the development as presently configured is nearly the same as it was at the very beginning of the process when an entirely different financing mechanism was used. But it is not relevant if this is a case in which the developer was originally willing to proceed with a lower profit projection than that which is considered acceptable under normal affordable housing guidelines. See Board's Brief, p. 12.

since the development has been completed. Exh. T-4, ¶ 67. We disagree. There is no indication in the MHP Guidelines that pre- and post-construction risks are to be allocated within the overall risk of developing affordable housing. One proposed development may realize the full risk—a 2½% cost overrun—just in the permitting phase; another may see that much in construction overruns; a third may see no overruns at all. Also see Exh. T-6, 11. The developer in this case should not be penalized simply because the risk that has materialized materialized after construction was completed.

Thus, we will examine the calculations of ROTC provided by the Board's expert in comparison to standard set in the MHP Guidelines. Instead of the 5% U.S. Treasury rate used by the developer's expert, the Board's expert used a figure of 4.87%. Accepting that for the sake of argument, a reasonable return is 2½% higher, or 7.37%. But each of the seven analyses the expert provided shows an ROTC less than that, and his own primary analyses (those based on his own figures—"NEF Approval..." and "Post-Construction") show an ROTC of 6.6%. Exh. T-4-G, columns D and F. This evidence corroborates the developer's proof, and we find that the developer has proven (and the Board has not refuted) that the unchanged, age-restricted development approved by the Board is uneconomic.

B. Local Concerns

As noted above, when the developer has sustained its burden of proof with regard to the economics of the development, we must determine whether there is a local concern that outweighs the regional need for housing.

First, the Board argues that as a matter of law an age-restriction which was accepted by the developer in the original permit is a sufficient concern to support the restriction. We cannot accept this argument. The developer points to *dictum* in our *Lexington Ridge* case that conditions requiring housing to remain affordable as rental housing in perpetuity represented a policy that was "in accord with the legislative intent and purpose," and therefore were "consistent with local needs." *Lexington Ridge Assoc. v. Lexington*, No. 90-13, slip op. at 25 (Mass. Housing Appeals Committee Jun. 25, 1992). But in that case, it was unnecessary to address the question of whether the board had proven a factual justification for the conditions since we ruled that the conditions had not rendered the development uneconomic. *Lexington Ridge*, slip op. at 36.

The Board also argues that even though the need for housing for older households is not a local concern in the normal sense, that is, a design, planning, or environmental concern, the town has a legitimate interest in ensuring that the sort of housing built within its borders addresses the actual needs of the population.[15] We agree, but the question of whether there is an actual need for age-restricted housing must be proven as a matter of fact.

Thus, finally, we are left with the factual question of whether there is a legitimate local concern sufficient to outweigh the regional need for affordable housing. The Board did present evidence of local and regional housing needs that support maintaining the development as rental housing instead of converting it to a condominium. See Exh. T-4, ¶¶ 71-79. But there is virtually no testimony or other evidence of local or regional housing needs that support the age restriction. We find therefore that the Board has not sustained its burden of proving a legitimate local concern that outweighs the regional need for housing.

VI. CONCLUSION

Based upon review of the entire record and upon the findings of fact and discussion above, the Housing Appeals Committee rules that decision of the Hanover Board of Appeals filed with the town clerk on December 15, 2006 is not consistent with local needs. The Board is directed to remove the condition in the comprehensive permit that restricts occupancy of the development to households one member of which is over 55 years of age. 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.

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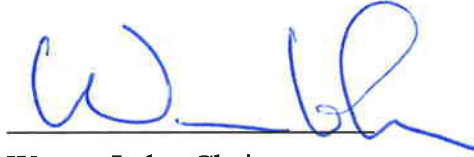
15. Neither party has argued that this may not be a local concern at all, but rather a concern entirely within the province of the subsidizing agency or project administrator. See *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 6-9 (Mass. Housing Appeals Committee Jun. 25, 1992). We do not address that question, but if we were to so rule, then it would be for MassHousing—not the Board or this Committee—to determine whether the need for non-age-restricted housing in comparison to the need for age-restricted housing justified lifting the restriction.

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

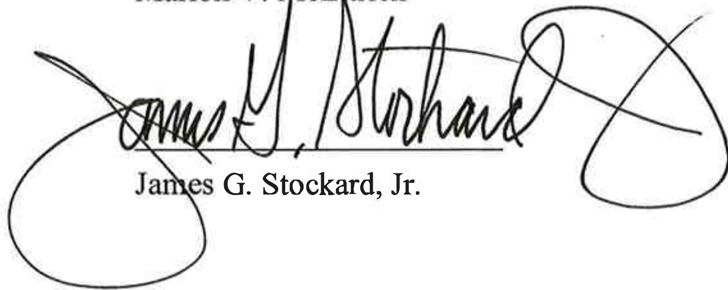
Housing Appeals Committee



Date: January 22, 2008

Werner Lohe, Chairman

Marion V. McEttrick



James G. Stockard, Jr.

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