COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

RISING TIDE DEVELOPMENT, LLC

v.

LEXINGTON BOARD OF APPEALS

No. 03-05

DECISION

June 14, 2005

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COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

RISING TIDE DEVELOPMENT, LLC, Appellant	)	
v.	)	No. 03-05
LEXINGTON BOARD OF APPEALS, Appellee	)	

DECISION

I. PROCEDURAL HISTORY

In January 2002, Rising Tide Development, LLC, submitted an application to the Lexington Zoning Board of Appeals for a Comprehensive Permit pursuant to G.L. c. 40B, §§ 20-23 to build 48 condominium units of mixed-income affordable housing at 536-540 Lowell Street in Lexington. Exh. 1. The housing is to be financed under the Housing Starts program of the Massachusetts Housing Finance Agency (MassHousing) or the New England Fund (NEF) of the Federal Home Loan Bank of Boston. Exh. 5, 6, 56. During the yearlong local review process, several alternative sizes and configurations for the development were considered, and ultimately, the developer proceeded with a 36-unit proposal. Tr. I, 98-99. The Board unanimously granted the permit, filing its decision with the Lexington Town Clerk on February 7, 2003. But the permit imposed a number of conditions, most significantly a reduction in the number of housing units to 28 units (of which 8 were to be affordable).

Exh. 1, pp. 6-7. From this decision the developer appealed to the Housing Appeals Committee. The Committee conducted a site visit, and held nine days of *de novo* evidentiary hearing, with witnesses sworn, full rights of cross-examination, and a verbatim transcript.[1] Following the presentation of evidence, counsel submitted post-hearing briefs.

II. FACTUAL OVERVIEW

The developer proposes to construct 36 condominium units in nine four-unit buildings on a 3.6-acre site. Tr. I, 28, 72, 104; Exh. 4, 8. The site is located on Lowell Street, one of the Lexington's main thoroughfares; the street is residential in the immediate vicinity of the site, but in the general area, it also has commercial and institutional uses. Tr. I, 79-80, 92; VI, 159-160; VII, 50. The site is shaped roughly like an equilateral triangle, with its base along the west side of Lowell Street and its apex to the rear, away from the street. See Exh. 9. The south side of the site abuts the rear yards of six houses on East Street. Exh. 9. These houses are on lots ranging in size from 12,000 to 15,000 square feet. Tr. I, 71. On the northwest side of the triangular site, it abuts the backyards of four houses on

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1. The Committee issued a joint Pre-Hearing Order, agreed to by the parties. In it, the parties stipulated that the developer satisfies the three jurisdictional requirements found in 760 CMR 31.01(1). The interveners objected to these stipulations. However, such objections, including a question raised during the seventh session of the hearing concerning the expiration of the project eligibility determination issued by the Massachusetts Housing Finance Agency, are beyond the scope of their interest. See § III, infra; also see Tr. VII, 6-7; Exh. 56.

The Board also stipulated that Lexington had not met any of the statutory minima defined in G.L. c. 40B, § 20 (e.g., that 10% of its housing stock be subsidized housing; see 760 CMR 31.04), thus foreclosing the defense that its decision is consistent with local needs as a matter of law pursuant to that section. Pre-Hearing Order (Jun. 5, 2003), §§ I-2, I-4, I-5, I-6. In footnote 4 of its brief the Board "notes that it expects by the time of the Committee's decision in this matter that the Town will have achieved compliance with the 10 percent threshold...," and then after the filing of briefs, notified the Committee that the town had in fact passed the 10% threshold. This is of no consequence, however, since the time at which compliance is measured is the time of the Board's decision. *Casaletto Estates, LLC v. Georgetown*, No. 01-12, slip op. at 18 (Mass. Housing Appeals Committee May 19, 2003).

Burroughs Street, which are on lots one acre in size or larger. Tr. I, 71; VII, 133-135.

The site is currently occupied by a large, commercial greenhouse and a single-family home, both of which are to be demolished. The neighborhood is zoned for single-family homes on lots with a minimum area of 30,000 square feet. Exh. 55, p. 13665; Tr. VI, 177.

III. MOTION TO INTERVENE

On March 19, 2003, thirteen abutters, residents of Burroughs Road, East Street, and Lowell Street moved to intervene pursuant to our regulations, 760 CMR 30.04(2), "in order to assert matters set forth in the accompanying Memorandum of Law in Support..." Motion to Intervene, p 1. (filed Mar. 19, 2003).[2] The memorandum alleges that the proposed project "has the potential to dramatically impact [their] real property, including threats to health and safety from flooding, fire, stormwater runoff, noise, dust and vibration."[3] Memorandum, p. 1 (filed Mar. 19, 2003). On June 5, 2003, an almost identical group of fourteen abutters, citing G.L. c. 30A, § 10A and alleging concerns for ground water resources, pesticide pollution, and excessive noise, filed a second motion to intervene to address possible "damage to the environment" (as that term is defined in G.L. c. 214, 214, § 7A). During the hearing before the Committee, rulings on these motions were deferred, and the proposed interveners, through counsel, were permitted to participate fully in the proceedings as *amici*.

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2. Several other motions were filed, including a Motion to Quash a Subpoena issued to an employee of MHFA (filed September 21, 2004), a related Motion in Limine (filed September 23, 2004), and a motion by the interveners to "cure jurisdictional defect" (filed September 28, 2004).

3. Concerns about noise, like concerns about light trespass, might well be dismissed as aesthetic sensitivity insufficient to support intervention in the absence of an allegation that such matters are regulated under the Lexington zoning bylaw. See *Monks v. Zoning Board of Appeals of Plymouth*, 37 Mass. App. Ct. 685, 688, 642 N.E.2d 314, 315 (1994). We need not reach this question since it was not pursued during the hearing.

We turn first to the motion made pursuant to our regulations. An administrative agency has broad discretion to grant or deny intervention. *Tofias v. Energy Facilities Siting Board*, 435 Mass. 340, 346, 757 N.E.2d 1104, 1109 (2001). It is not required to allow intervention by petitioners who have not demonstrated a sufficient interest in the proceedings. See *Newton v. Department of Public Utilities,* 339 Mass. 535, 543 n.6, 160 N.E.2d 108, 113 (1959). Conversely, it may allow people who are not substantially and specifically affected to participate in proceedings for limited purposes, and such participation may even be extensive if there are special circumstances to provide justification. See *Boston Edison Co. v. Dept. of Public Utilities*, 375 Mass. 1, 45-46, 375 N.E.2d 305, 332, cert. den. 439 U.S. 921 (1978).

Our standards for intervention set out in 760 CMR 30.04, and require a "showing that [the intervener] may be substantially and specifically affected by the proceedings...."[4] As is clear from the commentary in the regulation, this means showing "that their harm would be related to the granting of relief from local regulation as requested by the developer in this

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4. Our standards are similar to and reflect the requirements of the state Administrative Procedures Act, c. 30A, § 10. They are also very similar to the standing requirements applied by the courts. Although as an administrative agency, our discretion is presumably sufficiently wide so that we could apply our intervention standards more liberally than the courts do the standing requirements, we have always—largely for the sake of consistency and clarity—attempted to apply our standards so as to be identical to the courts' standing requirements. (The same standing requirements apply to both zoning appeals under G.L. c. 40A and comprehensive permit appeals under G.L. c. 40B. *Bell v. Zoning Board of Appeals of Gloucester*, 429 Mass. 551, 553, 709 N.E.2d 815, 817 (1999).) Of course, procedurally, in the courts abutters have the benefit of the rebuttable presumption established under G.L. c. 40A, § 11; this is not available to them under our regulations.

In cases in which the abutters do not satisfy our standards for intervention, we will typically permit them to participate in our hearings on a limited basis as "interested persons." See 760 CMR 30.04(4). Although participation by interested persons has been permitted by our regulations for many years, in the past abutters were often permitted to participate fully as "amici" with only the most cursory review of their actual interests in the controversy. We amended § 30.04 and other procedural portions of our regulations effective July 2, 2004. Our intention is to be clearer and more precise during the early stages of the hearing process in delineating the rights of interveners and

appeal, that their harm is not a common harm which is shared by the all the residents of the Town, and that the Board will not diligently represent those interests." *Weston Development Group v. Hopkinton*, No. 00-05, slip op. at 6-7 (Mass. Housing Appeals Committee May 26, 2004). In addition, the harm stated must not be speculative. See *Tofias v. Energy Facilities Siting Board*, 435 Mass. 340, 348, 757 N.E.2d 1104, 1110 (2001).

Many of the allegations and arguments in the abutters' motion and the accompanying eight-page memorandum misunderstand the respective roles of the Board and the interveners. Much of the eight-page memorandum asserts four esoteric arguments dealing primarily with the procedures or standards under which the Board considered the application. These, however, are not matters that specifically affect the abutters.

First, they question the developer's status as a limited dividend organization as established by a project eligibility letter issued by the Massachusetts Housing Finance Agency (MassHousing). See 760 CMR 31.01(1)(a), 31.01(2)(a)(5). We have held repeatedly, however, that it is primarily the role of the subsidizing agency to ensure that the developer is a proper limited dividend organization at the time the project receives final subsidy approval. *Mallow Realty Trust v. Gloucester*, No. 02-13, slip op. at 3 (Mass. Housing Appeals Committee May 26, 2004); *Crossroads Housing Partnership v. Barnstable*, No. 86-12, slip op. at 10-11 (Mass. Housing Appeals Committee Mar. 25, 1987). The courts have concurred in our interpretation. *Hanover v. Housing Appeals Committee*, 363 Mass. 339, 378-380, 294 N.E.2d 393, 421 (1973); *Maynard v. Housing Appeals Committee*, 370 Mass. 64, at 67, 345 N.E.2d 382 (1976). It is perfectly proper, in fact routine, that the Board

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interested persons. Interveners will be permitted to participate fully, but their participation will be limited to those issues that affect them specifically; interested persons will be limited further.

accepted the MassHousing determination in this regard, and this is not a matter that is of any specific concern to the abutters.

Second, the abutters make a nearly indistinguishable argument "challeng[ing] the Board's acceptance of the project eligibility letter... pursuant to 760 CMR 31.01(1)." This, too, is a jurisdictional matter clearly not of specific concern to individual residents of the town.[5] Third, they argue that Board failed to examine the project's finances and establish an acceptable profit limitation. The Board's consideration of these matters should be very limited since they are primarily within the province of the subsidizing agency. *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 7 (Mass. Housing Appeals Committee Jun. 25, 1992); also see *Board of Appeals of Hanover v. Housing Appeals Committee*, 363 Mass 339, 379, 294 N.E.2d 393, 420-421 (1973). But in any case, they are not of specific concern to the abutters. Finally, they argue that the Board "failed to require the Applicant to provide proof of regional need, if any, for low and moderate-income housing." This, too, is not a specific concern of the abutter, and in fact in most cases it is not necessary for the Board to make a specific finding with regard to regional housing need since "the municipality's failure to meet its minimum housing obligations, as defined in §20, will provided compelling evidence that the regional need for housing does in fact outweigh the objections to the proposal." *Id.*, at 366, 413.

The abutters' motion to intervene is denied with regard to the above jurisdictional matters raised in their original motion to intervene.

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5. The abutters also subpoenaed an official from MassHousing in order delve into the process and facts behind that agency's issuance of the project eligibility letter. Tr. VI, 11. MassHousing moved to quash the subpoena, and the presiding officer granted that motion for reasons discussed in detail in *Farmview Affordable Homes, LLC v. Sandwich*, No. 02-32, slip op. at 2-5 (Mass. Housing Appeals Committee Ruling May 21, 2004). Tr. VI, 22, 25-27.

With regard to matters that are of legitimate concern to abutters, the motion provides little or no factual specificity.[6] But, since they were permitted to participate as *amici*, their interests did become clear during the hearing. Their backyards abut the development site, and they raise concerns about density and stormwater management. Under the proper circumstances, these are exactly the sort of specific concerns that would lead us to grant the motion to intervene.

With regard to stormwater management, as will be seen when we address this issue in detail in Section VI-C, below, while specific, factually the concern is not substantial. We therefore deny the abutters' motion with regard to this issue.

Density, however, which is addressed in Section VI-A, below, is a concern substantial enough in this case to support intervention by the abutters. The neighborhood is zoned for single-family houses. If the housing proposal were simply for single-family houses on smaller lots than permitted under existing zoning, it is unlikely that the abutters' concerns would rise to a level that would support intervention. But here, larger multi-family buildings are proposed. If the proposal complied with the setbacks required in the Lexington Zoning Bylaw for multi-family districts, and if there were no other unusually obtrusive features, then we would be unlikely to grant intervention. But the proposal does not meet the 40-foot setback requirement for multi-family districts, and the abutters' concerns about whether the bulk and proximity of these buildings will impact their properties aesthetically or otherwise is a legitimate and substantial one. We therefore grant their motion with regard to the issue of density only.

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6. The Committee will normally rule upon a motion to intervene before the evidentiary portion of the hearing commences. It is therefore incumbent upon proposed interveners to plead their interests with specificity in their motion.

Finally, we turn to the later motion, which asserts a right to intervene pursuant to G.L. c. 30A, § 10A. That section of the Administrative Procedures Act permits not less than ten persons to intervene in an adjudicatory proceeding in which damage to the environment, as defined in G.L. c. 214, § 7A, might be at issue. We are not convinced that an appeal before the Housing Appeals Committee—where intervention rights are already established by 760 CMR 30.04—is the sort of proceeding for which nearly automatic intervention contemplated by G.L. c. 30A, § 10A is appropriate.[7] And in any case, the purpose of such intervention is "in order that any decision… shall include the disposition of [the] issue [of damage to the environment and the elimination or reduction thereof]." G.L. c. 30A, § 10A. Full intervention by these persons is unnecessary for two reasons.

First, in appeals under the Comprehensive Permit Law, some of the issues typically joined between the parties—the developer and the Board—are environmental issues. Thus, the purpose of § 10A is served in that our hearing process includes the disposition of issues of damage to the environment. In this case, because of the nature of the motion to intervene and it generality (see below) it is difficult to ascertain exactly what damage to the

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7. There appear to be no reported precedents interpreting G.L. c. 30A, § 10A that can be of assistance. It is fair to assume, however, that the policy considerations underlying the similar provisions of G.L. c. 214, § 7A are instructive. Initially, the Supreme Judicial Court interpreted that statute broadly. See *Boston v. Massachusetts Port Auth.*, 364 Mass. 639, 646, 308 N.E.2d 488, 494 (1974). But the Court's more recent interpretation of the law has been increasingly narrow. See *Town of Warren v. Hazardous Waste Facility Site Safety Council*, 392 Mass. 107, 466 N.E.2d 102 (1984); *Cummings v. Secretary of the Executive office of Environmental Affairs*, 402 Mass. 611; 524 N.E.2d 836 (1988); *Town of Wellfleet v. Glaze*, 403 Mass. 79, 525 N.E.2d 1298 (1988); *Town of Walpole v. Secretary of the Executive Office of Environmental Affairs*, 405 Mass. 67, 537 N.E.2d 1244 (1989); also see *Enos v. Secretary of the Executive Office of Environmental Affairs*, 48 Mass.App.Ct. 239, 247 n.13, 719 N.E.2d 874, 880 n.13 (1999), aff'd 432 Mass. 132, 731 N.E.2d 525; also see *Enos v. Secretary of the Executive Office of Environmental Affairs*, 432 Mass. 132, 141-142, 731 N.E.2d 525, 532-533 (2000). This ruling is consistent with these precedents.

environment is feared, but there is no reason to believe that the Board will not adequately protect these environmental issues as it presents its case to us.

Second, in their motion, the interveners assert that "a ruling by the Housing Appeals Committee favorable to the Applicant would adversely effect environmental resources, including but not limited to ground water resources, result in pesticide pollution, and generate excessive noise," and further argue that "the Town of Lexington will not adequately represent *their* interests" (emphasis added). Nowhere do they allege environmental damage with further specificity. The statutory provision under which they would proceed provides that "damage to the environment shall not include any insignificant… impairment…." G.L. c. 214A, § 7A, para. 1. Here, instead, the record shows that many, if not all, of the individuals named have requested to participate largely to protect their own, individual property interests. But they have been granted the status of interveners under 760 CMR 30.04 on an appropriately limited basis, and to grant them broader intervention in derogation of the requirements of that section of our regulations by asserting that they are really interested in protecting the environment in general would be a misuse of G.L. c. 30A, § 10A.

Within the context of the Comprehensive Permit Law, the proposed interveners have not alleged environmental damage sufficient to support their motion, and it is therefore denied.

IV. REQUEST TO DEEM THE GRANT OF A PERMIT A DENIAL

After the briefs were filed in this matter, the Bristol Superior Court ruled in the case of *9 North Walker Street Development, Inc. v. Commonwealth and Rehoboth Zoning Board of Appeals*, No. BRCV 2003-00767 (Dec. 28, 2004) that while the decision of the local board

was couched as an approval with conditions, it should in fact have been considered a denial. The developer brought this to our attention by letter filed on January 21, 2005, and requested that the decision in this case be treated as a denial.

There are a number of questions with regard to the precedential effect of the Superior Court decision, and, in addition, the Housing Appeals Committee filed a Motion for Reconsideration with the Court, and the matter has now been remanded to the Committee for further consideration. We need not consider the questions raised by the Court's ruling, however, since we find below that the developer has met its burden of proving that conditions imposed by the Board rendered the housing proposal uneconomic. The effect of that finding is to shift the burden to the Board to prove local concerns that outweigh the regional need for affordable housing, which is the same burden that would be imposed if we ruled that the Board's decision was in fact a denial.

V. ECONOMIC EFFECT OF THE CONDITIONS

When the Board has granted a comprehensive permit with conditions, the ultimate question before the Committee is whether the decision of the Board is consistent with local needs. 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 31.06(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 [or profit] as defined b the applicable subsidizing agency…." 760 CMR 31.06(3)(b); also see G. L. c. 40B, § 20.

The first step in the analysis of reasonable return is to determine whether the proposed housing is rental housing or homeownership housing, since the analysis for these types of housing is slightly different. Then for homeownership housing, such as that under consideration here, an analysis of the Return on Total Costs (ROTC) is conducted.[8]

Once the Return on Total Costs is established for a particular proposed development, we must determine whether it is reasonable, that is, whether it is sufficient in the marketplace to induce the developer to invest its resources in pursuing the proposal. Although our regulation refers to a reasonable return "as defined by the applicable subsidizing agency," currently, subsidizing agencies have not defined such a return quantitatively. See Tr. IV, 18; VI, 15-17. This is due, in part, to the fact that what level of return is reasonable varies over time depending on changes in interest rates in the financial markets. Thus, in the absence of policy direction, we will determine what level of return constitutes a reasonable return from the evidence as a factual matter.

The crux of the dispute between the developer and the Board is the number of housing units that should be permitted on the site. Thus, with regard to economics, what are primarily at issue are a number of conditions that either explicitly limit the development to 28 units (with 8 affordable units) or impose design constraints that have the same effect, and therefore the developer prepared *pro forma* financial statements reflecting the two different size developments. See Pre-Hearing Order, § II-B(1).

The developer presented these *pro formas* and other evidence on the economics of its

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8. The requirement that a developer be a limited dividend organization appears in G.L. c. 40 B § 21 and 760 CMR 31.01(1)(a). This is further defined in 760 CMR 30.02, which indicates that the developer must agree "to limit the dividend on invested equity." This regulatory definition was added in 1986, prior to the advent of ownership affordable housing programs. Since ownership

proposal through its development manager, who is also a principal in the enterprise. Having worked in the development of affordable housing for many years, he is highly qualified to testify with regard to the economics of this proposal. See Tr. III, 128-142. He used a standard analysis based upon a *pro forma* financial statement that he prepared for a 28-unit proposal, and testified that the return or profit would be 5.2% of total costs ($734,000) if the land acquisition cost was carried at $3,000,000 or 7.5% ($1,033,000) if the land acquisition cost was assumed to be $2,700,000.[9] Exh. 37; Tr. III, 156, 180. He offered credible testimony that this profit is "woefully inadequate," and that he would have built the 28-unit development as approved, rather than face the time and expense of appeal, if it would result in a reasonable return. Tr. IV, 13, 15, 151.

The Board challenges that analysis on several grounds.[10] First, it argues that the land acquisition cost used in the analysis is inflated. See Board's Brief, pp. 4-6. Next, it argues that revenue from the sale of market-rate housing units is underestimated. See Board's Brief, pp. 7. Third it argues that there is $310,000 in "redundant" project overhead and administration. See Tr. VIII, 63-67. When these inaccuracies are taken into account, the

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housing is not held for investment, the specific terms used in the regulation are not meaningful in that context. Therefore, a different analysis must be undertaken—the Return on Total Costs analysis.

9. Both at the local hearing and before us, a confusing array of *pro formas* was presented. They were prepared at different times, and the assumptions contained in them vary in a number of different ways. For instance, an abbreviated *pro forma* from 2002 for a 28-unit development was introduced during cross-examination of the developer's principal. Exh. 46, p. 7; Tr. IV, 34, 142. Though it showed a profit of 11.96%, the developer argued from the time when it was created that it showed that a reduction in the proposal to 28 units "would likely render the project uneconomic." Exh. 46, p.1. Thus, despite various differences, it is consistent, in its broad outlines, with the later 28-unit *pro forma* relied on during the hearing before this Committee.

10. Subsumed within the various analyses is the effect of a condition requiring that 8 units, not the typical 7 (or 25%) units be sold as affordable units. Similarly, during the course of this lengthy hearing, other details were raised that would have some impact on the financial projections. Some of these, as the Board points out with regard to decks and patios, for instance, have virtually no impact.

Board argues, the projected profit is actually $2,800,000 or 21.3% of total costs.

A. Land Acquisition Cost

The developer's principal testified that a base price of $2,700,000 was negotiated for purchase of the site. Tr. III, 149. This appears to have been an arms-length transaction, based in part on the land's value if it were developed under the town's cluster zoning bylaw, which would permit between 15 and 18 houses to be built. Tr. III, 151; Exh. 42, p. 1. It is also consistent with an agreement in 1995, which was never consummated, to sell the land to a different purchaser for $2,100,000.[11] Tr. III, 152; IV, 50; V, 38-40. Nevertheless, we must consider whether the $2,700,000 valuation is consistent with the appraised market value of the land under the existing zoning.

The Board commissioned an appraisal that showed the value as $1,700,000. Exh. 50; Exh VI, 58. Their financial witness[12] testified that a figure of about $2,000,000 would be more accurate due to appreciation.[13] Tr. VIII, 60-63. The appraisal, however, was flawed because of the build-out assumptions upon which it was based. That is, the appraisal was

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See Board's Brief, p. 12. Others are sufficiently minor that they were not briefed by the Board, and are thus waived. See *Cameron v. Carelli,* 39 Mass. App. Ct. 81, 85 653 N.E.2d 595, 598 (1995).

11. The developer's principal was credible in defending the sales price on cross-examination. His testimony was not weakened by the indication in the MassHousing project eligibility letter that there may have been a conflict between figures in the *pro forma* submitted to it and its land acquisition policy. See Exh. 6, p. 3. The reference in Exhibit 6 is ambiguous, and he explained on redirect examination that the concern raised involved a bonus provision in the agreement for the purchase of the land, which has no impact on the $2,700,000 as we are considering it. See Tr. III, 149, 154; IV, 35, 146.

12. This witness, Richard Heaton, was actually presented on direct examination by the abutters' counsel. Counsel for the Board and the abutters worked together throughout the hearing, however, and it is of little consequence that this witness was examined by the abutters' lawyer. It should be noted again, however, that financial aspects of the proposal are part of the Board's case, but are not within the more limited interests of the abutters.

13. Though the issue of land value is beyond the scope of the abutters' intervention, they had also commissioned an appraisal (showing the value of the land as only $1,330,000). Exh. 49;Tr. IV, 55. The author did not testify, and there was testimony that its analysis was flawed. Tr. V, 41-43.

based on two different assumptions—that the highest and best use of the land would either be for four single-family homes or for a cluster development under existing zoning of only ten units. Tr. VI, 58; Exh. 50, p. 20. The appraiser testified that he settled on the figure of ten units for a cluster development after discussions with representatives of the Lexington Planning Board and the Board of Appeals, but, in fact, the Planning Board twice indicated in writing that the actual development capacity of the parcel was 15 to 18 units. Tr. VI, 66; Exh. 41, 42.

The developer rebutted the Board's appraisal by engaging a second expert, who testified that the value of the property is between $2,500,000 and $3,000,000. Tr. V, 30-37.

We find that $2,700,000 is a fair value to carry in the *pro forma* financial statement for land acquisition.

B. Revenue from Market-Rate Sales

The developer's principal testified that projected sales prices of affordable units were established based upon standard procedures. Tr. III, 171. Market-rate units were priced based on his own study over two and one half years and on the advice of a local real estate broker. Tr. III, 172, 177-179; Exh. 39, 39-A. In particular, he described in detail how he compared the housing he is proposing to similar market-rate developments called Roosevelt Circle, Coppersmith Way, Old Smith Farm, and Johnson Farm. Tr. III, 177-179. His judgment in this regard is highly credible, and was not undercut by cross-examination or the testimony of other witnesses. Cf. Tr. VIII, 115-137. We find that the revenues shown in the *pro forma* are accurate projections.

C. Project Overhead and Administration

The *pro forma* financial statement for the proposed development shows three separate

cost items: "general contractor fee (at 5% of building costs)," "construction management and oversight," and "project overhead and administration." Exh. 37. The Board's expert argues that these are duplicative.[14] Tr. VIII, 63-67. He acknowledges, however, that the general contractor fee is legitimate. Tr. VIII, 63. And certainly, though the parties introduced little evidence on this point, it is appropriate for the developer to hire a construction manager to over see the work of the independent contractor, whether an individual or organization, who is doing the actual work. As the Board's expert acknowledged on cross-examination, a construction manager "would manage the project for the… the owner, manage the work that's done on site…." Tr. VIII, 106. Thus, construction management and oversight is a proper cost line item. Also see Tr. III, 164. Whether another cost item for project overhead and administration is proper is not as clear. The most unambiguous evidence we have on this point is testimony from the developer's principal that "every affordable housing program I have worked with allows an overhead expense." Tr. III, 168. We find this credible and persuasive, particularly since it appears to be confirmed by the MassHousing documents that were admitted into evidence. That is, the MassHousing "Project Feasibility" *pro forma* explicitly lists "developer overhead" as the second to last soft cost item. Exh. 58. And, a model "Preliminary Construction Budget" that is part of MassHousing's official guidelines for the Housing Starts program has identical hard and soft cost line items except that the overhead item is labeled "consultant." Exh. 57. We find it appropriate to carry a general contractor fee, a construction manager cost, and developer overhead as separate costs.

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14. Only the appropriateness of this cost, not its amount, is in issue. The developer's principal testified that the typical allowable expense for project administration and overhead is 5% of total costs, and that he carried a figure of $250,000, which is slightly less than 2%. Exh. 37; Tr. III, 168; IV, 144.

D. Summary and Reasonableness of the Return

Before stating our conclusion on the issue of reasonable return, it is useful to describe the context in which profit projections are prepared. First, it must be pointed out that not only is the ultimate projection of total profit merely an estimate, but in addition, nearly all of the factors on which the calculations are based are themselves estimates. That is, even if only one factor were an estimate—the final sales prices, for instance—and the others were know quantities, there would be an element of speculation in the ultimate conclusion. But not only the sales prices, but also nearly all of the costs are also unknown to one degree or another. Even the land acquisition cost—which one might think is the clearest of these figures—cannot, as has been seen, be specified with absolute certainty.

Second, different experts approach the nuances of profit analysis in slightly different ways, and the discrepancies can be magnified by the adversary process. Though we believe that all of the witnesses who appeared before us are professionals who testified truthfully, their approaches are subtly influenced by their positions in this litigation. That is, their choice of methodologies and assumptions cannot help but be influenced by the outcome they or their clients favor.

In this complicated and sometimes confusing context, we attempt to both analyze the different methodologies used and evaluate the credibility of the experts. From our experience, we believe that in this case the approach taken by the developer was proper. Based on all of the evidence and the credibility of the witnesses, but in particular on the *pro forma* financial statement introduced by the developer, Exhibit 37,[15] we conclude that the

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15. We have also examined Exhibit 58 with great interest. This is apparently an internal, working document prepared in 2002 by MassHousing when they issued a project eligibility determination. We do not necessarily expect it to conform in every way with the figures in the developer's *pro*

Return on Total Costs for this proposal when reduced to 28 units is 7.5%.

Determining what is a reasonable return in the abstract in this case is not possible. The developer's second expert, who specializes in market analysis and financial feasibility of development, testified that a reasonable return is 15%. Tr. V, 27-28. The Board's financial expert testified that it is 12%. Tr. VIII, 29, 51. From this evidence it is not possible to determine what a minimum reasonable return is in the abstract, but since the projected profit for the 28-unit development is only 7.5%—well less that the figures set by opposing witnesses—the developer has sustained its burden of proving that the conditions imposed by the Board make construction of the housing uneconomic.[16]

VI. ISSUES

Since the developer has sustained its initial burden, the burden shifts to the Board to prove that there is a valid health, safety, environmental or other local concern that supports each of the conditions imposed, and that such concern outweighs the regional need for low or moderate income housing.[17] 760 CMR 31.06(7).

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forma, Exhibit 37, which was prepared a year later, but nevertheless, in its broadest outlines, it is consistent with the developer's projections. With regard to cost, it shows the developer's projections to be conservative, that is, to be less favorable to its own position in this litigation than to the Board's position. For instance, Exhibit 58 shows higher land acquisition costs than the developer does. Similarly, it shows higher total hard costs. Total soft costs are nearly identical. Where it diverges from the developer's estimates is in projected revenues, showing $4,000,000. This discrepancy was not addressed by the parties, but we are confident of the accuracy of the developer's figures, as addressed in detail in § V-A, above.

16. This is consistent with the opinion of the bank which would fund the development under the NEF, which reviewed the *pro formas* for the two different sized proposals and concluded that it "would not recommend approval of the twenty-eight unit project...." Exh. 43.

17. The standard that must be met by the Board is not simply that there be a "rational basis" for each condition, as was implied by some of the testimony. See e.g., Tr. VII, 20, 21-22, 28, 29, 47.

In this case, the issues raised relate to the Board's "firm belief that 36 units was over-utilization of the property and created intractable health and safety problems."[18] Board's Brief, p. 13. The Board and the abutters joined in making four specific arguments in this regard: 1) that the proposal is too dense in relationship to the surrounding neighborhood, 2) that there are parking and internal traffic safety issues, 3) that stormwater issues are not properly addressed, and 4) that there is insufficient open space.[19] Board's Brief, 13-18.

A. Density

The Board and the abutters argue that because of its density, the proposed housing will be out of character with the neighborhood and "immensely visually intrusive." Board's

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18. The Pre-Hearing Order lists many conditions as being in issue. Several of these are primarily legal issues concerning which no evidence was introduced. These issues were not briefed, and thus are waived. See *Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85 653 N.E.2d 595, 598 (1995). Though that alone is reason enough to strike them, they are not defensible for other reasons as well. The requirement that the final development use funding only the Housing Starts program, and not NEF funds is not an issue of local concern. See *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 7 (Mass. Housing Appeals Committee Jun. 25, 1992). That final plans be submitted to the Board for approval offends our long-standing rule against "conditions subsequent." See *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); also see 760 CMR 31.09(3). And a condition providing that the permit lapse if construction does not begin within two years is permissible on its face, but by regulation must permit limited extensions. See 760 CMR 31.08(4).

Other conditions described in the Pre-Hearing Order are incorporated within larger issues. That is, as will be seen, the conditions described in §§ II-B(1)(c)(ii), II-B(1)(c)(iv), and II-B(1)(c)(v) of the Pre-Hearing Order—setbacks, distance between buildings, and restrictions on decks and patios—relate primarily to density. The condition described in § II-B(1)(c)(iii)—involving the local wetland bylaw—is Condition 9 of the Comprehensive Permit (Exh. 1, p. 10), and mentions "Conservation Commission concerns," which in fact are concerns about 100-year storm calculations for storm water system design. Condition 12, described in Pre-Hearing Order § II-B(1)(c)(vi), apparently concerns to protection and replacement of trees under the Lexington Tree Bylaw, and could relate to visual screening and density, but this issue was not briefed and is therefore waived. See *Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85 653 N.E.2d 595, 598 (1995).

19. As noted in Section III, above, and also in note 14, above, the scope of the abutters' interests are limited to matters that affect them directly, that is, only to density and possibly stormwater runoff. But the Board and the abutters worked together closely in presenting throughout the hearing, and the Board has adopted arguments and testimony raised by the abutters. See Tr. VII, 104; Board's Brief, p. 1 n.1. To simplify discussion, we will, for the most part, refer to experts and evidence as presented by the Board and abutters together.

Brief, p. 14; Tr. VII, 50-51, 57, 85. The civil engineer and land use planner who testified for the Board and abutters summarized his opinion most clearly saying that if the proposal is built "there clearly would be a different character to the neighborhood in a sense that now the neighbors overlook a somewhat passive, non-intrusive use. Under the future scenario there will be tall and relatively intensely developed residential structures." Tr. VII, 67; also see Tr. VI, 153. The developer's architect, on the other hand, testified that he tried in his design "to make this look as if it were part of the community in size and character of the architecture." Tr. III 27. In choosing between these differing opinions, we must consider a number of facts.

First is the matter of the character of the neighborhood. There is no allegation that the architectural style of the proposed housing clashes with the neighborhood. In fact, the architect carefully considered similar multi-family developments in this part of Lexington. Tr. III, 18-25. Nor, obviously, can there be any claim that multi-family housing is an uncharacteristic use in this area. Not only is there other multi-family housing in the area, but in approving this proposal as a 28-unit development, the Board has clearly indicated that such a use is appropriate.[20] And while the Board's and abutters' expert is certainly correct that the existing greenhouses and accessory power plant currently on the site are fairly unobtrusive in relation to surrounding houses, he overstates the case in suggesting that if the proposed housing is built, "little of the natural or scenic characteristics of the site" will remain. See Tr. VII, 85-86. Any such characteristics of the site have already been altered. Considering all of these factors, we find that the proposal is in character with the neighborhood.

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20. The abutters' interest is not in the use *per se*, but rather only in aspects that affect them directly, such as the greater bulk of multi-family units, which is discussed below.

Second, the Board and abutters raise a more serious concern in arguing that the new buildings will be unduly intrusive due to their bulk and setbacks from adjoining yards. We will examine this in terms of several different factors.

As a preliminary matter, much was made of some imprecision in the preliminary architectural plans that were introduced into evidence. See Tr. VII, 145; Interveners' Brief, pp. 13-21. As is common in cases before us, the architectural plans have been revised several times. The developer's current proposal is shown in Exhibits 4 and 8. This is a revision of earlier plans shown in Exhibit 2. The primary difference is that Exhibits 4 and 8 include changes in the site layout of four buildings at the front of the site to address concerns raised by the Board. Certain aspects of the design are not shown in as much detail on Exhibits 4 and 8 as they were on Exhibit 2. For instance, Exhibit 2 has detailed landscaping plans that will be incorporated into the Exhibit 4 plans. In addition, there was a drafting error in Exhibit 4 in the architect's rendering of the open space—a three-story (or two-and-one-half-story) building was shown in the background, even though the actual design provides for all two-story buildings. Exh. 4, sheet 2; Tr. III, 106-108. This rendering apparently still reflected the "rejected" or superceded plans shown in Exhibit 2, which showed seven end condominium units as having a third-floor bedroom. Tr. III, 64-65. In any case, it is clear from Exhibit 4, that all of the buildings as finally proposed will be only two stories.

Similarly, there was confusion about the final design of the buildings in terms of the elevation of the first floors of the buildings above existing grade. This is important since it obviously affects the overall height of the buildings and their appearance from the abutters' yards. The developer committed to constructing the buildings so that their first floor elevations would be within 12 inches of the elevations shown on Exhibit 2, sheet 4. Tr. IX,

103, 108. Thus, as shown clearly on Exhibit 4, sheet 8, the maximum height of the buildings to the peak of the roof will be 34 feet above the first floor elevation and 36 feet above final grade. Exh. 4, sheet 8; also see Exh. 8 ("Abbreviated Schedule of Dimensional Controls"); Tr. III, 31. This is well within the dimensional requirements of the Lexington Zoning Bylaw, which are 40 feet in both single-family and multi-family residential districts. Exh. 55, p. 13665.

Though the proposed buildings will be within the height requirements of the zoning bylaw, they are, as the Board's and abutters' expert points out, tall in relation to neighboring houses. See Tr. VII, 67. The highest building, one on the southern border of the site, will have a first floor elevation is shown as 216 feet. Exh. 2, sheet 4. Based on the developer's commitment, above, it could be twelve inches higher than that, or 217 feet. The existing elevation in its location is 212 feet. Exh. 2, sheet 2. Since by design the peak of the roof will be 34 feet above the first floor elevation, simple calculation shows that the elevation of the peak may be as much as 39 feet above the existing grade.[21]

In terms of bulk, the buildings are also larger than most of the houses in the neighborhood, particularly those on East Street whose backyards they abut. But they are roughly the same size as some of the houses currently being built in the neighborhood. Two houses on Boroughs Street have been torn down recently and replaced with much larger houses—houses with footprints greater than 3,000 square feet and total usable space,

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21. A technical concern related to building height must be addressed. There was disagreement about whether the estimated level of groundwater is above or below the grade of the proposed basements. Since an increase in height would likely make the buildings more visible to the abutters, if, before or during construction, it is determined that actual groundwater levels are higher than expected, the buildings may not be raised. Other engineering solutions, such as the foundation drainage system described by the Board's and abutters' expert, must be implemented. See Tr. VII, 158.

including garages and basements, approaching 10,000 square feet. Exh. 9, 10; Tr. I, 69, 75-76; III, 32.

Another factor that affects how the proposed buildings will be perceived by the abutters is the separation between them. The Board and abutters also argue that lack of building separation results in a "wall" effect. Both the chairman of the Board and the Board's and abutters' expert expressed a preference for 30 feet of space between buildings. Tr. VI, 155, 157; VII, 42-43. Under the circumstances here, however, where we do not have the flat exterior of an apartment building, but rather, a varied, two-story façade with broken rooflines, gables, and dormers, and where all buildings are separated by at least 25 feet and some by more than that, this characterization hardly seems accurate. See Exh. 4, sheet 6; Exh. 8; Tr. III, 31.

More important than any of the above factors is the distance from which the buildings are set back from adjacent properties. The Lexington Zoning Bylaw would permit individual houses to be built in this single-family residential district within 15 feet of the property line or 25 feet if they were large, "jumbo-size" houses. Tr. I, 85; II, 132-134. Setbacks in multi-family districts are 40 feet. Exh. 55, p. 13665. Currently, at the front of the property, to the south on Lowell Street, the greenhouse to be demolished as part of the proposal is only 10 to 15 feet from an existing house; the new buildings will be set back 20 feet from the property line and 40 to 50 feet from the next house on Lowell Street. Tr. I, 68, 73, 128; Exh. 10, 8. To the north on Lowell Street, the existing power plant for the greenhouses, which has a 25-foot smoke stack, is only 5 feet from the property line of the existing abutting house; the proposed buildings will be set back 20 feet from the property line and 40 to 50 feet away the existing house. Tr. I, 68, 73, 128; Exh. 10, 8. On the other two sides of this triangular site—

that is, to the rear, abutting the backyards of the East Street and Boroughs Street houses—the setbacks of the existing greenhouses, which are quite low buildings, vary from as little as 5 feet to 30 feet or more from the property lines. See Exh. 2, sheet 2; Exh. 10. Exh. 10. In those locations, the proposed buildings will be 25 feet from the site's southern boundary, making them 100 to 120 feet distant from the houses on East Street.[22] Tr. I, 73; Exh. 8. The new buildings will also be 25 feet from the site's northwest boundary, that is, about 170 feet from the houses on Boroughs Street.[23] Tr. I, 73; Exh. 8.

The final factor relating to the impact of the proposed buildings on the abutters is to what extent they will be screened by vegetation. There is currently a good deal of vegetation along the property line. Tr. I, 92, 95; III, 30; Exh. 10. In addition, new plantings will be provided along the perimeter of the site. Tr. III, 27; Exh. 2, sheet 6.

Considering all of these factors, we are not persuaded that given their bulk and setback the proposed housing will have a great impact on the abutters.

Third, the Board and abutters allege that the new buildings will cast shadows on adjoining properties. Tr. VII, 90. The abutters' expert did not prepare a shadow study or other evaluation, however. Tr. VII, 145-146. The facts show that the new buildings will comply with the height requirements in the zoning bylaw, that they will be set back from the

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22. A garage is proposed in the southwest corner of the property. Though it might provide something of a buffer and backs up to a barn, it is only 10 feet from the property line. Tr. IV, 128-129, 164-165. It is unclear to what extent this is objectionable to the abutters. Though the garage appears to be a better design than open parking spaces, neither is critical to the overall housing design. For that reason, if the interveners desire that the garage be removed and replaced with parking spaces in that area—also set back from the property line at least 10 feet—we will order that change if the request is made in writing to the developer and the Board within 30 days after this decision becomes final. See Tr. IV, 164-165; Section VII-2(d), below.

23. There was also a great deal of rather opaque testimony from both sides concerning decks and patios and their relation to setbacks and stormwater runoff. See e.g., Tr. I, 128-130; VII, 37-38, 124-

property line, and that at the northern boundary where winter shadows could be the greatest problem, the abutters' houses are at the greatest distance from the development. We find no evidence that shadows are a legitimate concern in this case.

In summary, though some of the concerns raised about density in this case are clearly legitimate, the Board and the intervening abutters have not proved that there will be a significant impact on the surrounding neighborhood, and certainly have not proved that any such impact outweighs the regional need for affordable housing.

B. Parking and Traffic

The Board and abutters argue that because parking is provided for the housing units in the form of garages with tandem parking outside of them, it is inadequate and unsafe. Interveners' Brief, pp. 6-7; Board's Brief, pp. 14-15. But the Board's argument is undercut by the fact that the 28-unit development that it approved also included tandem parking.[24]

Three experts testified on behalf of the developer concerning parking. One professional engineer testified on direct testimony, and another engineer and the developer's architect testified on cross-examination. They were clearly of the opinion that overall parking was adequate, that tandem parking was appropriate, and that 24-foot-wide areas for side-by-side parking were satisfactory. Tr. IX, 16-20; also see Tr. II, 44-50; Tr.III, 94-96; IX, 43-46.

The Board's and abutters' expert testified that there were not adequate parking spaces since he believed that tandem spaces should not be included. Tr. VII, 68-69. He testified

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126; Interveners' Brief, pp. 50-52. This is not a significant issue, and we conclude that the condition imposed by the Board was appropriate.

24. Once again, this is not an issue within the scope of the abutters' intervention since no argument has been made that the onsite parking configuration affects them in any specific and substantial way.

further that "in this particular instance, I think [tandem spaces] are highly undesirable and unsafe because access to the individual dwellings is provided by a common driveway which is only 18 feet in width." Tr. VII, 70. As was pointed out in rebuttal testimony, and is clearly discernible on the plans, this is in error—single driveways are 18 feet wide, but shared driveways are 24 feet wide.[25] Tr. IX, 18-19, Exh. 8.

The burden with regard to the matter of tandem spaces, as with the other local concerns, is on the Board, and it has not proven a substantial concern that outweighs the need for housing.

A second issue is raised by the configuration of the driveway. The driveway is a simple, 18-foot-wide, one-way loop that allows drivers to turn off Lowell Street, drive through the interior of the site, and exit again onto Lowell Street. Tr. I, 100; Exh. 8. It was modified slightly from the original design, removing an awkward internal "alley" and increasing the width from 16 feet, at the request of municipal officials. Tr. I, 66, 101, 103; IX, 20. No parking is permitted on it. Tr. III, 30.

Once again the developer's three experts, though they did not provide detailed testimony, were clearly of the opinion that that this was safe and adequate. See Tr. II, 45, 48; Tr. III, 95, 96; IX 19-20, 46-47. The Board's and abutters' expert disagreed, suggesting that the driveway is too narrow, particularly for delivery vehicles, and that "with a one-way street pattern that empties onto a public way, ...[traffic is] going to be circulating in and out of Lowell Street and back into the site, which is a highly undesirable circulation pattern." Tr. VII, 70, 105-106, 108. He did not elaborate on this testimony or refer to technical standards

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25. Though the testimony on this point was clear, we have included a condition that all areas in which two cars may be parked side-by-side shall be 24 feet wide. See Section VII-2(e), below.

to substantiate his opinion. We find that though the driveway may raise issues of inconvenience, the Board has not met its burden of establishing the existence of a substantial safety concern that outweighs the regional need for affordable housing.[26]

C. Stormwater

The site of the proposed housing is one on which stormwater can be managed easily—it is quite flat and even though 47% of it is impervious surface, there is currently no stormwater mitigation of any kind. Tr. II, 131; see Exh. 2, sheet 2. In the summer of 2002, the Lexington Engineering Department commented on the developer's site plans, which included plans for stormwater management, and the developer submitted revised plans in response. Exh. 13. Upon further review, the Engineering Department concluded that "[t]he increase of units from 32 to 36 still results in a net decrease in storm water runoff from the site versus existing conditions." Exh. 14; also see Tr. I, 110-121. Nevertheless, the Board and abutters remained concerned that the drainage system was not designed to accommodate a 100-year storm. Tr. VII, 32, 109. In response, although there is apparently no legal requirement that it do so,[27] the developer determined that it is possible to comply with the state Department of Environmental Protection Stormwater Management Policy, and committed to doing the additional work necessary to comply. Tr. III, 5; IX, 8; also see Section VII-2(B), below.

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26. An even less fully developed issue is that the driveway location is "a classically undesirable situation... just over the crest of a vertical curve [which results in] limited sight distance." Tr. VII, 105. The Board's and abutters' expert acknowledged that he did not take any of the measurements required to analyze sight distance. Tr. VII, 105; also see Tr. IX, 23. Similarly, there was a great deal of ultimately inconclusive testimony concerning storage of snow that will be plowed from the driveway, a matter that in these circumstances at most raises another issue of inconvenience, not safety. See e.g., Tr. VII, 71; IX, 20-21.

27. The record is unclear, but this may be required by Lexington's local wetlands bylaw.

A specific concern raised about the stormwater management system is whether detention basins have been designed properly. It is certainly not of concern, as the abutters seem to imply, that the basins will contain as much as four feet of water immediately after a large storm. See Interveners' Brief, p. 10; Tr. II, 104-105; IX, 88. That is what they are designed to do.[28] But the Board's and abutters' expert testified that because "[ground] water is only 5 feet down, ... there would be a possibility" of standing water in one of the detention basins, and thus it would not function properly. Tr. VII, 110-112. His testimony was far from conclusive, as was shown on cross-examination. Tr. VII, 117-118. The developer's expert indicated that there would not actually be standing water, but that there might be water in the dry-well portion of the catch basin that is below a ground-level catch basin. Tr. IX, 84, 86. The confusion with regard to this issue is not atypical since the developer is permitted to proceed under the Comprehensive Permit Law with preliminary designs. 760 CMR 31.02(2)(a); Tr. IX, 76. But the exact design of the detention basins must be addressed in detail before and during construction. This will be assured by the developer's commitment to comply with the state's Stormwater Management Policy, which will be enforced by our condition in Section VII-2(b), below.

Finally, the record is unclear as to what, if any, specific concerns abutters may have about stormwater runoff onto their individual properties. Though the site is very flat, there is currently a very shallow slope off the site at some locations on the southern boundary. Exh. 2, sheet 2. There is some indication that more water might flow onto the abutters' land at that point, though probably only if the drainage system were not designed to accommodate

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28. The question of fencing the detention basins was not raised. Though not usually necessary, fences can be added for safety if the slopes in a basin are particularly steep.

the 100-year storm. Tr. II, 108-109; VII, 32. Presumably, the redesign to state standards will address this concern. There was also a minimal amount of testimony indicating that runoff from patios in the same area may flow across the backyards of several condominium units into the neighbors' backyards. See Tr. VII, 34, 115-116. This evidence, however, does not even begin to approach the level of proof that would be required to sustain the burden of proving a local concern that outweighs the regional need for housing.

D. Open Space

The Board also argues that insufficient open space is provided on the site.[29] It points out correctly that there is only a "single, central common area," and then argues that the developer "counts as open space the land areas within the separators of parking stalls, separators between the roadway and the dwelling units, areas designated for snow storage, and land areas adjacent to the proposed stormwater detention basins."[30] Board's Brief, p. 17; also see Tr. III, 110; Exh. 3.

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29. With reference to concerns about intensity (which are similar to concerns about open space), the Board refers to a MassHousing guideline for the Housing Starts program that limits the density of developments to "the greater of 8 units per acre or 4 times the surrounding density." Board's Brief, p. 13; also see Exh. 57, p. 4. This may well be a useful guide to MassHousing in conducting preliminary reviews of proposals, but as we have said repeatedly, the obligation of both the local Board and this Committee within the comprehensive permit process is to review proposals not on the basis of some abstract density/intensity standard, but rather on the particular facts presented by the housing development, the site, and the neighborhood. See *CMA, Inc. v. Westborough,* No. 89-25, slip op. at 27 (Mass. Housing Appeals Committee June 25, 1992); *Hastings Village, Inc. v. Wellesley,* slip op. at 21-22, No. 95-05 (Mass. Housing Appeals Committee Jan. 8, 1998), *aff'd* No. 98-235 (Norfolk Super. Ct. Nov. 12, 1999). That being said, we note that the proposal in this case, at 10 units per acre, is little in excess of the MassHousing standard. Further, the guideline is apparently intended to be applied flexibly since MassHousing originally issued a project eligibility determination for 48 units. Exh. 5.

30. The interveners have argued that there is not enough space dedicated to snow storage. This issue, like concerns about the roadway, seems at worst to be a matter of inconvenience. It does not specifically affect the interveners, and it was not presented in sufficient depth to meet the Board's burden of proof.

Two separate issues are raised here. First, we are not concerned that there is a single area designated as common open space. This is approximately a quarter acre of land in the center of the site where there is a small, fenced children's play area next to a larger, open lawn area to be surrounded by trees. Exh. 8, Exh. 2, Exh 3; Tr. II, 81. (These areas are shown clearly on Exhibit 8, though they appear in more detail on the landscape plan in Exhibit 2, sheet 6, and on Exhibit 3, which are "very similar." Tr. II, 79. In fact, providing such an area is exactly the approach that should be taken in designing affordable housing. Cf., *Dennis Housing Corp. v. Dennis*, No. 01-02, slip op. at 8-12 (Mass. Housing Appeals Committee May 7, 2002)(upholding denial of comprehensive permit on grounds that no space had been provided for recreation); also see *Hastings Village, Inc. v. Wellesley,* slip op. at 29, No. 95-05 (Mass. Housing Appeals Committee Jan. 8, 1998), *aff'd* No. 98-235 (Norfolk Super. Ct. Nov. 12, 1999)(permit granted where adjoining public areas compensated for lack of usable open space on site). In addition, each condominium unit has a small, private backyard area. No evidence was presented that the common recreation area or the backyards are not large enough; rather, the backyards appear to be typical and the common area appropriate. A legitimate local concern with regard to usable open space has not been proven.

Second, is the more technical and ultimately less important question of how *total* open space compares to formal requirements. The Lexington Zoning Bylaw itself might provide a framework for such an analysis, even though the Comprehensive Permit Law permits the waiver of any requirements it contains. In their briefs, however, the parties did

not analyze how those standards might apply to the facts before us.[31] The Zoning Bylaw provisions relating to open space, lot coverage, and related issues are very complex, and where they have not been presented carefully to us by the parties, we are not prepared to rely on them. See e.g., Exh. 55, pp. 13592-13593, 13603, 13605-13606, 13619-13622, 13665. The bare facts are clear enough, however. The total area of the site is 159,500 square feet, and the amount of impervious surface is 82,940 square feet. Exh. 8 (Abbreviated Schedule of Dimensional Controls). Thus, by calculation, 52% of the site is impervious surface or 48% total open space. This is not atypical for this sort of dense suburban development. See, e.g., *Hastings Village, Inc. v. Wellesley, supra* (43% open space). But such general comparisons have little value since our mandate is to review each case on its merits. Here, the burden of proof is on the Board, and in order to prove that the proposed development impinges upon local concerns sufficiently to outweigh the need for housing—particularly in order to prove that by relying on numerical, percentage guidelines—it would need to present substantial evidence and analysis. It has not done so.

VII. CONCLUSION

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

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31. This is perhaps because, as appears from the testimony of the chairman of the Board, the Board's primary concern was usable open space. Tr. VI, 154.

1. The comprehensive permit shall conform to the application submitted to the Board except as provided in this decision.

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

(a) The development, consisting of 36 total units, including 9 affordable units, shall be constructed as shown on drawings by Bruner/Cott and Associates, Inc. (Greenhouse Condominiums Schematic Plans), rev. May 2003 (Exh. 4, 8), and shall be generally consistent with utility and landscaping details shown on Preliminary Site Development Plans prepared by Meridian Engineering, Inc., Aug. 16, 2002 (Exh. 2).

(b) Prior to commencement of construction, the applicant shall submit to the Lexington Department of Public Works a revised stormwater management report prepared by the project engineer that demonstrates that the final plans meet the DEP Stormwater Management Policy.

(c) Finished first floor elevations for the perimeter buildings shall be within twelve inches of the elevations shown on Exhibit 2, sheet 4, and the interior buildings at the front of the site shall have first floor elevations no higher than the highest perimeter building (see Tr. IX, 108).

(d) If the interveners make a written request to the developer and the Board within 30 days after this decision becomes final, the garage shown on the plans in the southwest corner of the site shall be removed from the design and replaced with parking spaces, which shall be set back at least 10 feet from the property line, i

(e) All areas in which two cars may be parked side-by-side shall be 24 feet wide.

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

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

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

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

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

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

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

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: June 14, 2005

Werner Lohe, Chairman

Joseph P. Henefield

Christine Snow Samuelson

James G. Stockard, Jr.

LPc\l