C O M M O N W E A L T H O F M A S S A C H U S E T T S

H O U S I N G A P P E A L S C O M M I T T E E

FALMOUTH HOSPITALITY, LLC

v.

FALMOUTH ZONING BOARD OF APPEALS

No. 2017-11

DECISION

May 15, 2020

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C O M M O N W E A L T H O F M A S S A C H U S E T T S

H O U S I N G A P P E A L S C O M M I T T E E

FALMOUTH HOSPITALITY, LLC, Appellant, v. FALMOUTH BOARD OF APPEALS, Appellee.	)	No. 2017-11

DECISION

I. INTRODUCTION AND PROCEDURAL BACKGROUND

This is an appeal pursuant to G.L. c. 40B, § 22 of a decision by the Falmouth Board of Appeals granting a comprehensive permit with conditions to the Appellant Falmouth Hospitality, LLC (FHLLC). On or about November 9, 2016, FHLLC applied to the Board for a comprehensive permit to build a development consisting of 104 rental units, of which 26 would be affordable, in four structures on two lots at 556 Main Street and Lantern Lane in Falmouth, Massachusetts. Exhs. 2, ¶ 1; 14. The Board opened a hearing on December 8, 2016 and held hearings on five additional days, closing the hearing on June 5, 2017. The Board also held a workshop meeting during this period. Exh. 2, ¶ 2. By decision filed with the town clerk on July 14, 2017, the Board granted a comprehensive permit that included numerous conditions and denied certain requested waivers of local requirements. Exh. 2.

On July 31, 2017, FHLLC filed an appeal with the Housing Appeals Committee. A conference of counsel was held on August 15, 2017. Pursuant to 760 CMR 56.06(7)(d)(3), the parties negotiated a pre-hearing order, which the presiding officer issued on January 12, 2018. The Board filed a motion *in limine* seeking to exclude all evidence regarding weekly, monthly or seasonal rental of market rate units, which the presiding officer denied on February 14, 2018. In preparation for hearing, the parties submitted pre-filed direct testimony of 11 witnesses. In April

2018, the Committee conducted a site visit and two days of hearing to permit cross-examination of witnesses. The parties introduced 82 exhibits into evidence. Following these two days of hearing, with encouragement from the presiding officer, the parties engaged in mediation, which resulted in an order of remand to the Board for consideration of a proposed insubstantial change in accordance with the parties' joint motion. The Board, on remand, did not approve the proposed insubstantial changes and on August 27, 2018, the presiding officer revoked the order of remand. The parties thereafter submitted briefs and reply briefs and presented oral argument.

II. FACTUAL BACKGROUND

FHLLC received a determination of project eligibility from MassHousing as the subsidizing agency pursuant to 760 CMR 56.04. Exh. 1. The developer has fulfilled the project eligibility requirements of 760 CMR 56.04(1). Pre-Hearing Order, § II, ¶ 3.

FHLLC proposes to build four buildings containing 104 rental units consisting of 54 one-bedroom apartments, 40 two-bedroom apartments, three three-bedroom apartments and seven three-bedroom townhouses. The development will be situated on approximately 2.2 acres on two lots at 556 Main Street and Lantern Lane, one within the Falmouth Business Redevelopment (BR) District and the other in the Residential C District. Two buildings (Buildings 1 and 2) will be sited within the BR district on Main Street (Route 28) in Falmouth on either side of Lantern Lane, a private way off Main Street. The other two buildings (Buildings 3 and 4) will be located immediately behind Buildings 1 and 2, within the residential district, also on either side of Lantern Lane. Buildings 1 and 2 are proposed to have three floors of apartment units above the ground level parking. FHLLC proposes a total of 154 parking spaces, including the parking on the ground floor of Buildings 1 and 2, exterior parking, and garages for the townhouses, Buildings 3 and 4. Approximately 73% of the site will consist of impervious surfaces. The development will include an in-ground pool and pool house and a small children's play area. The developer proposes a stormwater management system to comply with the state stormwater management policy. Exhs. 2, p.5; 3; 37, pp. 5-6.

The property currently consists of a parking lot and an old structure; its current uses are retail, contractor's yard and storage. Exhs. 3; 38, p. 1; Tr. II, 35. A condominium abuts the project site to the West. A 100-year old structure, estimated to be 28-30 feet in height, exists on the abutting property to the East, close to the property line. Exh. 76, C.1.D. Adjacent to the

property on Lantern Lane is a single-family home. Exh. 72, ¶ III.4. Across Main Street from the project site are an electric supply business and a real estate business. Exh. 37, pp. 5-10. No other building in the immediate neighborhood is as tall as the proposed project. *See, e.g.*, Exh. 72, ¶¶ II.4-5, III.1-6.

III. ECONOMIC EFFECT OF THE BOARD'S DECISION

A. Standard of Review

When a developer appeals a board's grant of a comprehensive permit with conditions and requirements, 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 conditions and requirements in the aggregate make the construction or operation of such housing uneconomic. *See* 760 CMR 56.07(1)(c)1, 56.07(2)(a)3; *Board of Appeals of Woburn v. Housing Appeals Comm.*, 451 Mass. 581, 594 (2008); *Haskins Way, LLC v. Middleborough*, No. 2009-08, slip op. at 13 (Mass. Housing Appeals Comm. Mar. 28, 2011). FHLLC alleges that numerous conditions and denials of waivers in the Board's decision cumulatively render the project uneconomic because it cannot achieve a reasonable financial return on this project as conditioned by the Board. It argues, relying on testimony of its witnesses and documentary evidence, that it has provided sufficient evidence that the Board's conditions and denials of waivers in the decision render the project uneconomic. The Board contends that the developer has not met its burden.

Under G.L. c. 40B, § 20, and pursuant to 760 CMR 56.00, *et seq.*, and the DHCD *Guidelines, G.L. c. 40B Comprehensive Permit Projects, Subsidizing Housing Inventory* (Dec. 2014) (*Guidelines*), to establish that the Board's decision makes the project uneconomic, FHLLC must prove that:

> any condition imposed by [the] Board in its approval of a Comprehensive Permit, brought about by a single factor or a combination of factors … makes it impossible for [FHLLC] to proceed and still realize a reasonable return in building or operating such Project within the limitations set by the Subsidizing Agency on the size or character of the Project, or on the amount or nature of the Subsidy or on the tenants, rentals, and income permissible, and without substantially changing the rent levels and unit sizes proposed by [FHLLC].

760 CMR 56.02: *Uneconomic*. Exh. 54, *Guidelines*, p. I-5. *See* G.L. c. 40B, § 20; 760 CMR 56.05(8)(d). Pursuant to the comprehensive permit regulations, we have first applied the

Guidelines' methodology for analyzing "reasonable return" for a rental housing project, a Return on Total Cost (ROTC) analysis.[1] 760 CMR 56.02: *Reasonable Return;* Exh. 54, pp. I-5, I-7. This ROTC methodology establishes the minimum reasonable return (the economic threshold). The ultimate question is whether the projected ROTC for the project as conditioned by the Board's decision falls short of the economic threshold. *HD/MW Randolph Ave., LLC v. Milton*, No. 2015-03, slip op. at 5 (Mass. Housing Appeals Comm. Dec. 20, 2018). If, as occasionally is the case, the ROTC of the development as proposed in the developer's application for a comprehensive permit is also below the economic threshold established by the *Guidelines*, a situation we have termed "uneconomic as proposed," developers are required to show more, specifically, that the Board's conditions render the project significantly more uneconomic than the project proposed. *See Autumnwood, LLC v. Sandwich*, No. 2005-06, slip op. at 3 and n.2 (Mass. Housing Appeals Comm. Decision on Remand Mar. 8, 2010); *511 Washington Street, LLC v. Hanover*, No. 2006-05, slip op. at 9, 12-14 (Mass. Housing Appeals Comm. Jan. 22, 2008); *Cirsan Realty Trust v. Woburn*, No. 2001-22, slip op. at 3 (Mass. Housing Appeals Comm. Apr. 23, 2015); *Haskins Way, supra,* No. 2009-08, slip op. at 18; *Avalon Cohasset, Inc. v. Cohasset*, No. 2005-09, slip op. at 13 (Mass. Housing Appeals Comm. Sept. 18, 2007). Although it may be logical to assume a developer would not propose an uneconomic project, since our economic threshold represents a technical standard, it is not always identical to the standard a particular developer may use to make its business decisions. As we have noted previously, a developer may choose, under some circumstances, to proceed with an uneconomic development. *Haskins Way, supra,* No. 2009-08, slip op. at 18; *511 Washington Street, supra,* No. 2006-05, slip op. at 10-11; *Rising Tide Dev., LLC v. Sherborn*, No 2003-24, slip op. at 16 n.16 (Mass. Housing Appeals Comm. Mar 27, 2006) (noting developers may accept lowered profits for developments subject to protracted litigation).

[1] We have previously stated that that while "the DHCD Guidance does not have the force of law because it was not promulgated as a regulation," in considering statutory and regulatory provisions, we generally give "deference to policy statements issued by DCHD, the state's lead housing agency." *Matter of Waltham and Alliance Reality Partners,* No. 2016-01, slip op. at 22 n.22 (Mass. Housing Appeals Comm. Decision on Interlocutory Appeal Feb. 13, 2018), and cases cited.

B. The Developer's Presentation

FHLLC challenges numerous conditions and waiver denials as contributing to rendering the project uneconomic. The most significant, to which it assigned specific monetary cost, include the following required modifications to the development:

1. "[A] revised design consistent with that suggested in the April 3, 2017 letter and a conceptual drawing by Glen Fontecchio…reducing the building height in those areas along Main Street and adjacent to the abutting residential properties" and with "[t]he roof pitch and gable design…modified in accordance with the recommendations of Glen Fontecchio." Exh. 2, Conditions A.5, A.7.[2]
2. Specified reductions in building height: "[a] portion of buildings 1 and 2 extending at least sixty feet … to the North shall be lowered to three stories along Main Street" and "[a] portion of the north wing of Building 1 along the rear property line (extending approximately forty feet… shall be lowered to three stories (nor more than forty feet… in height)." (Conditions A.7, A.8).
3. Denial of requested waivers of setback requirements. Exh. 2, Exhibit A, pp. 25-26.
4. Enclosure of the first-floor garage area "by exterior walls with appropriate fenestration" and provision of "[a]n adequate and designated striped parking aisle for delivery truck and postal service parking." (Conditions A.9, A.6).
5. Inclusion of "retail or commercial space or amenity space on the first floor along the frontage in accordance with the planning priorities delineated in the BR district and consistent with the recommendations of…[Mr.] Fontecchio." (Condition A.7).
6. Construction of "all outdoor parking areas…using pervious pavement or other suitable pervious material." (Condition E.22).
7. Construction of a four-foot wide sidewalk along the easterly side of Lantern Lane with five-foot wide grassed strips on either side of the sidewalk. (Condition F.8).
8. Provision of professional property management and maintenance personnel on the premises during normal daytime hours (Condition G.1).
9. Provision of a pull-off area along Main Street for the Cape Cod Regional Transit Authority buses to use to prevent vehicle conflicts on Main Street (Condition F.2).
10. Provision of a turning lane on Lantern Lane to facilitate right turns onto Main Street (Condition F.4).
11. To the extent allowed, provision of at least two speed bumps/speed tables on Lantern Lane (Condition F.6).

Other challenged conditions, to which monetary costs were not assigned, include:

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[2] *See* Exh. 2 for all referenced numbered conditions and waiver denials in the Board's decision.

12. a requirement that dumpsters serving the project be enclosed and covered, to the extent the requirement applies during construction (Condition E.16).
13. conditions establishing conditions of construction, including the timing or sequence of permits and construction (Conditions C.1.d, C.2.f, E.2).
14. prohibition of seasonal rental of market units and prohibition of leases for less than a year's duration (Condition A.10).
15. local preference requirements for initial rent-up (Condition B.4).
16. requirement of coordination with municipal authorities regarding a school bus waiting area before issuance of a building permit (Condition F.9).
17. prescription that further reductions in parking spaces without a corresponding reduction in units constitute a substantial change under 760 CMR 56.05(11) (Condition F.5).[3]

In contending that these and other conditions contribute to rendering the project uneconomic, FHLLC relies on testimony from several witnesses. Julianna Hoch, principal architect on the development, worked closely with FHLLC's site engineer, Joseph Peznola, P.E. She testified that the developer's original construction plans were peer reviewed by Glen Fontecchio, the Board's architectural consultant, who presented conceptual building designs to the Board during the hearing and testified during this appeal. Ms. Hoch reviewed the Board's decision and prepared a revised set of plans incorporating the Board's required modifications based on Mr. Fontecchio's comments and the conceptual design suggested by Mr. Fontecchio in the Board hearing. *See* Exhs. 2 (Condition A.5); 9-12; 53; 64, ¶¶ 7, 10-16.

Ms. Hoch testified that the Board's reference to Mr. Fontecchio's conceptual design was "overly vague."[4] Exh. 64, ¶ 16. *See* Exh. 53. She testified that the height limitations reduced the building height to three stories 60 feet to the north of Main Street and for a portion of Building 1 on the rear property line. Moreover, denials of waivers for setback requirements and the landscape requirement on either side of sidewalk along Lantern Lane (Condition F.8) reduced the area available for the buildings and for parking. Exhs. 2, pp. 25-26 (waivers); 64, ¶¶ 15-22; 65,

[3] The decision includes two Conditions identified as F.5.

[4] Condition A.5 states, in pertinent part: "Notwithstanding this condition, the Final Plans submitted by the Applicant shall show a revised design consistent with that suggested in the April 3, 2017 letter and a conceptual drawing by Glen Fontecchio with a Board date 'received' stamp of March 30, 2017 from Glen Fontecchio, reducing the building height in those areas along Main Street and adjacent to the abutting residential properties."

¶¶ 14-18. Ms. Hoch testified that these conditions and waiver denials led to a decreased unit count by 22 to 82 units. She also stated that because the development was required to provide 1.5 parking spaces per unit, 82 units and a management office would require 125 spaces. Therefore, in her direct testimony, she stated that the number of units was effectively reduced to 81 units. With her direct pre-filed testimony, Ms. Hoch submitted plans (the 12/22/17 Plan) that reduced some of the unit sizes. However, on rebuttal, she submitted revised plans (the 2/20/18 Plan), which did not change unit sizes from the plans originally submitted to the Board. She stated she revised her determination when she was made aware that the definition of "Uneconomic" in G.L. c. 40B, § 20 specifically references that the size of units is supposed to be substantially the same. She stated that when unit sizes are unchanged, the total unit count is reduced to 79 units under the decision. Exhs. 64, ¶¶ 23-26; 65, ¶¶ 14-18.

Mr. Peznola, the site engineer, testified that the denial of setback waivers and the requirement for a sidewalk with a 5-foot grassed area separating the street from the sidewalk (Condition F.8) decreased the area that can be occupied by the apartment buildings, Buildings 1 and 2. Exh. 58, ¶¶ 39-41. He also stated that the denial of setback waivers and the requirement to enclose the parking area resulted in a loss of 30 parking spaces, necessitating a reduction by 20 units of housing as a result of the requirement of 1.5 parking spaces per unit. He further testified that the requirement of a dedicated parking aisle caused the loss of an additional two parking spaces. He stated that the denial of requested waivers and the required setbacks reduced the footprint of Building 1 by 3,400 square feet and of Building 2 by 2,700 square feet. Exh. 58, ¶¶ 39-45. He also provided testimony regarding the required work for, and costs of, certain of the Board's conditions.

Jeffrey S. Dirk, the developer's traffic expert, testified regarding the work required for a bus pull-off area on Main Street for the Cape Cod Regional Transit Authority, speed bumps on Lantern Lane, and a left turn lane required by the decision. Exh. 56, ¶¶ 22-33.[5]

Robert Walker, the principal and manager of FHLLC, is a licensed construction supervisor, with over 30 years of experience in construction, land development and property management, who has permitted and constructed numerous residential developments, including

[5] The Board has stated it would no longer defend the turning lane and speed bumps specified in the decision, Conditions F.4, F.6. Board brief, pp. 25-26.

projects permitted under Chapter 40B. He stated his analysis of the anticipated costs for compliance with various conditions is based on that experience. Exh. 60, ¶¶ 1-2, 8. He testified that the Board's conditions in aggregate imposed significant additional costs. For certain conditions he identified specific associated costs, and for other conditions, he stated their financial impacts would result from delays and other costs that cannot be estimated at present. Exh. 60, ¶¶ 7-20.

Robert Engler, the developer's economic expert, is a manager of a real estate development and consulting firm experienced in the permitting and development of affordable housing. He relied on the estimates of Mr. Walker, Ms. Hoch, and Mr. Peznola for the specifications used to compare the project as proposed with the project as approved by the Board and to conduct his ROTC analysis. He supplemented the developer's estimated costs with his own experience as a developer and development consultant on several multifamily rental projects in the past few years. He provided *pro forma* analyses of the economics of the developer's proposed 104-unit development and what he called the Board's approved 81-unit development.[6] The *pro forma* for the approved development took into account the design changes required by the Board's decision. Exhs. 66, ¶¶ 6-7; 67, ¶ 2.

Mr. Engler testified that the applicable 10-year Treasury rate is 2.42%, and therefore the minimum ROTC, the uneconomic threshold for this project, is 6.92%. As proposed, the project's ROTC is 3.44%. Thus, he stated, the original project was uneconomic as proposed. He went on to testify that the ROTC, calculated for an 81-unit project as approved, was 2.23%, a reduction in ROTC by 35%. Mr. Engler testified that reducing project return by one-third or more makes the project "unquestionably" more uneconomic than as originally proposed. He also stated that the project approved by the Board was both uneconomic and significantly more uneconomic than the proposed project. Exhs. 66, ¶¶ 12-15, 17; 67, ¶ 4. Although Mr. Engler didn't prepare a new ROTC analysis for the 79-unit approved project, as determined by Ms. Hoch on rebuttal, he stated that the ROTC for a 79-unit development would be "somewhat lower, likely creating a 40% reduction in the ROTC." Exh. 67, ¶ 4. FHLLC argues that finding the approved project uneconomic with these ROTC results is consistent with *Haskins Way, supra,* No. 2009-08, slip op. at 17-18.

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[6] As noted, *supra,* Ms. Hoch testified that the total number of units permitted by the Board's conditions was 79.

C. Board's Challenge and Our Analysis

In opposition to FHLLC's economic case, the Board raised several arguments. It also presented testimony of its own witnesses regarding the nature and costs of the required modifications to the project. It argues that the conditions cause a reduction of only 13 units, rather than the 25 asserted by the developer. It disputes the developer's estimate of construction costs of the different conditions, as well as the *pro forma* analysis by Mr. Engler. The Board also raises the legal argument that FHLLC cannot use the costs of design changes required by the Board where the project eligibility letter required it to work with the Board on the project design, which we will address first. It argues that FHLLC has not met its burden of proving that the project as conditioned by the Board's decision is uneconomic, and significantly more uneconomic, than the proposed project.

1. Subsidizing Agency Project Eligibility Letter

The Board argues that MassHousing required in its project eligibility letter that FHLLC should work with the Town to address concerns relating to height, bulk, mass and design of the proposed buildings, and that FHLLC did not make any changes to the project following the issuance of the project eligibility letter and before applying for a comprehensive permit.[7] The Board asserts that FHLCC cannot now rely on Conditions A.5, A.7, and A.8, which address the issues raised by MassHousing, as rendering the project uneconomic. It argues that FHLLC's ROTC for the project, as proposed, has a higher "baseline" than if MassHousing had required the design changes before issuing the project eligibility letter. Therefore, it claims, it is unfairly penalized by imposing these conditions, if the developer can use them to prove that the conditions render the project significantly more uneconomic. It suggests that FHLLC was aware of MassHousing's concerns, and by ignoring the letter, left the Board in a Catch-22, where any

[7] MassHousing's letter stated: "The Applicant should work with the Municipality to address concerns relative to the height, bulk, mass and design of the proposed Project buildings. In particular, the Applicant should explore possible modifications to building elevations, including the incorporation of materials and design details intended to enhance the Project's compatibility within the surrounding streetscape and surrounding neighborhood context." Exh. 1, p. 4.

In an April 28, 2017 letter to the Board regarding a work session during the hearing before the Board, the developer stated it "is proposing to revise the building elevations of Buildings 1 and 2 in select locations to further break up the massing of the structure. Revised elevations will be submitted to this Board as soon as the same have been completed by the Applicant's Architect." Exh. 17, p. 5.

conditions related to the letter that further reduce the economic baseline render the project even more uneconomic.

FHLLC argues that the subsidizing agency's requirements should not be part of the economic analysis. It argues that MassHousing simply recognized that the Town had concerns about the height and design elements of the proposal.

We agree with FHLLC that the statements in the subsidizing agency's letter did not require the developer to change its design. To the extent that anything was required, the MassHousing letter can most logically be read to require FHLLC to engage in discussions to explore mutually agreeable changes.

The economic analysis for the purposes of G.L. c. 40B, § 23 is based on a comparison of the developer's proposed project as submitted to the Board with the project approved and conditioned by the Board. Therefore Conditions A.5, A.7 and A.8 form part of our economic analysis.

2. Design Changes Impacting Unit Count

As noted above, FHLLC's witnesses testified that the decision permits the construction of only 79 units. The Board disagrees, citing testimony of its architectural expert, Mr. Fontecchio, that compliance with Condition A.7 would result in a loss of only 13 units because the revisions only affect the building volume on the top floor. He stated that reducing the height in the front, on Main Street, would reduce the project by nine units (A.7), and reducing the height in the rear would lose an additional four units (A.8).[8] He testified that the only direct impact to the building volume is on the top floor, and that while minor adjustments may be necessary, no units need to be eliminated from the first two floors of the residential units. Exh. 72, ¶ C.4, C.7.

Ms. Hoch criticized Mr. Fontecchio's "assumption that Condition A.7 is the only condition resulting in a loss of units." Exh. 65, ¶ 15. She testified that setback requirements and waiver denials, as well as the reduction in allowable height, required the reduction in the number of units for the project. Her analysis is more credible than that of Mr. Fontecchio, as it takes into account all aspects of the decision that affected the unit count, including denial of waivers of setbacks and the loss of available parking. These required additional adjustments in unit count

[8] Although Condition A.8 limited the height in the rear of Building 1, the Board stated in its brief it would not defend this condition. Board brief, p. 21.

beyond those cited by Mr. Fontecchio. Exhs. 64, ¶¶ 23-26; 65, ¶¶ 14-18. Mr. Fontecchio acknowledged that he only considered the conceptual plan in his determination that 13 units would be lost, and he did not consider the action on waivers or the entire decision. Tr. I, 87-90. We agree with FHLLC that Mr. Fontecchio's opinion failed to consider all aspects of the Board's decision that would affect the permitted number of units, and we find Ms. Hoch's testimony to be more credible than that of Mr. Fontecchio.

The Board also criticizes Ms. Hoch, for determining the number of units without adjusting the size of units. It argues that the unit sizes could be reduced in conformity with federal Housing and Urban Development and DHCD regulations, and therefore claims that Mr. Engler's *pro forma,* based on her unit count is "all for naught." Board brief, p. 2. Regardless of whether unit sizes could be different under HUD and DHCD requirements,[9] we agree with the developer that our assessment of the economics of a Board's conditions is to be made "without substantially changing the … unit sizes proposed…." G.L. c. 40B, § 20. Ms. Hoch's determination of unit count in her rebuttal testimony took this requirement into account. Exh. 65, ¶¶ 16-18. Therefore, the Board's claim that Mr. Engler's financial analysis was tainted on this basis is without merit.

Based on the record, FHLLC's estimated loss of 25 units, resulting in a 79-unit project as approved, is credible and we accept it.

3. *Pro Forma* Calculations and ROTC Analysis

The Board argues that Mr. Engler's conclusions are not credible. It claims Mr. Engler improperly relied on Ms. Hoch's opinions regarding setbacks, unit size, and amenity space, and improperly relied on testimony of Mr. Walker, arguing he is unqualified to give his cost estimates.

We address elsewhere the Board's criticisms of Ms. Hoch's opinion and find them unavailing. *See* §§ III.B and III.C.2, *supra,* and § III.C.4(a), *infra*. With regard to whether Mr. Walker, a principal of FHLLC, was qualified to give estimates regarding costs of conditions, we find that his experience in the industry as described in his testimony, is sufficient to qualify him to provide those estimates. We note that the Board had the opportunity to discredit his testimony

[9] The Board did not identify these requirements in its brief.

on cross-examination. *See* § III.C.4, *infra*. Our discussion of the specific conditions requiring additional work addresses the credibility of the witnesses' opinions.

The Board also submitted testimony of its economic expert, Michael H. Jacobs, an affordable housing consultant with substantial expertise in housing finance who served previously as a senior development officer at MassHousing. Exhs. 70, ¶ 2; 74, ¶ 1. He provided a *pro forma* analysis of the ROTC for the project as conditioned by the Board, based on Mr. Fontecchio's analysis that the Board's design conditions result in a reduction of 13 units. He stated he did not modify any of Mr. Engler's site work numbers, and used the same accepted Chapter 40B percentages for general conditions, overhead and profit used by Mr. Engler, and accepted his standard 5% construction contingency for new construction projects. Exh. 74, ¶¶ 6-8.

The Board states in its reply brief that Mr. Engler's conclusions are faulty, based on testimony of Mr. Jacobs that mistakes or miscalculations in Mr. Engler's analysis "overinflated costs," citing Exh. 74, ¶¶ 9.f-14. Board reply brief, p. 8. The Board provides no analysis regarding Mr. Jacob's testimony, and, for the most part, as we discuss, Mr. Jacobs did not provide any calculations regarding the import of the asserted mistakes.

For example, regarding soft costs, Mr. Jacobs stated he used Mr. Engler's figures for the most part, with certain exceptions. Stating that Mr. Engler's $310,000 for "survey, permits" was overstated, he testified he would apply $248,579 for this line item, although his own *pro forma* identified survey and permits in separate line items, therefore leaving open to question whether his figure is a direct comparison to that provided by Mr. Engler. He further stated that "[s]ince the [ROTC] is an unlevered analysis (it excludes permanent debt), any costs associated with that debt such as permanent financing fees should be removed from the total development costs." Exh. 74, ¶ 10. He also stated he recalculated the developer fee "using the approved DHCD methodology" for his *pro forma* based on changes in these costs. However, his testimony did not identify the specific numeric adjustments attributable to removal of costs associated with permanent debt or the recalculated developer fee for the 81-unit scenario.[10] Exhs. 74, ¶ 10; 74-3.

[10] Since Mr. Jacobs' total development cost calculation was based on Mr. Fontecchio's discredited estimate that the Board's decision resulted in a 13-unit reduction, rather than the 25-unit reduction determined by Ms. Hoch, we cannot rely on this figure.

On rebuttal, Mr. Engler acknowledged that "some" of Mr. Jacobs' observations regarding soft costs were correct, but "they result in relatively small changes overall such that the net result on the [ROTC] is negligible and thus they are not important factors." Exh. 67, ¶ 3. Under these circumstances, we accept Mr. Engler's opinion that any net result on the ROTC of Mr. Jacobs' modifications to soft costs would be insignificant, even if we were to adopt them, and make no adjustments to Mr. Engler's calculations based on Mr. Jacobs' testimony.

Regarding operating income and expenses, Mr. Jacobs testified that the affordable rents used by Mr. Engler were incorrect. On his own *pro forma*, he used rents based on the 80% of area median income (AMI) rents approved by Massachusetts Housing Partnership. Exhs. 74, ¶ 11, 74-4; 74-3; 66-2. Mr. Engler did not respond to this testimony, and we accept that the MHP 80% AMI rents offered by Mr. Jacobs are the applicable affordable rents for the project. As shown below at note 11, a simple calculation reveals the amount of additional annual rental income attributable to correcting the affordable rents for both the proposed and approved projects. The difference between the increases in gross annual rental income for the two scenarios is less than $5,000. Notably, however, the increase in income is greater for the proposed project than the affordable project; thus, any impact on the net operating income, and in turn, the ROTC, will be an *increase* in the disparity between the ROTCs for the two scenarios, showing that the project as approved is that much more uneconomic than the proposed project.[11]

[11] The increase in annual rental income from substituting the MHP rents for Mr. Engler's affordable rents for both the proposed and approved project is shown below:

Unit Types	FHLLC Affordable Unit Rents	MHP 80% AMI Rents	Rent Differential per Unit	No. Units in each Category	Increase in Rental Income
(81 Units)					
1BR	$1,152	$1,275	$123	11	$1,353
2BR	$1,481	$1,530	$49	7	$343
3BR	$1,645	$1,768	$123	3	$369
Add'l rent/month					**$2,065**
Add'l rent/year					**$24,780**
(104 Units)					
1BR	$1,152	$1,275	$123	14	$1,722
2BR	$1,481	$1,530	$49	10	$490
3BR	$1,645	$1,768	$123	2	$246
Add'l rent/month					**$2,458**
Add'l rent/year					**$29,496**

Exhs. 66-2; 74-4.

Therefore, we have not incorporated the MHP rents identified in note 11 into our *pro forma* analysis in § III.D, as they would not alter the conclusions made by Mr. Engler.

The Board has presented no argument regarding the impact of this change on Mr. Engler's ROTC. Additionally, Mr. Jacobs presented no calculation using the MHP affordable rents for the 81-unit project analyzed by Mr. Engler;[12] nor did he acknowledge that Mr. Engler used the same rents for his *pro formas* for both the proposed and conditioned versions of the project, thus maintaining consistency for comparison.[13] *See* Exhs. 74, § 11; 74-3, 74-4, 66-2. A complete revised calculation, conducted through Effective Total Income to Net Operating Income, and the impact on ROTC, is more complex than should be performed by the Committee. Mr. Engler should have revised his *pro forma*, both for this rent change, and for the reduction in unit count from 81 to 79 units. Nevertheless, the simple arithmetic calculations in the table at note 11 are sufficient to support Mr. Engler's conclusions that the project as conditioned is uneconomic and that Mr. Jacobs' criticism is not enough to discredit Mr. Engler's conclusion.

Mr. Jacobs also challenged Mr. Engler's vacancy and bad debt allowance for the affordable units, suggesting that the 7.75% factor Mr. Engler used for these units is atypical, and stating Mr. Engler used a standard 5% allowance for market rate units. Mr. Jacobs suggested a 5% allowance should apply to the affordable units. Mr. Engler did not respond to this testimony. However, Mr. Jacobs did not provide specific calculation adjustments for the 81-unit project consistent with this testimony; nor did he address whether Mr. Engler used the 7.75% factor for the proposed project as well. Exh. 74, ¶ 12; 74-3; 66-2. It can be seen from Mr. Engler's *pro forma* that the vacancy and bad debt figure for the approved project is $24,235, calculated, according to Mr. Jacobs, at 7.75% of affordable rents; thus, Mr. Jacobs' proposed decrease of this figure by slightly more than one-third would not be a significant difference. Exh. 66-2. Therefore, we do not accept his suggestion to modify the vacancy and bad debt allowance.

The Board argues, citing Mr. Jacobs' testimony, that Mr. Engler overstated the management fee. Mr. Jacobs stated that Mr. Engler's management fee of $62,209, 3% of

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[12] As we have noted, Mr. Engler did not revise his pro forma from 81 to 79 units, but testified that the reduction in ROTC would likely increase from 35% to 40% based on this difference. Exh. 67, ¶ 4.

[13] Since Mr. Jacobs' *pro forma* is based on Mr. Fontecchio's 13-unit reduction in project size, it would not show the differential impact of the correction of the affordable rents.

effective total income for the conditioned project, was calculated incorrectly. His own calculation resulted in $44,066, a reduction of $18,143. Exh. 74, ¶ 13. Mr. Engler did not respond to Mr. Jacob's criticism. We accept Mr. Jacobs' testimony as more credible and use his figure.

Regarding administration costs generally, Mr. Jacobs testified that FHLLC's administration costs component of operating expenses was "vastly overstated," and its $255,000 estimate for the 81-unit proposed project should be reduced to $122,750. Exh. 74, ¶¶ 9.f, 13. In support, he provided a breakdown of administrative expenses from the Lyberty Green One Stop mortgage application. Exh. 74, ¶¶ 9.f, 13-14, 74-2. Mr. Engler disagreed in general with Mr. Jacobs' opinion that the administration costs were vastly overstated, asserting Mr. Jacobs' figure would reduce these costs to less than $1,500 per unit for the conditioned development. Citing his experience reviewing similar cost for apartment complexes, and his reviews of the MassHousing portfolio for 2014 and 2015, he stated average administrative costs for projects on Cape Cod well exceeded $2,000 per unit, and therefore he saw no reason to reduce those costs. *Id.* In response, Mr. Jacobs suggested that relying solely on average per unit costs on the Cape, without understanding the age of projects, targeted income mix or project size, can be misleading. He stated Mr. Engler's $2,000 per unit figure was meaningless without understanding the specific Cape projects Mr. Engler cited. We find Mr. Engler's approach to be reasonable, and consider his testimony more credible regarding the general administration expenses for the project.[14]

The Board argues Mr. Jacobs' *pro forma* is more credible overall than that of Mr. Engler, and, therefore, FHLLC did not meet its burden to prove the project uneconomic as conditioned or that it is significantly more uneconomic than the proposed development. Based on his analysis and adjustments, Mr. Jacobs testified that the approved project of 91 units (a 13-unit reduction from the proposed project) would have net operating income of $898,415. With a revised total development cost of $27,759,695, this would result in an adjusted ROTC of 3.24%. He stated that if the development is allowed to rent market rate units weekly, monthly, or seasonally, "it will have a dramatic impact on the [ROTC]." Exh. 74, ¶¶ 15-16; 74-3.

In response, Mr. Engler noted that Mr. Jacobs did not apply his reduced development and operating cost estimates to the *pro forma* for the proposed project, which would have provided a

[14] *See* § III.C.4(b), *infra*, regarding specific adjustments to administration costs regarding compliance with Condition G.1, property management and maintenance personnel.

proper comparison of the respective ROTC calculations. According to Mr. Engler, this would have resulted in an ROTC of 3.75%, or a 14% reduction in ROTC from the proposed to conditioned development models under Mr. Jacob's analysis. Exh. 67, ¶ 5. Mr. Jacobs responded that, since Mr. Engler had offered the 3.44% ROTC for the project as proposed, it became the new baseline because it was below the economic threshold, rather than an ROTC for the proposed project using the component figures he believed to be correct. *See* Exhs. 66, ¶¶ 12-14; 75, ¶ 5. Mr. Jacobs' view is incorrect, since a meaningful analysis requires consistent assumptions.

As shown above, the Board's reference to Mr. Jacobs' testimony criticizing Mr. Engler's analysis is insufficient to discredit his testimony and *pro forma*. The Board provided no argument or analysis of those criticisms, and Mr. Jacobs did not provide calculations regarding the import of most of his criticisms. Overall, we find this testimony does not discredit Mr. Engler's conclusions, although we would have preferred the submission of a revised *pro forma.* While we agree the rents should be modified to the MHP rents, since Mr. Engler's *pro forma* uses the same rents in both instances, it allows for a direct comparison, and the effect of the modification would only increase the disparity between the ROTCs for the proposed and approved projects.

Most importantly, we find that overall, Mr. Engler's *pro forma* applying the 81-unit count is more credible than Mr. Jacobs' *pro forma* using a 91-unit count, particularly as we credit Ms. Hoch's testimony that the decision actually requires a reduction to 79 units. Mr. Jacobs' analysis was based on the assumption that the decision required only a 13-unit reduction. The *pro forma* analysis he presented does not offer a credible calculation of the ROTC of the project as approved. *See* Exhs. 67, ¶ 5; 74, ¶ 7; 75. Nor does it show the proper comparison with the project as proposed without application of his modifications to the proposed project.

We accept FHLLC's *pro forma,* with the modifications noted in this decision for the purposes of calculating whether FHLLC has met its burden of proof. Where specific adjustments to Mr. Engler's *pro forma* identified in our findings increase the ROTC of the conditioned project, we apply them in our calculations in § III.D, *infra.*

4. Estimates of Costs of Board's Conditions

Both parties presented evidence regarding the costs of the modifications required by the Board's decision. FHLLC submitted testimony of its principal, Mr. Walker, its site engineer,

Mr. Peznola, its architect, Ms. Hoch, and its traffic expert, Mr. Dirk. The Board presented its own evidence through testimony of Mr. Fontecchio, its architect, Jennifer Conley, P.E., PTOE, its traffic engineer, and Brian K. Milisci, P.E., its engineering expert.

The Board argues that Mr. Walker's estimates are not detailed and have no independent backup. However, the Board had the opportunity to cross-examine Mr. Walker and other FHLLC witnesses regarding the bases for their opinions of estimated costs for the conditions imposed by the Board. We have previously noted the Supreme Judicial Court's view that the thrust of the Massachusetts approach is to address questions about the basis of expert testimony on cross-examination. *See Mattbob, Inc. v. Groton,* No. 2009-12, slip op. at 5 (Mass. Housing Appeals Comm. Dec. 13, 2010), citing *Commonwealth v. Barbosa*, 457 Mass. 773, 785 (2010); *Department of Youth Servs. v. A Juvenile,* 398 Mass. 516, 532 (1986). The detail provided by FHLLC's witnesses was sufficient to allow the Board to cross examine for the purpose of challenging the validity of those estimates. *Department of Youth Servs., supra,* 398 Mass. at 532. "An expert is allowed to base an opinion on facts or data not in evidence if the facts or data are independently admissible and are a permissible basis for an expert to consider in formulating an opinion." *Id at* 531. "If the facts or data are admissible and of the sort that experts in that specialty reasonably rely on in forming their opinions, then the expert may state that opinion without the facts or data being admitted into evidence." *Id*. at 532. The evidence shows that all of the witnesses who testified had sufficient experience in the areas in which they provided testimony to enable them to render opinions.

Moreover, Mr. Walker's testimony was supported by that of FHLLC's professional engineer in many instances, and Mr. Engler's testimony provided further support to aspects of Mr. Walker's testimony. Mr. Engler relied on Mr. Walker's and Mr. Peznola's estimates for site development costs as these individuals were familiar with the site, stating that the estimated site infrastructure costs for the development were within the range of construction costs for roadways, earthwork, landscaping and stormwater management facilities that he had seen for other projects of this size and complexity. Exh. 66, ¶¶ 6-7.

The parties submitted specific arguments regarding their estimated costs of particular conditions requiring additional work, including the bus pull-off, speed bumps, turning lane, impervious parking area, enclosed garage, and retail, commercial or amenity space. We analyze the parties' cost estimates for each of the conditions below.

a) Retail, Commercial or Amenity Space

Condition A. 7 requires that FHLLC incorporate "retail or commercial space or amenity space [where only parking is proposed] on the first floor along the frontage" of Main Street for both Buildings 1 and 2. Mr. Fontecchio testified FHLLC's plans did not depict the following standard amenities: entrance on Main Street, lobby, mailroom, electrical room, management office, janitor storage space or closet, or sprinkler space. Exh. 72, ¶ D.6. Based on the plans submitted by Ms. Hoch, she and Mr. Walker testified that usable proposed amenity or retail space consistent with this condition would be approximately 3,900 s.f. Mr. Walker stated that the added cost of incorporating this amenity space or retail space would be approximately $175.00 per square foot (s.f.), including design and architectural costs, labor, materials, furniture, fixtures, and other equipment. Accordingly, he estimated that the additional cost of this condition is $682,500.00. Exh. 60, ¶ 8; 65, ¶ 20.

Mr. Jacobs estimated the cost for this space to be $114,000, based on Mr. Fontecchio's testimony that the proposed amenity space would occupy 15 parking spaces, each 9 feet by 18 feet, which would be 2,430 s.f., rather than the 3,900 s.f. estimated by Mr. Walker and Ms. Hoch. Exhs. 60, ¶ 9; 65, ¶¶ 19-20; 72, ¶ D.7, 10; 74, ¶ 9. The Board argues that Mr. Walker's estimate is overstated because Ms. Hoch's original plan already included 1,575 s.f. of amenity space. Hoch Aff., ¶¶ 2-3. The Board's condition, however, required retail, commercial or amenity space fronting on Main Street to address the Board's concern regarding the streetscape in the business redevelopment district.

Ms. Hoch explained that the 1,575 s.f. area included space for mailboxes and sprinkler, mechanical and electrical needs, in two locations, one each in Buildings 1 and 2 near the entrances to the buildings off Lantern Lane. Tr. II, 18-25; Hoch Aff., ¶ 3. Although amenity space for some services already exists in the developer's plans, FHLLC's determination that 3,900 s.f. was required by Condition A.7 is consistent with the Board's decision and the sketch produced by Mr. Fontecchio at the Board hearing, which did not indicate dimensions or total square footage. Exh. 53. The amenity space already proposed near the entrances off Lantern Lane, for the purposes of mail collection and sprinkler, electrical and mechanical needs, as described by Ms. Hoch, does not address the stated concern in the condition for retail, commercial or amenity space fronting on Main Street. Ms. Hoch testified that the 18 feet in depth for this amenity space suggested by Mr. Fontecchio would be "too narrow to create

efficient, practical amenity and office space as contemplated by the condition." Exhs. 65, ¶ 20; 72, ¶ 7.

Accordingly, we consider that 3,900 s.f. is a reasonable application by FHLLC of the Board's decision, and we consider the testimony of Mr. Walker and Ms. Hoch that 3,900 s.f. was required for the required amenity space to be more credible than Mr. Fontecchio's testimony favoring 2,430 s.f.[15]

With regard to the cost per square foot, Mr. Engler testified that $125 per s.f. was "consistent with the cost one would find in other projects of this type and scale, and is even on the lower side of this range." Exh. 66, ¶ 8. Mr. Walker stated that $175 per s.f. was reasonable for "turn key, first class amenity and office space, inclusive of furniture, fixtures and equipment." Exh. 61, ¶ 9. Mr. Jacobs' $114,000, divided by the 2,430 s.f., yields approximately $46.91 per s.f. On the record before us, we find the $125 per s.f. figure suggested by Mr. Engler to be the most credible. *See* Exhs. 60, ¶ 9; 66, ¶ 8. Therefore, we will apply $125 per square foot for the amenity space. The $50 per square foot reduction in cost (the difference between $175/s.f. and $125/s.f.), multiplied by the 3,900 s.f. area, decreases the costs by $195,000, for a total cost of $487,500 to comply with this condition.

b) Management and Maintenance Personnel

Condition G.1. requires FHLLC to "provide professional property management and maintenance personnel on the premises during normal daytime hours…." Exh. 2, Condition G.1. Mr. Walker testified that this would cost as much as $80,000 per year in salary and require 500 s.f. of office space, at a cost of $87,500, applying $175.00 per s.f. Exh. 60, ¶ 20.

The Board argues that its decision did not require full-time management and maintenance staff and that office space would not be necessary for them. FHLLC argues that the Board has ignored federal and state requirements for accommodating employees. We agree with the developer that the condition requires salary and work space accommodation for the manager and maintenance staff. Mr. Walker properly assumed the requirement to be on-site during normal daytime hours meant full-time personnel who would need some office space.

[15] As we discuss in § V.C., *infra*, this is an example of the vagueness of various conditions in the Board's decision, which make it difficult for the developer to comply.

Mr. Walker estimated $80,000 annually for a full-time on-site manager and maintenance staff and Mr. Engler's *pro forma* for the 81-unit conditioned project explicitly included $80,000 for the cost of an "on-site manager" in FHLLC's administration costs of $255,000 that we discussed, *supra*, in § III.C.3. Exhs. 60, ¶ 20, 66-2. The Board argues that the added $80,000 should not be included, as Mr. Jacobs noted the cost of a full-time manager was already included in the project's One-Stop application. Exhs. 74, ¶ 9.f.; 74-2. The Board claims the One Stop application demonstrated that FHLLC already included approved administration expenses and the estimate of $80,000 should be reduced accordingly.

We accept Mr. Jacobs' evidence that FHLLC already included costs of a manager in its administration costs. Therefore, we will reduce Mr. Engler's administration costs line item by $80,000. Based on the record, we otherwise accept FHLLC's administration costs. Exhs. 67, ¶ 3; 66-2; 74, ¶¶ 9.f, 13-14, 74-2. *See* § III.C.3, *supra*.

The Board also relies on Mr. Jacobs to argue that the $87,500 for the added 500 s.f. is duplicative as office space is already addressed in the amenity space added to the project in addressing Condition A.7. Exh. 60, ¶ 9. We agree with the Board. Since FHLLC has provided 3,900 s.f. of amenity space that could also serve as office space for the staff, we will not allow the additional costs for 500 s.f. for personnel work space estimated by the developer. Exh. 60, ¶¶ 9, 20; 74, ¶ 9.f.

c) Enclosed Garage with Appropriate Fenestration

Condition A.9 requires that "[t]he first floor garage area (for the portions not converted to retail/amenity space) shall be enclosed by exterior walls with appropriate fenestration." The parties disagree in their briefs about the intent of the Board's condition. Mr. Walker estimated $250,000 for each building, for a total of $500,000, to enclose the garage, testifying that this would require additional added design, architectural, labor and materials costs, including specifically, the provision of a mechanical ventilation system consistent with the International Building Code. Exh. 60, ¶ 10. Mr. Peznola agreed with Mr. Walker that the required enclosure of the garage would necessitate a more extensive ventilation system. Exh. 58, ¶¶ 29-30.

Mr. Fontecchio testified the condition requiring "exterior walls with appropriate fenestration," does not call for a "fully enclosed" parking area, but rather was intended to mitigate the visual impact of a parking garage adjacent to other properties. He testified, also citing Condition C.1.e, which requires the submission of a landscaping plan, that screening using

lattice, fencing, planting or screening walls would be sufficient. He estimated the cost of such screening to be $150 per linear foot, using a better grade fence for a total length of 450 feet, totaling $67,500. Exh. 72, ¶ F. *See* Exh. 74, ¶ 9.b.[16]

We agree with the developer that the condition actually requires enclosing the space with walls containing windows, and we find its testimony regarding the work required to comply with the condition credible. Accordingly, we find the developer's cost estimate to be more credible than that of the Board and we accept it.

In its brief, the Board now proposes a new condition that the east building have windows and the west building have landscape screens. It argues that the resulting costs should be minimal. However, our analysis of the economics of the decision is based on the decision issued by the Board, not the Board's concessions made during this appeal.

d) Pervious Pavement in Parking Area

The Board's decision requires all outdoor parking areas to be constructed with pervious pavement or other suitable pervious material. Condition E.22. Mr. Walker testified that the amount of paved surface area required to be constructed with pervious material is 18,600 s.f. Based on his experience, he estimated that the added costs to install pervious pavement would be approximately $600,000, including design costs exceeding $75,000, a sub-base costing $200,000, pervious asphalt costing $30,000, labor and installation exceeding $250,000, and oversight exceeding $30,000. He also stated that annual maintenance, including vacuuming at least four times a year, would cost $50,000. Exhs. 60, ¶ 15; 61, ¶¶ A.5-7. Mr. Peznola, FHLLC's civil engineering expert, agreed that the costs of pervious pavement are higher than for non-pervious pavement, with greater installation and ongoing operation and maintenance expenses, including vacuuming and occasional power washing of the surface to maintain porosity and functionality. He also stated the relative cost of installation can be 25% higher than conventional pavement. Exh. 58, ¶ 23.

The Board's engineering expert, Mr. Milisci, considered that Mr. Walker's estimate of costs to install and maintain pervious pavement in the parking areas, including the components of the installation costs, was excessive, stating that it would be $32 per square foot in added

[16] The Board proposes in its brief that we impose a new condition that the east building (Building 1) have windows and the west building (Building 2) have landscape screens. It argues, without support, that the resulting costs should be minimal.

costs. Mr. Milisci used RS Means for his estimate regarding this condition. Exh. 70, ¶¶ C.3.8. He stated that RS Means, a national provider of construction cost data broken down by "region and area," is an "estimating tool for building construction." Tr. II, 78. He estimated the added cost of installation was approximately $30,000. He stated that while porous pavements can add 10% to 25% additional upfront installation costs, some of these added costs could be offset by smaller stormwater detention and retention facilities. He also disagreed with the developer's estimate of annual costs, and estimated a monthly sweeping program and required vacuuming would cost $24,000 annually. Exhs. 70, ¶¶ 5-11; 71, ¶ 6. Mr. Milisci testified that the additional installation costs would be approximately $75,000. Exh. 71, ¶¶ 4-7.

Mr. Walker testified that RS Means is not reliable to accurately estimate actual construction costs on complex geographically specific projects because "[c]osts of materials, labor and design fluctuate frequently and can vary significantly based on project location, making reliance on a product based upon 'averages,' such as those provided by RS Means, challenging in practicality." Exh. 61, ¶ A.1.2. He stated his analysis of estimated costs is based on his years of experience as a real estate developer, and in his work, he has not relied on RS Means for estimating construction costs for his developments. Exhs. 60, ¶¶ 2-4, 8; 61, ¶ A.1.2. Mr. Peznola, FHLLC's engineering consultant, concurred, stating that RS means estimates can be off by 100%. He testified that materials pricing in RS Means is the least accurate due to the volatility in local materials pricing, as by the time RS Means is able to gather the data for the annual cost guide and publish it, the numbers are obsolete. Exh. 59, ¶ 9. Mr. Walker also stated that Mr. Milisci's estimate of maintenance was inadequate in view of the need for vacuuming at least four times a year. Exh. 61, ¶¶ A.1.3-7.

Mr. Milisci acknowledged that RS Means does not account for different variables including work quality, productivity, overtime, project size, site conditions and others. Tr. II, 78-79. He also agreed that he would expect a client to bid a project based on their experience with similar properties and similar work. On redirect, he stated he would expect them to provide an itemized analysis of cost in preparing an estimate, and stated Mr. Walker did not provide a line by line itemized estimate of his costs. Tr. II, 79-81.

As FHLLC notes, we have previously favored estimates tailored to a specific project over RS Means data for estimating costs of conditions in our economic analysis. *See, e.g., Paragon Residential Properties, LLC v. Brookline*, No. 2004-16, slip op. at 32-33 (Mass. Housing

Appeals Comm. Mar. 26, 2007); *Autumnwood, supra*, No. 2005-06, slip op. at 10-11; *Cirsan, supra*, No. 2001-22, slip op. at 11-12. Overall, we find Mr. Walker's estimate of the required work and costs to be more credible than that of Mr. Milisci and we accept his estimate.

e) Bus Stop Pull-Off Area

The Board decision required the developer to provide a "pull-off area … along Main Street for the Cape Cod Regional Transit Authority buses to use to prevent vehicle conflicts on Main Street." Condition. F.2. The developer's traffic expert, Mr. Dirk, testified that based on a bus length of 40 feet and appropriate tapers to enter and exit, a safe pull-off would have to span approximately 160 feet in length, which exceeded the amount of frontage along Main Street in front of Building 1. Exh. 56, ¶ 27. FHLLC's professional engineer, Mr. Peznola, concurred, and stated the pull-off area would have to be approximately nine feet wide to provide ample maneuvering for the bus to clear the active lane of traffic. He stated the frontage of the site from Lantern Lane to the southeast corner on Main Street is 130 feet and a five-foot sidewalk on Main Street exists between the curb and the edge of the right of way. Mr. Peznola went on to testify that required work to provide the pull-off area included: 1) relocation of three utility poles containing major electric transmission wires, local electric services wires and communication lines, including one pole with a mounted transformer; 2) relocating curbing and drainage structures on Main Street in this area because of municipal stormwater catch basins in the area; 3) relocation of the public sidewalk on the site; and 4) acquisition of an access easement across the abutting property to the east because of the inadequate frontage on Main Street on the site for the bus pull-off area. He testified that the cost of the bus pull-off would exceed $250,000, including traffic mitigation measures. Exhs. 58, ¶¶ 24-27.

The Board's traffic engineer, Ms. Conley, testified that FHLLC's estimate was for a larger and more costly pull-off area than required. She stated the bus pull-off could be accommodated in an area approximately 60 feet long in front of the site between the existing utility poles, relocating the sidewalk, with an eight-foot wide pull-off that could be provided outside the existing traveled way. On cross-examination she stated that the pull-off area she designed was "about 75 feet. But the pull-out itself [has] got an effective length of … I believe about 40 feet" and would therefore be sticking out about five feet into Main Street when in the pull-off area, leaving 11 feet for travel. Tr. II, 89-90. She also testified that the pull-off could be in the area of a utility pole that would be required to be moved anyway, and that if a 5.5-foot

pull-off were constructed, a full-sized bus could enter and exit in the space available. She stated that a pull-off of this type could be constructed for less than $20,000. Exhs. 68, ¶¶ 3-5; 69, ¶¶ 3-5. Tr. II, 89-90. Mr. Milisci, using RS Means, concurred with Ms. Conley's estimate of $20,000. Exhs. 70, ¶ C.5.7; 71, ¶ 9. The Board's economic witness, Mr. Jacobs, relied on Mr. Milisci's cost estimates based on RS Means. Exh. 74, ¶ 9.d. The Board argues that the developer's costs of constructing the bus pull-off are not credible, and that the developer's witnesses overdesigned the pull-off area so the entire bus was out of the travel lane. It criticizes Mr. Peznola's use of his own estimates rather than RS Means, and argues Mr. Peznola provided no detail of his cost estimate.

FHLLC argues that Ms. Conley's proposal did not meet local transit authority requirements, and she was unaware of the necessary length for a pull-off. Tr. II, 88-89. It cites to minutes of the Board's hearing on FHLLC's application, at which a Board member noted testimony that the standard for the RTA was 80 feet for a pull-off (40 feet plus 20 feet in front and behind the bus). Exh. 41, p. 2 (May 18, 2017 minutes). It also notes that Mr. Peznola testified that the bus pull-off would require the relocation of two utility poles. For this reason, it argues the Board's estimate cannot be accepted. Mr. Dirk testified that the pull-off area could not be constructed as Ms. Conley suggested because "i) the relocated sidewalk would need to cross property that is not under the control of the Town or FHLLC in order to connect to the existing sidewalk to the east of the Property; ii) the pull-off area would cross/intersect … Lantern Lane parallel to Main Street, creating multiple conflict points for both vehicles and pedestrians; and iii) the presence of vehicles in the pull-off area would restrict (limit) lines of sight to and from the east along Main Street for a motorist exiting the access to the project." He also criticized her cost estimate, stating that at least two utility poles would need to be relocated, and in addition to full-depth roadway reconstruction, the pull-off would require milling and repaving of Main Street, granite curb installation, sidewalk construction, drainage structures, traffic details and incidental construction activities that could not be accommodated within her proposed budget. Exh. 57, ¶ 3.

We find the testimony of Mr. Dirk and Mr. Peznola more credible than that of Ms. Conley concerning the proposed work estimated for complying with the Board's condition. Their determination of the minimum length for the pull-off is more credible than her view, in light of the testimony regarding the guidelines of the Cape Cod Regional Transit Authority. In

addition, Ms. Conley's plan did not take into consideration all aspects of the work required. We find the developer's proposed design of the pull-off is a reasonable interpretation of the requirement to address minimization of conflict with traffic on Main Street. We therefore accept FHLLC's estimate of costs for this condition.[17] We also find the developer's cost estimate to be more credible than that of the Board. FHLLC's estimate accounted for all the work encompassed by the condition. Mr. Milisci's costs are based on RS Means, and do not account for all of the required work. Therefore, we accept FHLLC's estimate for this condition.

f) Four-Foot Sidewalk and Five-Foot Grassed Strips

The Board decision requires the developer to construct a four-foot wide sidewalk and five-foot wide grassed strips on either side of the sidewalk along the easterly side of Lantern Lane. Condition F.8. Mr. Walker testified that, while the developer proposed a sidewalk on its plans, this condition requires approximately 1,000 s.f. of new lawn area for approximately 200 linear feet, requiring additional sod, labor for sod installation, labor and materials for additional irrigation, and likely additional landscaping. Exhs. 60, ¶ 19; 61, ¶¶ A.2.8-A.2.9. In addition to the cost of materials and labor for the sidewalk modification, Ms. Hoch and Mr. Peznola testified that this condition contributed to the increased setback for Building 1, which reduced the area available for parking and the buildings. Exhs. 58, ¶ 39; 64, ¶ 22.

The Board argues that Mr. Walker provided no independent support for the cost of $25,000 for sod, labor and materials. It relies on the testimony of Mr. Milisci that the cost would be negligible because the decision only requires moving the sidewalk and grass strip five feet away from the curb. Exh. 70, ¶¶ C.4.4-C.4.5. However, we agree with FHLLC that this condition requires an *additional* grass strip, not simply moving an existing one, and we therefore accept the developer's estimate as more credible. Exhs. 3-4 (plans); 58, ¶ 39; 60, ¶ 19. We also note this condition contributes to the decrease to the footprint of Building 1, thereby affecting the number of units permitted.

[17] The Board also included two additional traffic conditions it is no longer defending: a right-hand turning lane from Lantern Lane to Main Street (F.4), and two speed bumps on Lantern Lane (F.6). Even though it withdrew these conditions during the course of the hearing, they were included in the decision, and the costs submitted by the developer for these conditions are properly treated in the economic analysis of the decision as conditioned by the Board. Therefore, we accept the developer's estimates of costs for these two conditions, respectively, $275,000 for a turning lane and $50,000 for speed bumps. Exh. 60, ¶¶ 17-18.

g) Conditions Without Quantified Financial Costs

The Board argues that the developer did not provide any financial details for a number of conditions, and therefore cannot argue that these conditions render the project uneconomic. *See* § III.B, *supra*.

FHLLC argues that these conditions do have financial impacts, although they cannot be estimated. It argues that Condition A.6, requiring a designated striped parking aisle for delivery truck and postal service parking, reduces the number of parking spaces and consequently the number of permitted units, as testified by Mr. Peznola. Exh. 58, ¶ 45. Mr. Walker and Kevin S. Eriksen, FHLLC's general counsel, both testified that Condition A.10, requiring leases to be for no less than 12 months, imposes additional costs on the project, including the cost of lost rents, and legal and management fees. *See* Exh. 60, ¶ 11; 62, ¶¶ 54-55.

FHLLC also argues certain conditions will have a financial impact from timeline constraints and delays that cannot be estimated. It cites testimony from its witnesses of the effect of delays caused by Condition C.2.f, regarding the timing for obtaining necessary permits, *see* Exh. 60, ¶ 12; Condition F.9, specifying the timing for coordination with the Town for a school bus waiting area, *see* Ex. 62, ¶¶ 81-82; and Condition E.16, to the extent it requires dumpsters to be covered during construction. Mr. Walker stated covering dumpsters during construction would be highly impracticable because dumpsters change location frequently and enclosing them would result in unnecessary delays and costs. Exh. 60, ¶ 14. For these conditions, FHLLC has presented sufficient evidence of a contribution to the uneconomic impact of the Board's decision, although, excepting A.6, they do not figure in the computation of the ROTC of the project as conditioned.

For several of the conditions FHLLC argues would have an economic impact, it cites to no evidence in its briefs: Conditions B.4, establishing timelines with respect to the local preference requirement; C.1.d., regarding the timing of the submission of a construction mitigation plan; E.2, requiring engineer review pre-construction; and F.5, prescribing that a further reduction in the number of parking spaces will be a substantial change under 760 CMR 56.05(11), will require a costlier modification process. We find FHLLC failed to provide sufficient argument or evidence of a likely economic impact with respect to these three conditions.

D. *Pro Forma* Analysis and Conclusion Regarding Economics

The parties disagree about what the Board's decision requires, and the support for testimony regarding financial impact of conditions. With regard to the disputed aspects of the developer's economic analysis, we accept its development costs figures as more credible than those of the Board, with the exceptions noted above. The differences between the parties with respect to additional conditions, other than the reduction in unit count, are shown below.

Table 1: Costs for Required Additional Work—Additions to Total Development Costs

Specific Work Items	FHLLC Estimate	Board Estimate	Committee Finding	Difference Between FHLLC Estimate & Committee Finding
Bus pull-off area, F.2	$250,000	$20,000	$250,000	$0
Turning Lane, F.4	$275,000	No evidence	$275,000	$0
Pervious pavement for outdoor parking areas, E.22	$600,000	$30,000	$600,000	$0
Retail, commercial or amenity space on first floor along frontage, A.7	$682,500	$114,000	$487,500	$195,000
Enclosed first floor garage, A.9	$500,000	$67,500	$500,000	$0
Speed bumps on Lantern Lane, F.6	$50,000	No Evidence	$50,000	$0
Additional five-foot grass strip along sidewalk on Lantern Lane, F.8	$25,000	Negligible	$25,000	$0
Personnel office space, G.1	$87,500	$0	$0	$87,500
Total Costs added to TDC for New Work	$2,470,000	$231,500	**$1,957,500**	**$282,500**

Table 2: Changes to FHLLC Operating Expenses Required by Findings

Specific Operating Expense Items	FHLLC Estimate	Board Estimate	Committee Finding	Difference Between FHLLC Estimate & Committee Finding
Administration Costs (G.1)	$255,000	$122,750	$175,000	$80,000
Management Fee	$62,209	$44,066	$44,066	$18,143
Total Reduction in FHLLC Operating Expenses	$317,209	$166,816	**$219,066**	**$98,143**

Exhs. 60, ¶ 9, 10, 15-20; 61, *passim*. Mr. Engler's figures for total development costs and operating expenses, as well as net operating income, should be adjusted based on these amendments. Thus, based on the evidence, the calculated difference in ROTC between the proposed and the approved projects is set out below

Table 3: ROTC Calculation

	FHLLC Pro Forma: Proposed 104 Units	FHLLC Pro Forma: Approved 81 Units	Board Pro Forma: 91 Units	Committee Finding: Modifying FHLLC 81-Unit Pro Forma
Total Development Costs (TDC)	$29,432,278	$28,767,686	$27,759,695	
Reduction from FHLLC TDC 81 Units (Table 1)				$ (282,500)
Adjusted TDC – 81 Units				**$28,485,186**
Total Operating Expenses	$824,903	$826,209		
Reduction from FHLLC Operating Expenses (Table 2) 81 Units				$ (98,143)
Adjusted Total Operating Expenses – 81 Units				**$728,066**
Effective Total Income	$1,838,652	$1,468,873	$1,629,151	$1,468,873
Net Operating Income (NOI)	$1,013,749	$642,664	$898,415	**$740,807**
ROTC (=NOI/TDC)	**3.44%**	**2.23%**	**3.24%**	**2.60%**

ROTC (Return on Total Cost) is calculated by dividing NOI (Net Operating Income) by TDC (Total Development Cost). Thus, ROTC is: $ 740,807 / $ 28,485,186 = 2.60%. This calculation does not take into account our finding that the approved project would consist of 79, rather than 81 units. Mr. Engler testified that the ROTC would decrease further by 5% with this change.

As noted above, both the 3.44% ROTC for the proposed project and our finding of 2.60% for the approved project are below the ROTC threshold of 6.92%. *See* Exh. 66, ¶ 13. The ROTC for the approved project is 0.84% below that for the proposed project, which we find to be a substantial reduction. *See Milton, supra,* No. 2015-03, slip op. at 11 and cases cited. Thus, we find the ROTC for the approved project is both uneconomic, and significantly more uneconomic, than the ROTC for the developer's proposal.

IV. LOCAL CONCERNS

Since FHLLC has sustained its initial burden to demonstrate that conditions and requirements in the Board's decision would, in the aggregate, render the building or operation of the project uneconomic, the burden then shifts to the Board to prove, with respect to those conditions and requirements challenged on economic grounds, first, that there is a valid health, safety, environmental, design, open space or other local concern that supports each of the conditions and requirements imposed, and then, that such concern outweighs the regional need for low and moderate income housing. 760 CMR 56.07(1)(c), 56.07(2)(b)3. *See also* Pre-Hearing Order, § IV, ¶ 6. The burden on the Board is significant: the fact that Falmouth does not meet the statutory minima regarding affordable housing establishes a rebuttable presumption that a substantial regional housing need outweighs the local concerns in this instance. 760 CMR 56.07(3)(a); Pre-Hearing Order, § II, ¶ 2; G.L. c. 40B, §§ 20, 23. *See Zoning Bd. of Appeals of Lunenburg v. Housing Appeals Comm.,* 464 Mass. 38, 42 (2013) (stating there is a rebuttable presumption that there is a substantial housing need that outweighs local concerns if statutory minima are not met), citing *Boothroyd v. Zoning Bd. of Appeals of Amherst,* 449 Mass. 333, 340 (2007), quoting *Board of Appeals of Hanover v. Housing Appeals Comm.,* 363 Mass. 339, 367 (1973) ("municipality's failure to meet its minimum [affordable] housing obligations, as defined in [G.L. c. 40B, §] 20 will provide compelling evidence that the regional need for housing does in fact outweigh the objections to the proposal").

The Board has asserted several issues of local concern. It did not present lengthy or substantial arguments in its brief on these issues, but identified the following conditions that it asserts are supported by local concerns with respect to the integrity of the BR district.

FHLLC argues that the Board has failed to meet its burden to establish local concerns with respect to the conditions and denied waivers. Additionally, FHLLC argues that the Board has improperly redesigned the project, and that its changes are not supported by valid local concerns, particularly where the redesigns are based on vague recommendations.

The Board responds that "[m]ost of these local concerns are expressed in the Zoning By-law the Appellant wishes to ignore. Section 240-240 spells out the maximum height, maximum cover, minimum setbacks and yards, required first-floor nonresidential use, and streetscape connectivity. These design requirements of the BR District are a codified statement of local concerns." Board reply brief, p. 18. Mr. Fontecchio testified that the BR district was adopted to promote "the revitalization of commercial centers using mixed-use redevelopment integrating retail, office, restaurant and community service uses with housing, such as second floor apartments, condominiums and townhomes," and a chief objective of the district is to foster "pedestrian-friendly streetscapes" and "pedestrian-friendly storefronts to offer street side gathering places in front of redeveloped properties." Exh. 7 2, ¶ II.3.[18]

Additionally, the Board argues that its conditions, including those requiring a protective grass strip between a road and a sidewalk and its ban on short term leases, are common sense, suggesting that 1) FHLLC is proposing a 56-foot tall building that will serve more as a hotel than affordable housing, 2) the BR District requires Main Street buildings to address the street and first floor uses to be pedestrian friendly, 3) the project has greater than the maximum permitted impervious cover of 60%, with 73%, 4) tenants will require services like mailboxes, janitors, and management, and 5) "it's not neighborly to leave your southern abutter with an unobstructed

[18] Section 240-240.A states: "Purpose. The purpose of this article is to promote the revitalization of commercial centers using mixed-use redevelopment integrating retail, office, restaurant and community service uses with housing, such as second floor apartments, condominiums and townhomes. This redevelopment fosters pedestrian-friendly streetscapes by requiring rear and side yard parking, allowing shared parking between businesses and uses, reducing and consolidating curb cuts, and allowing parking reductions in exchange for on-site green space. The district also relaxes front, side and rear yard setbacks to encourage sidewalk development and pedestrian-friendly storefronts to offer streetside gathering places in front of redeveloped properties, rather than front yard parking fields." Exh. 44.

view into a covered parking lot 10 feet away." Board reply brief, p. 18. We address the sufficiency of those arguments below.

A. Building Height and Setbacks

Condition A.5 requires, *inter alia,* "a revised design consistent with that suggested in the April 3, 2017, letter and a conceptual drawing by Glen Fontecchio with a Board date 'received' stamp of March 30, 2017 from Glen Fontecchio, reducing the building height in those areas along Main Street and adjacent to the abutting residential properties." Condition A.7 is a bit more specific, requiring "[a] portion of buildings 1 and 2 extending at least sixty feet … to the North shall be lowered to three stories along Main Street."

The Board notes correctly that conditions regarding height, site plan, size or shape are typical conditions a Board may impose, pursuant to *Zoning Bd. of Appeals of Amesbury v. Housing Appeals Comm.*, 457 Mass. 748, 757 (2010) *(Amesbury)*. It then argues that the height of the building, within the BR district, and assertedly near to the center of Falmouth, causes the development to be incongruous and not consistent with the style of the area, and that a 56-foot height compared to the 35-foot maximum height in the BR District will dwarf other nearby buildings.[19] The Board argues the purpose of the BR District, as articulated in § 240-240.A of the zoning bylaw *see* note 18, *supra,* is required for special permits and cannot be ignored by FHLLC. It refers to the testimony of Mr. Fontecchio, who stated "Falmouth is a traditional New England (Cape Cod) Village. Its traditional scale and character contribute to the town's draw as a tourist attraction and its financial stability. Maintaining height, setback, and massing is an established design method for protecting the character of villages. … Abandoning this uniformity not only impacts immediate abutters, but diminishes the character of the village." Exh. 72, ¶¶ III.B.1-B.2. Mr. Fontecchio further stated that in his opinion the reduction of the height of the project's buildings to three stories for the first 60 feet to the North of Main Street better fosters pedestrian-friendly streetscapes, because it eliminates a looming presence over the sidewalk and furthers the BR district's purpose of encouraging sidewalk development and pedestrian-friendly storefronts. Exh. 72, ¶ B.8. The Board also argues that a shadow study should have been conducted to address the impact of the height and setbacks sought by the developer, although the

[19] The Board has declined to defend Condition A.8 requiring a reduction in the height of the rear of Building 1. *See* note 8, *supra.* Therefore, Condition A.8 is struck.

Town Zoning Administrator, Sari Budrow, testified that no "shadow study" was required in the district. Tr. I, 49. The Board suggests that because Falmouth has achieved 6.4% toward the 10% SHI affordable housing goal, the local concern embodied in this bylaw should be found to outweigh the need for affordable housing.

FHLLC argues that the local requirements cited by the Board are precisely the type the statute contemplated overriding, citing *Standerwick v. Zoning Bd. of Appeals of Andover,* 447 Mass. 20, 29 (2006), which stated "[i]n cities and towns that have not met the minimum statutory threshold of affordable housing, a developer may override bulk, height, dimensional, use and other limitations, often invoked as a pretext to exclude affordable housing."

Ms. Budrow characterized the area of the proposed project as "along the gateway to historic Main Street." Exh. 76, ¶ C.1.C. Mr. Eriksen testified that the project site is not located within a historic district, there is no formal "gateway" designation, and the zoning bylaw does not use this term. Exh. 63, ¶ 3. Ms. Budrow, responding to Mr. Eriksen, stated that the height proposed for Buildings 1 and 2 would "interrupt the gradual increase in density from south to north that mark the informal 'gateway' to historic downtown, which contains an historic district and registered historic buildings." Exh. 77, ¶ 3. Ms. Hoch also testified the site currently is "a pretty desolate looking lot with poor drainage and a pretty old structure on it. Almost anything improves it." Tr. II, 35.

While we have previously stated a "board must review the proposal submitted to it, and may not redesign the project from scratch." *Pyburn Realty Trust v. Lynnfield*, No. 2002-23, slip op. at 14 (Mass. Housing Appeals Comm. Mar. 22, 2004), quoting from *CMA, Inc. v. Westborough*, No. 1989-25, slip op. at 24 (Mass. Housing Appeals Comm. June 25, 1992), a board may deny requests for waivers and impose conditions even if such action would require a developer to modify its project, if the action is supported by valid local concerns that outweigh the need for affordable housing. *See Hanover, supra,* 363 Mass. 339, 346; *CMA, supra,* at 24 n.13; *See also* 760 CMR 56.05(8)(d).

On this record, the Board has not established a valid local concern with regard to the denial of the building height waiver that outweighs the need for affordable housing. MassHousing's project eligibility letter stated "[r]elationship to adjacent streets; Integration into existing development patterns: The two primary buildings front directly onto Main Street, echoing the relatively flat front facades and shallow setbacks characteristic of the older, more

traditional structures in Falmouth's downtown area." Exh. 1, p. 7. Thus, more generally, this building is designed to be close to the street, and the Board has not shown that in this immediate neighborhood its height constitutes a detriment that outweighs the need for affordable housing.[20]

The question to be addressed here is whether the Board's conditions appropriately address valid local concerns applicable to the project site that outweigh the need for low and moderate income housing, or whether they go beyond properly addressing valid local concerns and constitute improper redesign of the project. Even when a board demonstrates a valid local concern, we examine the conditions imposed to ensure that they are supported by that local concern, and may modify a condition that is not properly tailored to the local concern. The Board must also show how the concerns set out in the local bylaw apply to the facts of this case—how the specific interests it has identified are important at this site. *Herring Brook Meadow, LLC v. Scituate*, No. 2017-15, slip op. at 25-26 (Mass. Housing Appeals Comm. May 26, 2010).

Although the Board has expressed the importance of preserving its village character within the historic district and the importance of its redevelopment goals in the BR district, it has not demonstrated on this record that the interests of § 240-240A of its zoning bylaw regarding pedestrian-friendly streetscapes in the immediate neighborhood of the project site warrant prohibiting the height and setbacks requested by FHLLC. The Board has provided very little evidence regarding the nature of the immediate neighborhood. Nor does the suggestion of Mr. Fontecchio that the building would loom over pedestrians, even if true, demonstrate substantial specific harms with regard to design of the project that would outweigh the need for affordable housing.[21] As the condition is not credibly supported, it constitutes an improper redesign of the project. *See Webster Street Green, supra,* No. 2005-20, slip op. at 12. Therefore, these aspects of

[20] The parties have not addressed whether FHLLC's willingness, during the Board hearing, to revise the building elevations of the buildings fronting on Main Street to break up massing led to any modifications. While we do not require such modifications in our decision, we encourage the developer to consider them. *See* note 7, *supra.*

[21] Additionally, the Board's decision and testimony of Mr. Fontecchio suggest that FHLLC's failure to conduct a shadow study supports its height and setback requirements. In response, FHLLC argues that the Falmouth zoning bylaw (Exh. 44) does not require submission of a shadow study in this zoning district, nor do the Town's comprehensive permit rules (Exh. 78) and, therefore, the Board has no basis for this condition. *See 8 Grant Street, LLC v. Natick,* No. 2005-13, slip op. at 19 (Mass. Housing Appeals Comm. Mar 5, 2007) ("requirements should not be imposed on affordable housing that go beyond those imposed by regulation on other new development in community").

Conditions A.5 and A.7 are struck and the denial of the requested waiver from the height requirement is overturned.

Finally, the Board also denied requested waivers of side yard setback requirements on the ground that without a shadow study it lacked sufficient information for construction and maintenance of the buildings proposed to approve a waiver. Exh. 2, p. 26. In its brief, it relies on FHLLC's lack of a shadow study, and suggests the impact of the proposed setbacks on abutters is unneighborly. FHLLC counters that Mr. Peznola testified the proposed setback were sufficient for construction and maintenance of the project. Exhs. 58, ¶ 32; 59, ¶¶ 1-8. The Board has not demonstrated a valid local concern that outweighs the need for affordable housing to support its denial of the requested setback waivers. Accordingly, the requested waivers are granted.

B. Commercial, Retail or Amenity Space

Condition A.7 also requires FHLLC to "house retail or commercial space or amenity space on the first floor along the frontage in accordance with the planning priorities delineated in the BR district and consistent with the recommendations of the Board's consultant, Glen Fontecchio." The Board argues that the purpose and requirements of the BR district articulated in § 240.240.A of the bylaw represented a valid local concern. It claims the condition is intended to honor "the planning priorities for streetscape integrity in the BR District," relying on testimony of Mr. Fontecchio that "[FHLLC's] plan shows no direct connection from the building to the public sidewalk on Main Street." Board brief, p. 19; Exhs. 72, ¶ D.5; 44. FHLLC argues the purpose alleged by the Board is too vague to represent a valid local concern.

Regarding amenity space, Mr. Fontecchio stated the plan lacked normal amenities associated with an apartment building of this size, including an entrance on Main Street, a lobby, mailroom, electrical room, management office, janitor storage space or closet and sprinkler space. Exh. 72, ¶ D.6. Ms. Hoch testified that FHLLC included 1,575 s.f. of amenity space on the parking level in its original plans, for purposes including entranceways off Lantern Lane, lobbies, mail services, janitorial services, and mechanical and sprinkler rooms. Hoch Aff., ¶ 3; Tr. II, 19-20, 22-24.

The Board asserts in its brief that while it would prefer the amenities to be located behind an active front door onto Main Street in Building 1, the building is not lacking in key components located elsewhere within the two buildings. The Board therefore requests that the

Committee modify Condition A. 7 "to honor the district's desire to foster pedestrian-friendly streetscapes." Board brief, p. 21. It argues that the Cape Cod Commission favorably reviewed FHLLC's streetscape design for the hotel it had earlier proposed on the project site. *See* Exh. 76-2, HPCCF4, pp. 9-10. It therefore requests that we modify this condition to provide:

> The east building shall provide a mix of windows and landscape screens on its front façade. The west building shall cover its front façade with landscape screens.

Board brief, p. 21. We agree with FHLLC that the condition as written with respect to retail, commercial, or amenity space, is not supported by a valid local concern that outweighs the need for affordable housing. However, FHLLC has not argued against the Board's specific suggestion of a modified streetscape design which appears tailored to the interests regarding the streetscape in the BR district. Therefore, we will accept the Board's modification to Condition A.7, which will provide:

> Condition A.7. The east building shall provide a mix of windows and landscape screens on its front façade. The west building shall cover its front façade with landscape screens.

C. Enclosure of Garage

Condition A.9 requires that "[t]he first floor garage area (for the portions not converted to retail/amenity space) shall be enclosed by exterior walls with appropriate fenestration." The Board argues that the parking area need not be fully enclosed, but that only "appropriate fenestration" is required. Relying on testimony of Mr. Fontecchio, it suggests that "an appropriate combination of lattice, fencing, planting, or screening walls would accomplish the goal of the ZBA, which was to relieve the neighbor to the south of a direct view into the parking garage" Board brief, p. 21. Mr. Fontecchio stated that the condition was intended to mitigate the visual impact of a parking garage adjacent to other properties, to provide visual and sound screening of vehicles, including blocking vehicle headlights. Exh. 72, ¶ F.6.

FHLLC has not argued against this specific proposal. Indeed, its only argument with respect to Condition A.9 addresses the costs associated with the condition as included in the decision. Therefore, we will accept the Board's modification to Condition A.9. to provide that "FHLLC shall provide a visual screening of the garage from the abutter to the south through a combination of lattice, fencing, plantings or screening walls."

D. Pervious Pavement for Exterior Parking

Condition E.22 provides that "to reduce the impact of the building and lot coverage waiver requested … all outdoor parking areas shall be constructed using pervious pavement or other suitable pervious material." The Board argues that the district establishes a maximum of impervious area of 60%, but the proposed project will have an impervious area of 73%. It argues that this condition, requiring the outdoor parking area to use pervious pavement promotes consistency with the maximum impervious cover limit of 60% in the BR District. *See* Exh. 44, § 240-240.H.3. The desire to conform to the local requirement, by itself, is insufficient to establish a valid local concern. The Board has not shown the impact of the requested increase in impervious area on the site, and it has not demonstrated a valid local concern for this condition that outweighs the need for affordable housing. Therefore, this condition is struck.

E. Bus Stop Pull-Off Area

Condition F.2 requires FHLLC to provide a "pull-off area … along Main Street for the Cape Cod Regional Transit Authority buses to use to prevent vehicle conflicts on Main Street." In support of this condition, the Board argues that a bus stop would reduce vehicle conflicts on Main Street and provide a safe place to pick up passengers as a planned stop or a "flag" spot, citing testimony of Ms. Conley. S*ee* Exh. 68, ¶ C.2; Tr. II, 94-96. The bus schedule for the Main Street route indicates that potential passengers may "Flag us wherever it's safe!" Exh. 82. FHLLC's traffic engineer, Mr. Dirk, testified in the hearing before the Board that a bus pull-off was unnecessary. Exh. 40. On cross-examination, Ms. Conley acknowledged that she did not know whether there was another pull-off location on Main Street. Tr. II, 87-88.

We agree with FHLLC that the Board has not demonstrated a valid local concern for this requirement. Condition F.2 is struck.

F. Management and Maintenance Personnel

Condition G.1 requires FHLLC to "provide professional property management and maintenance personnel on the premises during normal daytime hours and an emergency contact name and number for tenants and the Falmouth Police and Fire Departments." In support of this condition, the Board argues its intent was to ensure that the tenants would have prompt and

professional attention to problems affecting occupancy. The Board did not cite evidence or provide any municipal requirements supporting these concerns.

FHLLC argues that this condition does not relate to the class of local concerns contemplated by *Amesbury.* Its arguments focus more directly on a challenge that the condition addresses issues within the responsibility of the subsidizing agency. We determine, *infra*, in § V.A., that this condition as written invades the authority of the subsidizing agency, and we require a modification of the condition. FHLLC assumed the cost of management in its *pro forma*; however, the nature and extent of management and maintenance services to be established is within the responsibility of subsidizing agency. Therefore, as discussed in § V.A, we will modify this condition and Condition D.2.c. accordingly. *See Roger LeBlanc v. Amesbury,* No. 2006-08, slip op., App. at 38 (Mass. Housing Appeals Comm. Sept. 27, 2017 Ruling).

G. Prohibition on Short Term Leases

Condition A.10 prohibits seasonal rentals, and requires leases to be for a period of at least 12 months. In support of this condition, the Board argues that it was primarily concerned FHLLC was attempting to circumvent the previous denial of a hotel development at the site, and that short-term arrangements would have a disruptive effect on the tenants in affordable units, *See* Exh. 77, ¶ 5. It also asserts a prohibition on short-term leases for market units is common sense.

FHLLC's arguments addressed authority and equal treatment issues, which we address below. Nevertheless, the Board's local concern argument, generally stated and unsupported, does not establish a local concern supporting this condition that outweighs the need for affordable housing. Based on our discussion, *infra,* in § V.A, this condition will be modified.

H. Sidewalk and Grassed Strip along Lantern Lane

Condition F.8. requires FHLLC to provide a "four-foot-wide sidewalk … along the easterly side of Lantern Lane in front of the parking area serving Building 1 'which] shall be protected from traffic along the street and in the parking area by a five-foot-wide grassed strip on either side of the sidewalk." In support of this condition, the Board argues that it is "common sense." Board reply brief, p. 18. The Board contends this condition does not require additional grassed areas. However, we agree with FHLLC that the condition requires additional grass cover.

See Exhs. 3-4; 58, ¶ 39; 60, ¶ 19. The Board has not demonstrated a local concern that outweighs the need for affordable housing for this condition. It is therefore struck.

I. Other Conditions

The Board's briefs make no arguments regarding a local concern to support Condition A.6 (requiring a designated striped parking aisle for delivery truck and postal service parking); C.2.f (regarding timing for obtaining permits); Condition E.16 (to the extent it requires dumpsters to be covered during construction); and Condition F.9 (with respect to the timing and sequence of events for coordination with the Town for a school bus waiting area). Its arguments that such conditions are within its "condition-setting power" do not demonstrate a valid local concern.

Since the Board made no argument specifically demonstrating a local concern supporting any of these conditions, it has waived its defense that a valid local concern supports these conditions pursuant to our longstanding rule that failure to submit evidence or argument on an issue constitutes waiver of that issue in proceedings before Committee. *See, e.g., Oceanside Village, LLC v. Scituate*, No. 2015-03, slip op. at 33 (Mass. Housing Appeals Comm. July 17, 2007); *White Barn Lane, LLC v. Norwell*, No. 2008-05, slip op. at 31 (Mass. Housing Appeals Comm. July 8, 2011); *Washington Green Dev., LLC v. Groton*, No. 2004-09, slip op. at 3 n.2 (Mass. Housing Appeals Comm. Sept. 20, 2005); *An-Co, Inc. v. Haverhill*, No. 1990-11, slip op. at 19 (Mass. Housing Appeals Comm. June 28, 1994). *See also Okoli v. Okoli*, 81 Mass. App. Ct. 371, 378 (2010), citing *Lolos v. Berlin*, 338 Mass. 10, 14 (1958) (right of party to have point considered entails duty to provide assistance with argument and appropriate citation of authority); *Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85 (1995).

Therefore, Conditions A.6 and C.2.f are struck. Condition E.16 is modified to provide that the requirement for coverage of dumpsters does not apply during construction. Since FHLLC agreed to a modification of Condition F.9, that condition is modified pursuant to our discussion in § V.D.

V. LAWFULNESS OF THE BOARD'S CONDITIONS

FHLLC challenges a number of conditions as exceeding the authority of the Board and requests that these conditions be struck from the comprehensive permit. In defending the

conditions, the Board argues that it retains "plenary power to regulate matters of local concern within the jurisdiction of the board." Board brief, p. 3. Specifically, it argues that it has the power to impose conditions with regard to "housekeeping" or "plenary" matters despite the absence of a local requirement or regulation authorizing it to do so. FHLLC objects to the Board's argument, suggesting that such a theory would allow the board to impose any condition it stated was "of the type that might fall within the hypothetical jurisdiction of hypothetical local boards, even if the jurisdiction over that area was not explicitly set forth in the local board's rules and regulations or their governing statutes." FHLLC reply brief, p. 2 (Emphasis omitted).

In *Amesbury, supra,* 457 Mass. 748, the Supreme Judicial Court determined that the Committee may strike conditions that are beyond the authority of the local zoning board's power to impose. The court made clear that "the local zoning board's power to impose conditions is not all encompassing, but is limited to the types of conditions that the various local boards in whose stead the local zoning board acts might impose, such as those concerning matters of building construction and design, siting, zoning, health, safety, environment, and the like." *Id.* at 749. The *Amesbury* court stated, "the power of the board derives from, and is generally no greater than, that collectively possessed by these other bodies." *Id*. at 756, citing G.L. c. 40B, § 21. It is established in the comprehensive permit regulations and our decisions that municipalities may only impose on a project approved under Chapter 40B those non-waived local requirements and regulations that were in effect at the time of its application to the Board. 760 CMR 56.02: *Local Requirements and Regulations*;[22] *Hollis Hills, LLC v. Lunenburg,* No. 2007-13, slip op. at 40-41 (Mass. Housing Appeals Committee Dec. 4, 2009), and cases cited; *Hollis Hills, LLC v. Lunenburg,* No. 2007-13, slip op. at 12 (Mass. Housing Appeals Comm. Post Decision Ruling and Order Mar. 25, 2018), citing *Castle Estates, Inc. v. Park and Planning Bd. of Medfield,* 344 Mass. 329, 332-334 (1962) (those who make applications to land-use boards should have notice of requirements with which they will be expected to comply). *See Beale v. Planning Bd. Of Rockland,* 423 Mass. 690, 697 (1996);; *Fieldstone Meadows Dev. Corp. v. Conservation*

[22]760 CMR 56.02: *Local Requirements and Regulations*, provides:

> Local Requirements and Regulations – mean, all local legislative, regulatory, or other actions which are more restrictive than state requirements, if any, including local zoning and wetlands ordinances or by-laws, subdivision and board of health rules, and other local ordinances, by-laws, codes, and regulations, in each case which are in effect on the date of the Project's application to the Board.

Comm'n of Andover, 62 Mass. App. Ct. 265 (2004); *See also Green View Realty, LLC v. Holliston*, No. 2006-16, slip op. at 10-14 (Mass. Housing Appeals Comm. Jan. 12, 2009) and cases cited; *Lever Development, LLC v. West Boylston,* No. 2004-10, slip op. at 10 (Mass. Housing Appeals Comm. Dec. 10, 2007).

These statements of the law are consistent with the requirement that "[t]he Board shall have the same power to issue permits or approvals as any Local Board which would otherwise act with respect to an application." 760 CMR 56.05(10)(a). Thus, the Board does not have hypothetical powers that other boards might be given, but only the powers that the town has chosen to give its various boards by requirements and regulations in effect at the time of the comprehensive permit application. Although in general we disagree with the Board's view of the law as stated in *Amesbury,* we review each of the conditions in dispute to determine if it has legal support.

As discussed below, in addition to its "plenary condition-setting authority" argument, the Board also contends that the ruling of the presiding officer on certain conditions in *Canton Property Holding, LLC v. Canton,* No. 2003-17 (Mass. Housing Appeals Comm. Order Modifying Comprehensive Permit Sept. 17, 2010) (*Canton* Order), which modified the comprehensive permit in *Canton Property Holding, LLC v. Canton,* No. 2003-17 (Mass. Housing Appeals Comm. Sept. 20, 2005) (*Canton* Decision), should govern our analysis of conditions here.[23] As we discuss below, that order does not control here. We address these issues in the context of the specific challenges below.

A. Conditions Intruding in the Province of the Subsidizing Agency

> Condition A.10. All residential units approved under this Comprehensive Permit shall be residential rental apartment units. Seasonal rental of the units in the Project is strictly prohibited; the lease of any units shall be for a period of not less than twelve (12) months. All leases shall be through the Management Company, and shall not be sublet by any other entity.

FHLLC argues citing *Amesbury*, *supra*, 457 Mass. 748, 749, 765, that Condition A.10 does not "pertain to building construction and design, zoning, health, and safety," but relates to the management and operation of the project and is within the authority of the subsidizing

[23] The *Canton* Order, a published ruling, was not issued by the full Committee.

agency. It argues that the Board has no authority to impose this condition because G.L. c. 40B, § 21 is silent on the question of minimum rental terms, and no local rule or bylaw contains any requirement for seasonal rentals.

The Board argues that this condition is necessary to prevent the use of units in the project as short-term or seasonal rentals. It suggests this project should be viewed with skepticism because FHLLC originally sought the approval of the Cape Cod Commission for a 110-room hotel at the same location, which application was rejected. *See* Exh. 76-2.

Mr. Erikson testified that a lease duration restriction of one year "imposed upon a rental development prohibits month-to-month tenancies, tenancies at will, and short-term leases with tenants whose jobs or life circumstances require a primary residence for a duration of less than one year." Exh. 63, ¶ 6. The Board also refers to the *Guidelines'* requirement that to be included on the SHI, the units must be governed by a use restriction that "requires that tenants of rental units and owners of homeownership units shall occupy the units as their domiciles and principal residences." Exhs. 54, § II.A.1.e(4); 77, ¶ 5. It argues that short term leases are inconsistent with this requirement and that short-term leases would have a disruptive effect on tenants in the affordable units. The Board now requests that we modify this condition as follows:

> The dwelling units in the project shall be governed by a use restriction consistent with Section II.A.1.e(4) of "DHCD's Guidelines for G.L. c. 40B Comprehensive Permit Projects, Subsidized Housing Inventory," updated December 2014, which states that for units to be eligible for inclusion on the Subsidized Housing Inventory (SHI) they shall be governed by a use restriction that "requires that tenants of rental units and owners of homeownership units shall occupy the units as their domiciles and principal residences."

Board brief, p. 11.

Although month-to-month tenancies can be consistent with principal residences, DHCD *Guidelines* make clear that for eligibility on the SHI, all units in this development must have a use restriction providing that units be occupied as domiciles and principal residences. Exh. 54, *Guidelines,* § II.A.1.e.(4), p. II-3. It is the responsibility of the subsidizing agency to ensure that the development meets the requirements for eligibility on the SHI. The Board's suggested revision to the language characterizes DHCD *Guidelines'* requirements, and goes beyond merely expressing a preference for a condition governing a particular area to dictating the requirements, which is not within the Board's authority. Therefore, this condition is modified to state:

"Condition A.10. The dwelling units in the project shall be governed by a use restriction subject to and consistent with the requirements of the subsidizing agency and applicable law."

> Condition B.4. For the initial rent-up of the Project, the maximum number of affordable units allowed by law and the applicable subsidy program, but not more than seventy percent (70%) of the units, shall be reserved for present residents of the Town of Falmouth, or employees of the Town of Falmouth or teachers employed by the school district serving Falmouth. A lottery shall be established in a form approved by the Subsidizing Agency and/or the Project's monitoring agent to effectuate this local preference, with an approved secondary lottery for all other Applicants. The Applicant shall assist the Town in the submittal of any evidence required by the Subsidizing Agency to support this local preference requirement. The Board acknowledges that it will be required to provide evidence satisfactory to the Subsidizing Agency of the need for the foregoing local preference and to obtain approval of the categories of persons qualifying for the same, and in no event shall the Applicant be in violation of the terms of this Comprehensive Permit to the extent the Subsidizing Agency disapproves the local preference requirement or any aspect thereof. The Applicant shall provide reasonable and timely assistance to the Town in providing this evidence. If the Board or its designee does not provide such information within sixty (60) days of a written request by the Applicant, its Lottery Agent, the Subsidizing Agency or DHCD, then this condition shall be void unless the Applicant has failed to provide reasonable and timely assistance as described above.

Citing *Amesbury, supra,* 457 Mass. 748, 765, FHLLC argues that this condition is within the authority of the subsidizing agency and should be struck. While it does not object in principle to the imposition of a local preference, noting it is explicitly permitted by *Guidelines,* § III.D.1.b., FHLLC objects to the language in the condition which, it argues, would "shift[] the burden from the municipality to the applicant, particularly with the vague 'reasonable and timely' modifier for the applicant's assistance." FHLLC reply brief, p. 16.

The Board suggests this condition is within its responsibility because it is the role of the Board to shape the local preference categories, and argues that unless this provision is in the comprehensive permit, the subsidizing agency cannot order one on its own. The developer argues that Condition B.4 mirrors DHCD regulations and the *Guidelines*, but with critical differences, citing *Simon Hill, LLC v. Norwell*, No. 2009-07, slip op. at 40 (Mass. Housing Appeals Comm. Oct. 13, 2011) ("[h]owever well-intentioned the conditions are, or however closely they may appear to follow the current requirements of the subsidizing agency, such conditions improperly encroach on the responsibility of the subsidizing agency and are therefore impermissible").

The subsidizing agency is the final arbiter of whether local preference requirements meet DHCD's requirements. *Guidelines,* § III.D., p. III-7. The Supreme Judicial Court stated:

> …although the board's condition-setting power under § 21 is not expressly confined to the four or five examples specifically mentioned in the section, that power is circumscribed in substance by those examples, and conditions imposed by the board must fit within the same kind or class of local concern or issue that the examples address. Accordingly, insofar as the … conditions included requirements that went to matters such as, inter alia, project funding, regulatory documents, financial documents, and the timing of sale of affordable units in relation to market rate units, they were subject to challenge as ultra vires of the board's authority under § 21.

Amesbury, supra, 457 Mass. 748, 757-758. In *Simon Hill, supra,* at 40, we noted that "[p]ursuant to the court's direction in *Amesbury,* the Committee examines conditions that address matters within the province of the subsidizing agency carefully." When in certain instances we have allowed conditions to address areas of subsidizing agency responsibility it is clear that such provisions remain entirely subject to the authority and requirements of the subsidizing agency, only allowing the board to state a preference, as the Board suggests here. *See, e.g., LeBlanc, supra,* No. 2006-08, slip op., App. at 12, 26, 27. Unlike the conditions in *Leblanc*, where we merely modified a board's conditions to ensure the board's preference was subject to the requirements of the final arbiter, the subsidizing agency, this condition seeks to specify all details of a local preference requirement. Accordingly, we will modify this condition to state: "Condition B.4. A local preference for the initial rent-up of the project may be established subject to, and solely in accordance with the requirements of, the subsidizing agency and applicable law."

> Condition D.2.c. Prior to issuance of the certificate of occupancy for the last residential building to be constructed, …
>
> The Applicant shall retain a Management Company. The Applicant shall submit to the Board all information relating to the Management Company being retained to act as the property manager that the Applicant submits to the Subsidizing Agency as part of the Final Approval Process, including a copy of the Applicant's contract therewith. Such property management agreement shall, at a minimum, address building security, public access, pet policy, staffing, trash removal, and smoking policies, and other issues addressed in the conditions herein.
>
> Condition G.1. The Applicant shall provide professional property management and maintenance personnel on the premises during normal daytime hours and an emergency contact name and number for tenants and the Falmouth Police and Fire Departments.

FHLLC argues that because these conditions relate to the management and operations of the project, they are within the authority of the subsidizing agency. It argues that Conditions D.2.c and G.1 require an on-site property management company, another decision which should be left to the developer and subsidizing agency, as they "do not 'relate to the class of local concerns contemplated by' G.L. c. 40B, § 21," citing *Amesbury*, *supra,* 457 Mass. 748, 765. FHLLC brief, p. 24. It states it has no objection to providing an emergency contact name and number for tenants and the town police and fire departments.

The Board argues that this is not a programmatic issue subject to the subsidizing agency, and that building security, public access, pet policy, staffing, trash removal, smoking policies, among others, are crucial to the safety and comfort of the tenants. It argues this is within its plenary power granted by *Amesbury* to require FHLLC to ensure that the premises will be supervised, safe, and secure. It has, however, cited no local rule or bylaw establishing this requirement.

As we stated in *LeBlanc, supra,* No. 2006-08, slip op., App. at 25, the Board is entitled to receive a copy of the property management plan provided to the subsidizing agency, but it is for the subsidizing agency to dictate the terms of the management and maintenance personnel on the project site. Condition D.2.c is modified to state that "[t]he Applicant shall provide to the Board and all other relevant municipal boards a copy of the property management plan provided to the subsidizing agency." Condition G.1 is modified to state: "[t]he Applicant shall provide an emergency contact name and number for tenants and the Falmouth Police and Fire Departments." *Id.,* App. at 35.

B. Conditions Subsequent Requiring Inappropriate Post-Permit Review

The Board is permitted to designate individuals or municipal departments with expertise to review various aspects of the plans for consistency with the final comprehensive permit. The Board may even conduct that review itself, if it has the necessary expertise, as long as the review is for consistency with the permit. "Improper conditions subsequent" are conditions that reserve for subsequent review matters that should have been resolved by the Board during the comprehensive permit proceeding. Such conditions include, for example, those requiring new test results or submissions for peer review, and those which may lead to disapproval of an aspect of a development project. *See Attitash Views, LLC v. Amesbury,* No. 2006-17, slip op. at 12

(Mass. Housing Appeals Comm. (2007); *Peppercorn Village Realty Trust v. Hopkinton*, No. 2002-02, slip op. at 22 (Mass. Housing Appeals Comm. Jan. 26, 2004) (allowing condition for submission of additional plans concerning issues not addressed in preliminary plans submitted with comprehensive permit application as long as they do not require further hearing and approval by Board, but entail only approval by town official who customarily reviews such plans). Our precedents, as well as 760 CMR 56.05(10(b), "permit technical review of plans before construction, and routine inspection during construction, by all local boards or, more commonly, by their staff, e.g., the building inspector, the conservation administrator, the town engineer, or a consulting engineer hired for the purpose. Such review ensures compliance with the comprehensive permit, state codes, and undisputed local restrictions, as well as any conditions included in the final written approval issued by the subsidizing agency." *Attitash, supra*, No. 2006-17, slip op. at 12; *LeBlanc, supra*, No. 2006-08, slip op. at 7-8.

FHLLC challenges Conditions A.4, A.12, C.1.a, C.1.c, C.1.d, C.1.e, C.2.d, C.2.e, D.1.b, D.2.b, E.3, and E.22[24] on the ground that they improperly require post permit review that goes beyond review for consistency with the comprehensive permit. It argues that the Board has improperly retained control over the filing of final plans, retaining the right to further review, comment upon, and potentially deny, later plans. It argues that, since the Board would not be the municipal body approving such plans on a non-comprehensive permit application, these conditions are inconsistent with 760 CMR 56.05(10)(b) by requiring further review and approval by the Board, regardless of whether the Board is the local board or person charged with review of a particular submission. Arguing they are beyond the Board's authority, it requests that we amend these conditions to provide that only approval by the town official who customarily reviews such plans is required.[25]

[24] Condition E.22, requiring pervious cover for the exterior parking area, has been struck as unsupported by local concerns. *See* § IV.D., *supra.* FHLLC's assertion the condition grants the Board improper post permit review is addressed, *infra,* with regard to other conditions.

[25] FHLLC also objects to Condition E.2 on the ground that it improperly requires it to pay for post permit peer review. FHLLC brief, p. 13. The condition includes a provision that "[t]he Board shall be entitled to retain its own structural and/or geotechnical engineer to review the report provided by the Applicant's consultant." In its brief, Board states it does not intend to defend Condition E. 2, because "if the Building Commissioner requires the consultation of a structural or geotechnical State Building Code authorizes him to demand it." Board brief, p. 24. Therefore, this condition is struck.

> Condition A.4. The Applicant shall submit an Approval Not Required Plan to the Board creating the two (2) lots shown on the plans, and shall file such plan with the Barnstable Registry of Deeds. A copy of said filing shall be submitted to the Board of Appeals prior to the issuance of a Building Permit.

FHLLC argues with regard to Condition A.4. that the comprehensive permit functions as a master permit and the Board cannot require it to seek an additional application for endorsement of an Approval Not Required Plan. It states that the comprehensive permit can be recorded at the Registry of Deeds. It also argues that this condition is beyond the Board's authority. The Board argues in support of the condition that if FHLLC uses procedures under the subdivision control law, the Board takes on the powers of the planning board. It also argues that this condition is within its plenary "condition-setting" powers as defined in *Amesbury*.

The Board's comprehensive permit is a "master permit which shall subsume all local permits and approvals normally issued by Local Boards," *see* 760 CMR 56.05(10)(b); 760 CMR 56.07(6)(c). Thus, an endorsement to be issued by the planning board is subsumed within the comprehensive permit, which satisfies the requirement for the ANR plan. The Board, therefore, may not condition the development on separately obtaining such an endorsement. This condition is beyond the Board's authority because it must address all matters before it in the single comprehensive permit. Additionally, it is an improper condition subsequent because it requires FHLLC to take further action for review and approval beyond review for consistency with the comprehensive permit. Accordingly, this condition is struck.

> Condition A.12. Except as otherwise specifically provided herein, where this Decision provides for the submission of plans or other documents for approval by the Zoning Administrator or other Town Departments, the Zoning Administrator or applicable Department Head will use reasonable efforts to review and provide a written response within thirty (30) days following submission. For submissions that require assistance from an outside consultant, as determined by the Zoning Administrator or applicable Department Head, the thirty-day time period shall not begin until the consultant's fee has been fully funded by the Applicant.

The Board states in its brief that it has no objection to the modification of this provision consistent with Condition 2 in the *Canton* Order to provide for the final plans to be reviewed by the building commissioner, who may consult with the Board.[26] *Canton* Order, *supra*, No. 2003-

[26] Condition 2 of the *Canton* Order provides: "[p]rior to issuance of a building permit for any dwelling unit, the applicant shall submit final construction plans for that unit and the area of the site in which that unit is located to the Canton building code compliance officer for review and approval within 30 days of submission. The building code compliance officer may consult with the board and such other local boards as he or she deems necessary. Such final construction plans shall include such drawings and specifications

17, slip op. at 2. The Board also argues that the Committee has previously authorized use of G.L. c. 44, § 53G funds for post permit review, citing *Leblanc* and the *Canton* Order. Board brief, pp. 5, 13. FHLLC stated that it has no objection to modifying the condition to indicate that final plans be submitted to the individual who normally deals with such matters in the Town. Consistent with our practice, we will modify this condition with respect to review, to state:

> Condition A.12. Where this Decision provides for the submission of plans or other documents for approval by the Board, the Zoning Administrator or other Town Departments, this reference shall mean submission to the appropriate municipal official with relevant expertise to determine whether the submission is consistent with the final comprehensive permit, such determination not to be unreasonably withheld. Such municipal official may consult with other town officials or offices with relevant expertise as they deem necessary or appropriate.

See Condition 1, § VII; *LeBlanc, supra,* No. 2006-08, slip op., App. at 1; *Milton, supra,* No. 2015-03, slip op. at 65.

With respect to the payment of fees, the developer objects to the Board's assertion that it may require additional fees for outside review. It argues that *Canton* did not permit assessment of additional fees. FHLLC points out that typically towns are reimbursed for monitoring costs by the building permit fees assessed for construction, and objects to the imposition of additional fees beyond those normal fees as beyond the authority of the Board. *See Haskins Way, supra,* No. 2009-08, slip op. at 11, which notes that 760 CMR 56.05(5) addresses review fees assessed before the issuance of a comprehensive permit, but does not address construction monitoring fees after the permit has been issued. In *Haskins Way,* we noted that "[t]ypically, towns are reimbursed for the costs of such monitoring by the quite substantial building-permit fees assessed for all construction." *Id.* at 11.

Contrary to the Board's suggestion, we have prohibited boards from imposing fees that are not already generally required. In the *Canton* Order, *supra,* No. 2003-17, slip op. at 3, the Committee allowed only fees to the extent they "could be assessed to a non-affordable housing subdivision or a project of a type and scale similar to the proposed housing". However, in our

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are routinely required under Canton bylaws, rules, and regulations (including the Rules and Regulations of the Canton Planning Board governing the Subdivision of Land), and under state law, and no additional drawings or specifications that are not required of non-affordable housing." *See* 760 CMR 56.05(10)(b). *Id.* at 2.

more recent decisions, consistent with 760 CMR 56.05(b) we have made clear that such fees must be consistent with requirements established by local requirements or regulations. *Leblanc, supra,* No, 2006-08, slip op., App. at 33 (payment of review fees applied only "to the extent provided in municipal bylaws and regulations);" *Milton, supra,* No. 2015-03, slip op at 52. *See* G.L. c. 44, § 53G (providing for special deposit accounts for reasonable fees for employment of outside consultants when imposed by municipalities pursuant to local rules promulgated under G.L. c. 40B, § 21). Therefore, Condition A.12 is further modified to provide that "If municipal officials engage outside consultants for review of plans and documents, fees will be charged to the Applicant only if in compliance with municipal bylaws or regulations." In order to charge a particular fee, the Board is required to identify for FHLLC the local bylaw or regulation that authorizes charging such a fee in this context. *See LeBlanc, supra,* No. 2006-08, slip op. at 10.

> Condition C.1.a. Prior to any construction or site development activities (including site clearing, tree removal, grading, etc.) on the Property, whether or not pursuant to a building permit, the Applicant shall: ...
>
> Deliver to the Board a check in a reasonable amount determined by the Board to be used for the board to retain outside experts for technical and legal reviews and inspections requires under these conditions. Said funds shall be deposited by the Board in an account pursuant to G.L. c. 44, § 53G and shall only be used for technical reviews and inspections associated with this Project. Any unspent funds shall be returned to the Applicant with accrued interest at the completion of the project. If at any time the Board reasonably determines that there are insufficient funds to cover the costs of technical reviews, it shall inform the Applicant and the Applicant shall forthwith deliver additional funds as specified by the Board in a reasonable amount as may be determined by the Board. Said funds may be used by the Board to hire civil engineering, traffic engineering, legal counsel, accounting, and/or other professionals that the Board deems reasonably necessary to ensure compliance with the conditions hereof.

The Board argues this condition is within its condition-setting powers under *Amesbury*. FHLLC objects to this condition as another example of improper post permit review, particularly with respect to the requirement of additional fees for outside review. It argues that Condition C.1.a improperly requires it to provide funds for additional post-permit peer review and legal fees and that 760 CMR 56.05(5) only permits fees for peer review during the board hearing, and permits neither post permit monitoring nor charging of fees for such monitoring.

With respect to the assessment for legal fees, the comprehensive permit regulations prohibit such fees, consistent with the Committee's longstanding practice. 760 CMR

56.05(5)(a) states "[l]egal fees for general representation of the Board or other Local Boards shall not be imposed on the Applicant." *See also Sugarbush Meadow, LLC v. Sunderland*, No. 2008-02, slip op. at 22-24 (Mass. Housing Appeals Comm. June 21, 2010), and cases cited. Consistent with Condition A.12, we modify Condition C.1.a to allow the imposition of other fees only if they are in compliance with municipal bylaws or regulations. In order to charge a particular fee, the Board is required to identify for FHLLC the local bylaw or regulation that authorizes charging such a fee in this context. *See LeBlanc, supra*, No. 2006-08, slip op. at 10.

> Condition C.1.c. Prior to any construction or site development activities … on the Property …. the Applicant shall: … Submit to the Board for review and administrative approval Final Engineering Drawings and Plans … that conform to the requirements of this Comprehensive Permit and incorporate the conditions herein ... The Final Plans shall be submitted to the Board at least thirty … days prior to the anticipated date of commencement of building construction or submission of an application for building permits, whichever is earlier.…

FHLLC argues that requiring the Board to determine the approval of the final plans is an improper condition subsequent. With respect to this condition, the Board reiterates its argument regarding Condition A.12, and states it has no objection to ordering the final plans to be reviewed by the Commissioner, who "may consult" with the Board. We will require modification of this condition to be consistent with our modification of A.12, and with Condition 1, § VII.

> Condition C.1.d. Prior to any construction or site development activities … on the Property …. the Applicant shall: … Submit to the Building Commissioner and the Zoning Administrator a construction mitigation plan…. Other than site work and such other work as may be authorized in writing by the Building Commissioner, no other construction of units shall commence and no building permits shall be issued under this Comprehensive Permit until the Building Commissioner, in consultation with the Board's peer review engineer, has approved the Final Plans as being in conformance with this Decision. …

The Board argues that this condition is consistent with *Amesbury,* 457 Mass. 748, 765 n.21[27] and the *Canton* Order. Board brief, p. 7. As described above, FHLLC argues that this

[27] Footnote 21 stated: "While the HAC noted that conditions 43A, 43B, 43D, 43K, 43L, 43N, 43W, and 59 improperly required the developer to appear before the board or other town official in the future for further review and approval, it does not appear that the HAC believed that requirements designed to ensure compliance with the comprehensive permit, State codes, and local restrictions were beyond the board's control. Rather, the process for such routine inspection was already clearly established. Thus, the HAC determined that the conditions were unnecessary or superfluous, and imposed minor modifications to them. Similarly, conditions 18, 19, and 20, together, required the developer to comply with local

condition improperly leaves the review to a peer review engineer. It argues that the Board has improperly retained control over the filing of final plans, retaining the right to further review, comment upon, and potentially deny, later plans. It argues that since the Board would not be the municipal body approving such plans on a non-comprehensive permit application, these conditions are inconsistent with 760 CMR 56.05(10)(b) by requiring further review and approval by the Board, regardless of whether it is the local board or person charged with review of a particular submission.

The *Amesbury* footnote referenced by the Board addressed the Committee's concern that the review of plans for consistency with the permit complied with local requirements. With respect to the Board's arguments concerning the *Canton* Order, our requirements for review of the developer's submissions for compliance with the permit are established in 760 CMR 56.05(10)(a)-(c) and our decisions in *LeBlanc* and *Milton.*

The "Board shall have the same power to issue permits or approvals as any Local Board which would otherwise act with respect to an application," 760 CMR 56.05(10)(a), and it "may issue directions or orders to Local Boards designed to effectuate the issuance of a Comprehensive Permit…and the construction of the Project, in accordance with 760 CMR 56.05(10)(b)." 760 CMR 56.05(10)(c). Nevertheless, the conditions must be consistent with 760 CMR 56.05(10)(b), which requires all local boards to "take all actions necessary" to ensure consistency with the comprehensive permit. 760 CMR 56.05(10)(b). The role of the Board at this stage, as articulated in § 56.05(10(c), is to issue directions or orders to local boards, or more typically, local officials who act for these boards, to expedite the construction of the project. Review by the relevant local board allows the officials with the most expertise to issue permits, consistent with the requirement of expedition, and avoids the delays that would occur if the Board were to review each application and render each such determination. This local official may consult with other town officials, including the Board, when they believe in the exercise of their judgment, such consultation will assist their review of

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zoning, subdivision, wetlands, and public health requirements. Again, the HAC recognized that the developer need comply with local requirements, but modified the provisions only to ensure that compliance was measured by local requirements in effect on the date of the application to the board, rather than at the time of the board's decision or when a building permit is sought. Cf. *Zoning Bd. Of Appeals of Canton v. Housing Appeals Comm.*, 451 Mass. 158, 161 [] (2008); *Taylor v. Housing Appeals Comm.*, 451 Mass. 149, 155 [] (2008)." *Amesbury, supra,* 457 Mass. 748, at 765 n.21.

submissions. It is not the role of the Board to oversee construction. Generally, such oversight is by the municipal officials who have the relevant experience and authority, including the building department, not the entire Board. Rather than prohibit the Board taking this role on, however, we generally have allowed it to do so if it is the entity with the appropriate expertise, such as with regard to zoning matters.

Accordingly, we will require modification of this condition to be consistent with Condition A.12 and Condition 1 of § VII. If the building commissioner determines the need to consult with a peer reviewer, they may do so. For example, a municipality may not have staff able to review plans for consistency with the comprehensive permit and it might need the services of an outside consultant. However, any assessment of fees to FHLLC for a peer review engineer must be consistent with applicable municipal bylaws, rules and regulations. 760 CMR 56.05(5)(b). Therefore, if such consultation would result in the assessment of a fee to FHLLC, the Board is required to identify for FHLLC the local bylaw or regulation that authorizes charging such a fee in this context. *See LeBlanc, supra,* No. 2006-08, slip op. at 10.

> Condition C.1.e. Prior to any construction or site development activities … on the Property, … the Applicant shall: … Submit to the Board for its administrative approval, a landscaping plan with the Final Plans, signed and sealed by a Registered Landscape Architect ... The final landscaping plans shall preserve the existing perimeter tree cover to the greatest extent practicable.
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> Condition C.2.d. Prior to the issuance of any building permits, the Applicant shall: . . . Submit to the Zoning Administrator final Architectural Plans prepared, signed and sealed by an architect with a valid registration in the Commonwealth of Massachusetts. … The Architectural Plans shall be submitted in such form as the Zoning Administrator may request.
>
> Condition C.2.e. Prior to the issuance of any building permits, the Applicant shall: ... Obtain and file with the Zoning Administrator a copy of all required Federal, State, and local permits and approvals required to begin construction of the Project.
>
> Condition D.1.b. Prior to issuance of a certificate of occupancy for a specific portion of the Project, the Applicant shall: … Provide a letter to the Board, signed by the Applicant's civil engineer, certifying that the Project has been constructed in compliance with the Final Plans in all material respects.
>
> Condition D.2.b. Prior to the issuance of the certificate of occupancy for the last residential building to be constructed, the Applicant shall: … Submit to the Building Commissioner and the Zoning Administrator as-built full-sized plans for all buildings in the Project prior to final sign off by the Building Department or Zoning Administrator.

The Board again argues that these conditions are within the Board's general "condition-setting powers" as defined by the Supreme Judicial Court. FHLLC objects to the conditions on the ground that they exceed the Board's authority to review plans after the issuance of a permit. It has not stated any other specific objection to the content of the condition. We will require the modification of Condition C.1.e to require review for consistency with the comprehensive permit by the appropriate municipal authority with relevant expertise pursuant to Condition 1, § VII. Condition D.1.b is modified to require submission to the appropriate municipal authority with relevant expertise pursuant to Condition 1, § VII. Finally, Conditions C.2.d, C.2.e and D.2.b appear to refer to the municipal authority the Board considers to have the relevant expertise. These conditions are retained, subject to Condition 1, § VII.

> Condition E.3. The Applicant shall permit representatives of the Board to observe and inspect the Property and construction progress until such time as the Project has been completed and the final occupancy permit issued.

The Board argues that this condition is also within the Board's condition-setting powers. FHLLC objects on the ground that the condition exceeds the Board's authority to review plans post-permit. FHLLC specifically objects to the Board inspecting the property, arguing that such oversight should be reserved to the appropriate municipal bodies, such as the building inspector.

We agree with FHLLC that the role of inspection of the property should be reserved to the appropriate municipal officials with expertise to review the construction progress. Accordingly, we will require modification of this condition to require that "[t]he Applicant shall permit municipal officials with relevant expertise to observe and inspect the Property and construction progress for compliance with the comprehensive permit until such time as the Project has been completed and the final occupancy permit issued."

C. Other Conditions Beyond the Board's Authority

> Condition A.5. The Project shall consist of not more than one hundred and four (104) rental apartment units, located in four (4) structures, and other related residential amenities, all as shown on the Approved Plans. Notwithstanding this condition, the Final Plans submitted by the Applicant shall show a revised design consistent with that suggested in the April 3, 2017, letter and a conceptual drawing by Glen Fontecchio with a Board date 'received' stamp of March 30, 2017 from Glen Fontecchio, reducing the building height in those areas along Main Street and adjacent to the abutting residential properties. The Project shall consist of fifty-four (54) one-bedroom apartments, thirty-nine (39) two-bedroom apartments and eleven

> (11) three-bedroom apartment units for a total of one hundred and sixty-five (165) bedrooms.

FHLLC argues that this condition is beyond the Board's authority because it required the developer to comply with vague recommendations of the Board's consultant, Mr. Fontecchio, that were also based on incomplete information and a conceptual drawing that it argues was not filed with the Board. Ms. Budrow, stated in the hearing that Mr. Fontecchio's conceptual drawing was not stamped in during the hearing but was stamped by the Board. Tr. I, 28-30. FHLLC also argues the condition is inherently contradictory because it requires a redesign but makes it impossible to construct 104 units for the development.

The Board argues that this is a proper condition "with respect to height, site plan, size or shape, or building materials …" under G.L. c. 40B, § 21 and *Amesbury*, 457 Mass. 748, 757. It argues further that this condition is similar to one approved by the presiding officer in the *Canton* Order.

We disagree with the Board. We already struck the height limitation aspect of this condition in § IV.A, *supra.* Here, the Board's reliance on a plan that is not incorporated into the decision is an impermissibly vague condition and therefore outside its authority. *See Leblanc, supra,* No. 2006-08, slip op. at 7. This condition is not comparable to the condition in *Canton,* a typical condition issued by the Committee which ordered the permit to conform to the application except where otherwise provided, and specified the plans that were included in the application. *Canton* Decision, *supra,* No. 2003-17, slip op. at 24. Therefore, the Board's condition requiring FHLLC to comply with Mr. Fontecchio's conceptual drawing was improperly vague and ambiguous and the second sentence of this condition is struck on this basis as well.

> Condition A.7. A portion of buildings 1 and 2 extending at least sixty feet (60') to the North shall be lowered to three stories along Main Street and shall house retail or commercial space or amenity space on the first floor along the frontage in accordance with the planning priorities delineated in the BR district and consistent with the recommendations of the Board's consultant, Glen Fontecchio. The roof pitch and gable design shall be modified in accordance with the recommendations of Glen Fontecchio.

The first sentence of Condition A.7 has already been found inconsistent with local needs and we have required a modification of this condition, *see* §§ IV.A and IV.B, *supra.* FHLLC also argues that Condition A.7 improperly requires non-residential use in a portion of

the project, which it asserts is beyond the Board's power and contrary to Chapter 40B's intent to provide housing. It argues that the Board may not impose a requirement for commercial or retail use within the first story space because the purpose of Chapter 40B is to provide housing, citing *Hanover, supra*, 363 Mass. 339, 354 (Chapter 40B must be construed in a manner that effectuates its intent); *Landers v. Board of Appeals of Falmouth*, 31 Mass. App. Ct. 939, 941 (1991) (noting comprehensive permit cannot authorize commercial use).

FHLLC further argues that the Board's reliance on the dimensional requirements of § 240-240.H of the bylaw are insufficient to support the conditions, arguing they are the types of conditions Chapter 40B contemplates being waived or overridden to permit the construction of affordable housing under *Standerwick, supra,* 447 Mass. 20, 29 ("[i]n cities and towns that have not met the minimum statutory threshold of affordable housing, a developer may override bulk, height, dimensional, use, and other limitations, often invoked as a pretext to exclude affordable housing").

The Board cites § 240-240.A of the Zoning By-Law, *see* note 18, *supra,* and again relies on *Amesbury* to argue that "[c]onditions and requirements with respect to height, site plan, size or shape, or building materials" are consistent with G.L. c. 40B, § 21. *Id.* at 757. It also asserts that the *Canton* Order affirmed a similar condition (Condition 2).[28]

Conditions regarding building dimensions and setbacks are within the Board's authority. Here the Board is seeking to apply its local bylaw requirements, and therefore this condition may not be struck as beyond the Board's authority. However, the Board has not shown that § 240-240 mandates commercial use for a portion of a multifamily development. Exh. 44, § 240.240A-G. We rule that the Board lacks the authority to impose the requirement for retail or commercial space. *See Landers, supra,* 31 Mass. App. Ct. 939, 941 (noting comprehensive permit cannot authorize commercial use). Additionally, as FHLLC has argued, the requirement for amenity space and other references to recommendations by Mr. Fontecchio are improperly vague and those aspects of the condition are also struck on this basis. The condition remains as we have modified it in § IV.B, *supra*. *See Leblanc, supra,* No. 2006-08, slip op. at 7.[29]

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[28] The Board's assertion of the similarity of a condition in the *Canton* Order is erroneous.

[29] Although FHLLC challenges Condition A.8 (reducing the height of the rear of Building 1) as unlawful, we need not address its claim. The Board has not defended this condition and it is therefore struck. *See* notes 8 and 19, *supra*.

D. Other Conditions Challenged as Unlawful

FHLLC argues that Conditions A.6, A.11, A.16, C.2.f, E.19, E.20, F.2, F.4, F.5, F.6, F.8, and F.9 are not based on evidence and are therefore arbitrary and must be struck.[30] The Board cites *Amesbury, supra*, arguing these conditions are within its condition-setting powers. It has not cited a local rule or bylaw in support of the conditions.

> Condition A.6. There shall be a minimum of thirty-one (31) outdoor parking spaces (inclusive of required handicap spaces). An adequate and designated striped parking aisle for delivery truck and postal service parking shall be included in the Final Plans. Such parking aisle shall not conflict with and/or block any travel lane or parking spaces.

FHLLC's argument against the lawfulness of this condition is essentially an argument that the Board failed to support a local concern. The Board argues it is within its condition-setting powers. Although it argues those condition-setting powers enable it to regulate matters of local concern, it did not identify a local concern for which it should exercise such powers; nor did it cite to any other legal authority for it to impose parking requirements of this nature. Therefore, it has not established a basis to impose this condition. In any event, we have already struck this condition as unsupported by local concerns.

> Condition A.11. Pursuant to the revised Waiver List submitted to the Board and attached hereto as Exhibit A, the Applicant has requested, and the Board has granted, those waivers from the Falmouth Zoning Bylaw and other local by-laws and regulations as specified therein. No waivers are granted from requirements that are beyond the purview of G.L. c. 40B, §§ 20-23. No waiver of permit or inspection fees has been granted. Any subsequent revision to the Approved Plans, including but not limited to revisions that are apparent in the Final Plans that require additional or more expansive waivers of any local by-laws or regulations, must be approved by the Board in accordance with 760 CMR 56.05(11).

FHLLC argues that if the approved plans show the need for an additional variance, the final decision should be treated as having granted such a waiver, even if no explicit waiver language was included in the decision. The Board argues this condition is consistent with the comprehensive permit regulations and a similar condition was upheld in the *Canton* Order, Condition 26.

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[30] We have already determined that Conditions A.6, C.2.f, F.2, F.8, and the aspect of Condition F.9 regarding the timing and sequence of permits, are unsupported by valid local concerns. *See* § IV, *supra.* Conditions F.4 and F.6 were not defended by the Board and are therefore struck. *See* note 5, *supra*.

The first sentence of the condition identifies explicit waivers that have been granted, and is within the authority of the Board. We agree with FHLLC, however, that by approving the proposed plans, waivers clearly required by approved plans are encompassed within this decision, unless such waivers or approvals are explicitly contradicted by a specific waiver denial we have upheld.

The remainder of the condition is vague, ambiguous, or improperly characterizes 760 CMR 56.05(11), and is therefore improper. *See Leblanc, supra,* No. 2006-08, slip op. at 10; *Milton, supra,* No. 2015-03, slip op. at 61. This condition is modified to state "Condition A.11. No waiver of permit or inspection fees has been granted."

> Condition A.16. Unless otherwise indicated herein, the Board may designate an agent to review and approve matters on the Board's behalf subsequent to this Decision.

The Board suggests this condition encompasses matters beyond the authority of the building commissioner. It relies on *Amesbury, supra*, 457 Mass. 748, 765 n.21 (discussing Condition 79) and the *Canton* Order, slip op. at 3 (Conditions 13 and 20), to argue the Committee impliedly approved the use of peer reviewers and other agents post-permit. FHLLC argues that the Board does not have authority after the permit is issued, and therefore no authority to outsource such functions. It also claims that the Board does not specify what matters it believes to be outside the purview of the building commissioner or other appropriate local authorities.

Under the Committee's decisions, post permit review and approvals as to consistency with the comprehensive permit are to be made by the appropriate municipal authority with expertise to conduct the review and approval regarding consistency with the comprehensive permit. Such authority may consult with others who have appropriate expertise, including the Board, or a Board member, if appropriate. Although 760 CMR 56.05(10)(a) allows the Board the same authority as other local boards to issue permits and approvals, we agree with FHLLC that this condition suggests improperly that the Board will conduct post permit review and has the authority overall to outsource such review, contrary to 760 CMR 56.05(10)(b), which provides for local boards to undertake the review of the final plans for consistency with the comprehensive permit, and with our precedents. *See, e.g., Oceanside Village, LLC v. Scituate,*

No. 2005-03, slip op. at 66 (Mass. Housing Appeals Comm July 17, 2007). Accordingly, we will modify this condition to provide:

> Condition A.16. Unless otherwise indicated herein, the Board may designate an agent to review and approve matters for consistency with this decision on the Board's behalf, where the Board is the appropriate municipal body to conduct the review, or has been consulted by another local board or official. If the Board engages outside consultants for review of plans and documents, fees may be charged to the Applicant only if in compliance with municipal bylaws or regulations.

> Condition C.2.f. Prior to the issuance of any building permits, the Applicant shall ... [o]btain all necessary building, electrical, plumbing, and associated permits required to begin construction of the Project required by state law.

FHLLC argues that this condition violates Chapter 40B, as it relates to the timing of building and other permits being issued, which is not subject to the Board's determination but should be left to the appropriate local authority. The Board did not specifically respond to FHLLC's argument, and we have already struck it as not supported by local concerns. A routine condition we establish in our decisions includes a requirement that state permits and requirements, as well as nonwaived local requirements, must be met. *See* § VII.

> Condition E.19. The Applicant shall comply with all applicable state and federal requirements relating to noise from construction activities, including the regulations contained at 310 CMR 7.10 and the DEP's Noise Policy contained in DAQC Policy 90-001. The Applicant shall also implement all necessary controls to ensure that vibration from construction activities does not constitute a nuisance or hazard beyond the Property. Upon notification from appropriate municipal officials, the Applicant shall cease all construction activities creating noise in excess of state and federal standards, and shall implement such mitigation measures as is necessary to ensure the construction activity will comply with applicable State and Federal requirements.

FHLLC criticizes this condition as violating Chapter 40B, arguing that to the extent E.19 imposes requirements beyond those found in the applicable state building code, the Board lacks authority to impose such a requirement. The Board argues this condition is within its condition-setting powers under *Amesbury,* referring to a footnote in *Amesbury* suggesting that the Committee did not believe "that requirements designed to ensure compliance with the comprehensive permit, State codes, and local restrictions were beyond the board's control." *Amesbury*, *supra,* 457 Mass. 748, 765 n.21. *See* note 27, *supra.* Board brief, p. 13.

Consistent with our regulations, we require boards to implement local requirements. The Committee's standard conditions require developers to comply with all applicable federal and

state requirements. Indeed, neither the Committee nor the zoning boards are authorized to alter those requirements.

This condition however, appears to go beyond simply requiring compliance with state codes. Accordingly, we shall modify this condition to state, "Condition E.19. The Applicant shall comply with applicable state and federal laws, and non-waived local, rules and requirements regarding noise and vibration from construction activities."

> Condition E.20. The Applicant is responsible for the sweeping, removal of snow and sanding of the internal roadways and driveways providing access to residents of the Project, including but not limited to the portion of Lantern Lane that bisects the Property, as well as emergency vehicles.

FHLLC argues that Condition E.20 violates Chapter 40B because it purports to change the historical plowing pattern of the Town, which it asserts the Town employees indicated would remain, citing Exh. 31, p. 3. It argues that it is impractical for FHLLC to plow the portion of Lantern Lane within its property while the Town plows the remaining portion of the roadway, asserting the Town has provided no reason it cannot continue to plow the roadway. It also argues that post permit day-to-day maintenance is not the kind of local concern the Board may regulate. The Board again claims that this condition is within its condition-setting powers under *Amesbury*.

Mr. Eriksen testified that Lantern is currently a private way. Exh. 62, ¶ 75. In a November 21, 2016 memorandum to Ms. Budrow, Scott Schluter, a Town staff engineer, responded to a series of questions, including "Will Lantern Lane remain a private right of way?" by stating that "if it remains a private right of way the Town will plow the roadway and provide trash pickup …." Exh. 31, p. 3. Ms. Budrow testified that James F. Grady, Jr., the Town Superintendent of Highways, informed her "[t] Department of Public Works does not provide roadway maintenance of any kind to this street. Snow plowing is provided when accumulations are 3" or more by a hired contractor paid for by the town of Falmouth. Further, the road conditions of Lantern Lane have made it very difficult to plow due to the large number of pot holes and defects which are present." Exh. 76, ¶ C.2.S; Tr. I, 48. Ms. Budrow also stated that litigation is ongoing regarding the status of Lantern Lane. *Id.* She further reported Mr. Grady stated the Town hires a private contractor to plow to allow emergency vehicles, trash and postal vehicles to use the roadway. While we credit the statements against interest by the Town officials concerning past activities regarding plowing Lantern Lane, we do not credit the

assertion Ms. Budrow attributed to Mr. Grady that "he is under no obligation or duty to maintain Lantern Lane." Exh. 77, ¶ 7. Neither party has cited to any local requirement regarding the party that bears the legal obligation to maintain the private roadway, including the portions within the project site. However, it is clear on this record that the portion of Lantern Lane lying within the project site is predominantly for private purposes. Therefore, we will modify this condition to state, "Condition E. 20. The Applicant is responsible for the sweeping, removal of snow and sanding of the internal driveways providing access to residents of the Project, and of that portion of Lantern Lane within the Project site, unless the Town is legally obligated to perform such work pursuant to applicable nonwaived local rules and requirements or other legal requirements."

> Condition F.5. Any further reduction in the number of parking spaces for the Project, absent a corresponding reduction in the number of units, shall constitute a substantial change pursuant to 760 CMR 56.05(11).

FHLLC argues that Condition F.5 is inappropriate because it interprets the regulations, claiming the regulations speak for themselves and the Board may not impose a similar-but-not-identical condition. The Board argues that it is simply notifying FHLLC in advance that it would treat any further request to reduce the number of parking spaces as a substantial change.

We have previously struck conditions that interpret the comprehensive permit regulations. *See Milton, supra*, No. 2015-03, slip op. at 61. This condition predetermines the result of a proposed change under the regulations. It is inconsistent with the purpose and intent of the modification provisions of the regulations. For this reason, Condition F.5 is struck.

> Condition F.8. A four-foot-wide sidewalk shall be constructed along the easterly side of Lantern Lane in front of the parking area serving Building 1. Such sidewalk shall be protected from traffic along the street and in the parking area by a five-foot-wide grassed strip on either side of the sidewalk. Marked crosswalks shall be placed at the entrances to the parking area.

FHLLC argues that this condition violates Chapter 40B, that it is arbitrary because there was no evidence that a buffered sidewalk along Lantern Lane is necessary. The Board argues that this condition is within its condition-setting powers under *Amesbury.* The developer's argument goes to whether the Board has established a local concern supporting this condition. Although the Board argues its condition-setting powers enable it to regulate matters of local concern, it did not identify a local concern for which it should exercise such powers; nor did it cite to any other legal authority for it to impose requirements of this nature. Therefore, it has not established a

basis to impose this condition. In any event, we have already struck this condition as unsupported by local concerns. *See* § IV.H, *supra.*

> Condition F.9. Prior to the issuance of a building permit, the Applicant shall coordinate with the Falmouth Public Schools Transportation Department, or other appropriate municipal authority, to locate a school bus waiting area for the Project. The applicant shall notify the Board of Appeals of said approved location.

In its reply brief, FHLLC argues that Condition F.9 relates to the timing and sequence of building and other permits being issued. It does not object to providing a school bus waiting area, but suggests such a decision should be required prior to the issuance of an occupancy permit rather than before the issuance of building permit. Mr. Eriksen stated that it may take time to coordinate with the appropriate municipal agency, and it would be beneficial for all parties to view the project near completion before selecting the location for the bus waiting area. Exh. 62, ¶ 82. The Board has not offered any argument regarding this condition.

As requested by FHLLC, this condition will be modified to require the selection of the bus waiting area prior to the issuance of the occupancy permit and to require notification of the approved location to the appropriate local authority with relevant responsibility.

VI. UNEQUAL APPLICATION

FHLLC argues that the Board has treated this project differently than unsubsidized projects in violation of the comprehensive permit regulations. It claims that certain of the conditions imposed by the Board have not been equally applied to unsubsidized and subsidized housing projects, specifically Conditions A.10, A.15, E.2, E.11, E.13, and E.17. [31] It relies on the testimony of Mr. Eriksen, who stated that he had reviewed other Board decisions, and stated that the challenged conditions have not been applied to unsubsidized developments.

The Board argues that *Avalon Cohasset, supra,* No. 2005-09, is analogous, and suggests that this Committee decision stands for the proposition that the Committee will not find unequal treatment if there is any evidence that other, unsubsidized, projects have been treated in the same fashion. *Id.* at 23.

> Condition A.10. All residential units approved under this Comprehensive Permit shall be residential rental apartment units. Seasonal rental of the units in the Project

[31] Although FHLLC challenges Condition E.2 as treating it unequally, the Board has stated it will not defend this condition and it is struck. *See* note 25, *supra*.

> is strictly prohibited; the lease of any units shall be for a period of not less than twelve (12) months. All leases shall be through the Management Company, and shall not be sublet by any other entity.

FHLLC argues that, in addition to invading the responsibility of the subsidizing agency, Condition A.10 subjects the developer to unequal treatment. FHLLC relies on testimony of Mr. Eriksen that the record includes eight Town decisions on other projects in Falmouth. Of these, one is a comprehensive permit decision with no lease duration condition, and seven are special permit decisions. Exhs. 45-52. Of the latter, Mr. Eriksen testified that five contained lease duration conditions. Two prohibited seasonal leases, one prohibited leases less than four months in duration, two required the master deeds to prohibit owner rentals for durations of less than six months and one year respectively. Another decision stated that the Board recognized the applicant planned to rent units on a monthly, tenancy at will, basis. Exh. 62, ¶¶ 46-53. FHLLC also argues the Board has not shown any minimum lease duration in the Falmouth Transportation Master Plan, as suggested in the Pre-Hearing Order, § IV.7(f), that this minimum has not been imposed in rental affordable housing developments, and there is not a basis for requiring one here.

The Board argues that it has shown that it has imposed, or shown good reason not to impose, minimum lease terms in other instances. Ms. Budrow testified that the Board "consistently conditions special and comprehensive permits on an as needed basis, with no discrimination between types of permits" and that it "adds a lease duration condition based on the location, number of units, traffic and other issues that seasonal or other rental limitations warrant so as not to impact the units in the development, abutters, or the area." Exh 76, ¶ 2.I.

The Board's argument is unpersuasive. FHLLC has shown that different rules have applied to subsidized and unsubsidized rental projects, and the Board's general explanation is inadequate to justify the different treatment. Therefore, we find that the Board has improperly treated subsidized and unsubsidized projects unequally with regard to lease duration and this condition is struck on this basis as well, and replaced with the modification we describe in § V.A, *supra*. We note that the use restriction that will be required for all units in this rental development will effectively prohibit daily and weekly rentals.

> Condition A.15. The sidewalks, driveways, roads, utilities, drainage systems, and all other infrastructure shown on the Approved Plans as serving the Project shall remain private in perpetuity, and the Town shall not have, now or in the future, any legal responsibility for the operation or maintenance of the infrastructure,

> including but not limited to snow removal and landscape maintenance. In this regard, that portion of Lantern Lane within the Project shall not be dedicated to or accepted by the Town.

As we noted above, the parties agree Lantern Lane is a private way. Exhs. 62, ¶ 76; 76, ¶ C.2.S; 77, ¶ 7. FHLLC argues that this condition constitutes unequal treatment as the Board has plowed, and has stated it will continue to plow, Lantern Lane. It argues that coordinating plowing of the portion of the roadway within the site with the Town's plowing of the remainder of the private roadway would be a "logistical nightmare." FHLLC reply brief, p. 35.

The Board argues the condition is within its condition-setting powers under *Amesbury*, and a similar condition was upheld in the *Canton* Order (Condition 16). It relies on the testimony discussed above regarding the private roadway's condition and assertions the Town bears no obligation to plow it. Exh. 77, ¶ 7. In support, the Board cites *Zoning Board of Appeals of Groton v. Housing Appeals Comm.*, 451 Mass. 35 (2008). The Board argues that since the Town has no regulation establishing its obligation to provide the service, its decision not to do so cannot be unequal treatment. We agree with the Board that FHLLC has not established unequal treatment with this condition. However, as noted above, if a local bylaw, regulation or other legal requirement provides for the Town to maintain or plow private roadways generally, or this roadway in particular, it is required to do so for the portion of Lantern Lane with the project site. Accordingly, the first sentence of this condition is modified to include the following language at the end: "…, unless otherwise required by Town bylaw or regulation or other legal requirement."

> Condition E.11. … The contract with the Management Company shall note that no satellite dishes shall be allowed.

The Board argues that this condition is within its condition-setting powers, and FHLLC has not shown unequal treatment. It argues that the zoning bylaw permits television or radio antennas but not satellite dishes, and that a use not specifically authorized is prohibited. *See* Exh. 44. FHLLC argues that this condition violates federal law, 47 CFR § 1.4000, and therefore is void regardless of whether it has been applied to unsubsidized developments, which it asserts is not the case. We agree with the Board that FHLLC has not demonstrated unequal treatment.

We have already determined that the Board cannot dictate the language of the contract with the management company. *See* our discussion of Condition D.2.c, in § V.A, *supra.* Therefore, this condition is struck. With respect to whether a local bylaw would be overridden by

state or federal law, our conditions in § VII make clear that the project must comply with applicable state and federal law.

> Condition E.13. Construction activities shall be conducted between the hours of 7:30 a.m. and 7:00 p.m., Monday through Friday.

FHLLC argues that other Board decisions show that usual construction hours in Falmouth are 7:00 a.m. to 7:00 p.m., supporting FHLLC's argument that a start time of 7:30 a.m. has not been applied to other developments, whether unsubsidized or subsidized. Mr. Eriksen testified that none of the other eight decisions he reviewed "restrict construction activities to between 7:30 a.m. and 7:00 p.m." Exh. 62, ¶ 68. Therefore, FHLLC requests that this condition be modified to establish a start time of 7:00 a.m. for construction activities.

The Board argues that this condition is within its condition-setting powers under *Amesbury*, and that it is intended to prevent inappropriate and unsafe work hours in the downtown. It compares this condition to one affirmed in the *Canton* Order (Condition 14). It relies on Ms. Budrow's testimony that the Board "has never reviewed an application for a comprehensive permit, variance, or special permit for a building this tall this close to Main Street." Exh. 76, ¶ C.1.C. It argues that slightly different conditions limiting the times of construction activities for this project are not "unequal treatment," but rationally based provisions. FHLLC has submitted evidence of different treatment between this project and unsubsidized housing. Ms. Budrow's testimony cited by the Board, given in the context of the need for a shadow study, does not support a different treatment in construction hours. Accordingly, we find that unequal treatment in the application of this requirement. We will require a modification of this condition to change the start time for construction activities to 7:00 a.m. as requested by the developer.

> Condition E.17. All retaining walls visible from a public way or direct abutters, as determined by the Building Commissioner based upon the time of year when such walls would be most visible, shall be constructed in an aesthetic manner. Specifically, retaining walls shall avoid the use of exposed concrete to the greatest extent practicable.

FHLLC notes Mr. Eriksen's testimony that the decisions he reviewed demonstrate that the vague language "shall be constructed in an aesthetic manner" as a standard for retaining walls required in this condition has not been applied to other developments. Exh. 62, ¶ 69.

The Board again relies on Ms. Budrow's testimony that the Board "has never reviewed an application for a comprehensive permit, variance, or special permit for a building this tall this close to Main Street," Exh. 76, ¶ C.1.C, to argue there is a basis for different treatment of the project, claiming that "any conditions requiring aesthetic retaining walls where none have previously been located are not "unequal treatment"—they are rationally based provisions tailored to this very unique construction project." Board brief, p. 33. On this record, we find that FHLLC has been treated differently, particularly with respect to the vague, undefined standard to which it has been held. We also agree with FHLLC that this condition as written is unduly ambiguous and vague. *See Leblanc, supra,* No. 2006-08, slip op. at 10. Therefore this condition is modified to state, "[a]ll retaining walls visible from a public way or from the property of direct abutters, as determined by the Building Commissioner based upon the time of year when such walls would be most visible, shall be constructed in a manner to avoid the use of exposed concrete to the greatest extent practicable."

VII. CONCLUSION AND ORDER

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 the decision of the Board exceeds the Board's authority, renders the project uneconomic and is not consistent with local needs, and includes unequal application of local rules and requirements between this project and unsubsidized housing. The decision of the Board is vacated and the Board is directed to issue a comprehensive permit that conforms to this decision as provided in the text of this decision and to the following conditions.

1. Any specific reference made to the "Board's Decision," "this Decision" or "this comprehensive permit" shall mean the comprehensive permit as modified by the Committee's decision. Any references to the submission of materials to the Board, the building commissioner, or other municipal officials or offices for their review or approval shall mean submission to the appropriate municipal official with relevant expertise to determine whether the submission is consistent with the final comprehensive permit, such determination not to be unreasonably withheld. Such official may consult with other officials or offices with relevant expertise as they deem necessary or appropriate. In addition, such review shall be made in a reasonably expeditious manner, consistent with the timing for review of comparable submissions for unsubsidized projects. *See* 760 CMR 56.07(6).
2. The amended comprehensive permit shall conform to the application submitted to the

Board, and the Board's original decision, as modified by this decision.

3. The comprehensive permit shall be subject to the following conditions:
    a. The development, consisting of 104 total units, including 26 affordable units, shall be constructed substantially as shown on plans entitled "Preliminary Site Plan, Lyberty Green, 556 Main Street, Falmouth, Massachusetts," dated April 11, 2017 (as revised) by Hancock Associates (Exhibit 3), and shall be subject to those conditions and requirements imposed in the Board's decision filed with the Falmouth Town Clerk on July 14, 2017 (Exhibit 2), as modified by this decision.
    b. The Board shall not include new, additional conditions.
    c. The developer is required to comply with all applicable non-waived local requirements in effect on the date of FHLLC's submission of its comprehensive permit application to the Board, consistent with this Decision.
    d. The developer shall submit final construction plans for all buildings, roadways, stormwater management system, and other infrastructure to Falmouth town entities, staff or officials for final comprehensive permit review and approval pursuant to 760 CMR 56.05(10)(b).
    e. All Falmouth town staff, officials, and boards shall promptly take whatever steps are necessary to permit construction of the proposed housing in conformity with the standard permitting practices applied to unsubsidized housing in Falmouth.
4. Should the Board fail to carry out this order within thirty days, then, pursuant to G.L. c. 40B, § 23 and 760 CMR 56.07(6)(a), this decision shall for all purposes be deemed the action of the Board.
5. 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 applicable local zoning and other bylaws, regulations and other local requirements in effect on the date of FHLLC's submission of its comprehensive permit application to the Board, 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 and all other Falmouth town staff, officials, and boards shall take whatever steps are necessary to ensure that building permits and other permits are issued, without undue delay, upon presentation of construction plans, pursuant to 760 CMR 56.05(10)(b), that conform to the comprehensive permit and the Massachusetts Uniform Building Code.

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

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

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

HOUSING APPEALS COMMITTEE

May 15, 2020

Shelagh A. Ellman-Pearl, Chair

Marc L. Laplante

James G. Stockard, Jr.