

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

WEST FALMOUTH ESTATES, LLC

v.

FALMOUTH ZONING BOARD OF APPEALS

No. 2025-01

DECISION

July 16, 2026

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Robert E. Engler
Douglas Azarian
Edwin A. Monteiro
Robert Pena

Board's Witnesses

Amy Lowell
Matthew Cote
Noreen Stockman

WEST FALMOUTH ESTATES, LLC,	)	
Appellant,	)	
v.	)	No. 2025-01
FALMOUTH ZONING BOARD OF APPEALS,	)	
Appellee.	)	

I. INTRODUCTION AND PROCEDURAL BACKGROUND

On January 30, 2025, West Falmouth filed an appeal with the Housing Appeals Committee. An initial conference of counsel was held on February 18, 2025. Pursuant to 760 CMR 56.06(7)(d)3, the parties negotiated a pre-hearing order, which the presiding officer issued

on June 30, 2025.¹ In preparation for the hearing, the Board submitted pre-filed direct testimony of three witnesses and West Falmouth submitted pre-filed direct and rebuttal testimony of six witnesses. On October 22, 2025, a site visit and the first day of hearing took place for the cross-examination of witnesses. An additional day of hearing was held on October 23, 2025. A total of 67 exhibits were entered into evidence.² Following the presentation of evidence, the parties submitted post hearing briefs and the developer filed a reply brief.

II. FACTUAL BACKGROUND

West Falmouth proposes a development consisting of 20 single-family, for-sale homes with five reserved for low or moderate income households on a 4.27-acre site. Exhs. 3, 6. The project, located along North Falmouth Highway, is in a Single Residence “B” zoning district in the Town of Falmouth (Town). Pre-Hearing Order, § II. The proposed development includes one access point from North Falmouth Highway to the project, consisting of a private roadway to access the 20 residential lots. Exh. 6. This proposed roadway is approximately 660 feet in length with a cul-de-sac turnaround at the end. Exh. 3, Att. 1; Exh. 4, p. 2. The easterly portion of the project site primarily consists of wooded space to be cleared prior to construction, and the topography rises significantly toward the rear of the project site. *Id.*; Exh. 8, p. 7. Currently, one residential dwelling with a detached garage exists on the project site. Exh. 8, p. 8.

The proposal includes two separate model home designs: the “Schooner” (1,819 sq. ft) at 27 feet, 10 inches in height and the “Sloop” (1,943 sq. ft) at 29 feet, 9 inches in height. Each home consists of three bedrooms, an attached single car garage and two surface parking spaces. *Id.* The development will include a total of six visitor parking spaces: three proposed spaces located near the easterly portion of the development and three additional proposed spaces located

¹ The Pre-Hearing Order was amended on October 8, 2025, and October 20, 2025, to reflect changes in the hearing schedule as agreed upon by the parties at the status conference held on October 7, 2025, and the pre-hearing conference held on October 20, 2025.

² A majority of the exhibits were contested. Exhibits 21 and 39 were withdrawn. Tr. I, 5; Tr. II, 49. The presiding officer admitted all the proffered exhibits *de bene esse* at the hearing and allowed the parties to argue their objections to these exhibits in their post hearing briefs. Tr. II, 48. Neither party pursued their objections to the exhibits in their post hearing briefs. In general, the Committee, as an administrative body, has discretion to admit evidence that would not be admissible in a court and determine the weight assigned to such evidence. *See* G.L. c. 30A, § 11(2); *Wall Street Dev. Corp. v. Walpole*, No. 2022-08, slip op. at 5-6 (Mass. Housing Appeals Comm. Apr. 13, 2026), and cases cited. Because we do not find the contested exhibits to be prejudicial, we are reluctant to strike them. Accordingly, we admit all contested exhibits into evidence.

near the westerly portion of the development, totaling 46 parking spaces within the proposed development. *Id.*

The area abutting the project site is comprised of single-family dwellings. *Id.*, p. 7. The project site is bounded to the north by Route 151; Route 28 to the east; Brick Kiln Road to the south; and open space owned by Salt Pond Bird Sanctuary to the west. Exh. 3, Att. 1. A residential condominium development, Haland Stables, and an independent service station are also located to the south of the site. *Id.* Plans show that six of the proposed lots will be served by private onsite septic systems, while the remaining lots will share one of three common septic systems. Exh. 6.

III. MOTIONS TO STRIKE

A. Motion to Strike the Pre-Filed Testimony of Amy Lowell

On October 10, 2025, West Falmouth moved to strike, in its entirety, the pre-filed testimony of Amy Lowell, the Wastewater Superintendent for the Town, and Exhibit A attached to Ms. Lowell's pre-filed testimony on the grounds that the testimony is improper, prejudicial and irrelevant. Memorandum in Support of Motion to Strike the Pre-Filed Testimony of Amy Lowell (Developer Motion to Strike), pp. 1, 6. The developer claims that Ms. Lowell's pre-filed testimony addressed a proposed Town regulation³ that was under review by the Town's Board of Health and not in effect at the time West Falmouth filed its comprehensive permit application. *Id.* West Falmouth therefore argues that Ms. Lowell's testimony is irrelevant and may not be considered by the Committee. *Id.*, p. 1.

The Board stipulated that the proposed Town regulation was not in place when the developer filed the comprehensive permit application. Tr. I, 17, 18. However, the Board states that the Town has been concerned with the increasing amount of nitrogen in the Town's waterways. Ms. Lowell's testimony, the Board argues, has been offered to provide context for Condition G20, which requires West Falmouth to install denitrification septic systems for all affordable units. *Id.*

The Committee, as an administrative body, is not bound by the rules of evidence observed by courts. *See* G.L. c. 30A, § 11(2). We agree with the Board's argument that such

³ The proposed health regulation at issue would require all new residential construction located in nitrogen sensitive areas, as designated by the Town's Board of Health, to install alternative on-site septic systems in nitrogen-sensitive areas. Exh. 61, ¶ 2.

testimony provides context for the Committee and may be admitted in our administrative proceedings. Unless the inclusion of testimony, such as that challenged here, is prejudicial, we are reluctant to strike such testimony. Developer's counsel cross-examined Ms. Lowell, providing an opportunity for West Falmouth to challenge the credibility of Ms. Lowell's opinions. In this instance, we find that the challenged testimony of Ms. Lowell is not prejudicial, as the Committee is experienced in evaluating and weighing such testimony. *See 100 Burrill Street, LLC v. Swampscott*, No. 2005-21, slip op. at 2 n.2 (Mass. Housing Appeals Comm. June 9, 2008). The parties have had ample opportunity to address their credibility in their post-hearing brief. For these reasons, Ms. Lowell's pre-filed testimony and Exhibit A will not be struck and the motion is denied.

B. Motion to Strike Rebuttal Testimony of Robert Pena

On October 21, 2025, the Board moved to strike the rebuttal testimony of Robert Pena and all exhibits attached to this pre-filed testimony. *See* Exh. 68 (Mr. Pena's Response to Pre-Filed Testimony of Noreen Stockman). The motion raised various grounds for striking the rebuttal testimony, including that it contains improper hearsay statements, lacks sufficient foundation, exceeds Mr. Pena's personal knowledge, and is beyond the substantive scope of Ms. Stockman's direct testimony.⁴ Motion to Strike Rebuttal Testimony of Robert Pena (Board motion). At the start of the hearing on October 22, 2025, the presiding officer heard oral arguments on the motion, admitted the pre-filed testimony and related exhibits *de bene esse* and directed the parties to address in their post-hearing briefs its credibility and weight. Tr. II, 48.

Administrative proceedings operate under the relaxed rules of evidence where "[e]vidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs." G.L. c. 30A, 11(2); *100 Burrill Street, LLC, supra*, No. 2005-21, slip op. at 2 n.2 (finding that "[t]he admission of hearsay is discretionary under the less strict rules of evidence governing administrative proceedings"). Specifically with regard to hearsay, such evidence is "viewed through a lens of reasonableness," and hearsay evidence that meets the administrative standard may be admitted or considered. *Weiss Farm Apartments, LLC v. Stoneham*, No. 2014-10, slip op.

⁴ Initially, Mr. Pena's rebuttal testimony was not signed under oath pursuant to 760 CMR 56.06(7)(e)5, and the developer offered to resubmit the testimony under the oath. The Board agreed to allow the developer to refile to cure this particular mistake but maintained all other objections. Tr. I, 7, 8. The developer refiled Mr. Pena's rebuttal testimony, contained in Exhibit 68, under oath on October 22, 2025.

at 22 (Mass. Housing Appeals Comm. Mar. 15, 2021) *aff'd* No. 2181CV00818 (Middlesex Super. Ct. July 21, 2022), citing *Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n*, 401 Mass. 526, 530 (1988) (when evidence is exclusively hearsay in administrative proceeding, the question is whether the evidence has indicia of reliability and probative value).

Here, the Board's motion to strike did not provide specific arguments other than general assertions that Mr. Pena's rebuttal testimony should be excluded and failed to identify sufficient cause for excluding Mr. Pena's rebuttal testimony. Although Mr. Pena's testimony contains hearsay and several unsupported opinions, the testimony may have some limited relevance to the issue of permissible septic tanks and construction costs. Further, the Board had sufficient opportunity in its post-hearing brief to provide argument that the testimony is prejudicial, which it failed to do; we are reluctant to strike evidence unless the challenged evidence is prejudicial. *River Stone, LLC v. Hingham*, No. 2016-5, slip op. at 4 (Mass. Housing Appeals Comm. Sept. 23, 2022), *aff'd Zoning Bd. of Appeals of Hingham v. Housing Appeals Comm.*, No. 24-P-828, Mass. App. Ct. Aug. 25, 2025 (Rule 23 decision). For these reasons, none of Mr. Pena's rebuttal testimony, contained in Exhibit 68, or any associated exhibits will be struck and the Board's motion to strike is denied.

IV. 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. 760 CMR 56.07(1). Pursuant to the Committee's procedures, however, there is a shifting burden of proof. The appellant must first prove that the conditions and requirements in the aggregate make construction or operation of the 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); *Falmouth Hospitality, LLC v. Falmouth*, No. 2017-11, slip op. at 3 (Mass. Housing Appeals Comm. May 15, 2020). To establish that the Board's decision makes the project uneconomic, the developer 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 [West Falmouth] 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 [West Falmouth].

760 CMR 56.02: *Uneconomic*. See G.L. c. 40B, § 20.

To determine whether the Board's conditions render a homeownership development project uneconomic, the comprehensive permit regulations specify "that profit to the Developer is not more than 20% and not less than 15% of the total development costs." 760 CMR 56.02: *Reasonable Return* (a). We calculate the economic impact of the Board's decision using a return on total costs (ROTC) analysis in which the total projected revenue from unit sales is divided by total development costs. See *River Stone*, *supra*, No. 2016-5, slip op. 12; *Matthob, Inc. v. Groton*, No. 2009-10, slip op. at 21 (Mass. Housing Appeals Comm. Dec. 13, 2010). This methodology allows the parties to calculate the projected ROTC for the project as conditioned and determine whether it falls below the minimum reasonable return of 15% of total development costs. See *HD/MW Randolph Ave., LLC v. Milton*, No. 2015-03, slip op. at 5 (Mass. Housing Appeals Comm. Dec. 20, 2018), *aff'd Zoning Bd. of Appeals of Milton v. HD/MW Randolph Ave., LLC*, 490 Mass. 257 (2022).⁵

If the developer proves that the project is uneconomic, the burden then shifts to the Board to prove that there is a valid local concern which supports each challenged condition and that the local concern outweighs the regional need for affordable housing. 760 CMR 56.07(1)(c)2; 56.07(2)(b)3.

B. The Developer's Presentation

1. The Developer's Witnesses

In support of its argument that the decision renders the project uneconomic, West Falmouth relies on testimony primarily from Robert Engler, its consultant and economic expert. He is the President of SEB, LLC, a real estate development and consulting firm that specializes in the permitting and development of affordable housing under G.L. c. 40B. Mr. Engler testified he has worked in over 150 Massachusetts communities relating to permitting housing units under Chapter 40B over the past 50 years. Exh. 56, ¶¶ 1-2. He submitted financial analyses of the

⁵ 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, which we have termed "uneconomic as proposed," a developer must show more: specifically, that the Board's conditions render the project significantly more uneconomic than the project proposed. See *id.*; *Weiss Farm*, *supra*, No. 2014-10, slip op. at 6-7; *Falmouth Hospitality*, *supra*, No. 2017-11, slip op. at 4.

project costs and revenues as proposed at 20 single-family homes, and as conditioned at 16 single-family homes. Exhs. 56B, 56C. He relied upon Mr. Pena, Mr. Azarian, and a professional engineer at Lombardo Associates Inc. for hard cost estimates. For soft cost estimates, he applied the criteria prescribed by the Comprehensive Permit Guidelines, estimates from the developer, and his own experience as a consultant. Exh. 56, ¶ 7.

Douglas Azarian, who has 38 years of experience as a licensed real estate broker in the Cape Cod area, prepared a comparative market analysis for this project and provides specific analysis of pricing for the two model homes – the “Sloop” and “Schooner” – based upon location of the proposed development, lot size, density and unit layout. Exh. 57, ¶¶ 1-7. Mr. Azarian estimated \$948,450.00 to be the market unit sales price of the “Sloop” model and \$925,900.00 to be the market unit sales price of the “Schooner” model as of June 2025. *Id.*, ¶¶ 7-8; *see* Exhs. 57B, 57C. He also reviewed the proposed site plans and elevation for each proposed model home. *Id.*, ¶ 4. Mr. Azarian testified that he has personal knowledge of the market conditions in the Town and has represented sellers and buyers in transactions involving single-family homes in the Town. *Id.*

Richard Tabaczynski, a professional civil engineer and vice president of Atlantic Design Engineers, LLC, was retained as the project manager. Exh. 58, ¶ 3. He testified that he is a civil engineer and has experience preparing subdivision plans, along with planning residential and commercial projects. He further testified that he has been involved in preparing designs for other developments within the Town permitted under Chapter 40B, and is familiar with the local health regulations, zoning bylaws and subdivision regulations. *Id.*, ¶ 2. Mr. Tabaczynski prepared the preliminary plans submitted with the comprehensive permit application and his testimony addressed conditions and waiver denials relating to the reduction of units. He testified, based on his personal knowledge and experience, that Conditions G7, G14, G20, O5, O9 and waiver denials W3, W5, W11, W12, W23 would reduce the number of units and impose additional expense to the developer. However, his testimony does not identify specific costs associated with each condition. Exh. 58, ¶¶ 4-14; *see* Exh. 6.

Eduard Eichner, a water scientist, testified to the project’s impact upon a nearby watershed, Herring Brook, resulting from the proposed septic systems. He testified that he worked as a water scientist for the Cape Cod Commission for approximately 18 years, serving as one of the technical leads for the Massachusetts Estuary Project (MEP), which assessed estuaries

in southeastern Massachusetts. Exh. 55, ¶ 1. He reviewed the proposed plans for the project, consisting of 20 single-family homes to be equipped with individual and shared Title 5 on-site septic systems. *Id.*, ¶ 4. He testified that he found the project will not harm the Herring Brook estuary, and the installation of denitrifying septic systems is unnecessary. *Id.*, ¶¶ 1-9.

Robert Pena, a licensed construction supervisor and developer, served as a representative for West Falmouth to assist in its comprehensive permit application. Exh. 60, ¶ 1. Mr. Pena has over 40 years of experience as a general contractor and constructed over 40 single-family homes and residential condominiums. *Id.*, ¶¶ 1-2. He has also worked as a developer on projects permitted under Chapter 40B. Additionally, Mr. Pena testified to installing over 250 septic systems in Barnstable County. *Id.*, ¶ 6. Mr. Pena testified to the additional costs associated with many of the imposed conditions and waiver denials, but his testimony identified no specific estimates. *See* Exhs. 60, 68, 69.

Edwin Monteiro, the developer's witness, has been a real estate developer and construction contractor for 35 years. He testified he has managed the construction of over 200 single-family homes and has installed over 300 septic and sewer systems in Barnstable County, giving him extensive knowledge into lot accessibility as it relates to septic systems. Exh. 59, ¶ 1. Mr. Monteiro stated that he reviewed the design plans for the proposed subdivision lots and attended Board hearings on this matter. *Id.*, ¶¶ 2-3. Specifically, he reviewed the waiver denial, Waiver W5, and testified that a side yard clearance of five feet would provide adequate access to maintain, repair or replace a septic system. Exh. 59, ¶¶ 4-9.

2. Challenged Conditions with Assigned Monetary Value

West Falmouth argues, relying on expert testimony and documentary evidence, that it has provided sufficient evidence that the Board's imposed conditions adversely affect the project's economics, rendering it uneconomic within the meaning of G.L. c. 40B, § 20, and 760 CMR 56.00, *et seq.* The most significant, to which it assigned specific monetary costs, include the reduction of units and the requirement that each affordable unit contains an innovative/alternative, or denitrifying, septic system.

a. Reduction in Units

Condition G16 reduces the number of units from the proposed 20 units to the permitted 16, and is the primary condition challenged by West Falmouth as rendering the project uneconomic. Exh. 8, pp. 16-17; Developer brief, p. 6; *see* Pre-hearing Order, § IV.A.1. In

support, West Falmouth relied on the testimony of Mr. Engler, who prepared two pro forma financial statements summarizing the projected costs and expenses of the proposed 20-unit project and 16-unit project approved by the Board. Exhs. 56B, 56C. Relying upon the market analysis provided by Mr. Azarian, Mr. Engler used \$925,900.00, as the projected market unit sales price for the “Schooner” model home and \$948,450.00, as the projected market unit sales price for the “Sloop” model home. Exhs. 56, ¶ 7; 57, ¶¶ 7-8.

Mr. Engler testified that the 20-unit project would result in a \$2,373,669 profit over the total development costs of \$13,078,681, equaling a net profit of 18.1 percent. *Id.*, ¶8; Exh. 56B. Whereas, for the approved 16-unit project, Mr. Engler stated the profit would be \$1,274,712, which is 11.5 percent of the total developmental costs of \$11,038,988. *Id.*; Exh. 56C⁶. The net result, Mr. Engler stated, is a reduction in profit margin of 33% to proceed with the 16-unit project. *Id.* He stated that the pro forma for 16 units calculates three fewer market rate units and one fewer affordable unit from total development sources. Mr. Engler concluded that he found that the conditions imposed by the Board’s decision would reduce the developer’s profit margin to less than 15 percent and therefore render the project as “uneconomic.” Exh. 56, ¶ 8. We find that West Falmouth has presented sufficient evidence to support a finding that reducing the project from 20 to 16 units would significantly contribute to a decrease in the return on total cost of the project, rendering the project uneconomic.

b. Innovative/Alternative Septic Systems

Condition G20 requires the developer to install “Innovative/Alternative” (I/A) septic systems for each affordable unit. Exh. 8, pp. 16-17; Exh. 55, ¶ 5. West Falmouth argues that the installation of the I/A septic system will contribute to rendering the project uneconomic. *See* Pre-hearing Order, § IV.A.1; Developer’s brief, p. 3. Mr. Eichner, West Falmouth’s water scientist, stated that an I/A septic system is “an advanced on-site wastewater treatment system designed to remove nitrogen and other pollutants from household wastewater,” and testified that the operation and installation of such systems are more expensive than standard Title 5 septic systems. Exh. 55, ¶ 5.

⁶ The pro forma contained in Exhibit 56C refers to 18 units, which does not match Mr. Engler’s testimony or the total number of units under “Development Sources” in Exhibit 56C. *See* Exh. 56, ¶ 6. This appears to be a typographical error, and we proceed on the basis that the pro forma contained in Exhibit 56C is for 16 units.

Mr. Engler estimated that the total cost to install an I/A septic system for four affordable units would be an additional \$140,000.00. Exh. 56, ¶ 5; Exh. 56C. He relied on cost estimates provided to him by Pio Lombardo, P.E., from Lombardo Associates, Inc. *Id.*; Exh. 56D. Mr. Engler testified that Lombardo Associates provide Nitrex I/A septic systems for the region and further explains that this Nitrex system remains one of the two I/A septic systems accepted by the Town. Exh. 56D. The Board provided no evidence to counter Mr. Engler's denitrification costs. We accept Mr. Engler's testimony as a credible general estimate of the additional costs associated with the installation of the I/A septic systems.

Condition G9 states, in relevant part: "[t]his [c]omprehensive [p]ermit shall be a master permit which shall subsume all local permits and approvals normally issued by local Boards....The Board of Health ...[is] excluded from this provision; the [developer] shall be required to comply with any Board of Health...requirements at the time of application for a building permit." Exh. 8, p. 15. West Falmouth contends that Condition G9 would subject the proposed development to a local health regulation enacted in October 2025, requiring denitrifying septic systems to be installed for all new residential construction located in nitrogen sensitive areas as designated by the Board of Health. Developer reply, pp. 10-11; Exhs. 61, ¶2; 61A. *see* Pre-hearing Order, § IV.A.1.

Because the project site is within a locally designated nitrogen sensitive area, West Falmouth argues this condition would require the developer to install I/A septic systems for each proposed lot at an additional cost. Exh. 61, ¶ 5; Developer reply, p. 10. The 16-unit pro forma, prepared by Mr. Engler, estimates that an I/A septic system costs an additional \$35,000 per unit to install.⁷ Exh. 56C. West Falmouth points to Mr. Engler's testimony, as "clear and specific evidence," that requiring West Falmouth to install 20 I/A septic systems will render the project uneconomic. *Id.*

The parties agree that this health regulation was enacted after the filing of West Falmouth's comprehensive permit application. Tr. I, 17, 18. In accordance with 760 CMR 56.02, the developer need only comply with local requirements in effect as of the date of the application to the Board. *Attitash Views, LLC v. Amesbury*, No. 2006-17 slip op. at 11 (Mass. Housing

⁷ Mr. Engler testified, relying on Mr. Lombardo's estimate, that an I/A septic system costs an additional \$50,000 per unit to install. To be consistent with the 16-unit pro forma, we accept that it would cost an additional \$35,000.00 per lot to install an I/A septic system. Exh. 56D.

Appeals Comm. Oct. 15, 2007), *aff'd sub nom Zoning Bd. of Appeals of Amesbury v. Housing Appeals Comm.*, 457 Mass. 748 (2010). We find that, by its terms, Condition G9 would subject the proposed development to the local health regulation at issue, requiring the developer to install an I/A septic system for each proposed lot at approximately \$35,000.00 per lot. The Board does not refute Mr. Engler's testimony regarding the costs of installing an I/A septic system. We therefore accept Mr. Engler's cost estimate and find that Condition G9 contributes to rendering the project uneconomic.

3. Challenged Conditions without Assigned Monetary Value

While the developer does not quantify the financial impact of the following conditions, it claims that such conditions will incur additional unnecessary costs that together contribute to rendering the project uneconomic. The Board has not introduced evidence associated with the cost of compliance for the conditions discussed below.

a. Unit Height

Condition G14 requires the maximum height of units to not exceed 30 feet. Exh. 8, p. 15; *see* Pre-hearing Order, § IV.A.1. Mr. Pena testified that both the Massachusetts State Building Code and Town zoning bylaw permit single-family units as tall as 35 feet. Exh. 68, pp. 25-26. While the developer concedes that its preliminary plans show that the height of the proposed units will be under 30 feet, it argues that these measurements are based on the elevation of the project site before there has been construction, grading or filling of the lot. *Id.*; Developer brief, p. 12. Mr. Pena explained that the "the natural grade along the [development's] subdivision road rises in elevation," and the height of the proposed units may vary after leveling the project site, potentially exceeding the heights depicted in the preliminary plans. *Id.*, ¶¶ 26-27. He testified to the necessity of "[r]easonable design flexibility within the 35-foot standard ... to accommodate architectural variety, energy-efficient roof pitches, and solar orientation, particularly given the site's steep topography." *Id.*, p. 26. This condition, he testified, could require design alterations and resubmission to the Board, if units exceed 30 feet in height, which would result in costly delays to West Falmouth. *Id.* We find credible and accept Mr. Pena's testimony that there would be additional costs contributing to the financial impact of this condition.

b. Doorway Width and Accessible Units

Condition G17 requires the units to include a first-floor bathroom and bedroom with a minimum 32-inch-wide doorway and obligates the developer to make units accessible upon a

buyer's request. Exh. 8, p. 16. West Falmouth argues this condition "would throw off the existing design in that several other dimensions would be affected and would need to be changed," resulting in extra costs for the developer. Developer brief, p. 14. Similarly, West Falmouth further contends that requiring the developer to make units accessible at a buyer's request would also cause the developer to incur an unnecessary expense from design alterations. *Id.*; see Pre-hearing Order, § IV.A.1. We agree with the developer that this condition will create additional costs due to construction delays and project redesigns that cannot be estimated. We find this condition, even though no monetary value has been assigned to it, would have an adverse economic impact on West Falmouth's profit. See *Falmouth Hospitality, supra*, No. 2017-11, slip op. at 8, 26 (evidence that a condition will have unenumerated costs resulting from delays may be considered in determining whether that condition contributes to the uneconomic impact of the decision).

c. Short-Term Rentals

Condition G21 requires the homeowner rules and regulations to set forth in its "master deed" that "only market rate units may be rented for a minimum one-year period if rental is allowed, with no seasonal or short term rentals." Exh. 8, p. 17. West Falmouth states that the master deed is a document that applies only to condominiums and not developments with single-family homes. Therefore, the rules and regulations for this development would not be set forth in a master deed. Developer brief, p. 15. However, West Falmouth argues that its failure to establish the "master deed" for the development, as required by this condition, will be in violation of the comprehensive permit. Such a violation, West Falmouth argues, could lead to work stoppages and delays that will cause damage to the project's finances. Developer reply, p. 12; see Pre-hearing Order, § IV.A.1. We find that Condition G21 would have an adverse economic impact relating to project delays occasioned by the requirement to create a master deed.

d. Construction of Bus Shelter and Play Area

Condition S15 requires the construction of a bus shelter and play area for the development. Exh. 8, p. 20. The developer, providing no specific monetary value, argues that this condition contributes to making this project uneconomic in the aggregate. Developer reply, pp. 12-13; see Pre-hearing Order, § IV.A.1. Relying on Mr. Engler's testimony, West Falmouth claims that costs associated with constructing the bus shelter "would have been among the construction costs assessed by Mr. Engler in the [p]ro-forma." *Id.*, p. 12. Mr. Engler stated that

he based the 16-unit pro forma on “the same data points for costs...except as differentiated by the [Board’s] decision,” although he did not testify specifically to the projected construction costs regarding the bus shelter. Exh. 56, ¶ 6. West Falmouth claims further that “[c]learly, the construction of a bus shelter will cause additional expense to the [d]eveloper.” Developer reply, p. 12.

Additionally, West Falmouth argues that requiring a play area, in addition to the developer’s proposed recreational area, will decrease lot availability, thereby indirectly limiting the number of units that could be built. Reducing the number of units from the 20 proposed units, West Falmouth argues, would contribute to rendering the project uneconomic. *Id.*, p. 13.

While Mr. Engler did not provide a specific cost estimate associated with the construction costs of building a bus shelter, we agree that compliance with this condition would require additional construction work by West Falmouth that will cause it to incur an expense that is likely more than de minimis. With respect to the required play area, we find that this condition also effectively reduces the number of units that could be developed by decreasing lot availability. Accordingly, we find the testimony that compliance with Condition S15 would likely cause West Falmouth to incur additional costs, both in redesign and construction, that would contribute to the uneconomic nature of the approved project credible and we accept it.

e. Other Cost Claims

Condition O3 requires, in part, that “[a]ny material substantially diseased or dead [plant material] shall be removed or replaced with similar sized plants, within two years of the final Certificate of Occupancy, by the developer.” Exh. 8, pp. 21-22. West Falmouth argues the two-year requirement imposes an unreasonable financial burden onto the developer, thereby “affecting the reasonable return on investment and ultimately the economic viability of the project.” Developer brief, p. 16. The Board argues that the developer plans to clear cut the site to prepare it for construction and therefore this condition does not require anything extraordinary from the Developer. Board brief, p. 11.

West Falmouth further argues that Condition O9 characterizes the accessway into the proposed subdivision as a driveway, as opposed to a roadway, and will require the developer to create additional access and structures to comply with the design standards for a driveway. Developer brief, pp. 17-18; Pre-hearing Order, § IV.A.1, 4. Condition O9 requires West Falmouth to “provide an ADA compliant sidewalk along the interior driveway. The sidewalk

shall have tactile strips where the driveway intersects with North Falmouth Highway. The project driveway shall have vertical curbing on the side with the sidewalk.” Exh. 8, p. 23. Mr.

Tabaczynski testified that the project roadway, as proposed, will have an access ramp at the intersection with North Falmouth Highway and vertical curbing along the project roadway adjacent to the sidewalk. He further testified that the proposed sidewalk would comply with the Americans with Disabilities Act (ADA) and Massachusetts Architectural Access Board requirements. Exh. 58, ¶ 9.

Noreen Stockman, the Town’s Zoning Administrator, testified that Mr. Pena confirmed the proposed accessway into the subdivision would be categorized as driveway, as opposed to a subdivision road. Mr. Pena conceded this point. Ms. Stockman further testified that the proposed project did not comply with the Town’s road standards, specifically the minimum road width. Exh. 63, ¶ 6. Mr. Tabaczynski responded that this proposed “project is and always was a subdivision, consisting of a roadway with individual lots fronting along the roadway.” Exh. 65, p.3. He testified that the preliminary plans “included a ‘typical Road Cross Section’ on Sheet 5 that shows the proposed right of way, paved travel lanes, sidewalk and utilities.” *Id.*; see Exh. 6.

While the Board argues that West Falmouth has not demonstrated that this condition renders the project uneconomic, it does not refute the argument that, by characterizing the proposed accessway as a driveway, this condition would require the developer to redesign the proposed sidewalk to include additional features. Board brief, p. 12. In addition, the Town’s zoning bylaws define a “Street” as “...a way established by a subdivision plan approved in accordance with the Subdivision Control Law (G.L. c. 41, §§ 81K - 81GG),” and define a “Common Driveway” as “[a] vehicular way, *which is not a street*, providing access to 3 or more residential, industrial, or commercial lots.” Exh. 10, p. 26, Zoning Bylaw Chapter 240, §3.3 (emphasis added). It may conflict with the Town’s zoning bylaws to define the proposed accessway as a driveway, rather than a street or way. Such a conflict may require the developer to address the inconsistency before the Board, thereby delaying the developer from proceeding.⁸

⁸ The developer, citing Mr. Tabaczynski’s testimony, argues defining the accessway as a driveway could preclude the creation of lawful lots and lead to potential title issues at the time of sale arising under the Subdivision Control Law, G.L. c. 41, §§ 81K-81GG. Developer brief, p. 24. It is not uncommon for cases before this Committee to raise title issues, but the Committee does not have jurisdiction over the creation of lawful lots under G.L. c. 41, §§ 81K-81GG. This is an issue for the courts to decide.

We find that Conditions O3 and O9 would subject the developer to incur costs associated with sidewalk redesign, leading to delay and uncertainty, thereby contributing to the financial impact of the Board's decision.

f. Waivers Denials

West Falmouth requested the following waivers from the Town's Zoning Bylaw:

- § 240 – 11.2(B),⁹ to allow for the minimum lot width of 15 feet and minimum frontage of 15 feet, which the Board denied, and imposed the minimum lot width and frontage of 45 feet. Exh. 8, p. 24 (Waiver W3).
- § 240 – 11.4(A)2¹⁰ to allow 15 foot setback from the street and side and rear setbacks of five feet. Exh. 8, p. 24 (Waiver W5). The Board granted Waiver W5, in part, to allow a 15-foot setback from the street; however, it denied the request to allow a side and rear setback of five feet. *Id.*

West Falmouth argues that compliance with these conditions would prevent the development of 20 units. Pre-hearing Order, § IV.A.1, 4. Mr. Tabaczynski testified that the denial of reduced lot width and frontage of 15 feet “will inhibit the number of lots that can be developed.” Exh. 58, ¶ 10. West Falmouth's proposed plans show that only lot 12 has a proposed frontage of 15 feet, while lots 10, 11, and 13 each have a proposed frontage of 19.3, 16.1, 16.5 feet, respectively, which are below the Board's required 45 feet. All other lots shown on the plan have at least the minimum required 45 feet of frontage. Exh. 6, sheet 3. Additionally, Mr. Tabaczynski stated “[r]equiring a setback of 10 feet on every lot will result in the loss of one or more building lots.” *Id.*, ¶ 11. Although West Falmouth did not quantify the costs, we find it credible and accept the testimony that denying the request for frontage of 15 feet and for the side and rear setback of five feet will preclude the development of 20 units, thereby contributing to the financial impact of the Board's decision.

West Falmouth requested waivers from the Town's subdivision regulations, which require a street layout with a width of 60 feet at the entrance to the project for the first 200 feet and require dead-end streets no longer than 500 feet. Exh. 14, §§ 305 – 24(B), 24(D)2. West Falmouth requested waivers from these requirements to allow a roadway width of 26 feet and no

⁹ Zoning Bylaw, § 240 – 11.2(B) requires minimum lot width of 125 feet and minimum lot frontage of 100 feet. Exh. 10, p. 118.

¹⁰ Zoning Bylaw, § 240 – 11.4(A)2 requires front setbacks from the street of 25 feet with side and rear setbacks of 10 feet. Exh. 10, p. 122.

longer than 664 feet, which the Board denied. Exh. 8, p. 25 (Waiver W11) (Waiver W12). The developer argues, citing testimony of Mr. Tabaczynski, that requiring a street layout with a width of 60 feet reduces land availability, thereby restricting the number of developable lots. Developer reply, p. 8; Exh. 58, ¶ 12. In addition, Mr. Tabaczynski stated that “[t]he length of 664 feet is necessary in order to allow for the development of 20 lots,” and without granting this waiver “the project will lose a number of lots.” *Id.*, ¶ 13. The developer contends that denying its request for these waivers prevents the construction of 20 units within the project site and therefore contributes to the financial impact of the Board’s decision. Developer reply, p. 7. We accept as credible the evidence that denying West Falmouth’s waiver requests would preclude the development of 20 single-family homes and therefore compliance with these subdivision regulations contributes to the financial impact of the Board’s decision.

West Falmouth sought a waiver from the Town’s health regulations, FHR 15.2(1), to permit “common/shared septic tanks on a separate lot or within the private road right-of-way,” which the Board denied. Exh. 8, p. 26 (Waiver W23). The developer submitted preliminary plans showing three shared septic systems for the following proposed lots: 1, 2, 3, 4, 8, 9, 10, 11, 13, 14, 15, 17, 19 and 20. Exh. 6. Mr. Tabaczynski testified that the denial of this waiver will prevent West Falmouth from creating 20 individual lots. Exh. 58, ¶ 14. The developer argues that the shared septic systems “are essential to the design and implementation” of the project. Developer brief, p. 28. To the extent that this denial precludes the creation of 20 units, the developer claims it imposes uneconomic requirements on West Falmouth. Developer reply, p. 7. Although West Falmouth did not quantify the reduction in units resulting from prohibiting shared septic systems, we find credible and accept the testimony that it will preclude the development of 20 units and contribute to the uneconomic impact of the Board’s decision.

4. Developer’s Pro Forma Analysis and Proof of Economic Case in Aggregate

Mr. Engler provided pro forma financial analyses of the project as proposed at 20 units, and as conditioned at 16 units with four I/A septic systems. Based on his analyses for both development models, he testified that the ROTC for the project, as conditioned by the Board, would render the project uneconomic in comparison to the project as proposed. Mr. Engler testified that the project, as conditioned, would lead to a reduction in profit, as a result of “many cost items being constant and not tied to unit reduction,” along with “the additional costs of denitrification imposed by the [Board]” Exh. 56, ¶ 8. He calculated that the ROTC for the

project, as proposed with 20 single-family units, is 18.1 percent, and for the project, as conditioned, is 11.5 percent, resulting in a reduction in profit margin of 33 percent. He concluded that this 33 percent reduction in the profit margin is a substantial decrease in profit and would render the project uneconomic in nature. *Id.*

As to the remaining conditions and waiver denials without specific cost amounts, West Falmouth submitted evidence that those requirements would lead to construction delays and unnecessary costs that together make the project uneconomic. West Falmouth submitted testimony from Mr. Tabaczynski who testified that denial of the requested waivers would preclude the development of 20 lots. Exh. 58, ¶¶ 10-14. Mr. Pena testified that restricting each unit's height to 30 feet may necessitate a redesign of the units, which would result in a redesign requiring further hearing by the Board. He stated this would cause "unnecessary hardship" and construction delays. Exh. 68, p. 27. As for the remaining conditions, West Falmouth argues the conditions, by their terms, will require specific work or costs by the developer, incurring further expense. West Falmouth contends that it need not prove that each condition individually will render the project uneconomic nor quantify each individual condition. Developer reply, pp. 1-3, citing *White Barn Lane, LLC v. Norwell*, No. 2008-05, slip op. 14 (Mass. Housing Appeals Comm. July 18, 2011); see 760 CMR 56.07(1)(c). Rather, the developer argues it has satisfied its burden by demonstrating that "the conditions taken as a whole resulted in an uneconomic project as permitted," and the burden therefore shifts to the Board to prove there is a valid local concern that outweighs the regional need for affordable housing. *Id.*, p. 3, citing *680 Worcester Road, LLC v. Wellesley*, No. 2019-09, slip op. at 13 (Mass. Housing Appeals Comm. Mar. 15, 2021).

C. The Board's Challenge

The Board asserts that West Falmouth has failed to meet its initial burden because the developer did not provide evidence of the economic impact for the numerous conditions and waiver denials challenged as rendering the project uneconomic. The Board argues that "[n]othing contained in Mr. Engler's Pre-Filed Testimony [or] the supporting pro formas... address the costs associated with any condition or waiver denial," except for the reduction from 20 units to 16 units and the installation of the I/A septic system. Board brief, pp. 3-4. citing *River Stone, supra*. No. 2016-05, slip op. at 49, citing *Weiss Farm, supra*, No. 2014-10, slip op. at 4 n.4. The Board argues that the developer has failed to sustain its burden to demonstrate that the challenged conditions and waiver denials render the project uneconomic and, therefore, the burden does not

shift to the Board to prove local concerns to justify those conditions and waiver denials. Board brief, p. 3. Nonetheless, the Board submitted no testimony or evidence disputing West Falmouth's case on economics pertaining to the unit reduction or installation of I/A septic systems, nor did it provide any testimony or evidence on any other conditions and waiver denials challenged by West Falmouth.

D. Committee Analysis and Conclusion Regarding Economics

Under Chapter 40B and 760 CMR 56.00, the conditions need only render the project uneconomic in the aggregate. *White Barn, supra*, No. 2008-05, slip op. at 14. We do not require each condition individually to render a project uneconomic. Instead, if “credible evidence [shows] that some adverse economic impact likely will occur, it is not necessary that [a developer] demonstrate for each condition the precise predicted value of the adverse impact, as long as the aggregate impact is shown to make the building or operation of the project uneconomic.” *Id.* at 16.

With regard to West Falmouth's economic analysis, we find credible and accept Mr. Engler's testimony and financial statements. We accept his total development costs, including his estimated cost associated with installing I/A septic systems, for which Mr. Engler relied on Pio Lombardo, a professional engineer. Moreover, we find to be credible Mr. Azarian's market analysis to support a market rate sale price of each unit to be either \$948,450.00 or \$925,900.00, depending on design model. Finally, we credit Mr. Engler's findings that the 20-unit project, as proposed, would produce a ROTC of 18.1 percent and the 16-unit project, as conditioned by the Board would produce a ROTC of 11.5 percent. Exhs., 56B, 56C. We determine this to be a substantial reduction. *See Milton, supra*, No. 2015-03, slip op. at 11 (ROTC reduction of 1.62% is both uneconomic and significantly more uneconomic); *Cirsan Realty Trust v. Woburn*, No. 2001-22, slip op. at 15 (Mass. Housing Appeals Comm. Apr. 23, 2015) (ROTC of 1.66% lower is significantly more uneconomic); *Falmouth Hospitality, supra*, No. 2017-11, slip op. at 29 (ROTC reduction of 0.84% is substantial and renders the project significantly more uneconomic). We conclude that West Falmouth presented sufficient evidence that reducing the project from 20 to 16 single-family homes, along with the required installation of I/A septic systems for each affordable unit, will produce a profit that falls below the minimum reasonable return of 15 percent. *See* 760 CMR 56.02: *Reasonable Return*; *White Barn, supra*, No. 2008-05,

slip op. at 14. Thus, we find the ROTC for the project as approved by the Board renders the project uneconomic.

With respect to the remaining conditions and waiver denials with no specific adverse economic value assigned, as discussed in § IV.B.3, *supra*, we determine that, by their terms or based upon relevant testimony, many require specific work by West Falmouth that will cause more than a de minimis cost and thus, result in an undetermined economic impact, ultimately contributing to the adverse impact on the developer's profit. *See Riverview Properties, LLC v. Kingston*, No. 2021-09, slip op. at 13 (Mass. Housing Appeals Comm. Directed Decision Jan. 21, 2026), citing *Weiss Farm, supra*, No. 2014-10, slip op. at 30.

West Falmouth argues the following conditions have an economic impact, but cites no evidence in its briefs as to that impact: Condition G2 requiring the developer to submit revised plans showing 16 dwellings; Condition G7 prescribing accessible parking as required by the building commissioner; Condition G8 requiring the developer to return to the Board for any changes to the project; Condition G18 requiring no further subdivision, creation of additional housing units, or any other structures, without further approval of the Zoning Board of Appeals; Condition B5 requiring the developer to submit revised "as-built" plans showing a "recreational area" and "bus shelter" as consistent with Condition S15; Condition O3 regarding fencing that may be required by the Town's Building Commissioner as part of any retaining wall; and Condition O5 requiring the repair of any damage to North Falmouth Highway that occurs during the construction process to state standards. While West Falmouth objects to Condition G5 in its brief as misclassifying the development's access road as a driveway, the developer did not challenge this condition in the Pre-Hearing Order. The Committee has longstanding rules about waiver of arguments that require parties to identify issues in the pre-hearing order and provide arguments in briefs to preserve these issues for consideration. *River Stone, supra*, No. 2016-05, slip op. at 24 n.19; *Sugarbush Meadow, LLC v. Sunderland*, No. 2008-02, slip op. at 3 (Mass. Housing Appeals Comm. June 21, 2010), *aff'd Zoning Bd. of Appeals of Sunderland v. Sugarbush Meadows, LLC*, 464 Mass. 166 (2013); *See also Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85- 86 (1995), quoting *Lolos v. Berlin*, 338 Mass. 10, 13-14 (1958). We find that, with regard to Conditions G2, G7, G8, G18, B5, O3 and O5, West Falmouth failed to submit adequate argument that these conditions have an economic impact on the project, and with regard to Condition G5, West Falmouth failed to challenge this condition as uneconomic in the Pre-

Hearing Order. Therefore, West Falmouth has waived any argument that these conditions are unsupported by valid local concerns. We note, however, that Conditions G2 and B5 are subject to Condition 3, § VIII *infra*. Condition G18 is subject to Condition 1, § VIII, *infra*. This addresses the developer's concerns.

V. LOCAL CONCERNS

Since West Falmouth has sustained its initial burden to demonstrate that conditions and denials of waivers in the Board's decision would, in the aggregate, render 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 second, 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* Pre-Hearing Order, § IV.B.1. The burden on the Board is significant: the fact that the Town does not meet the statutory minima regarding affordable housing establishes a rebuttable presumption that a substantial regional housing need outweighs the local concerns. 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 which outweighs Local Concerns" if statutory minima are not met), quoting *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, 346, 365, 367 (1973) ("municipality's failure to meet its minimum [affordable] housing obligations defined in § 20 will provide compelling evidence that the regional need for housing does in fact outweigh the objections to the proposal").

A. Witnesses

The following experts proffered by the Board testified regarding the contested conditions. The Board's witness, Matthew Cote, has been a civil engineer since 2000 and has experience in peer reviewing proposed developments under Chapter 40B. Exh. 62, ¶¶ 1-2. His firm, Beals and Thomas, Inc., was retained by the Board to provide a peer review of the developer's comprehensive permit application. Mr. Cote testified to participating in numerous projects with the Town, and his familiarity with the Town's zoning bylaws and other relevant regulations. *Id.*, ¶ 3. He reviewed site plans and documentation submitted by West Falmouth with its

comprehensive permit application, along with final site plans dated February 23, 2024, revised through December 17, 2024. *Id.*, ¶ 4; *see* Exh. 52, p. 1.

Amy Lowell, the Wastewater Superintendent for the Town since 2016, testified to a proposed health regulation before the Town's Board of Health that would require denitrifying septic systems to be installed for new residential construction in nitrogen sensitive areas, as designated by the Town's Board of Health. Exh. 61, ¶¶ 1-2. She further testified regarding the Town's efforts to reduce nitrogen levels within coastal ponds and the impact new construction has on the Town's existing nitrogen concern. *Id.*, ¶¶ 4-5.

Noreen Stockman, the Town Zoning Administrator, testified that she has held this position since 2018, and is responsible for assisting the Board in its review applications involving zoning relief, management of public hearings and preparation of its written decisions. Exh. 63, ¶¶ 1-2. She testified regarding the density of the proposed project and compliance with Town bylaw requirements. *Id.*, ¶¶ 3, 6.

B. Project Design Changes

West Falmouth argues that the conditions imposed by the Board requiring design changes are not supported by valid local concerns. Most significantly, it argues that the Board requires the developer to (1) reduce the number of units from 20 to 16; (2) modify interior doorway width requirements; and (3) create a bus shelter and play area.

The Board also denied several of West Falmouth's requested waivers from local bylaws and regulations relating to lot dimensions and side and rear yard setbacks (waivers W3 and W5); roadway length and width (waivers W11 and W12); and shared septic systems (waiver 23). The Board's conditions reduced the size of the project and, in support of those conditions, presented witness testimony illustrating concerns associated with neighborhood compatibility, size and intensity of the proposed project.

In past decisions, we have ruled that the "board must review the proposal submitted to it and may not redesign the project from scratch." *Milton, supra*, No. 2015-03, slip op. at 16, citing *Pyburn Realty Trust v. Lynnfield*, No. 2002-23, slip op. at 14 (Mass. Housing Appeals Comm. Mar. 22, 2004), quoting *CMA, Inc. v. Westborough*, No. 1989-25, slip op. at 24 (Mass. Housing Appeals Comm. June 25, 1992); *see also Peppercorn Village Realty Trust v. Hopkinton*, No. 2002-02, slip op. at 6 n.4 (Mass. Housing Appeals Comm. Jan. 26, 2004) and cases cited. While a board may deny waiver requests or impose conditions that require the developer to modify the

project, such action must be supported by valid local concerns that outweigh the need for affordable housing. *Hanover*, 363 Mass. at 339, 363; *Milton*, *supra*, No. 2015-03, slip op. at 16; *Westborough*, *supra*, slip op. at 24 n.13; 760 CMR 56.05(8)(d). We consider 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 if they exceed addressing valid local concerns and constitute an 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. A board must also show how the concerns set out in the local bylaw apply to the facts of the case and how the specific interests it has identified are important at this site. *Way Finders, Inc. v. Ludlow*, No. 2017-13, slip op. at 26 (Mass. Housing Appeals Comm. Mar. 15, 2021); *Herring Brook Meadow, LLC v. Scituate*, No. 2017-15, slip op. at 25-26 (Mass. Housing Appeals Comm. May 26, 2010). As discussed below, the Board failed to provide sufficient evidence that a valid local concern outweighs the need for affordable housing.

1. Unit Reduction and Setbacks

Condition G16 requires, *inter alia*, “[t]he development shall be limited to a maximum of 16 single-family dwellings.” Exh. 8, p. 16. The Board argues that density concerns, steep topography and incompatibility with the existing neighborhood necessitates this reduction and that 16 units is the maximum number of dwelling units the project could accommodate. Board brief, p. 5. In the Pre-Hearing Order, the Board cited the local zoning bylaws and subdivision regulations but has provided no specificity relating to the manner in which these provisions demonstrate a local concern for this site that requires a reduction in units. *See* Pre-hearing Order, § IV.B.1.

Ms. Stockman testified that the proposed 20 units located on a 4.27-acre parcel would result in a density of 4.7 units per acre.¹¹ Exh. 63, ¶ 3; Tr. I, 55. Ms. Stockman testified that she reviewed other comprehensive permit projects, consisting of single-family developments, that were recently approved during her tenure to compare the density of this project to other single-family developments within the Town. Tr. I, 87; Exh. 63, ¶ 3. The six single-family projects reviewed by Ms. Stockman were as follows: 1) 430 Locustfield Rd. with 2.93 units per acre; 2)

¹¹ Ms. Stockman agreed that the precise density of the project is 4.68 units per acre, and she rounded to 4.7 units per acre in her pre-filed testimony. Tr. I, 55. We accept Ms. Stockman's calculation.

Sam Turner Rd. with 4.09 units per acre; 3) 419 Waquoit with 4.55 units per acre; 4) 511 Brick Kiln with 4.12 units per acre; 5) 0 Percival with 2.18 units per acre; and 6) Helms/Kendall Ln. with 5.62 units per acre. To calculate the density for each project, including the West Falmouth project, Ms. Stockman testified that she used the square footage for a total acreage of the entire development divided by the total number of units. *Id.*

Ms. Stockman testified that she found the West Falmouth project to be higher in density than the six aforementioned comprehensive permit projects and “not keeping with the appropriate density” for this site and neighborhood. Exh. 63, ¶¶ 3, 5. She further stated that the density of the proposed project, along with the project site’s steep topography, would lead to “many lots requiring retaining walls in between lots.” *Id.*, ¶ 5. Therefore, she testified that the retaining walls contribute to limiting the space between units and present concerns associated with access to septic systems in rear yards. The Board argues that the density and access challenges led to the Board reducing the total number of units. Board brief, pp. 5-6.

Mr. Cote testified that the underlying zoning requires 40,000 square feet minimum lot areas and that conventional development of this 4.27-acre parcel “would only likely result in 3 lots given the needs for roadways, stormwater management, etc.” Exh. 62, ¶ 6. Because the proposed project will result in the average lot size of 6,300 square feet, Mr. Cote testified that the proposed development is inconsistent with the existing neighborhood. *Id.* Mr. Cote calculates that the proposed 20 units located on a 4.27-acre parcel would result in a density of 4.7 units per acre. *Id.*, ¶ 5. He acknowledges, however, that the density of this proposed project meets the density requirements set forth in M.G.L. c. 40R, Smart Growth Zoning and Housing Production Act.¹² Mr. Cote suggests that the Smart Growth guidelines do not account for “needs for on-site wastewater disposal resulting from the increased density.” *Id.* Yet, Mr. Cote states that he “took no exception to the proposed density from a technical standpoint.” *Id.*, ¶ 5; Tr. II, 8. On cross-examination, he testified that he “didn't necessarily review the [character of the] neighborhood in general, just the reference to the neighborhood is the underlying zoning and the 40,000 square foot minimum lotting in that particular area.” Tr. II, 10.

¹² Smart growth regulations allow a density of at least eight units per acre for Developable Land zoned for single-family residential use. 760 CMR 59.04(1)(d)(3)(a)(i). Neither party presented evidence that the proposed development is within a smart growth district.

West Falmouth argues that the Board's reasons for the reduction in units—density concerns and inconsistency with the existing neighborhood—are unsupported by the evidence. Developer reply, p. 15. The developer claims there has been “dozens of Chapter 40B projects over several years in Falmouth where density was higher [than the proposed project].” *Id.* To support this argument, West Falmouth introduced a table chart that the developer claims records “all of the 40B projects in Falmouth, many of which had densities greater than 4.68 units per acre.” Developer brief, p. 31; Exh. 28. Although the Board does not object to Exhibit 28 in its brief, the information contained in Exhibit 28 had not been authenticated by Ms. Stockman or any other witness. Ms. Stockman testified on cross-examination that it is a list that was created and maintained by someone within the office of the Board prior to her tenure, but that she could not attest to who created it, the accuracy of the information or whether Exhibit 28 contained density calculations of developments consisting of single-family homes or apartment units. Tr. I, 60-61, 70-72. West Falmouth further argues that the density of the proposed project, 4.7 units per acre, is slightly higher than Ms. Stockman's comparable 40B projects: the Sam Turner Project with 4.09 units per acre, 419 Waquoit Project containing 4.55 units per acre and the 511 Brick Kiln Project consisting of 4.12 units per acre. Developer brief, p. 30; Exh. 63, ¶ 3. Therefore, the developer argues that the proposed density is not an “extreme departure” from other 40B projects that exceeded four units per acre. Developer brief, p. 31.

“It is not sufficient in the context of Chapter 40B to simply quantify density; rather, there must be a more sophisticated analysis of the proposed design and its relation to the site and surrounding areas.” *River Stone, supra*, No. 2016-05, slip op. at 31 (internal citations omitted). We find that the Board failed to demonstrate what, if any, the impact would be of the 20-unit development on the surrounding area. *See Hastings Village, Inc. v. Wellesley*, No. 1995-05, slip op. at 20 (Mass. Housing Appeals Committee Jan. 8, 1998), *aff'd* No. 00-P-245 (Mass. App. Ct. Apr. 25, 2002) (analysis for density “involves determining the impact of the development on factors ranging from municipal services and traffic to aesthetics and overall livability of the surrounding neighborhood”). Furthermore, the Board has provided very little evidence regarding the nature or character of the immediate neighborhood and how the project would be detrimental. We conclude that the Board did not demonstrate a valid local concern with regard to the conditions related to density to justify the reduction of the project size from 20 to 16 single-family homes that outweighs the regional need for low and moderate income housing.

Accordingly, Condition G16 is modified to state that the “development shall be limited to a maximum of 20 single-family dwellings.”

Additionally, West Falmouth sought waivers from §§ 240-11.2B and 240-11.4A of the Town’s Zoning Bylaws to allow a lot width and frontage of 15 feet and a proposed side yard setback of five feet and argues that denials of these requested waivers would result in a reduction in units. Exh. 8, p. 24 (Waiver W3 and Waiver W5); Developer brief, pp. 18, 23.

The Board argues that denials of requested waivers W3 and W5 are consistent with local needs because it relieves concerns regarding functionality and access to the side and rear yards. It contends that the “small lots hemmed in with retaining walls and negligible side yards” would lead to “challenges associated with accessing the rear yards and septic systems.” Board brief, pp. 5. Mr. Cote had no specific issue with waivers allowing the lot width of 15 feet, frontage of 15 feet, and five-foot rear and side yard setbacks. Rather, he stated that the proposed lot dimension is a “significant . . . reduction in the lot areas and frontage” and testified that his firm “deferred to the Board relative to the appropriateness of the waiver being requested” and the impacts associated with such a reduction in lot dimensions, the existing character of the neighborhood and installation of on-site wastewater. Exh. 62, ¶¶ 5-7; Exh. 52, ¶ 2. His testimony did not elaborate on what those impacts would be or how they would adversely affect the character of the neighborhood.

The Board’s arguments are related to the intensity of the uses on the site. While similar to density, intensity pertains to the functioning of the housing on the project site, including questions such as adequate open space and recreational space, functionality of common areas, accessibility of the site to and from other areas of the neighborhood, and other related factors as to “whether the number of units are too large not for the surrounding area but for the particular parcel of land.” *See Lynnfield, supra*, No. 2002-23, slip op. at 9, citing *Hastings Village, Inc, supra*, No. 1995-05, slip op. at 26.

The Board’s primary concern is how the five-foot side yards would impact access to septic tanks located in the rear of a lot. Board brief, pp. 5-6. Although Mr. Cote states his firm “took no exception . . . from a technical standpoint” to allow side yards of five feet, he testified that the steepness of the project site changes significantly from west to east, leading to “a roadway with the maximum allowable slope of 10 [percent].” Because of the steep topography, Mr. Cote testified that this results in “building lots with individual septic systems being

encumbered by retaining walls to create plateaus for the systems.” Exh. 62, ¶¶ 8, 9. In the event that abutting lots share a retaining wall in the side yard, he explained the retaining wall location paired with the compacted side yard would limit access to a rear-yard septic system, and sufficient access to the rear yard remains necessary to maintain, repair or replace a septic system. *Id.*; Tr. II, 15-16. Mr. Cote testified that a conventional concrete septic tank weighs approximately 12,000 pounds and stated that transporting a concrete septic system requires large machinery that could not maneuver through a side yard of 5 feet with a retaining wall. At worst, Mr. Cote stated “a conventional concrete tank could be craned over the home. While possible, this would appear to be a cost prohibitive alternative....” Exh. 62, ¶¶ 14, 17. He noted that rear-yard access may be further impeded if mechanical systems are placed in that same side yard. *Id.*, ¶ 10. On cross-examination, Mr. Cote agreed that access issues could be resolved by the grant of easements before conveyance of the lots in question. Tr. II, 17.

West Falmouth responds that it intends to install polypropylene septic systems, as permitted by the Town and the Massachusetts Department of Environmental Protection (DEP). *See* 310 CMR 15.226(1); Exhs. 64, 64A. Mr. Monteiro testified that a side yard setback of five feet would allow adequate access to each lot’s rear yard for the purposes of maintaining, repairing or replacing a septic system. Exh. 59, ¶ 9. Mr. Monteiro, who has experience installing septic systems in Barnstable County, stated that polypropylene septic tanks are considerably lighter than concrete tanks. He testified that these septic tanks “can be split lengthwise into two halves, which facilitates installation and transportation,” through side yards of five feet to access the rear of the lot. Exh. 59, ¶ 8. Mr. Monteiro further testified that future repair or replacement of the rear-yard septic systems could be performed using a mini excavation machine, approximately 38 inches wide and narrow enough to maneuver through the proposed side yards.¹³ *Id.*, ¶ 7.

In response to Mr. Cote’s concern that the lots having individual systems and having retaining walls would “create plateaus for the systems,” Mr. Tabaczynski testified that retaining walls located in the side, rear or front of lots are not uncommon in residential developments and the steeper rise in topography is only at the rear of the site, “which affects about 8 lots.” Exh. 64,

¹³ Mr. Cote estimated that a 1,500-gallon septic tank would be approximately five to six feet tall and testified that a mini excavator may have a limited ability to dig the required excavation depth, as it cannot dig deeper than six feet. Exh. 62, ¶ 15. Conversely, Mr. Monteiro testified that narrow excavator and similar excavation machinery can dig more than 6 feet. Exh. 69, p. 2. We accept and credit Mr. Monteiro’s testimony as it relates to the excavation machinery, given his extensive experience in the field.

pp. 1-2. Furthermore, the developer counters that obstacles between a home and retaining wall, such as bulkheads and mechanical equipment, would be positioned to provide unobstructed access for maintenance, repairs or replacement to rear-yard septic systems. Developer brief, pp. 21-22; Exh. 64, p. 2. West Falmouth asserts the Town's Fire Department "made no comment or offered no objections to the proposed setbacks" when the developer submitted the preliminary plans, with the reduced side-yards, to the fire department for its review. Developer brief, p. 20; *see* Exh. 58, ¶ 11.

We accept and credit the testimony of Mr. Tabaczynski and Mr. Monteiro. We do not find West Falmouth's waiver request will prohibit use of the side-yard or impede access to the rear yard. Further, we find that the proposed lot dimensions or setbacks would not prevent maintenance, replacement or repair of a rear-yard septic system, particularly in light of the testimony regarding polypropylene septic systems. Therefore, we conclude that the Board has not proven a valid local concern that outweighs the need for affordable housing sufficient to support the conditions related to the lot dimension and setbacks. Accordingly, the denials of waivers W3 and W5 are overturned and the waivers are granted.

2. Doorway Width

Condition G17 requires that the interior of each unit "shall include a first-floor bedroom and bathroom with a minimum 32-inch doorway width," and specifies that "[t]he developer shall make units...accessible upon request of the buyer." Exh. 8, pp. 15-16. Ms. Stockman testified on cross-examination that there is no requirement in the Zoning Bylaws for 32-inch doorway widths. Tr. I, 86.

The Board argues the floor plans for both the "Schooner" model unit and the "Sloop" model unit illustrate a first-floor bedroom and bathroom with a 32-inch-wide doorway. Board brief, p. 9, citing Exh. 7. Ms. Stockman testified that such requirements in Condition G17 memorialized the floor plans submitted with West Falmouth's comprehensive permit application. Exh. 63, ¶ 6, p. 2.¹⁴ West Falmouth claims that the design plans do not depict 32-inch interior doorways for the first-floor bedroom or bathroom. *Id.*, p. 13; Exh. 7. Therefore, West Falmouth claims that this requirement is based on an incorrect interpretation of the floor plans and should

¹⁴ It appears Exhibit 63, containing Ms. Stockman's pre-filed testimony, has been misnumbered as paragraph six has been numbered twice, and therefore, any citation to Exhibit 63, ¶ 6, will include a page number for clarity.

be stricken. While the floor plans for the “Sloop” model depict first floor bedroom and bathroom doorways between 28 and 30 inches, the developer did not provide floor plans for the “Schooner” model. Exh. 7. West Falmouth also argues that there are no laws, rules or regulations requiring the developer to provide accessible dwelling units at no cost to the buyer upon request.

The Board did not offer any evidence or argument in support of the portion of Condition G17 requiring the developer to make units accessible upon a buyer’s request; therefore, it has waived its defense that a valid local concern supports that condition. We further find that the Board failed to credibly demonstrate a local concern with regard to the requirement of 32-inch-wide doorways for the first-floor bedroom and bathroom. Thus, Condition G17 is partially struck with respect to those requirements. Because the developer does not contest requiring a first-floor bedroom and bath in each unit, that portion of Condition G17 remains.

3. Bus Shelter and Play Area

Condition S15 requires the developer to provide a play area for the proposed development. Exh. 8, p. 20. The Board argues that the Town’s subdivision regulations, §305-26, provide the Board the authority to require the inclusion of a play area within the proposed project. Board brief, pp. 10-11. The Falmouth subdivision regulation at issue states:

The Board may require in proper cases that the plan show a park or parks suitably located for playground or recreation purposes. The park or parks shall not be unreasonable in area in relation to the land being subdivided and to the prospective uses of such land. Deeding of open spaces to lot owners is preferred. The applicant shall furnish the Board with a certified copy of any easement or restrictions of record relating to or affecting such parks, playgrounds and recreation areas and the continued maintenance thereof.

Exh. 14, Subdivision Regulations, §305-26 (Open Spaces). West Falmouth responds that “neither the Falmouth Zoning Bylaw nor the Falmouth Subdivision Regulations require construction of a bus shelter in a subdivision.” Developer reply, pp. 12-13. Mr. Pena testified that the landscaping plans already propose 10,495 square feet of recreational space. Exh. 60, ¶ 61; Exh. 12A. West Falmouth claims that it should not be required to construct both the play area and recreational area. *Id.*, pp. 14-15.

We agree with the developer that Subdivision Regulations §305-26 pertains only to open spaces and do not require the construction of a bus shelter. While the Board has identified a local regulation that supports a condition for a play area in the development, *see* Exh. 14, Subdivision Regulations, §305-26, it has failed to introduce evidence of any specific concerns in support of

this condition requiring an additional play area within the development or a rationale for maintaining the application of the regulation to this project. *See White Barn, supra*, No. 2008-05 slip op. at 18 (“existence of the local rule alone is insufficient to demonstrate that it represents a valid local concern, much less to indicate its importance in relation to the need for housing”). Moreover, a review of the Board’s comprehensive permit decision shows that the Board granted West Falmouth’s request to waive Subdivision Regulation §305-26, in its entirety. *See* Exh. 8, p. 25 (Waiver W14).

Thus, we conclude that the Board has not demonstrated a valid local concern requiring the construction of a bus shelter or the play area that outweighs the need for affordable housing. Condition S15 is struck.

4. Sidewalks

Condition O9 requires that West Falmouth “provide an ADA compliant sidewalk along the interior driveway. The sidewalk shall have tactile strips where the driveway intersects with North Falmouth Highway.” Exh. 8, p. 23. West Falmouth suggests that the Board’s characterization of the subdivision road as a driveway, not a roadway, will require the developer to redesign the proposed sidewalk to comply with this condition. Developer brief, pp. 17-18. The Board contends that Condition O9 is consistent with the Town’s Subdivision Regulations for which no waiver was sought. Board brief, p. 12. It points to the Town’s Subdivision Regulations, §§ 305-30 and 305-37, that state “[s]idewalks...shall be required in every subdivision” and “[accessible] curb cuts at intersections shall be provided.” *Id.*, quoting Exh. 14, §§ 305-30 and 305-37.

Relying on Mr. Tabaczynski testimony, West Falmouth argues that the proposed sidewalk complies with the accessibility requirements under the ADA and Massachusetts Architectural Access Board relating to subdivision roads. Developer brief, p. 18; Exh. 58, ¶ 9. Characterizing the roadway into the subdivision as a driveway, West Falmouth claims, would require the developer to install additional access and ADA compliant structures. Developer Brief, p. 18. West Falmouth argues that the Board failed to provide evidence that characterizing the roadway as a driveway and redesigning the proposed sidewalk are supported by local concerns. It requests that this condition be struck.

West Falmouth’s primary objection is the characterization of the accessway as a driveway, which is not compliance with the local subdivision regulations, under §§ 305-30 and

305-37 as suggested by the Board. The comprehensive permit application submitted by West Falmouth describes the proposed project as “developed off of a +/- 660-foot-long private roadway” and provided a preliminary plan titled “Preliminary Road Plan and Profile.” Exhs. 4, p. 2; 6, p. 6. In Mr. Cote’s peer review dated November 20, 2024, he repeatedly characterizes the accessway as roadway. *See* Exh. 52, ¶¶ 6-10, 12-13, 15, 18, 34-35, 37, 41, 44, 45. The evidence supports a finding that the accessway into the proposed subdivision has been characterized as a roadway and that the proposed sidewalk has been designed to comply with state and federal regulations relating to sidewalk specifications along a roadway. This condition would require the developer to redesign the proposed sidewalk to comply with standards associated with a driveway and therefore constitutes an improper redesign of the project. *Lynnfield, supra*, No. 2002-23, slip op. at 14.

Moreover, we require a developer to comply with all non-waived local requirements and regulations in effect on the date of its comprehensive permit application, as well as state and federal requirements. While West Falmouth sought and was granted a partial waiver by the Board under the Town’s subdivision regulations to reduce the width of the proposed sidewalks, it is still required that the sidewalks contain curb cuts at intersections. Exh. 8, pp. 25, 26 (Waivers W16, W20). Accordingly, we modify Condition O9 for clarity to state: The developer shall provide an ADA-compliant sidewalk along the interior roadway. The sidewalk shall have tactile strips where the roadway intersects with North Falmouth Highway. The project roadway shall have vertical curbing on the side with the sidewalk.

C. Landscaping

Condition O3 requires, in relevant part, “[a]ny material substantially diseased or dead shall be removed and replaced with similar sized plants, within two years of the Final Certification of Occupancy, by the developer.” Exh. 8, pp. 21-22.

The Board argues that the landscaping requirement is consistent with the Town’s Zoning Bylaw, § 240-14.3. Board brief, p. 11; Exh. 10, pp. 151-152. This provision of the Zoning Bylaw, the Board claims, “requires filing of a landscape plan, contains performance standards for the landscaping to be provided, and supports inclusion of Condition O3 in the Comprehensive Permit.” *Id.* West Falmouth does not contest the submission of a landscape plan nor compliance with landscaping standards under this bylaw; rather the developer challenges only the two-year

requirement in which the developer must comply with this condition. West Falmouth therefore proposes modifying the terms to a six-month requirement. Developer brief, p. 16.

West Falmouth has not requested a waiver to the Town's Zoning Bylaw, § 240-14.3, but we find that the two-year time period, where the developer must comply with the condition, extends beyond the Zoning Bylaw's requirement. In relevant part, § 240-14.3E requires "[a]ny plants that die or are damaged shall be replaced within 1 year." Exh. 10, p. 153. Furthermore, the Board does not produce testimony or evidence demonstrating a valid local concern for this condition that outweighs the need for affordable housing. Therefore, Condition O3 is modified, in part, to be consistent with the Town's Zoning Bylaw, § 240-14.3E as follows:

Landscaping shall be installed as presented, in accordance with the landscape plan with all plant materials maintained in good health. Any invasive vegetation shall be removed. Any material substantially diseased or dead shall be removed and replaced with similar sized plants, within one year of the Final Certification of Occupancy, by the developer....

D. Dwelling Height

Condition G14 requires that "[t]he maximum height of the dwellings shall not exceed 30 feet." Exh. 8, p. 5. The Board argues that Condition G14 "does not pose any impediment whatsoever to the [d]eveloper's proposed construction and instead memorializes the dimensions of the [d]eveloper's own proposal." Board brief, p. 9. The evidence shows that the proposed development will consist of 3-bedroom dwellings less than 30 feet in height. Exh. 7. Ms. Stockman testified that the Board has a standard practice of conditioning the height of the proposed units in accordance with the developer's proposal. Exh. 63, ¶ 6, p. 3. West Falmouth responds that the maximum building height within the SR-B district is 35 feet, and by limiting the maximum height of the dwellings to 30 feet, the developer remains subject to a condition that is more restrictive than the Town's Zoning Bylaw. It argues that the preliminary plans submitted with its comprehensive permit application are preliminary in nature and that the terrain will change after the project site becomes leveled, thereby altering the height of the proposed dwellings. Developer brief, pp. 12-13. Thus, West Falmouth claims that allowing dwelling units 35 feet in height, as provided in the Bylaw, provides the developer "a safety net for as-built height differentials." *Id.*

The Board provides no evidence that this Town practice of conditioning the maximum height of a building to reflect a developer's proposal has been codified or published. Nor has the

Board presented evidence as to when the practice began or specific projects where the practice had been carried out. On this record, the Board failed to prove that this unwritten rule is a valid local regulation or requirement. *See 383 Washington Street, LLC v. Braintree*, No. 2020-04, slip op. at 18 (Mass. Housing Appeals Comm. Mar. 13, 2022), *aff'd* No. 23-P-1213, Mass. App. Ct. June 18, 2025 (finding board failed to show fire chief's unwritten practice of requiring fire access on three sides of a building was a valid local rule or regulation as it amounted to "unbridled discretion" to effectively deny a comprehensive permit); *41 Tusnua LLC v. Newton*, No. 2024-13, slip op, 13 (Mass. Housing Appeals Comm. April 30, 2026) (determining board did not demonstrate that the city's unwritten and discretionary rule constituted a valid local requirement or regulation). Accordingly, Condition G14 is struck.

D. Other Conditions and Waiver Denials

The Board's brief makes no argument regarding a local concern to support the following conditions and denials of waiver requests:

- Condition G9 (requiring the developer to seek additional permits and approval from the Board of Health and Conservation Commission);
- Condition G20 (regarding the requirement that I/A septic systems be installed for all affordable units);
- Condition G21 (prohibits market rate units from seasonal and short-term rentals and requires any rental of a market rate unit for a period of at least one year);
- Waiver W11 (prohibiting the narrowing of the street layout from 60 feet in width);
- Waiver W12 (denying extending the dead-end street within the proposed development to 664 feet); and
- Waiver 23 (disallowing shared septic systems).

It is incumbent on parties to provide the Committee with appropriate legal arguments in their briefs relating to any legal issues they ultimately wish the Committee to address in its decision. Moreover, that argument, to be adequate in assisting us in our consideration of their positions, must specifically reference the relevant evidence in the record, including appropriate citations to pertinent legal authorities and an analysis of those authorities. Because the Board failed to brief the legal arguments regarding the local concerns for above conditions and waiver denials, the Board has waived any argument that they are supported by local concerns that that outweighs the need for affordable housing. *See e.g. Falmouth Hospitality, supra*, No. 2017-11,

slip op. at 38, and cases cited. *See Okoli v. Okoli*, 81 Mass. App. Ct. 371, 378 (2012); *Lolos*, 338 Mass. 10, 14 (right of party to have point considered entails duty to provide assistance with argument and appropriate citation of authority). Therefore, Conditions G9 and G20 are struck. Waivers W11, W12 and W23 are granted. Condition G21 is modified pursuant to our discussion in § VI.B, *infra*.

VI. LAWFULNESS OF THE BOARD'S CONDITIONS

In *Amesbury*, the Supreme Judicial 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.” 457 Mass. 748, 749. The *Amesbury* court also stated, “insofar as the board’s . . . 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.” *Id.* at 758.

West Falmouth identified in the Pre-Hearing Order several conditions as unlawfully extending beyond the Board’s authority to impose and otherwise violating Chapter 40B, §§ 20-23. *See* Pre-Hearing Order, § IV.A.3. For conditions challenged on unlawful grounds, the developer is not required to make a preliminary showing that such conditions, individually or in aggregate, render the project uneconomic. To the extent that conditions are inconsistent with law or the comprehensive permit regulations, or interfere with the authority of the subsidizing agency, we strike or modify them, as appropriate. *See LeBlanc v. Amesbury*, No. 2006-08, slip op. at 7-8, App. at 17 (Mass. Housing Appeals Comm. Ruling Sept. 27, 2017).

A. Conditions Within the Province of the Subsidizing Agency

Condition G19: To the extent permitted by law, preference for the sale of affordable dwellings shall be given to homebuyers that are Falmouth residents, employees of the Town, employed within the Town, or who have children attending Town schools. The Applicant shall work with the Housing Coordinator to communicate with the State, and shall provide the required lottery information for the affordable units.

While West Falmouth does not object, in principle, to a local preference, it challenges the language in the condition to the extent that it conflicts with requirements set forth by the subsidizing agency. Developer brief, p. 14. The developer therefore requests modifying

Condition G19 to state: “preference for the sale of affordable dwellings shall be given to homebuyers that are Falmouth residents, employees of the Town, persons employed within the Town or persons who have children attending Falmouth schools, to the extent that such preferences are permitted by EOHLC guidelines.” *Id.* The Board argues that it is permissible under comprehensive permit guidelines, § III.D, to impose a condition requiring a local preference for affordable units, subject to the requirements set forth in the guidelines. Board brief, p. 10; Exh. 45, § III.D, p. III- 6, 7.

The subsidizing agency is the final arbiter of whether local preference requirements comply with requirements of the Executive Office of Housing and Livable Communities (EOHLC). *Falmouth Hospitality, supra*, No. 2017-11, slip op at 43; *Way Finders, supra*, No. 2017-13, slip op at 37. In *Simon Hill*, 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.” *Simon Hill v. Norwell*, No. 2009-07, slip op. at 40 (Mass. Housing Appeals Comm. Oct. 13, 2011). All specifics of a local preference requirement are within the exclusive jurisdiction of the subsidizing agency but nevertheless, the language in this condition is not inconsistent with the subsidizing agency’s authority, and Condition G19 is modified to provide that it is subject to the requirements of the subsidizing agency and applicable law. *See, e.g., LeBlanc, supra*, No. 2006-08, slip op., App. at 12, 26, 27.

B. Conditions Beyond the Board’s Authority

Condition G8: Any deviation, no matter how minor, from plans submitted and approved, shall be submitted to the Zoning Board of Appeals for approval, prior to implementation of said change.

The Board argues that this condition remains consistent with the comprehensive permit regulations, 760 CMR 56.05(11). Board brief, p. 8. We disagree, finding that this condition is vague, ambiguous and mischaracterizes 760 CMR 56.05(11)¹⁵ and is therefore improper. *See Falmouth Hospitality, supra*, No. 2017-11, slip op. at 56; *VIF II/JMC Riverview Investment Partners, LLC v. Andover*, No. 2012-02, slip op. at 13-14 (Mass. Housing Appeals Comm. Feb.

¹⁵ Section 56.05(11) states:

- (a) A [developer that] desires to change the details of its Project as approved by the Board or the Committee, it shall promptly notify the Board in writing, describing such change. Within 20 days the Board shall determine and notify the Applicant whether it deems the change substantial or insubstantial...
- (b) If the change is determined to be insubstantial..., the Comprehensive Permit shall be deemed modified to incorporate the Change.

27, 2013) (modifications must be evaluated within framework established by the regulations). This condition is struck and any requested modifications to the comprehensive permit shall be subject to the provisions of 760 CMR 56.05(11).¹⁶

Condition G11: This permit shall lapse three (3) years from the date on which this decision is filed in the Town Clerk's office, if a substantial use of the Comprehensive Permit has not sooner commenced, except for good cause, as determined by the Zoning Board of Appeals.

West Falmouth contends that this condition is unfair because it does not account for the time period in which the comprehensive permit would be under appeal and requests the language be revised to state the permit “shall lapse three years from the date that the Town Clerk issues a Comprehensive Permit with a certificate that no appeals are pending.” Developer brief, pp. 11-12. The Board claims that this condition “requires that the [d]eveloper commence substantial use of the Comprehensive Permit within three (3) years,” and is consistent with the regulations, 760 CMR 56.05(12)(c). Board brief, p. 8.

This condition mischaracterizes the requirements of 760 CMR 56.05(12) regarding finality and lapse of permits and is therefore in violation of the regulations. 760 CMR 56.05(12)(c). Accordingly, Condition G11 is struck. *See* 760 CMR 56.05(12); *White Barn, supra*, No. 2008-05, slip op. at 41-42.

Condition G20: I/A septic systems shall be installed for all affordable units.

The developer argues that this requirement is based on the Town’s Board of Health regulation that became effective after the filing date of the comprehensive permit application and should be removed. Developer brief, p. 9. This health regulation, West Falmouth claims, was adopted by the Town’s Board of Health in October 2025 and it would require all new construction to install I/A septic systems in areas designated by the Board of Health. *Id.*; Tr. I, 43. The Board concedes that this health regulation was not in effect at the time the developer filed its comprehensive permit application and did not brief the issue. Tr. I, 17.

¹⁶ West Falmouth did not challenge Condition G8 as unlawful, however, the Committee has the authority to strike unlawful conditions that conflict with our regulations. *Riverview Properties, supra*, No. 2021-9, slip op. at 28, citing *Simon Hill, supra*, No. 2009-07, slip op. at 44 n.20; *Leblanc, supra*, No. 2006-08, slip op. at 5.

West Falmouth’s comprehensive permit application was filed March 29, 2024, and the local health regulation at issue was not in effect until October 2025. The comprehensive permit regulations require the developer to comply only with local requirements in effect as of the date of the application to the Board. 760 CMR 56.02; *Amesbury, supra*, No. 2006-17 slip op. at 11. In any event, we have already struck this condition as unsupported by local concerns.

Condition G21: The Homeowner documents and rules and regulations of the master deed shall provide that only market rate units may be rented for a minimum one-year period if rental is allowed, with no seasonal or short-term rentals. Affordable units must remain owner occupied.

West Falmouth agrees to prohibit the use of market-rate units as short-term rentals; however, it contests the reference to a “master deed.” Because the proposed development is not a condominium development, West Falmouth states that any homeowner association rules and regulations would not be set forth within a master deed. Therefore, West Falmouth requests striking any reference to the “master deed” in Condition G21 and further modifying this condition. Developer brief, p. 15.

Because this is a single-family development, not a condominium project, a master deed requirement is inapplicable. *Leblanc, supra*, No. 2006-08, slip op. at 11, App. at 11, 18, 55. While this reference was likely a typographical error, we strike the reference to a “master deed” and modify, at the developer’s request, the condition to state that “the Homeowner documents shall provide that the market-rate units may be rented only once during any calendar year.” Developer brief, p. 15

Condition B1(4): The [developer] is required to provide . . . Homeowner documents, including Master Deed and Rules and Regulations.

The parties agreed to delete the reference to any “Master Deed.” Developer brief, p. 16; Board Brief, p. 11. Accordingly, “Master Deed” is stricken from this condition.

Condition O3: Fencing may be required as part of any retaining wall to ensure the safety of children, based on the height, as reviewed by the Building Commissioner.

West Falmouth challenges Condition O3 as unlawful and “seeks to retain the right to construct fencing... to promote safety or provide privacy screening for the development...within the parameters of the State Building Code.” Pre-Hearing Order, § IV.A.3. West Falmouth requests this condition be modified to state that “[f]encing shall be installed on any retaining wall in compliance with the Massachusetts Building Code.” Developer brief, p. 17. The developer

contends, citing Mr. Tabaczynski's testimony, that the proposed retaining walls would be required to comply with the Massachusetts State Building Code. Exh. 64, p. 2. However, the developer provided no argument on how this requirement falls outside the Board's authority to impose as an unlawful condition. Thus, this requirement is retained and is subject to Conditions 1 and 5 in § VIII, *infra*.

Waivers: Waiver W23: West Falmouth sought a waiver from Falmouth Health Regulation, FHR 15.2(1), to allow shared septic systems on a separate lot or within the private road. *See* Exh. 9, p. 1. West Falmouth claims the Board unnecessarily denied this waiver, despite its authority to waive the Town's Health Regulations. Developer brief, p. 30; *see* 760 CMR 56.02: *Local Board*. The Board provided no specific argument in its briefing. We agree with the developer. In *Falmouth Hospitality*, we noted that "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 . . . with 760 CMR 56.05(10)(b).'" *Falmouth Hospitality, supra*, No. 2017-11, slip op. at 50, citing 760 CMR 56.05(10)(c). In any event, we have already granted this waiver as unsupported by local concerns.

VII. UNEQUAL TREATMENT

General Laws, chapter 40B, § 20 provides that local requirements and regulations cannot be deemed "consistent with local needs" unless they are "applied as equally as possible to both subsidized and unsubsidized housing." *See also* 760 CMR 56.07(2)(a)4. There is no shifting burden of proof on this issue. *Avalon Cohasset, Inc v. Cohasset*, No. 2005-09, slip op. at 8 (Mass. Housing Appeals Comm. Sept. 18, 2007). West Falmouth, as the appellant, carries the burden of proving unequal treatment and the Board may present evidence to rebut the developer's proof. 760 CMR 56.07(2)(a)4.

In the Pre-Hearing Order, West Falmouth alleged that numerous conditions constituted unequal treatment; however, most of those challenged conditions are not addressed outside of the Pre-Hearing Order. *See* Pre-Hearing Order, § IV.A.2. Simply listing a condition in the Pre-Hearing Order, without providing further argument in briefs, is insufficient to establish unequal treatment by the Board. *Weiss Farm, supra*, No. 2014-10, slip op. at 82; *see Riverview Properties, supra*, No. 2021-9, slip op. at 15 and cases cited. Accordingly, West Falmouth's

arguments as to unequal treatment of its subsidized project are waived for the following conditions that are not specifically addressed in briefing: Conditions G2, G7, G8, G16, G18, G20, G21, S3, S4, B5, O3, O5, O9, W3, and W5.

To the extent West Falmouth has provided specific arguments, we discuss those conditions below.

West Falmouth argues that Condition G14, limiting the maximum height of each proposed dwelling to 30 feet, subjects it to unequal treatment on the basis that the Town's Zoning Bylaw permits a maximum dwelling height in the Single Residence B District of 35 feet. Developer reply, p. 13; *see* Exh. 10, § 240 – 11.5. West Falmouth further states, without providing evidence of other permits for comparison, that “clearly all other developments or single-family homes within the Town of Falmouth have been permitted to a height of 35 feet.” *Id.*

Ms. Stockman testified that the developer's proposed plans depicted dwelling heights of either 27 feet, 10 inches or 29 feet, 9 inches. She further testified that the Board “has a standard of practice of conditioning height consistent with the [developer's] proposal.” Exh. 63, ¶ 6. Thus, the Board counters that limiting each dwelling's height to 30 feet memorializes the dimensions of the proposed units as shown in the developer's proposal. Board brief, p. 9. The Board further argues that West Falmouth presented no testimony for the assertion of unequal treatment and failed to provide evidence of unsubsidized housing developments that have not been held to this requirement. *Id.*, p. 4. We agree with the Board that the evidence does not support the finding of unequal treatment and therefore this challenge to Condition G14 fails. *See Weiss Farm, supra*, No. 2014-10, slip op. at 84 (finding there had been no unequal treatment where developer provided no documentation for assertion and failed to identify other specific developments not held to restriction). In any event, we have struck this condition as unsupported by local concerns.

Condition G17 requires each unit to have a 32-inch-wide doorway for the first-floor bedroom and bathroom. Exh. 8, p. 16. West Falmouth argues that the Board imposed the 32-inch doorway requirement based upon the Board's incorrect reading of the proposed floor plans to depict a 32-inch interior doorway. It claims imposing a condition not reflected in the developer's plans constitutes unequal treatment because

“the [p]roject is being treated differently than other projects.” Developer reply, p. 13. The Board states the 32-inch doorway requirement is based on the developer’s proposed plans. Board brief, p. 9, citing Exh. 7. It further responds that West Falmouth has failed to provide evidence showing other unsubsidized projects in Falmouth did not have this restriction. *Id.*, 4.

West Falmouth’s arguments are unconvincing, and we agree with the Board that the evidence does not support the finding of unequal treatment. Therefore, this challenge to Condition G17 fails. We have already struck this condition as unsupported by local concerns.

West Falmouth claims that Condition S15 requires the developer to build a “play area” for the development, in addition to the already proposed recreational area. Developer reply, p. 14. To require the developer to construct both areas, the developer argues it “would be treating the Applicant differently under the subdivision regulation than the Town has implicitly treated other developments.” *Id.*, p. 15. The developer has provided no evidence of unsubsidized housing developments that were not held to this requirement and thus, we cannot find Condition S15 constitutes unequal treatment. We have already struck this condition as unsupported by local concerns.

VIII. CONCLUSION AND ORDER

1. Based upon review of the entire record, and upon the findings of fact and discussion above, the Housing Appeals Committee affirms the granting of a comprehensive permit but concludes that certain of the conditions imposed and waiver requests denied in the decision of the Board exceed the authority of the Board, render the construction or operation of the project uneconomic and are not consistent with local needs. 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 also subject to the following conditions. 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 also be subject to the following conditions:

- a. The Development, consisting of 20 total units, including 5 affordable units, shall be constructed as shown on the site plans set out in and prepared by Atlantic Design Engineers, LLC, revised through December 17, 2024 (Exhibit 6), and shall be subject to those conditions and requirements imposed in the Board's decision filed with the Falmouth Town Clerk on January 13, 2025 (Exhibit 8), as modified by this decision.
- b. The Board shall not include new, additional conditions.
- c. The Board's decision is modified to provide that the developer is required to comply with all applicable non-waived local requirements and regulations in effect on the date of West Falmouth's submission of its comprehensive permit application to the Board, consistent with this decision pursuant to 760 CMR 56.02: *Local Requirements and Regulations*.
- d. The developer shall submit final construction plans for all buildings, roadways, stormwater management systems, 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 West Falmouth'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 a building permit and other permits are issued to West Falmouth, 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 EOHLC 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

July 16, 2026

Lisa V. Whelan

Lisa V. Whelan, Chair

Lionel G. Romain

Lionel G. Romain

James G. Stockard, Jr.

James G. Stockard, Jr.

Alexandra Noonan

Alexandra C. Noonan, Presiding Officer