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

RIVER STONE, LLC

v.

HINGHAM ZONING BOARD OF APPEALS

No. 2016-05

DECISION

September 23, 2022

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

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

RIVER STONE, LLC, Appellant,	)	
v.	)	No. 2016-05
HINGHAM ZONING BOARD OF APPEALS, Appellee.	)	

DECISION

I. INTRODUCTION AND PROCEDURAL BACKGROUND

This is an appeal, pursuant to G.L. c. 40B, § 22, of a decision by the Town of Hingham Zoning Board of Appeals (Board) granting a comprehensive permit with conditions to River Stone, LLC (River Stone or developer). It is the final appeal before the Housing Appeals Committee regarding the proposed development that is the subject of the comprehensive permit. On March 29, 2016, River Stone applied to the Board for a comprehensive permit to build a development consisting of 36 for sale condominium units on 6.7 acres off Ward Street in Hingham, Massachusetts. Exhs. 1, 7. After the Board opened its hearing on April 27, 2016, it invoked the housing unit minimum safe harbor under G.L. c. 40B, § 20 and 760 CMR 56.03(3)(a). River Stone notified the Board and the Department of Housing and Community Development (DHCD) of its objection to this determination, and the hearing before the Board was suspended pending the determination of the safe harbor issue. DHCD thereafter issued a letter that Hingham was not entitled to the safe harbor. The Board filed an interlocutory appeal

with the Committee pursuant to 760 CMR 56.03(8)(c). After hearing, the Committee denied the appeal on October 31, 2017 and we remanded the matter to the Board for further proceedings.[1]

The Board's hearing resumed, with the Board holding numerous sessions, concluding on June 25, 2018. During that hearing, River Stone revised its proposal, reducing the total number of units from 36 to 32. Exh. 1, pp. 2-3. By decision filed with the town clerk on August 6, 2018, the Board granted a comprehensive permit subject to numerous conditions. Exh. 1.

On August 24, 2018, River Stone filed the current appeal with the Committee.[2] A conference of counsel was held on September 27, 2018. At the conference, counsel for the developer advised that a recent Land Court decision addressing its rights to use the proposed accessway to the project might require it to modify its proposal. River Stone thereafter filed a notice of project change and request for determination of insubstantiality, which the Board opposed. The presiding officer ruled that the proposed change was insubstantial pursuant to 760 CMR 56.07(4). The parties then negotiated a pre-hearing order, which the presiding officer issued on June 8, 2020.

In preparation for hearing, the parties submitted pre-filed direct testimony of 14 witnesses and proffered 114 exhibits for admission into evidence. River Stone filed motions to strike the testimony and related exhibits submitted by Board witness Patrick Brennan and to strike Exhibit 111, a purported update to the Town's subsidized housing inventory. The Board opposed both motions.[3] In October 2020, the Committee conducted a site visit and four days of hearing to permit cross-examination of witnesses. The parties thereafter submitted briefs and reply briefs. At the conclusion of the hearing, the presiding officer asked the parties to review the decision's conditions and indicate the conditions still in dispute for determination by the Committee. The parties were able to negotiate many of the previously disputed conditions and reach an agreement

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[1] *See Matter of Hingham and River Stone, LLC*, No. 2016-05 (Mass. Housing Appeals Comm. Decision on Interlocutory Appeal October 31, 2017) (*Hingham I*).

[2] It was during the current appeal of the comprehensive permit decision that River Stone identified Robert Engler as one of its anticipated expert witnesses. Pursuant to Housing Appeals Committee Standing Order 2005-02, the presiding officer, by order dated July 13, 2020, directed River Stone to file a statement explaining the relationship of Mr. Engler to the proposed project at issue. After reviewing the submissions, Committee member James G. Stockard has declined to recuse himself from consideration of this matter.

[3] We address these motions below in § III.

on them. These, and the remaining disputed conditions for which the parties are requesting Committee determination under 760 CMR § 56.07(2), are reflected in proposed Exhibits 115 (redline) and Exhibit 116 (clean), which are hereby admitted into evidence. We accept the modifications of the agreed-upon conditions and incorporate them into this decision. *See* § VII.A below. We therefore address only those conditions remaining in dispute as argued by the parties and, unless otherwise modified by this decision, modifications to the disputed conditions that have been agreed upon by the parties as shown in Exhibits 115 and 116, are accepted and incorporated into this decision.

II. FACTUAL BACKGROUND

River Stone received a determination of project eligibility dated March 16, 2016 under the New England Fund Program, fulfilling the project eligibility requirements of 760 CMR 56.04(1). Exh. 7, p. 18; Pre-Hearing Order, § II.3.

The proposal River Stone presents for appeal is a 32-unit ownership condominium development with eight low or moderate income units. The property, located off Ward Street in the Residence B zoning district, includes multiple parcels of land with a combined area of 6.7 acres. The project site primarily consists of areas of open and wooded space. It is bisected by Viking Lane, a partially constructed subdivision road. The proposal includes two access points from Ward Street to the project: Road C as primary access and Viking Lane as a secondary, emergency access.[4] Plans show a total of 142 parking spaces, including 14 spaces designated for visitors, and a nearby mail kiosk. Exhs. 1, 7. An existing single-family home on a portion of the property will be razed. The proposed structures are townhouse style, dispersed among 12 buildings, which include one to four units each. Attached two-car garages are included with each unit.

Two of the buildings and portions of an expanded stormwater management facility will be located within the 50-foot buffer to on-site bordering vegetated wetlands (BVW). These improvements, as well as a portion of a third building and Road C, are within the 100-foot buffer to the BVW. The project site is bounded by residential properties to the north; Ward Street and

[4] The issue of access was the subject of a Land Court proceeding in which the court issued a decision after this appeal was filed determining that River Stone lacked rights to Autumn Circle, its formerly intended access. As a result, the developer filed a notice of project change to reconfigure access, and a request for determination of insubstantiality, which was granted by the presiding officer. Pre-Hearing Order § III.2.c.

residential properties to the south; residential properties and low-lying wetland areas to the east; and Ward Street and residential properties to the west. Surrounding residential properties consist of primarily one and two-story single-family dwellings. The project provides for a shared "wastewater collection system [to] convey sewage flows to an on-site wastewater treatment plant and soil absorption system." Exh. 3, p. 3; *See* Exh. 1.

III. MOTIONS TO STRIKE

A. Portions of Testimony of Mr. Brennan and Related Evidence

River Stone moved to strike the testimony and related Exhibits B and C attached to Mr. Brennan's pre-filed testimony addressing alternative 24- and 27-unit plans he prepared, as well as all references thereto in his and other witnesses' testimony. As grounds therefor, River Stone alleges that such testimony is an improper attempt to redesign the project and an improper attempt to waive regulations after the issuance of the Board's decision to thwart the developer's evidence on uneconomic aspects of the project. The Board opposes the motion on the ground that Mr. Brennan's testimony and exhibits are in direct rebuttal to River Stone's claim that it can only build 19 units and, as a result, the project is uneconomic.

Mr. Brennan's testimony and the challenged exhibits and testimony were proffered regarding the issue of whether the Board's condition cumulatively limit the project to 19 units. The Committee, as an administrative body, has discretion to admit testimony that would not be appropriate in a court, *see* G.L. c. 30A, § 11(2), although the credibility and weight assigned to such testimony is a matter for the Committee. Unless the inclusion of testimony such as that challenged here is prejudicial, we are reluctant to strike such pre-filed testimony and exhibits. For these reasons, none of Mr. Brennan's testimony or exhibits, or testimony of other witnesses referencing such testimony or exhibits, will be struck. The parties have had ample opportunity to address their credibility in their post-hearing briefs.

B. Updated Subsidized Housing Inventory (Exhibit 111)

River Stone moved to strike Exhibit 111, a purported update of the Town's subsidized housing inventory, based upon 760 CMR 56.03(1)(a), which states that the DHCD subsidized housing inventory (SHI) is fixed as of the date of the comprehensive permit application to a board, not as of the date of the hearing before the Committee. Further, River Stone states that it

had not had the opportunity to verify the facts contained in Exhibit 111 before the hearing. The Board argues that the Town's most recent SHI is relevant to the presentation of its case on the weighing of local concerns and the need for affordable housing.

With regard to Exhibit 111, the Board argues it is not introducing it to establish that the Town has met the statutory minimum safe harbor established in G.L. c. 40B, § 20, but rather as evidence of the need for affordable housing in Hingham. Pursuant to 760 CMR 56.07(3)(b), to rebut the presumption that a substantial need for affordable housing outweighs local concerns, a board must produce evidence of the regional need for low and moderate income housing considered with the number of low income persons in a municipality affected. Exhibit 111 is a purported update by DHCD of the Town's subsidized housing inventory as of July 30, 2020, which, the Board argues, demonstrates that Hingham has increased its affordable housing stock. The Board points to this document as one piece of evidence that shows the local concern outweighs the housing needs. Board brief, p. 33-34.[5]

River Stone argues that the Board's attempt to introduce evidence related to Hingham's affordable housing stock, whether pre- or post-application, is insufficient to rebut the presumption of substantial housing need. It argues that the Board produced no evidence related to the regional need for housing or low income persons in Hingham nor did it produce evidence that housing need for purposes of the hearing in this matter are different than as represented through the SHI at the time of the project application.

The comprehensive permit regulation provides that that the SHI is fixed as of the date of application, not as of the date of the Committee hearing. Consistent with 760 CMR 56.03(1)(a), we rule that the evidence of the regional need for affordable housing is similarly to be viewed as of the date of the developer's application to the Board.[6] *See also* 760 CMR 56.07(3)(b). We

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[5] The Board also presented testimony regarding other subsidized housing developments in Hingham that have been approved but the testimony was generally focused on the approval process, not the affordability of the units or their eligibility for inclusion on the Town's SHI. Tr. IV, 80-84.

[6] *See Matter of Hingham and AvalonBay Communities, Inc.,* No. 2012-03, slip op. at 6 n.8 (Mass. Housing Appeals Comm. Jan. 14, 2013) (noting that a regulatory change promulgated February 22, 2008 to make application date operative date overturned prior rule established in *Casaletto Estates, LLC v. Georgetown*, No. 2001-12 (Mass. Housing Appeals Comm. May 19, 2003) and incorporated into prior comprehensive permit regulation). *See also Matter of Hingham and River Stone, LLC,* No. 2016-05, slip op. at 6 n.7 (Mass. Housing Appeals Comm. Oct. 31, 2017).

therefore now hold that evidence of progress toward the Town's housing goals occurring after the date of the comprehensive permit application similarly is not relevant to the balance of the housing need against valid local concerns.[7] Exhibit 111 is struck.

IV. LAWFULNESS OF THE BOARD'S CONDITIONS

In *Zoning Bd. of Appeals of Amesbury v. Housing Appeals Comm.*, 457 Mass. 748 (2010), 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." *Id.* at 749. An additional review the Committee takes is to consider claims by the developer that some of the conditions imposed by the Board are outside of its authority under *Amesbury*. For those conditions, a preliminary finding that the condition contributes to rendering the project uneconomic is not necessary, and only the lawfulness of the condition is considered.

A. Conditions Challenged as Unlawful

1. Landscaping Plans: Condition C.1(j)(i)

> C.1(j)(i): Detailed landscaping plan, including materials list specifying planting size and species, including a minimum of one roadway tree, not less than 12' in height, per unit on each side of the internal roadways. A minimum of four (4) roadway trees shall additionally be planted along the Project's southerly Ward Street frontage. Roadway trees shall not be less than twelve feet in height and of a species selected from the Hingham Shade Tree Committee's list of "Deciduous Tree Recommendations," revised Winter 2018. If the Applicant determines that such Recommendations are overly restrictive, Applicant shall submit proposed alternative, noninvasive roadway trees to the Zoning Administrator for review. A mix of evergreen and deciduous trees, shrubs, and other plantings shall be shown on a portion of the former Viking Lane between the three visitor parking spaces and the Project's northerly Ward Street frontage.

River Stone argues that this condition is based on Hingham regulations that became effective after the filing date of the application and should be removed, citing *Attitash Views, LLC v. Amesbury*, No. 2006-17 slip op. at 11 (Mass. Housing Appeals Comm. Oct. 25, 2007), *aff'd, Amesbury, supra,* 457 Mass. 748. The Board argues that the plans submitted by River

[7] The Board offered no argument regarding how the information contained in Exh. 111 should be weighed against the need for affordable housing in Hingham.

Stone during the hearing provided insufficient information and this condition simply requires a detailed landscaping plan. The Board cites *John Owens, et al. v. Belmont*, No. 1989-12, slip op at 11 (Mass. Housing Appeals Comm. June 25, 1992), arguing that, in that case, the Committee addressed insufficient landscape plans and imposed a new condition requiring the developer to submit a detailed landscaping plan signed by a registered architect showing the location of trees, shrubs and other plantings. *Id*. at 17. Board brief, p. 32. The Board, however, does not address River Stone's allegation that the condition is based upon regulations not in effect at the time of the application. River Stone's application was filed in March 2016 and the condition references the 2018 list of recommended trees. There was no evidence submitted that such a list was in effect in 2016, if so, if it was significantly different from the 2018 list. In accordance with 760 CMR 56.02 and *Attitash*, the developer need only comply with local requirements in effect as of the date of the application to the Board. Accordingly, Condition C.1(j)(i) is revised to require compliance with the Hingham Shade Tree Committee's list of "Deciduous Tree Recommendations" in effect as of the date of the application, if any such list was in existence at that time. If there was no such list in existence at that time, the developer shall consider and may choose to comply with a list of recommended trees provided by the Zoning Administrator.

2. **Wetlands Resource Area Protection: Condition C.1(b)**

River Stone argues that Condition C.1(b) was imposed based upon the results of an independent wetlands scientist report for which a fee of $1,500 was improperly charged to River Stone. River Stone argues it should be refunded or credited that amount toward additional peer review costs based upon 760 CMR 56.05(5)(b)(1) and *Zoning Bd. of Appeals of Sunderland v. Sugarbush Meadow, LLC*, 464 Mass. 166, 190 (2012). Developer brief, p. 48. *See* Exh. 27.

The Board argues that it is permitted to engage peer review consultants and it engaged the wetlands scientist to determine whether River Stone had accurately delineated the wetland boundary. The fee should not be refunded, the Board argues, because River Stone has not provided any evidence that the study was an "independent study." Board reply, p. 30-31. Further, the Board argues it engaged Mr. Zimmer to undertake peer review of the plans submitted by River Stone to determine whether River Stone's expert had accurately delineated the wetland boundary and identified all wetland resources within 100 feet. Board reply, p. 31. In an email exchange between Emily Wentworth, Senior Planner in Hingham, and River Stone's counsel, Ms. Wentworth indicated that the Board had received a peer review proposal from Mr.

Zimmer, which included field verification work. Exh. 30.

The comprehensive permit regulation, 760 CMR 56.05(5) authorizes the Board to employ outside consultants chosen by the Board where such expertise is not available within the municipality, as long as the work of the consultant consists of review of studies prepared on behalf of the applicant. Unlike *Sunderland*, this is not a case where the Board imposed a condition requiring an applicant to pay the board's legal fees, and, in contrast to legal fees, peer review fees are generally permitted to be assessed. *See Pyburn Realty Trust v. Lynnfield,* No. 2002-23, slip op. at 22-24 and n.15 (Mass. Housing Appeals Comm. Mar. 22, 2004) ("consultant" as used in statute is to provide "testimony" or "explanation" on technical aspects of proposed project to assist board in determining if project is consistent with local needs). Mr. Zimmer testified that he was retained by the Board "to serve as their Wetland Scientist in conjunction with the ZBA's review of the [project]." In conjunction with his review, he testified that he prepared comment letters, conducted field reviews of the site and reviewed the comprehensive permit plans prepared by River Stone. Exh. 93, ¶ 6-9.

We agree with the Board that, in light of the technical nature of the issue, it was reasonable for the Board to engage a consultant to do field verification of wetlands delineations and review the wetland and other environmental conditions shown on the comprehensive permit plans. Further, as the Board possesses the same power as any local board or official who would act with respect to an application, the Board may employ a consultant in the same manner as the Conservation Commission would under its Wetlands Bylaw. Exh. 84; *see Board of Appeals of Hanover v. Housing Appeals Comm*., 363 Mass. 339, 354 (1973). Accordingly, we decline to order a refund of the disputed fee.

B. Post-Permit Review

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

Hopkinton, No. 2002-02, slip op. at 22 (Mass. Housing Appeals Comm. Jan. 26, 2004) (allowing condition for submission of additional plans concerning issues not addressed in preliminary plans submitted with comprehensive permit application as long as they do not require further hearing and approval by Board, but entail only approval by town official who customarily reviews such plans). Our precedents, as well as 760 CMR 56.05(10)(b), "permit technical review of plans before construction, and routine inspection during construction, by all local boards or, more commonly, by their staff, e.g., the building inspector, the conservation administrator, the town engineer, or a consulting engineer hired for the purpose. Such review ensures compliance with the comprehensive permit, state codes, and undisputed local restrictions, as well as any conditions included in the final written approval issued by the subsidizing agency." *Attitash, supra*, No. 2006-17, slip op. at 12; *Roger LeBlanc v. Amesbury,* No. 2006-08, slip op. at 7-8 (Mass. Housing Appeals Comm. Sept. 27, 2017 Ruling) (*LeBlanc II*).

A fundamental purpose of G. L. c. 40B, §§ 20-23, is to "expedite action on such applications where previously a builder might have suffered delays of months and even years in negotiating approvals from various boards." *Dennis Housing Corp. v. Zoning Bd. of Appeals of Dennis*, 439 Mass. 71, 78 (2003); *Standerwick v. Zoning Bd. of Appeals of Andover*, 447 Mass. 20, 28-29 (2006) (legislative intent of Chapter 40B is to "promote affordable housing by minimizing lengthy and expensive delays occasioned by court battles commenced by those seeking to exclude affordable housing from their own neighborhoods"). For this reason, it is important that the review for consistency with the permit be made by those with necessary expertise to perform the task expeditiously. This will also facilitate efficient use of municipal resources. As we previously stated in *Falmouth Hospitality, LLC v. Falmouth,* No. 2017-11, slip op. at 50 (Mass. Housing Appeals Comm. May 15, 2020), the "Board shall have the same power to issue permits or approvals as any Local Board which would otherwise act with respect to an application," 760 CMR 56.05(10)(a), and it "may issue directions or orders to Local Boards designed to effectuate the issuance of a Comprehensive Permit ... and the construction of the Project, in accordance with 760 CMR 56.05(10)(b). 760 CMR 56.05(10)(c). Nevertheless, the conditions must be consistent with 760 CMR 56.05(10)(b), which requires all local boards to "take all actions necessary" to ensure consistency with the comprehensive permit.

The role of the Board at this stage, as articulated in § 56.05(10)(c), is to issue directions or orders to local boards, or more typically, local officials who act for these boards, to expedite

the construction of the project. Review by the relevant local board allows the officials with the most expertise to issue permits, consistent with the requirement of expedition, and avoids the delays that would occur if the Board itself were to review each subsidiary application and render each such determination. This local official may consult with other town officials, including the Board, when they believe that such consultation will assist their review of submissions; but it is not the role of the Board to oversee construction. Generally, such oversight is by the municipal officials who have the relevant experience and authority, including the building department. Rather than completely prohibiting the Board taking this role on, however, we generally have allowed it to do so if it is the entity with the appropriate expertise, such as with regard to zoning matters. *See Falmouth*, *supra*, No. 2017-11, slip op. at 50–51.

Conditions A.4 and B.6

> Condition A.4: The Applicant shall copy the Zoning Administrator and the Building Commissioner on all material correspondence between the Applicant and any federal, state or Town official, board or commission that concerns the conditions set forth in this Comprehensive Permit.
>
> Condition B.6: The Applicant shall provide the Zoning Administrator with up to $10,000 to support consultant review of the Project Plans to confirm compliance with the conditions of this Comprehensive Permit, including Condition c.3, and as-built plans, and such additional peer review funds as may be determined to be necessary by the Zoning Administrator in accordance with Condition A.6. This condition is not a limitation on Applicant's other peer review expenses that may be required by this Comprehensive Permit.

River Stone argues that Conditions A.4 and B.6 should be removed as they are improper conditions subsequent that are "likely to cause confusion and delay." Developer brief, p. 46. Brian Murphy, the developer's manager, testified that, while these conditions and others like it may seem "innocuous," the sheer number of conditions imposed by the Board will in fact hamper and delay the project from being built. Exh. 100, ¶ 6.

The Board states that these conditions are appropriate as they do not require further hearing or approval by the Board and are consistent with other local zoning bylaw provisions and rules and regulations. Board brief, p. 31.

Since the developer is already required to comply with all federal, state, and local regulations and it appears that the Board designated the appropriate local officials for monitoring approvals, Condition A.4 is retained.

With regard to Condition B.6, and the imposition of consultant fees, we have typically prohibited boards from imposing fees that are not already established by regulation or municipal fee schedule. Consistent with 760 CMR 56.05(2), we have made clear that such fees must be in compliance with requirements established by local requirements or regulations. *Falmouth, supra*, No. 2017-11, slip op. at 48; *Leblanc II, supra*, No, 2006-08, slip op. at 7-8; App. at 33 (payment of review fees applied only "to the extent provided in municipal bylaws and regulations"); *HD/MW Randolph Avenue, LLC v. Milton,* No. 2015-03, slip op at 52 (Mass. Housing Appeals Comm. Dec. 20, 2018), *aff'd, Zoning Bd. of Appeals of Milton v. HD/MW Randolph Ave., LLC,* 490 Mass. 257 (July 14, 2022). *See* G.L. c. 44, § 53G (providing for special deposit accounts for reasonable fees for employment of outside consultants when imposed by municipalities pursuant to local rules promulgated under G.L. c. 40B, § 21). Therefore, Condition B.6 is modified to provide that: "If municipal officials engage outside consultants for review of plans and documents, fees will be charged to the Applicant only if in compliance with municipal bylaws or regulations." In order to charge a particular fee, the Board is required to identify for River Stone the local bylaw or regulation that authorizes charging such a fee in this context. *See LeBlanc II, supra*, No. 2006-08, slip op. at 10; *Way Finders, Inc. and Fuller Future, LLC v. Ludlow*, No. 2017-13, slip op. at 51 (Mass. Housing Appeals Comm. Mar. 15, 2021).

V. ECONOMIC EFFECT OF THE BOARD'S DECISION

A. Standard of Review

When a developer appeals a board's grant of a comprehensive permit with conditions and requirements, the ultimate question before the Committee is whether the decision of the Board is consistent with local needs. Pursuant to the Committee's procedures, however, there is a shifting burden of proof. The appellant must first prove that the conditions and requirements in aggregate make the construction or operation of the housing uneconomic. *See* 760 CMR 56.02: *Uneconomic;* 760 CMR 56.07(1)(c)1, 56.07(2)(a)3; 56.05(8)(d); *Board of Appeals of Woburn v. Housing Appeals Comm.,* 451 Mass. 581, 594 (2008); *Falmouth, supra*, No. 2017-11, slip op. at 3; *Haskins Way, LLC v. Middleborough,* No. 2009-08, slip op. at 13 (Mass. Housing Appeals Comm. Mar. 28, 2011). Specifically, 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 [River Stone] toproceed 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 [it].

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

The comprehensive permit regulations provide that, for the purposes of determining whether the Board's conditions render an ownership development project uneconomic, a reasonable return for a limited dividend organization is a minimum of 15% of total development costs. 760 CMR 56.02: *Reasonable Return*(a). Consistent with *Mattbob, Inc. v. Groton,* No. 2009-10, slip op. at 21 (Mass. Housing Appeals Comm. Dec. 13, 2010), *Haskins Way, supra,* No. 2009-08, slip op. at 17, *Rising Tide Development, LLC v. Lexington*, No. 2003-05, slip op. at. 11 (Mass. Housing Appeals Comm. June 14, 2005), we evaluate the economic impact of the Board's decision using a return on total cost (ROTC) analysis whereby the total projected revenue from unit sales is divided by total development costs. This methodology allows the parties to calculate the return of the project as conditioned by the Board and compare it to the minimum reasonable return of 15% of total development costs.

If, as sometimes occurs, the ROTC of a development as proposed is below the minimum reasonable return established by the regulation, a developer must show more—that the board's conditions cause the project to have a significantly lower rate of return than that for the project proposed.[8] *See Milton, supra,* No. 2015-03, slip op. at 5; *Weiss Farm Apartments, LLC v. Stoneham,* No. 2014-10, slip op. at 6-7 (Mass. Housing Appeals Comm. Mar. 15, 2021), *aff'd* No. 2181CV00818 (Middlesex Super. Ct. July 21, 2022). For decades, we have "applied the 'significantly more uneconomic' test to determine whether the conditions imposed have made it impossible for the developer who is still willing to proceed to receive a reasonable return on its investment." *Zoning Bd. of Appeals of Milton,* 490 Mass. 257, 265; *see Falmouth, supra,* No. 2017-11, slip op. at 4 and cases cited. The SJC has upheld this well-established burden as a

[8] It is not uncommon for the economics of a proposal to change somewhat between the date of the subsidizing agency's project eligibility letter and our hearing date; however, by bringing forward the calculations of the proposed and conditioned versions of the project to the same date, typically the date the pre-hearing order is issued, a direct comparison can be made. As we have previously noted, the "uneconomic" standard that we apply is a technical standard that is not necessarily the same as the financial analysis used by the developer in making business decisions, perhaps after having already invested considerable time and money in a project, and we are aware that a developer may choose to move forward with a proposal that has a calculated return below the 15% threshold.

legitimate policy adopted through adjudication to fill in a gap in the statutory and regulatory regime, consistent with furthering the goals of 40B.[9] *Zoning Bd. of Appeals of Milton,*490 Mass. 257, 266.

To ensure a direct comparison of costs and revenues for the proposed project and the conditioned project, the *pro formas* for the proposed project and for the project as approved submitted for the hearing before the Committee include ROTC calculations based on data as of the same date.[10] Exh. 88, ¶ 6.

River Stone's project eligibility letter from MassHousing determined its proposed project of 36 units[11] was "financially feasible." Exh. 5. *See* note 9. Thus, if the return for the proposed project calculated using the ROTC methodology is below the 15% regulatory economic threshold, we compare the ROTC of both *pro formas* to determine whether the project as conditioned is substantially more uneconomic. In our cases we have required more than a nominal decrease in ROTC under these circumstances. *See, e.g., Stoneham, supra*, No. 2014-10, slip op. at 8*; Cohasset*, *supra,* No. 2005-09, slip op. at 12-13; *Milton*, *supra*, No. 2015-03, slip op. at 5; *Falmouth*, *supra*, No. 2017-11, slip op. at 4; *Haskins Way, supra,* No. 2009-08, slip op. at 13; *Sandwich, supra,* No. 2005-06, slip op. at 3 and n.2; *Hanover*, *supra,* No. 2006-05, slip op. at 9, 12-14; *Woburn*, *supra*, No. 2001-22, slip op. at 3. Consistent with these decisions and others assessing the economics of a board's decision, we require that when the ROTC of the proposed ownership project, as of the date of the issuance of the Pre-Hearing Order, is below 15%, the

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[9] *See Cozy Hearth Community Corp. v. Edgartown,* No. 2006-09, slip op. at 5 n.3 (Mass. Housing Appeals Comm. Apr. 14, 2008) ("[u]nder 760 CMR 56.04(6), the issuance of a project eligibility letter by MassHousing ... constitute[s] conclusive proof that [a developer] meets the site control, fundability and limited dividend or non-profit organization requirements"). The comprehensive permit regulations require that the subsidizing agency, as part of its project eligibility determination, make a finding that the proposed project appears "financially feasible within the housing market in which it will be situated." 760 CMR 56.04(4)(d). *See also* 760 CMR 56.02: *Reasonable Return*(c).

[10] We have established that the ROTC should be calculated as of the date of the issuance of the pre-hearing order. *Cohasset*, *supra,* No. 2005-09, slip op. at 17, n.21. Here, however, where the developer's prefiled testimony was actually filed before the issuance of the pre-hearing order, the parties have relied on it. *See* note 17, *infra.*

[11] The project as initially proposed was for 36 units but was reduced by the developer during the Board's hearing process from 36 units to 32. Therefore, the testimony and evidence presented is based on a 32-unit project.

project as conditioned by the Board's decision must have an ROTC significantly below that of the project as proposed.

B. The Developer's Challenged Conditions and Waiver Denials

River Stone argues, relying on testimony of its experts and documentary evidence, that it has provided substantial evidence that the Board's conditions and denials of waivers in the decision render the project uneconomic. It argues further that since its proposal was also uneconomic, it has sufficiently demonstrated that the conditioned project is significantly more uneconomic than that proposed.

1. Conditions Cumulatively Limit Project to 19 Units

Although the Board's decision does not state a specific maximum number of approved units or bedrooms, River Stone, citing testimony of its engineer Brad McKenzie, argues that only 19 units can be built on the site under the conditions imposed, rather than the 32 units it proposed. Exh. 87, ¶ 10. Mr. McKenzie testified that the following conditions in the aggregate limit the project to a maximum of 19 units. Exhs. 1; 87, ¶ 10; 87-C; Tr. I, 30-33.

a) Density Related Conditions

The Zoning Bylaw requires a front yard setback of 35 feet and side and rear setbacks of 20 feet. Exhs. 1, 82. River Stone requested waivers from those requirements to allow front and side yard setbacks of 5.7 feet and a rear setback of 5.6 feet, which waivers were denied, except to allow certain decks, porches and overhangs to extend into the bylaw's required setbacks. Exh. 1, Condition C.1.(a)(i)-(iii). Condition C.1.(a)(iv) states "[b]uildings along the Ward Street frontage shall be oriented to present a front façade to Ward Street in order to maintain the streetscape." Exh. 1. Finally, Condition C.1.(e)(ii) and (iii) require an 8-foot setback for retaining walls to property lines and a 10-foot setback to other structures, thereby denying River Stone's waiver request for reduced setbacks for the proposed retaining walls. Exh. 1.

b) Local Wetlands Conditions

Condition C.1(b)(i) prohibits improvements within 100 feet of the area the Board has deemed a vernal pool.[12] Conditions C.1(b)(iii) and (iv) include a no-build condition for undisturbed areas within the 50-foot buffer zone to the BVW and a 2:1 planting mitigation

[12] Condition C.1(b)(ii) was in dispute but has been removed by agreement of the parties.

condition within the buffer zone. Exh. 1. Mr. McKenzie testified that these conditions would prohibit the developer's proposed improvements of stormwater components within the alleged vernal pool protection zone and, for this reason, a secondary stormwater system would need to be included. As a result, he stated, in order to provide adequate buffer from this secondary stormwater system and to comply with the Board's conditions, there would be no room for placement of housing units between Ward Street and that buffer zone. Tr. I, 72-73.

c) Traffic

Condition C.1.(c)(i) imposes a condition that all internal roadways be 24 feet wide. Condition C.1.c(ii) requires a sidewalk along at least one side of the internal roadways of the project. Condition C.1.(c)(vi) imposes a requirement that driveways to individual units be a minimum of 21 feet long, measured between the garage door and the edge of sidewalk and 23 feet measured between the garage door and the edge of the traveled way in locations without a sidewalk. Exh. 1. Under these conditions, Mr. McKenzie testified:

> "I don't believe it's practical to build both of those units. Unit 10 is only a few feet from the edge of the paved way. And unit 11 scales out to be about a foot, one to two feet from the edge of that hundred-foot vernal pool protection zone. I'm not sure that that -- it's highly unlikely that that unit could be constructed without encroaching into that zone." Tr. I, 74-75.

He concluded that the construction of several units would be precluded because those units would either fail to comply with driveway length requirements or meet the required distance from the edge of the traveled way. Exhs 87, ¶ 10, 98, ¶¶ 21-24; Tr. I, 74-75.

2. **Nitrogen Treatment**

The Hingham Board of Health Supplementary Rules and Regulations for the Disposal of Sanitary Sewage (BOH Rules) permit a maximum of 110 gallons per day of sewage flow per 12,500 sq. ft. in lot area. Exhs. 85; 34. River Stone requested waivers of several sections of the BOH Rules to allow sewage flow of 426 gpd per 12,500 square feet (s.f.) in lot area, for a total flow of 9,900 gpd for the 90 bedrooms in the proposed project, which, it argues meets the general (non-nitrogen loading) Title 5 standard. The Board imposed a condition requiring the developer to elect between two alternatives: 1) the project must comply with the Title 5 standard applicable to property within a nitrogen sensitive area, which limits flow to 110 gpd per 10,000 s.f. in lot area; or 2) the project must include the installation of an on-site wastewater disposal system using an advanced nitrogen treatment facility. Exh. 1, Condition C.5.

River Stone argues that the Board's failure to waive the BOH Rules contributed to rendering the project uneconomic. Developer brief, p. 4. It also argues specifically that the refusal to waive the local requirements and the imposition of alternative conditions requiring nitrogen sensitivity compliance requires either a loss of 61 to 64 bedrooms or "installation of an onsite wastewater disposal system using advanced nitrogen treatment facility costing approximately $250,000 more than an appropriate wastewater system under state regulations." *Id*. p. 8. According to River Stone's hydrogeologist, Peter Dillon, denial of the requested BOH Rules waivers and this alternative Condition C.5[13] limit the project to 26-29 bedrooms instead of the 90 proposed bedrooms in 32 units.[14] In developing a design demonstrating the economic impact of the Board's conditions allowing only 19 units, Mr. McKenzie "disregard[ed] this limiting Board of Health factor." Developer brief, pp. 8, 9, n.4.While his testimony did not expressly include the economic impact of Condition C.5 on the project, it is clear that a bedroom reduction by more than two-thirds would significantly reduce the number of units allowed.

Mr. Dillon stated that Condition C.5's nitrogen treatment facility alternative would require River Stone to design and install a costly and complicated nitrogen treatment facility at a cost of $250,000. Exh. 102, ¶ 13. Mr. Murphy testified that this requirement would also necessitate an additional $150,000 in site work costs. Exh. 100, ¶ 4. River Stone's *pro formas* for the 19-unit project did not include the extra $150,000 in site work costs attributed to the nitrogen treatment condition. Exhs. 100. ¶ 4; 102, ¶ 13.

C. The Developer's *Pro Forma* Financial Analysis

1. Project Redesign

Mr. McKenzie developed a plan for purposes of evaluating the economic impact of the Board's conditions, "making assumptions that certain aspects of the project would comply with additional, discretionary review,"[15] and, based on that plan, he determined that a maximum of 19 units could be constructed. Exh. 87, ¶ 10; Tr. I, 73-75. Mr. Engler performed a financial analysis of the 32-unit project as proposed and the 19-unit project as modified by the conditions imposed

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[13] *See* § V.C.3, below.

[14] As proposed, there would be 18 two-bedroom units and 18 three-bedroom units. Exh. 7.

[15] *See* § IV.D.1, where Mr. McKenzie explained the kind of additional review he envisioned for conformance with the comprehensive permit.

by the Board. He relied upon the cost estimates provided to him by the developer, Mr. Murphy, and an excavation contractor retained by the developer, McDougall Bros. Enterprises. Exh. 88, ¶ 8. Mr. Engler calculated the ROTC for the project, as proposed with 32 units, to be 13.3% of total development costs and, for the project as conditioned by the Board with 19 units, to be negative 11.8%, a difference of 25.1%. Exh. 99-1; Tr. II, 93-94. Based on his analysis for both of these development models, Mr. Engler testified that the ROTC for the project as conditioned by the Board, would be "significantly more uneconomic" in comparison to the project as proposed. Exh. 99, ¶ 5.

2. **Market Rate Unit Sales Price**

In reaching his conclusions, Mr. Engler used $765,000 as the projected market unit sales price. This amount was based upon Mr. Murphy's analysis of comparable sales in Hingham as well as Mr. Murphy's own recent experience as a builder in the community. Exhs. 88, ¶ 8; 89, ¶ 16. Mr. Murphy testified that he engaged Peter Lane from Lane Valuation Group, Inc. (Lane Valuation) to provide an opinion of a proposed pricing range for market rate condominium units for the project to support his pricing analysis. Exh. 100, ¶ 3. Mr. Murphy testified that he has personal knowledge of market conditions in the Town of Hingham and has analyzed Hingham condominium sales, as summarized in his pre-filed testimony. Exh. 89, ¶ 16; 89-D. The market data provided by Mr. Lane, a licensed real estate appraiser, was prepared expressly for this project and provides specific analysis of pricing based upon a number of factors, including location, year built, unit size, site area and condition. Exh. 100, ¶ 3; 100-A.

3. Cost of Nitrogen Technology

River Stone's hydrogeologist, Mr. Dillon, testified that compliance with the Hingham BOH rules regarding nitrogen reduction, as required by Condition C.5, in addition to compliance with Title 5, 310 CMR 15, *et seq.,* would result in a loss of 61 to 64 bedrooms or "would require a significantly upgraded system from what is required under Title 5 at an estimated cost of $250,000." Exh 102, ¶ 13. See Exh. 100, ¶ 4 The only direct evidence of the economic impact of Condition C.5 submitted by the developer pertained to the cost of installation of the nitrogen treatment system and related site work; no evidence was presented regarding any impact on the number of units that could be built. Developer brief, pp. 8, 24. River Stone argues that

including the additional cost of nitrogen technology required by the Board in the economic analysis would have resulted in even more of a loss than that shown on Mr. Engler's *pro formas.* Exhs. 100, ¶ 4; 102, ¶ 13; Developer brief, pp. 8, 9, n.4.

D. Board's Challenge and Committee's Analysis

The Board raises several arguments in opposition to River Stone's economic case, as summarized below.

1. **Approved Project Size**

The Board acknowledges that the project's return as proposed is below the 15% minimum threshold but argues that River Stone failed to prove the project as conditioned is significantly more uneconomic than the proposed project. It presented testimony to support its contention that 24 units could be built under the conditions it imposed with a net profit percentage higher than the *pro forma* originally submitted by the developer for the proposed project in 2018 and higher than the developer's revised net profit percentage. The Board introduced a 24-unit plan prepared by its engineer, Mr. Brennan, which it alleges could be built in compliance with all of the Board's conditions. Exh. 91, ¶¶ 29-30, 91-B; 91-C. This plan, it argues, refutes River Stone's testimony that, to meet all of the Board's conditions, only 19 units can be built. Alternatively, the Board presented a plan prepared by Mr. Brennan showing 27 units that it alleges could be built with all conditions met except that the required 100-foot buffer for the vernal pool would be reduced to 50 feet. Exh. 91, ¶ 30, 91-C. The Board's witnesses, Mr. Zimmer and Ms. Fournier, testified that a partial waiver to reduce the 100-foot buffer to 50 feet would still adequately address local concerns while allowing Mr. Brennan's proposed 24 or 27-unit project. Exh. 93, ¶ 29, Exh. 95, ¶ 26. Based upon this 27-unit plan, Mr. Stankus calculated a *pro forma,* based upon the Board's market rate unit sales price of $900,000, showing an increase in net profit percentage to 18.58%, which, the Board argues, is economic. Board brief, pp. 7-8, Exh. 90, ¶¶ 12-13. For the 24-unit plan, also using the market rate sales price of $900,000, Mr. Stankus calculated a *pro forma* showing a net profit percentage of 14.41%. Exh. 90, ¶ 13, 90-R-2.1

Based upon this 24-unit plan, the Board argues that a net profit of 14.4% can be achieved, relying on testimony of its economic expert, Robert Stankus. Exh. 90, ¶ 13. The Board further argues that River Stone's 32-unit development as submitted to the Board in 2018 had only a net profit of 2.63%. Exh. 90, ¶ 4(ii). In his pre-filed testimony, Mr. Engler testified to a net profit

percentage of 8.1%[16] for the 32-unit proposed project as of May 2020 (the date of his pre-filed testimony).[17] Exhs. 90, ¶ 11; 88, ¶ 8; 99, ¶ 4; Tr. II, 93. The Board argues that the developer's net profit of 2.63% submitted to the Board in 2018 should be the profit that the Committee looks to in comparing the economics of the conditioned project. Mr. Stankus testified his 24-unit net profit percentage of 14.4% was based upon Mr. Brennan's proposed plan and is higher than 2.63% and Mr. Engler's initial *pro forma* of 8.1% and, using the highest figure, the project is not made significantly more uneconomic. Exh. 90, ¶ 13; *see* Board brief, pp. 3-4. Because the *pro formas* for the proposed project and for the project as approved submitted for the hearing before the Committee are based on data as of the pre-filed testimony deadlines set in the pre-hearing order, the Board's argument here is unpersuasive. *See* note 10, *supra*.

Mr. McKenzie testified that neither the 27-unit nor the 24-unit projects could be developed without an additional waiver from the requirement of a 100-foot vernal pool buffer. Exh. 84; Tr. I, 74-75. He stated that both the 27- and 24-unit projects suggested by Mr. Brennan would require modification of the existing stormwater system located within 100 feet of the alleged vernal pool. Exh. 98, ¶ 20. He testified that the condition imposed by the Board for the vernal pool protection zone prohibits improvements of stormwater components inside that zone and that prohibition, among other conditions, is what limits the project to 19 units. Tr. I, 72-73. Even with the reduction of the vernal pool buffer from 100 to 50 feet, as proposed by the Board's witnesses, Mr. Zimmer and Ms. Fournier, Mr. McKenzie testified that Mr. Brennan's plans would not comply with other local setback and state regulations. Exh. 98, ¶ 20; Tr. I, 73-75. Mr. McKenzie stated that Mr. Brennan's plans shift the location of some units, resulting in an "almost zero setback" from the septic tank structure to the adjacent unit. Tr. I, 74. He testified further that Mr. Brennan's plans result in placement of Unit 10 "only a few feet from the edge of the paved way" and Unit 11 "about a foot, one to two feet from the edge of the 100 foot vernal pool protection zone." Tr. I, 74. We accept Mr. McKenzie's testimony that these two plans would require a modification of the Board's decision.

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[16] Mr. Stankus used a net profit percentage of 8.05% instead of 8.1%. As the difference between these figures is immaterial, we use Mr. Engler's figure of 8.1%.

[17] The pre-hearing order, dated June 8, 2020, required the developer's pre-filed direct testimony to be filed by May 22, 2020. Pre-Hearing Order, § VII. While Mr. Engler's pre-filed testimony is dated May 20, 2020, not June 8, 2020, neither party has raised this slight discrepancy in the timing of his testimony as it relates to the date of the pre-hearing order.

We have stated that a 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. We agree with River Stone that neither the 24 nor 27 unit plan complies with the conditions as written by the Board. The flaw of the Board's arguments for either the 24- or 27-unit plan is that it is not based upon the Board's decision and all of its conditions but assumes a modification of that decision. A plan requiring a modification of a board's decision is not relevant to the evaluation of the economics of that decision. *See Falmouth, supra,* No. 2017-11, slip op. at 11. We accept as credible the testimony of Mr. McKenzie that both of Mr. Brennan's plans could not be developed because they cannot comply with local Board of Health setbacks, driveway length requirements, and the potential vernal pool buffer. Tr. I, 73-75. Further, the notations on Mr. Brennan's plans acknowledge that his proposed layouts assume use of existing stormwater facilities "with modifications as required." Exh. 91-B. We do not consider Mr. Brennan's testimony credible that either a 24- or 27- unit project could be built without modification of the Board's decision. Therefore, we find that the conditions in the Board's decision limited the project to 19 units.

2. **Pricing Assigned to Units**

In addition to the number of units, the Board argues that the primary difference in the parties' economic analyses is the pricing assigned to the market units. While Mr. Engler based his *pro forma* on a value of $765,000 for market rate units, the Board's expert, Mr. Stankus, used $900,000.[18] The Board argues that the basis for Mr. Engler's value of $765,000 for market rate units is not supported by credible evidence. Specifically, the Board takes issue with the developer's reliance upon information provided by Lane Valuation, who it alleges is not established as an expert in the field. The Board argues that the valuation opinion provided by Lane Valuation and relied upon by the developer should be discredited, because that opinion

[18] Mr. Engler initially testified that the affordable units should be carried at a price of $225,000, while the Board's witness, Ms. Wentworth, testified that the affordable units should be priced at $297,000. Exhs. 88-1; 88-2; 94, ¶ 17. In his rebuttal testimony, Mr. Engler accepted Ms. Wentworth's affordable unit price and revised his *pro forma* to accept the price of $297,000. Exh. 99, ¶ 2. Therefore, only the market rate unit sales price is in dispute.

ignored virtually all of the comparable properties that arrived at a square foot price higher than the $365 per s.f. used to establish the $765,000 per unit market rate price. Further, the Board objects to this evidence because Mr. Lane was not presented as a witness at the hearing, no expert credentials were provided for him, and the Board had no opportunity to cross-examine him. Board brief, p. 5. As we held in *Stoneham*, experts may base testimony on data collected and provided by others. Hearsay evidence is viewed through a lens of reasonableness and if it meets the administrative standard, it may be admitted and considered. *Stoneham, supra,* No. 2014-10, slip op. at 22; *Department of Youth Servs. v. A Juvenile*, 398 Mass. 516, 531 (1986). The Board had the opportunity to cross-examine both Mr. Murphy and Mr. Engler regarding the source of the data in the Lane Valuation report. Board counsel cross-examined both Mr. Engler and Mr. Murphy on the sources of the data reflected in Mr. Engler's *pro formas*. Therefore, we accept the valuation opinion provided by Lane Valuation and relied upon by the developer's expert witnesses.

The Board's expert, Mr. Stankus, based his *pro forma* on a projected market unit sales price of $900,000. Exh. 90, ¶ 11. He testified that many of the comparables in Mr. Murphy's testimony are for condominium units that appear to be smaller in square footage, stating that Mr. Murphy's estimates are significantly lower than what "current metrics" show for comparable units. Exh. 90, ¶ 11. The difference in *pro forma* numbers, as more fully explained below, using Mr. Engler's value versus that of Mr. Stankus, is about $2 million dollars. Mr. Stankus testified on cross-examination that he used seven properties to form the basis for his opinion on valuation of the market rate units. Tr. III, 34. Of those seven properties, three were sold in 2013, two were sold in 2017 and one was sold in 2019. Tr. III, 34. Of those seven, the Multiple Listing Service listing for 15 Elm Street in Hingham described the property as being "a stone's throw to downtown Hingham" and "a short stroll to the harbor." Exh. 89-D. Mr. Stankus testified on cross-examination that the River Stone project is more than a mile to Hingham harbor and is not within the same neighborhood as downtown Hingham. Tr. III, 36-37.

We credit Mr. Murphy's experience as a developer and a licensed real estate broker who has extensive experience in residential real estate development. Tr. II, 72. Mr. Murphy based his opinion on the valuation of the market rate units on a review of over 75 comparable listings sold or active between 2018 and 2020, and his personal knowledge of market conditions and Hingham condominium sales. Exhs. 89, ¶ 16; 89-D; 100, ¶ 3. His analysis of the comparable

listings in Hingham included consideration of each listing's location, size, and amenities, and whether they were in marketable or exclusive locations, such as near the waterfront or downtown. Tr. II, 64-66. Mr. Murphy also engaged the services of Mr. Lane, who had appraised two similar affordable housing projects in Hingham, to confirm his own valuation conclusion. Mr. Murphy testified that he has engaged the services of Mr. Lane in the past and considers him to be an expert in valuations for real estate in Hingham. Exh. 100, ¶ 3; Tr. II, 67. Mr. Stankus based his valuations on seven properties that he deemed comparable, as compared to the 75 properties reviewed by Mr. Murphy. Tr. III, 34. On cross-examination, Mr. Stankus testified that of the seven properties he considered, three of them were sold in 2013 and two were sold in 2017. Tr. III, 34. He further testified that he does not hold a real estate broker's license and is a valuation professional for business valuations that are driven by valuation economics. Tr. II, 124.

Overall, we find Mr. Murphy's testimony on the valuations assigned to the market rate units more credible than Mr. Stankus' testimony. Accordingly, we find that the pricing assigned to the market-rate units should be $765,000.

3. **Other Cost Claims**

a) No Evidence of Economic Impact

The Board contends that the developer's objections to the following conditions should fail because River Stone has not given any evidence of an economic impact of complying with these conditions:

1. Paper copy of correspondence (A.4): The Board argues that sending a copy of correspondence has no substantive economic impact on River Stone in this project. Board brief, p. 31; Board reply, p. 29.

2. Grading (C.1.(e)(i)): This condition requires River Stone to indicate the destination of any soil that may need to be removed from the site but the Board states that River Stone did not provide a specific economic reason for its objection. Board reply, p. 27.

3. Signs (D.4): The Board argues that River Stone acknowledged that there is no additional cost caused by this condition, which allows one sign instead of the two requested. Tr. II, 52.

4. Portable bathrooms (D.8): This condition requires the portable bathroom facility to be located at least 50 feet from the property's boundary line. The Board contends that the

developer provided no specific evidence of any cost for compliance with this condition. Board brief, p. 10; Tr. II, 57.

5. Conditions during construction (D.12, D.13): These conditions require daily sweeping of pavement areas to prevent tracking of soil into wetland resource areas and prohibits soil stockpiles within 100 feet of a wetland resource area and seeding of soil stockpiles that remain unworked for more than 14 days. The Board contends that the developer provided no specific evidence of any cost for compliance with these conditions. Board reply, p. 27.

6. Snow removal (F.1.(b) and F.5): The Board argues that River Stone provided contradictory positions on compliance with these conditions and argues, further, that these are post-construction conditions which are ongoing after sale of the units, when River Stone no longer has any interest in the property and, therefore, there will be no economic impact upon the developer. Board brief, pp. 11-12; Exh. 100, ¶ 10; Tr. II, 63; Developer brief, Appendix A.

We agree with the Board that the developer did not provide evidence of a financial impact associated with compliance with each of the above conditions. We have a longstanding rule that failure to submit evidence on any issue constitutes waiver of that issue in proceedings before Committee. *See, e.g., Oceanside Village, LLC v. Scituate*, No. 2005-03, slip op. at 33 (Mass. Housing Appeals Comm. July 17, 2007). Therefore, we do not consider what economic impact, if any, the conditions enumerated above have upon the project.

b) No Briefing of Economic Impact

The following conditions were listed generally in River Stone's brief as disputed conditions, supported by only conclusory statements. In many cases the brief cites to testimony that was only vaguely relevant to the particular condition. More importantly, River Stone did not submit adequate argument that these conditions have an economic impact on the project.

- Condition C.1(g)(iii): Fire hydrants in a number and location approved by the Fire Department and not greater than 800 feet from any dwelling unit in the Project.

- Condition C.1(h)(iv): Flared end sections shall be reinforced concrete. Plastic (HDPE) flared end sections are not allowed.

- Condition C.1(i): Lighting Plans

  (i) Photometric plan, with values not exceeding 0 candle foot overspill at any property line.

(ii) Details and specifications for proposed light post and building lighting, if any.

(iii) All site lighting shall be "DarkSky" compliant.

(v) Building-mounted lighting, if any, shall be located at entries; mounted no higher than 8' above finished grade; and downward directed. No floodlights shall be permitted.

- Condition C.1(j)(ii): A minimum 10' buffer area planted with a mix of evergreen and deciduous trees and shrubs to present a reasonably opaque, natural barrier to a height of 10' shall be planted between the rear of the units in the Project and all side and rear property lines. No fence greater than 4' in height shall be located within the front yard along Ward Street.

- Condition D.4: The Applicant may display one, unlighted, temporary construction or marketing sign not exceeding 12 square feet at the primary site entrance on Ward Street, stating appropriate marketing information on the site, provided it otherwise complies with Section V-B of the Zoning By-Law. The temporary construction and marketing sign shall be displayed for no longer than three years from the date of issuance of a Building Permit, which term shall be renewable at the Board's discretion.

- Condition D.8: Portable bathroom facilities, trash containers, and portable generators shall be located within the fenced construction area for the Project, at least 50 feet from the boundary of the Property.

Having failed to brief the economics of these conditions, River Stone has waived any argument that they are unsupported by valid local concerns.[19] We will not alter these conditions.

[19] As in many Committee proceedings, this case involves a significant number of challenged conditions and sub-conditions that were identified in the pre-hearing order, as well as testimony from many witnesses on a wide range of issues and facts, resulting in a complex record for consideration. While the pre-hearing order sets the outer limit of issues in the Committee's hearing, it is not uncommon for parties to choose not to pursue some issues in light of evidence presented during the hearing. For this reason, it incumbent upon the parties to provide appropriate legal argument based on cited facts in the record for any legal issues they ultimately wish the Committee to address in its decision. In this case, there was a great deal of the pre-filed testimony, which, though unchallenged, contained irrelevant material or addressed issues not briefed by the parties. Issues that are not briefed are waived. *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); *Hilltop Preserve Lid. Partnership v. Walpole*, No. 2000-11, slip op. at 2 n.1 (Mass. Housing Appeals Comm. Apr. 10, 2002); *An-Co, Inc. v. Haverhill*, No. 1990-11, slip op. at 19 (Mass. Housing Appeals Committee Jun. 28, 1994)*; see also Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85-86 (1995), quoting *Lolos v. Berlin*, 338 Mass. 10, 13-14 (1958).

E. *Pro Forma* Analysis and Conclusion Regarding Economics

Mr. Stankus' *pro forma* testimony was based primarily upon Mr. Brennan's proposed plans increasing the number of units from 19 to 24 or 27 while Mr. Engler's *pro forma* was based upon the decrease in number of units from 32 to 19. Exhs. 88, 90. The Board and Mr. Stankus accepted the developer's costs and revenues, with the exception of (a) the effect of the conditions on the number of units that could be built; (b) the market rate sales price of the units; and (c) the cost for increased nitrogen technology. Exh. 90, ¶¶ 10, 11; Tr. II, 123. As discussed in § V.D.1 above, we determine that the Board's decision would only permit a 19-unit project.

With regard to the market rate sales price of the units, as we discussed in § V.D.2 above, we find the developer's evidence credible to support its proposed market rate sales price of $765.000.[20] Therefore, for our *pro forma* analysis, we will use the market rate unit price of $765,000.

Finally, while the developer notes that the increased site development costs attributable to the alternative nitrogen technology requirement of $150,000 were not included in the *pro forma see* Exhs. 89, ¶ 14; 102, ¶¶ 9, 13, the record is unclear whether the developer's $250,000 cost for the installation of the advanced nitrogen treatment facility was included. Nevertheless, we accept as credible the developer's evidence of the costs attributable to this alternative condition.[21]

Mr. Stankus agreed on cross-examination that the 32-unit project, as analyzed using the developer-provided information regarding costs and revenue, was uneconomic as submitted. Tr. II, 120-123; Exhs. 88, ¶ 6; Board brief, p. 2. Mr. Stankus testified that the 32-unit project at his suggested sales prices ($900,000 for market rate units and $297,000 for affordable units) would

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[20] Mr. Engler's initial *pro forma* used $750,000 as the sale price for the market rate units. In response, Mr. Stankus also used $750,000 for his comparison *pro forma*. Subsequently, Mr. Engler revised his *pro forma* in his rebuttal testimony to $765,000 based upon the Lane Valuation relied upon by Mr. Murphy. However, Mr. Stankus' testimony was not revised and used the original $750,000 valuation. We have analyzed both figures in the chart below.

[21] Given the difference between the ROTC of the project as proposed and that of the project as conditioned, it is immaterial to our analysis whether any of the costs associated with this condition are included in the *pro forma.*

produce an ROTC of 30.90%.[22] For the 19-unit project, as approved by the Board, using his suggested sales prices, Mr. Stankus stated that the ROTC would be 1.75%.

In comparison, using River Stone's market unit sales price, for the 32-unit project, as submitted, Mr. Stankus showed an ROTC of 8.05% and for the approved 19-unit project, an ROTC of negative 16.06%.[23] Exh. 90-R-1.2.

The following tables shows the respective ROTC estimates of the parties, using each of their respective market rate unit sales valuations:

	River Stone Pro Forma - 32 Units (Market Rate $765,000)	**Board Pro Forma - 32 Units (Market Rate $750,000)**	**River Stone Pro forma - 19 Units (Market Rate $765,000)**	**Board Pro Forma - 19 Units (Market Rate $750,000)**	**Board Pro Forma - 27 Units (Market Rate $750,000)**	**Board Pro Forma 24 Units (Market Rate $750,000)**
Total development costs	$ 17,491,717	$17,491,717	$ 13,223,322	$ 13,223,322	$ 16,174,142	$ 15,008,916
Net Development Income	$ 19,818,000	$18,900,000	$ 11,659,500	$ 11,100,000	$ 15,825,000	$ 14,175,000
Developer Profit	$ 2,326,283	$1,408,283	$ (1,563,822)	$ (2,123,322)	$ (349,142)	$ (833,916)
ROTC	13.30%	8.05%	-11.83%	-16.06%	-2.16%	-5.56%

Exhs. 99; 99-1; 90-R-1.2; Tr. II, 93-94.

[22] Mr. Stankus testified that the project with 24 units as shown on Mr. Brennan's plans, using his suggested sales prices, would produce an ROTC of 14.41% while the 27-unit model would result in an ROTC of 18.58%. Exh. 90, ¶ 13.

[23] For the 24-unit project, Mr. Stankus showed an ROTC of negative 5.56%, for the 27-unit project, he showed an ROTC of negative 2.16%.

	Board Pro Forma 32 Units (Market Rate $900,000)	Board Pro Forma 27 Units (Market Rate $900,000)	Board Pro Forma 24 Units (Market Rate $900,000)	Board Pro Forma 19 Units (Market Rate $900,000)
Total development costs	$ 17,491,717	$16,174,142	$ 15,008,916	$ 13,223,322
Net development income	$ 22,896,000	$19,179,000	$ 17,172,000	$ 13,455,000
Developer Profit	$ 5,404,283	$ 3,004,858	$ 2,163,084	$ 231,678
ROTC	30.90%	18.58%	14.41%	1.75%

Exh. 90, ¶ 12. River Stone's ROTC for the proposed 32-unit project (13.30%) and its ROTC for the approved 19-unit project (-11.83%) are both below the ROTC threshold of 15%. The Board's decision causes a reduction of 16.06%. 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); *Woburn, supra,* No. 2001-22, slip op. at 15 (ROTC of 1.66% lower is significantly more uneconomic); *Haskins Way, supra*, No. 2009-08, slip op. at 17-18 (reduction of profits by 275 basis points (2.75%) renders the project significantly more uneconomic); *Falmouth, supra*, No. 2017-11, slip op. at 29 (ROTC reduction of 0.84% is substantial and renders the project significantly more uneconomic). Even using the Board's proposed market rate unit sales price of $900,000, the resulting ROTC for the approved 19-unit project is 1.75%, which we find to be a substantial reduction, rendering the project significantly more uneconomic than proposed.

Even assuming a 24-unit project could be constructed in conformance with all of the Board's conditions and, using the Board's higher proposed market rate unit sales price, those conditions decrease the project's net development income by more than half (30.90% vs. 14.41%), producing a return of less than 15% and eliminating at least 8 units. Under the Board's own analysis, this shows the Board's conditions render the project uneconomic. Exh. 90, ¶ 12; Developer reply brief, p. 3.

VI. LOCAL CONCERNS

Since the developer 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 then, that such concern outweighs the regional need for low and moderate income housing. 760 CMR 56.07(1)(c), 56.07(2)(b)3. *See also* Pre-Hearing Order, § IV. The burden on the Board is significant: the fact that Hingham does not meet the statutory minima regarding affordable housing establishes a rebuttable presumption that a substantial regional housing need outweighs the local concerns in this instance. 760 CMR 56.07(3)(a); Pre-Hearing Order, § II; G.L. c. 40B, §§ 20, 23. *See Zoning Bd. of Appeals of Lunenburg v. Housing Appeals Comm.*, 464 Mass. 38, 42 (2013) ("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").

The Board's decision incorporates in its Attachment C a chart in which it lists the Board's actions on waiver requests, indicating that applicable requested waivers are granted, denied or "denied to the extent expressly waived by conditions," without identifying the applicable conditions. Therefore, to the extent waivers have been denied in whole or in part, unless specifically identified in the parties' briefs, we refer below only to the conditions imposed by the Board, not the related waivers.

A. Density and Intensity

1. Building Layout, Setbacks, and Orientation

River Stone sought waivers from required setback and building separation requirements contained in § IV-A of the zoning bylaw. It challenges the Board's building layout conditions C.1(a)(i)–(iv), as follows:

> (i) Minimum front yard setback of not less than 35' measured between the Ward Street layout and any portion of a dwelling unit, including decks and porches.

Hingham requires a front yard setback of 35 feet in the zoning district. Exhs. 82, § IV-A; 94, 94-A; 2. River Stone requested a waiver of this requirement to allow a proposed front yard setback of 5.7 feet for three units. [24] Exhs. 1-C-1; 2, p. C-1. Emily Wentworth, Senior Planner for the Town of Hingham, testified that all but three of the 17 abutting properties along Ward Street comply with the requirements of this regulation. Exh. 94, ¶ 12-A. The Board argues that the proposed setbacks are 84% less than the local regulation requires and that abutting homes have, creating negative impacts on the aesthetics and overall livability of the surrounding neighborhood.

> (ii) Minimum side and rear yard setbacks of not less than 20' measured between side and rear property lines and a dwelling unit. Decks and porches, inclusive of any stairs, may extend up to 10' into the required side and rear yard setback, for a minimum side and rear yard setback of 10' for these attached accessory structures.

River Stone requested a waiver from the Hingham zoning bylaw rear and side yard setback requirement of 20 feet. Exhs. 82, IV-A; 1C. With regard to Condition C.1(a)(ii), Ms. Wentworth testified for the Board that that all of the abutting properties on Ward Street and Autumn Circle have rear yards exceeding this 20-foot requirement, with the average rear yard setback of 181 feet on Ward Street and 39 feet on Autumn Circle. Exh. 94-A. All but four of the 34 side yard setbacks of the abutting properties on Ward Street comply with the minimum 20-foot side yard setback requirement and along Autumn Circle, all but three of the 28 side yard setbacks meet the requirement. [25] Exhs. 94-A; 82, § IV-A. Yet, the Board argues, River Stone's project includes multiple units that back "right up to" abutters and meet neither the 20-foot building setback nor the 10-foot deck setback, including at least one unit with a deck only 5.6 feet from the abutting property line. Exh. 2, p. C-1. The Board argues that these setbacks are over 70% less than the local requirements and the setbacks of abutting properties and 45% less than the distance required under the partial waiver granted by the Board.

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[24] River Stone's Waiver List states it requested front yard setback waivers for units 19-21; however, the developer's plans show, and the Board's brief indicates, that the waivers would be applicable to units 21-23, along Ward Street. Exhs. 1, p. C; 2 p. C-1; Board brief, pp. 20-22.

[25] At least two homes predate the existing requirements. Exh. 94-A.

> (iii) Separation distance between buildings shall be increased to 20' with the exception of projections not exceeding 30 SF in area for steps, gutters, bay windows, terraces, outside chimneys, stoops, piazzas or porches, eaves, cornices, window sills or belt courses into this separation distance; provided, however, that any building element that supplies useable floor area to a building shall not constitute a projection, and further provided that no such projection shall cause the separation between buildings, inclusive of the projection, to be less than 18'.

The Hingham zoning bylaw requires a 30-foot minimum distance between detached structures on the same lot; River Stone sought a waiver of this requirement to allow varying distances of between 9 and 22 feet between structures and the Board granted a partial waiver to allow a minimum distance of 20 feet. Exhs. 82, § IV-D.9.b; 1-C. The Board argues that, similar to addressing the issue of proximity of the project to abutters, this condition seeks to ensure the quality of the layout of the site for the residents who will live within the project by protecting light and air between buildings and avoid overcrowding. Board brief, p. 24.

> (iv) Buildings along the Ward Street frontage shall be oriented to present a front façade to Ward Street in order to maintain the streetscape.

The Board imposed this condition not based upon any zoning bylaw or local regulation but rather on its desire to reorient the units abutting Ward Street so that they will face the street, consistent with the directly abutting and facing homes. It also argues this condition will eliminate a six-foot fence from significantly altering the existing streetscape. Board brief, p. 22.

The Board argues that the conditions imposed by Condition C.1(a)(i)-(iv) are consistent with local needs because they address the intensity on the site with respect to the height, bulk and placement of the project. Ms. Wentworth testified that the "stark impact of the density and intensity of the proposed Project in contrast to the surrounding neighborhood" is evidence that the conditions are consistent with local needs. Exh. 94, ¶ 12. The Board relies upon *Lynnfield, supra*, slip op. at 13, to justify the increased setbacks from the abutting properties, arguing that, without the increased setbacks, the project would result in significant negative impacts on the aesthetics and overall livability of the surrounding neighborhood. Board brief, p. 20.

River Stone argues that the density waivers it requested are reasonable and in keeping with the well-recognized purposes of Chapter 40B—to override bulk, height, dimensional, use and other limitations that are often invoked as a pretext to exclude affordable housing and that the denial of those waivers and the conditions imposed by the Board in Condition C.1(a)(i)-(iv) are not supported by the evidence. Developer brief, p. 34. In support of its waiver requests,

River Stone argues that the abutting properties and public traveling on Ward Street are visually protected from any density concerns by a privacy fence and retaining walls. Mr. McKenzie testified for River Stone that there are sufficient privacy and visual protections provided by the proposed fencing and retaining walls. Exh. 98, ¶ 22.

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. *Paragon v. Brookline*, No. 2004-16, slip op. at 43 (Mass. Housing Appeals Comm. Mar. 26, 2007), citing *Princeton Development, Inc. v. Bedford*, No. 2001-19, slip op. at 15 (Mass. Housing Appeals Comm. Sept. 20, 2005), citing *Hastings Village, Inc. v. Wellesley*, No. 1995-05, slip op. at 20-31 (Mass. Housing Appeals Committee Jan. 8, 1998), *aff'd* No. 98-235 (Norfolk Super. Ct. Nov. 12, 1999); *CMA, Inc. v. Westborough*, *supra*, No. 1989-25, slip op. at 27; *Pyburn*, *supra*, No. 2002-23, slip op. at 13. Similar to the attempted redesign in *Pyburn*, the Board here effectively reduced the number of units by increasing the required setback requirements and altering the orientation of the buildings. We don't consider the Board's use of percentage reductions in setbacks particularly meaningful. The project includes a privacy fence to protect abutters' views, as well as New England Village style buildings designed with no more than two stories and scaled to emulate single family homes in the surrounding neighborhood. Garages are scaled to reduce visual impacts and second story dormers include gables in order to provide a varied second story roofline visible to the street. Finally, the project includes a total of 3.65 acres of open space and lawn area for potential recreational use which also serve as buffer areas throughout the development. Exhs. 2, p. C-1; 7. We find 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 setbacks and placement of the buildings and therefore, Conditions C.1(a)(i)–(iv) are struck. River Stone's requested setback waivers are granted.

2. **Retaining Walls: Condition C.1(e)**

River Stone challenges Condition C.1(e)(ii) and (iii), relating to retaining walls, as follows:

> C.1(e)(ii): Retaining walls greater than 6' in height shall be located no closer than 8' to a property line. Due to the proximity of proposed retaining walls to abutting properties, the Applicant shall provide details on methods of construction that will be employed to insure there is no disturbance to abutting properties.

Under the zoning bylaw, a retaining wall in excess of six feet in height is treated as a structure and a 20-foot setback for structures to abutting property boundaries under § IV-A applies. Exh. 82, §§ IV-A, VI. River Stone requested a waiver from this requirement and the Board granted a partial waiver to allow a retaining wall setback of 8 feet from the project property line. The proposed project requires removal of ledge and installation of retaining walls. One retaining wall will be 20 feet high within six 6 feet of Unit 23 and one foot from the rear deck of Unit 24. Exh. 1, p. 6. The proposed retaining wall between Units 24-26 on the project site and 64 Ward Street will be up to 15 feet high and is shown about five feet from the property line. The wall would retain the earth between the wall and the 64 Ward Street property line. Exh. 17, p. 2. By allowing for an eight-foot setback (instead of 20 feet) the Board argues it has granted a significant waiver of 60% of the requirement that all unsubsidized projects must meet. In addition, the Board argues, the Board has granted a significant waiver that would allow a wall of significant height to be only eight feet from the property line. Board brief, p. 22.

River Stone argues that it has provided sufficient evidence that the wall will be designed by a structural engineer and will not encroach upon the abutting property or result in any safety issue and, therefore, the Board should have granted its waiver request for reduced setbacks as set forth on the project plans. Developer brief, p. 12. Mr. McKenzie testified for River Stone that there is no private property or safety concern to justify the distances between retaining walls. He stated that the walls will be designed by a structural engineer and the developer will provide detailed engineering plans to demonstrate that the walls can be constructed without encroaching onto abutting properties. Exh. 98, ¶¶ 13, 14; Tr. I, 50-54.

> C.1(e)(iii): Retaining walls shall be located a minimum of 10' from any structure or dwelling unit within the Project in order to support public safety access and provide sufficient natural light and air for residents of the Project.

The Board relies on Fire Chief DiNapoli's testimony to support Condition C.1(e)(iii) that the retaining wall setbacks allow insufficient space to set up a ladder to reach an upper floor of Unit 25. Mr. Brennan testified that "a portion of Unit 25 is only 6 feet off the proposed retaining wall." Exh. 91, ¶ 21. Mr. DiNapoli testified that the fire department requires not less than 10 feet of clearance to be able to set up a ladder in case of firefighting or rescue from an upper floor. Exh. 96, ¶ 21. Mr. McKenzie stated in his rebuttal that the "front and rear of Unit 25 are fully accessible with more than 10 feet of clearance." Exh. 98, ¶ 14. Mr. DiNapoli disputed Mr.

McKenzie's statement that fire department access to Unit 25 from other locations is sufficient, stating that Mr. McKenzie did not address how the fire department would reach people trapped in that area if the rest of the unit is consumed. For that reason, he stated that this condition is necessary for the safety of future residents and fire fighters. Exh. 109, ¶ 9.

Proposed Unit 25 is a duplex with Unit 24. Mr. McKenzie testified that adequate fire access is available, with more than 10 feet of clearance, from two of the three exterior sides of Unit 25. He also stated that the lighting and air is no different for this unit than if it was a middle unit. Exh. 98, ¶¶ 13, 14; Tr. I, 50-54. We find the testimony of Mr. McKenzie to be more credible than that of the Board's witnesses. The credible evidence shows Unit 25 will have sufficient fire safety access from the front and rear of Unit 25, and the developer need not provide the 10-foot setback from Unit 25 to the retaining wall.

Further, River Stone argues that Fire Chief DiNapoli testified that there are no fire safety laws, rules or regulations that would require a minimum of 10 feet around structures for public safety, rather the 10 foot rule is based on experience. Tr. III, 126. The developer argues, under *Zoning Bd. of Appeals of Sunderland v. Sugarbush Meadow, LLC*, 464 Mass. 166, 184 (2013) and *Lever Development, LLC v. West Boylston*, No. 2004-10, slip op. at 10 (Mass. Housing Appeals Comm. Dec. 10, 2007), that where a fire chief could not identify any local rule or regulation mandating the condition, the Committee should reject attempts by a board to "place restrictions on affordable housing if the Town has not previously regulated the matter in question." Developer brief, p. 34.

We also agree with River Stone that the Board has failed to prove that requirements contained in Condition C.1(e)(iii) are rooted in a valid local rule or regulation in force in the Town of Hingham. "In the context of a comprehensive permit application, just as the building official is a '[l]ocal board' within the definition of G.L. c. 40B, § 20, the fire chief is a 'local board or official who would otherwise act with respect to such application,' and the board in reviewing such application has the 'same power to issue ... approvals' as the fire chief." *Sunderland,* 464 Mass. at 182-183. "The board's power to disapprove a comprehensive permit, like its power to impose conditions in issuing a comprehensive permit, *Zoning Bd. of Appeals of Amesbury v. Housing Appeals Comm*., 457 Mass. 748, 755-756, (2010), is limited to the scope of concern of the various local boards in whose stead the local zoning board acts." *Zoning Bd. of Appeals of Holliston v. Housing Appeals Committee*, 80 Mass. App. Ct. 406, 417-418 (2011);

Zoning Bd. of Appeals of Woburn v. Housing Appeals Committee, 92 Mass. App. Ct. 1115, 4 (2017) (board failed to prove noise was local concern where town had no local regulation or bylaw regulating noise); *383 Washington Street, LLC v. Braintree*, No. 2020-04, slip op. at 15 (Mass. Housing Appeals Comm. March 15, 2022). We conclude that the Board has not satisfied its burden of proof that Conditions C.1(e)(ii) and (iii) are supported by a valid local concern that outweighs the regional need for affordable housing and, therefore, they are struck.

B. Wetlands Resource Area Protection

River Stone sought waivers from the Hingham Wetland Regulations 19 and challenges Condition C.1(b) (iii) and (iv),[26] which state:

> C.1(b)(iii): The undisturbed portion of the 50-foot wetland buffer zone, shown on the Project Plans as the existing Tree Line (see Legend on sheet G-1 for symbology) shall serve as the limit of work and identified on the ground with monuments. No clearing, grading or construction shall be permitted within this undisturbed area.
>
> C.1(b)(iv): All construction proposed within the disturbed portion of the 50-foot wetland buffer zone, shown on the Approved Plans as outside the existing Tree Line, shall be mitigated by native plantings, at a ratio of 2:1 or greater, within the 50-foot buffer zone.

The Board's decision refused to grant a waiver of the Wetland Regulations requirement of a 100-foot buffer around a potential vernal pool. Exh. 84. During the course of the Committee's proceeding, the parties agreed to remove this restriction, so that the controversy now centers on the remaining condition regarding a 50-foot buffer to the BVW. Exhs. 115, 116. The disputed conditions, C.1(b)(iii) and (iv), govern treatment of the 50 foot buffer to the BVW, which, the Board asserts also contains the potential vernal pool. Board reply, p. 24. Mr. Zimmer testified that the 50-foot buffer was justified for the protection of the wetland and the potential vernal pool, including providing a suitable habitat for fairy shrimp to survive. Tr. IV, 55. Additionally, the Town of Hingham's Senior Planner and Conservation Officer, Loni Fournier testified that

[26] The Board argues that testimony regarding the potential vernal pool and the fairy shrimp is irrelevant because the parties have agreed to remove Condition C.1(b)(ii), prohibiting improvements within the 100-foot vernal pool protection zone. In a footnote in its reply brief, the Board notes that Conditions C.1(b)(iii) and (iv) remain as disputed wetlands conditions and that the conditions related to the vernal pool, C.1(b)(i) and (ii), are no longer in dispute. Board reply, p. 24. The proposed decision submitted as Exhibits 115 and 116 shows C.1(b)(i) with proposed, agreed-upon changes and C.1(b)(ii) as deleted. Based on the parties' briefs and Exhibits 115 and 116, we consider Conditions C.1(b)(i) and (ii) revised or removed, as agreed to by the parties as shown on Exh. 115, and focus our discussion only on C.1(b)(iii) and (iv).

§ 7.4(c) of the Wetland Regulations lists a number of prohibitions within the 50 foot buffer zone, including clear cutting, grading, or filling, and structures. Exh. 84. In addition, she testified that §§ 23.3 and 23.7 specify that no new lawns or wall-type foundations may be constructed within the 50-foot buffer zone. Exh. 95, ¶ 16, 17. She explained the reasons for these provisions, which include the view that natural vegetated buffers are more valuable than disturbed buffers; natural vegetation filters sediments, nutrients, pesticides, and other pollutants before they reach a resource area; a naturally vegetated buffer also slows runoff and reduces erosion; and trees and shrubs in a natural buffer provide improved aquatic habitat. Exh. 95, ¶ 19. The Board argues that these reasons fit the definition of local concern in 760 CMR 56.02, to "protect the natural environment … or to preserve open space." The Board cites *Princeton Development, Inc. v. Bedford*, No. 2001-19, slip op. at 14-15 (Mass. Housing Appeals Comm. Sept. 20, 2005) for justification of these conditions because that decision found the "overall impact of the development," as designed in violation of the local bylaw constituted a local concern sufficient to outweigh the regional need for housing. Board brief, p. 29.

River Stone argues that there is no local concern justifying a 50-foot buffer from the BVW and that the project will need to comply with state wetlands act, regardless of the local bylaw. Further, it argues that the significant portions of the buffer area to the BVW are already disturbed and that the Board's witness, Mr. Zimmer, testified that it would be better to replace non-native invasive plants with native ones within the buffer. Tr. IV, 44, 45. The developer's environmental expert, Bradford Holmes, a certified Professional Wetland Scientist and Massachusetts Certified Arborist, testified that the Board's concerns are adequately protected by the Massachusetts Wetlands Protection Act (WPA), which requires that the developer prove that activities within a buffer will not have an adverse effect on a resource area. Exh. 103, ¶ 15.

There was extensive testimony regarding the potential vernal pool and the question of fairy shrimp inhabiting it. Mr. Holmes testified that the potential vernal pool, located within the BVW, does not meet the physical and biological criteria to be a certifiable vernal pool under the Massachusetts Natural Heritage and Endangered Species Program (NHESP) guidelines. Exh. 103, ¶¶ 6, 7. He testified that under NHESP's guidelines pertaining to vernal pools, adult fairy shrimp must be documented as biological evidence for a vernal pool to meet the criteria for certification. Exh. 103, ¶ 8. He further testified that he did not find or document any adult fairy shrimp or other vernal pool species, during his site reviews. *Id*. Mr. Holmes further testified that

the work that will occur within the BVW behind units 13 and 14 will not have an adverse effect on the BVW because the decks to be installed there will be supported over the ground to have a minimal occupation of the buffer zone, no work will occur within the wetlands, and mitigation will be included as necessary to comply with the WPA. Exh. 103, ¶ 16.

River Stone argues that the WPA allows work in the buffer zone that does not result in an adverse effect on the protected BVW, and the local requirements far exceed those state standards by prohibiting work within the buffer zone. Exhs. 35; 1, pp. B-4, C-9; 103, ¶ 15. The developer points to the cross-examination testimony of the Board's wetlands scientist, John Zimmer, who agreed that, even without the local regulations, the developer would be required to show under the WPA that its work is not disturbing the BVW and the potential vernal pool. Tr. IV, 57-58. River Stone also relies upon *Herring Brook Meadow, LLC v. Scituate*, No. 2007-15, slip op. at 26 (Mass. Housing Appeals Comm. May 26, 2010), to argue that the Board has failed to present "concrete evidence" to show the interests of the local bylaw would be affected by the proposed work to an extent not covered in state regulations. Developer brief, p. 37. *Princeton Development,* cited by the Board, is distinguishable: In that case, there were state-certified vernal pools, the site was in a Zone 2 wellhead protection area, the site was adjacent to core habitat areas protected under the state's living waters program, the site contained nearly an acre and a half of wetlands area, and the Town of Bedford had a 25-foot no disturb buffer. *Id.,* No. 2001-19, slip op. at 10. The environmental interests in that case were found to be significant and well-documented. There, the developer's evidence focused mainly on the state wetlands regulations and not the additional bylaw provisions that were more stringent. Here, by contrast, River Stone has addressed the alleged local concerns and provided evidence to demonstrate how each are adequately protected by the Wetlands Protection Act. Developer brief, p. 36.

We agree with River Stone that the interests to be protected by the local bylaw are the same as those protected by the WPA and the Board has failed to identify a specific local concern beyond that protected by the WPA that overrides the need for affordable housing. In *Zoning Bd. of Appeals of Holliston*, 80 Mass. App. Ct. at 420, the Appeals Court found that the developer was committed to the project's compliance with the WPA and had demonstrated that once the project is complete, the wetland resources on the property will be enhanced. That, coupled with the finding that the board had done nothing more than point out that the proposal violates the town's stricter bylaw, led the Court to hold that the board had failed to demonstrate that the

additional safeguards the local bylaw provides to wetlands interests beyond protections afforded by the WPA outweighed the community's need for low or moderate income housing. *Id.* at 420. Further, as we found in *Herring Brook Meadow, supra*, and as discussed in *Holliston,* 80 Mass. App Ct. at 420, simply identifying the existence of the BVW by itself does not establish a local concern. *Herring Brook Meadow, supra*, No. 2007-15, slip op. at 25. The burden is on the Board to prove that a local concern exists that outweighs the need for affordable housing. *Id.* at 22; *Sugarbush Meadow, LLC*, 464 Mass. at 171. We find that the Board failed to articulate specific harms from the limited activity within the 50 foot buffer zone, particularly, as Mr. Holmes testified, there will be an undisturbed strip of 6 feet of buffer zone shown on the project plans that will protect the potential vernal pool area and fairy shrimp, the only species identified within that area. Exh. 103, ¶¶ 13-15. We conclude that the Board has not satisfied its burden of proof that Conditions C.1(b)(iii) and (iv) are supported by a valid local concern that outweighs the regional need for affordable housing and, therefore, they are struck

C. Nitrogen Loading

River Stone sought waivers from BOH Rules § VI and challenges Condition C.5, which states, in pertinent part:

> Condition C.5
>
> (a) In accordance with a partial waiver from Section VI (8) of the local Board of Health Supplementary Septic Regulations and in an effort to minimize Project-related impacts related to nitrogen loading on existing private drinking water wells and potential public drinking water wells in the area, the Applicant shall either:
>
> (i) Reduce the number of bedrooms in the Project such that the onsite wastewater disposal system does not discharge more than 100 gallons of design flow per day per 10,000 SF in lot area; OR
>
> (ii) Design the onsite wastewater disposal system using advanced nitrogen reduction technology which has been certified by the Massachusetts Department of Environmental Protection for general use. This alternative additionally requires the following:
>
> (1) Prior to application for a Building Permit, the Applicant shall provide analyses identified in Title 5 guidelines relative to nutrient loading and nitrogen sensitivity. The required analyses identified below reflect the components of a basic septic Site-
> Specific Mass Balance Analysis.

- Hydrogeologic Assessment
- Mounding Analysis
- Nitrogen Analysis
- Groundwater Monitoring Program

(2) As the maximum daily sewage flow for the Project exceeds 7,500 gallons per day, the Applicant shall file a permit for a plant with the Zoning Administrator. In connection with the filing, the Applicant shall provide six (6) sets of plans prepared by a registered professional engineer. Said permit shall be subject to peer review (consistent with Condition A.6) to confirm compliance with all local Board of Health Supplementary Septic Regulations not expressly waived in Appendix C and the conditions set forth herein.

(3) The advanced treatment, denitrifying wastewater disposal system shall provide a level of treatment which will limit concentration of nitrate-nitrogen in groundwater to less than 10 milligrams per liter (mg/l) at the Project property/boundaries, provided that this alternative shall not be deemed a waiver of any requirements of Title 5 related to such a system. Calculations shall be submitted to document that the design of the system will comply with this condition. A ground water monitoring program shall be established which includes a preconstruction nitrate-nitrogen baseline assessment and post-construction quarterly nitrate-nitrogen analyses to verify compliance with the 10 mg/l limit.

b. All septic components under roadways shall be designed for loading of the Hingham Fire Department's largest apparatus (Tower Ladder). Leaching system piping under roadways shall consist of Schedule 80 PVC.

c. New test pits shall be conducted and systematically located to confirm the subsurface characteristics of the soils in the area of the proposed soil absorption system.

d. Separation from high groundwater shall be calculated after adding the effect of groundwater mounding to the high groundwater elevation as determined pursuant to 310 CMR 15.103(3).

e. The system installed for the Project shall be equipped with sensors and alarms to protect against high water due to failure of the pump consistent with Title 5.

The Board argues that that this condition is necessary to protect private potable wells from the risk of impacts from nitrogen loading. Its engineer, Mr. Brennan, testified that the BOH rules designate the area of the project as nitrogen sensitive to protect nearby potable wells that

are downgradient of the project site.[27] He stated that the BOH rules provide that the area of the project site is identified as a nitrogen-sensitive area and would have to comply with the Massachusetts Department of Environmental Protection (MADEP) requirements for nitrogen loading.[28] Tr. III, 86-87; Exh. 34. *See* Exh. 104, ¶ 5. Under this standard, the BOH Rules permit a maximum of 110 gallons per day of sewage flow per 12,500 s.f. in lot area. Exh. 85, § VI-8.

River Stone requested waivers of several sections of the BOH Rules to allow sewage flow of 426 gpd per 12,500 s.f. in lot area, for a total flow of 9,900 gpd for the 90 bedrooms in the proposed project, which, it argues meets the general (non-nitrogen loading) Title 5 standard. *See* 310 CMR 15.214-217. The Board's Condition C.5 grants a partial waiver of the BOH Rules requirement by allowing the developer to elect between two alternatives: 1) be held to the Title 5 standard applicable to property within a nitrogen sensitive area, which limits flow to 110 gpd per 10,000 sq. ft. in lot area. (which would allow 26 to 29 bedrooms instead of the 90 proposed); or 2) design the onsite wastewater disposal system using advanced nitrogen reduction technology which has been certified by the Massachusetts Department of Environmental Protection (MADEP) for general use. Exh. 1, p. B-12; Tr. IV, 6.

River Stone's engineer, Mr. McKenzie, testified that the project will meet Title 5 standards for design flow of 9,900 gallons of sewage per day (426 gpd per 12,500 s.f. in lot area) in a non-nitrogen sensitive area. Exhs. 87, ¶ 11; 98, ¶ 10. On behalf of the Board, Mr. Brennan testified that, "[w]hile the minimum state Title 5 requirements may indicate that nitrogen loading limits would not apply in a generic project of this type, the local conditions indicate that further review is required." Exh. 91, ¶ 16. He recommended a denitrifying system to protect the private wells shown on the "Properties with Potable Wells Ward Street" plan. *Id*

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[27] During the hearing Board witnesses suggested that the project would also harm a potentially productive aquifer located beneath the wetlands adjacent to the project site on the other side of Ward Street. Ms. Sarni testified that permitting the project without imposing the nitrogen related conditions would adversely impact this aquifer for future public water supply production purposes. Exh. 97, ¶ 22. She agreed that this aquifer was not within the Weir River Watershed. Tr. IV, 32-34. Therefore, neither the project site nor the aquifer is within a defined nitrogen sensitive area. With respect to the potential risk to an aquifer located beneath nearby wetlands, Mr. Brennan agreed new water supplies could not be placed in wetlands. Tr. III, 69-70. The Board did not pursue this issue in its brief.

[28] Mr. Brennan testified that full septic system design information is required to determine compliance with the BOH Rules and whether waivers are appropriate. Exh. 91, ¶ 6. In response, River Stone indicated that full septic design plans will be submitted with the final construction plans to determine compliance with Title 5. Exhs. 23, p. 5; 98, ¶ 10.

While the Board agrees that the site is not within a defined "nitrogen sensitive area" under Title 5, it argues that *Reynolds v. Zoning Bd. of Appeals of Stow*, 88 Mass. App. Ct. 339 (2015) supports the imposition of more stringent local requirements imposed by an overlay water resource protection district provision of the local zoning bylaw. Board brief, p. 16. The municipal water supply for Hingham, Hull and parts of Cohasset comes from the Weir River Watershed sub-basin. Exh. 37; Exh. 97, ¶ 12. In 1996, the Hingham Board of Health identified the Weir River Watershed, the sole source of the town's public drinking water supply, as a nitrogen sensitive area under state Title 5 regulations. Exhs. 20; 97, ¶ 12. That determination based upon scientific evaluation resulted in a state classification of the watershed as highly susceptible to cross contamination, including nitrogen. The MADEP also classified the watershed as highly stressed due to low flow conditions, which have the effect of elevating groundwater nitrogen concentrations. Exh. 20. BOH Rules § VI-8 was established "decades ago" in large measure due to Hingham's stressed watershed, seasonal rainfall coefficients, inevitable residential growth, and the Town's desire to protect the public water supply and private wells. Exh. 20. In August 2013, one of Hingham's public water supply production wells exceeded the safe threshold for groundwater nitrogen, which resulted in the well being taken offline. Exh. 20.

The Board argues there was undisputed testimony that there are several nearby potable wells downgradient of the site. Board brief, p. 17.[29] *See* Exhs. 37; 97, ¶¶ 9, 11, C-1, C-2; 104, ¶ 5; Tr. III, 66. Mr. Brennan testified that the BOH Rules designating this a nitrogen sensitive area are based in part on the presence of the potable wells. Tr. III, 87; Exh. 85, § VI-8. Ms. Sarni testified that, as the local public health concern related to nitrogen impacts on potable wells is not adequately addressed by compliance with Title 5's non-nitrogen standards, the local standard contained in § VI-8 of the BOH Rules was established due to the stressed watershed, residential growth, protection of the public water supply and the serious health effects of nitrogen on potable water supplies and private wells. Exhs. 20; 37; 97, ¶ 14. She testified that there are

[29] Mr. Brennan stated that the nearby wells that were downgradient of the site were located at 65, 77 and 87 Ward Street. On cross-examination, Ms. Fournier acknowledged that the GIS map of wells she had prepared did not show a well at 65 Ward Street. Ms. Sarni concurred on cross-examination. Tr. III, 138, 151. However, Ms. Sarni testified that the GIS map is only one way in which one would determine whether a residence had a potable well, and that the lack of a well marker on the GIS map is not conclusive as to the presence of a well. Tr. IV, 9.

eleven permitted potable wells in the immediate vicinity of the project, several of which are downgradient of the site. Exhs. 44; 97, ¶¶ 16, 20. Ms. Sarni provided nitrogen load calculations for the proposed project based on 90 bedrooms showing a resulting nitrate concentration at the property line of 15.64 mg/l. Exh. 97-D. At 90 bedrooms, Ms. Sarni testified, the project will generate 9,900 gallons of septic effluent per day, almost five times the state Title 5 policy threshold. Exh. 97, ¶ 21. Ms. Sarni explained the risk of nitrogen in drinking water: "The ingestion of drinking water with excessive nitrates/nitrites (nitrogen) can cause death related to methemoglobinemia (blue baby syndrome) in infants and has been linked to deaths diagnosed as Sudden Infant Death Syndrome, fetal and birth defects, and miscarriages. Unlike bacterial pathogens or toxic heavy metals, the treatment process for a community's water supply or a residential water supply well cannot filter excessive nitrogen from its groundwater source. The only protection residents have against excessive nitrogen groundwater contamination is reliance on unpredictable rainwater dilution or to limit its introduction. Exh. 97, ¶ 10. In order to protect the health of the residents who depend on these potable wells, Ms. Sarni testified that the developer should be required to adhere to the Title 5 nitrogen loading standards by either reducing the number of bedrooms or use of advanced nitrogen reduction technology. Exh. 97, ¶ 21.

Mr. Brennan acknowledged the project is not within a state-defined nitrogen sensitive area. Tr. III, 87. However, he testified, "[i]n our April 26, 2018 letter we noted that we believed that the private wells down gradient from the proposed soil absorption system may be adversely impacted by the proposed system and protection of these wells from contamination should be afforded. Exh. 91, ¶ 16. He testified that potable wells are at risk of a potential nitrogen source only if they are downgradient of that source. Tr. III, 66; Exh. 104, ¶ 5. He stated that "groundwater generally flows from higher elevations toward wetlands, streams and rivers at lower elevations. The ground grade at the site of the proposed soil absorption system is at about elevation 62 and the ground grade of the wetlands on the opposite side of Ward Street are at about elevation 45." Exh. 104, ¶ 5. Although he said he had no evidence that groundwater flows from the project to these three properties, Mr. Brennan also stated, "there's wetlands across the street, the wells flow between this development and those wetlands." Tr. III, 68. He pointed out, "[t]hat's what creates the wetlands and the streams and the rivers." Tr. III, 85. He acknowledged

that bedrock can change that flow "if there's bedrock, an outcrop in between that restricts that flow and blocks it." Tr. III, 69.

River Stone argues that the Board has failed to introduce credible evidence to support its assertion that nitrogen loading is a local concern not satisfied through Title 5 protections and, therefore, we should strike Condition C.5 and grant the requested waivers. Developer brief, p. 38. The nitrogen loading limitation found in § VI-8 of the Hingham BOH Rules, which limits discharge to no more than 110 gallons of design flow per day per 12,500 s.f. of lot area, it argues, is a "classic example of an exclusionary bylaw that has the effect of deterring development whether or not that result is in fact intended." *Id.* In support of its argument, River Stone relies upon the testimony of its hydrogeologist, Mr. Dillon, who testified that the wastewater from the site would not flow to the local potable wells identified by the Board because of the site geology. Exh. 102, ¶¶ 10, 11; Tr. IV, 120-123. He stated:

> Based on the complexity of the local bedrock fracture system there would be no way to determine if the potable wells in the area are downgradient, cross gradient or upgradient. In fact, it is possible that the water derived from these wells is from recharge to the aquifer from several miles away. It is also quite possible that little or no water from the River Stone project recharges the bedrock aquifer which would require a strong vertical hydraulic gradient that is unlikely in this area.

Exh. 102, ¶ 11. Mr. Dillon explained in detail the reason why the water discharging from the site would not pose a risk to the wells, based upon studies he has been performing for 35 years on this type of rock in this area. Tr. IV, 119. He stated that "[t]he geology of the area indicates bedrock close to or above the surface. Therefore, it is expected that the potable private wells in the area are in the bedrock aquifer." Exh. 102, ¶ 10; *see* Tr. IV, 119, 121. He described the expected direction of water flow:

> It will seep into fractures that are wide enough to get water into them, it will actually seep into the granite. The issue is getting the water that you're discharging that's going into the bedrock below the water table. So, in other words, as soon as the water from – if any water, and this is a pretty tight granite, it's younger than the granites in the area and so the fractures aren't as great as they are other places, but if you do get water in there, you're going to get water going down to the water table. And it's going to stay there at the water table. It will move in the direction of the direction [sic] the groundwater flows. And I believe it moves to the north here. Based on the fact that the ocean is much lower than the elevation of any groundwater that's going to be on land, so the north-south fractures, water is going to move to the north. Is it going to move into the potable wells? No. The reason for that is the average depth of a bedrock well in Massachusetts is 300 feet, that's USGS calculations. So, in order to get water from the water table to the intake

> of those wells, you need a pretty strong vertical hydraulic radius. So, there's two components of flow here. You're talking about the horizontal radius that is moving probably to the north in the direction of the lowest elevation of water in the area, and then there's the vertical component. In order to have a vertical component, you have to have some sort of driving effect. And that most of the time is the recharge to the aquifer, which the Town of Hingham believes is 18 inches per year. So, in order to drive something that deep with a strong vertical gradient, it just doesn't exist in this area. You don't have enough head -- I'm sorry. Water elevations aren't high enough to drive a vertical hydraulic gradient down a hundred feet.

Tr. IV, 125-126. On cross-examination, Mr. Dillon testified that there are two different aquifers—a bedrock aquifer and an overburden aquifer— and the soil absorption system is in a separate aquifer than the potable water supply. Tr. IV, 114. The overburden aquifer, he explained, is where there exists a thin layer of soil, "probably 10 feet thick," on top of bedrock into which sanitary waste is discharged. He stated that water coming from the overburden "would have dried up because it's just not thick enough." Tr. IV, 115. *See* Tr. IV, 114-116, 123. He testified that the wells are located in the bedrock aquifer and where a well is in bedrock and not in an area where waste is discharged, such as an overburden aquifer, there would be no risk of nitrate in the waste reaching the wells. Tr. IV, 122-123; Exh. 102, ¶ 10. He further stated that any nearby wells likely have sanitary seals required in Massachusetts separating them from the overburden soils used in the surrounding area for the discharge of sanitary waste. Therefore, he testified, there would be no impact to these wells from the nitrate discharged at the site. Exh. 102, ¶ 10.

The Board disputes Mr. Dillon's testimony that water discharged from the site would not pose a risk to the wells by pointing to his testimony on cross-examination that, "in the case of fractured granite that if the water is moving in one of the fractures, it can move north, south, east or west" and could change direction if it encounters a cross-fracture. Tr. IV, 129. Mr. Dillon's testimony went on, however, to state that it was his belief that the water on the site would discharge to the north, based upon the fact that the closest location of the ocean to the site is to the north. Tr. IV, 128-130. The Board also disputes Mr. Dillon's testimony regarding sanitary seals, based upon the testimony of Ms. Sarni that the wells in the area of the project date from the 1920s to the 1980s and there is no evidence in the record that any of them, given their age, have a sanitary seal. Exh. 110, ¶ 4. Ms. Sarni went on to state that Mr. Dillon's testimony that the nitrate will have no impact on the nearby wells is a "dangerous one when what is at stake is

the safety of the nearby potable wells and potential public water supply source." Exh. 110, ¶¶ 5, 6.

The developer points to the testimony of Ms. Sarni and Mr. McKenzie that public water was recently connected in front of the properties in question and is now available for the homeowners to connect to as an alternative to the use of their private wells, making the likelihood of elevated nitrogen in the wells an insufficient basis to impose this condition. Developer brief, p. 39; Tr. IV, 11-12; Exh. 113. Ms. Sarni testified, however, that the Board of Health does not have the right to order a private well decommissioned, except in the case of disrepair or risk to public health. Tr. III, 154-155.

River Stone argues that the Board failed to present any testimony that nitrogen from the project would "definitively put any potable wells at risk." This is an incorrect standard. In looking at the risk asserted by the Board, we are guided by the standard set out in *Reynolds, supra*. There the Appeals Court determined that the evidence showed that it is "more likely than not" that the project would cause excessive nitrogen levels at a specific neighboring well, it was "unreasonable to conclude that the local need for affordable housing outweighed neighbor's health concerns." *Reynolds*, 88 Mass. App. Ct. at 350. In *Reynolds*, an abutter of an affordable housing development contended, among other things, that the private wells on his and his neighbors' properties would have elevated nitrogen levels due to the discharge into the waste disposal system designed for the development and, therefore, it was unreasonable for the board to waive certain waste disposal limitations contained in the town bylaw. In *Reynolds*, 80 percent of the development was located within the town's water resource protection district, and thus, subject to local sewage disposal system regulations that are more protective than state standards. The Court found that there was sufficient evidence that the system would contaminate the groundwater such that unacceptable levels of nitrogen would reach an abutter's well and that compliance with state standards was insufficient to protect the groundwater from being contaminated by the project. *Id*. at 349. Reliance on private wells for drinking water, *Reynolds* held, "supports the inference that the area at issue, including the locus and the neighboring residential homes, is dependent on clean groundwater." *Id.* at 344. Maintaining clean groundwater servicing local private wells under those circumstances was an important local health issue, the Court found, that was not adequately protected by compliance with applicable state standards. *Id.* at 350.

As we have stated previously, it is incumbent on the Board to introduce evidence to demonstrate site specific concerns about elevated levels of nitrogen or any other rationale that would to support maintaining the application of the BOH Rules this project. *See White Barn Lane, LLC v. Norwell*, No. 2008-05, slip op. at 18 (Mass. Housing Appeals Comm. July 18, 2011); *Herring Brook Meadow, supra,* No. 2007-15, slip op. at 26. The Board has, in fact, provided evidence to establish that Hingham has had a long-standing, documented local concern in protecting its already stressed drinking water supply from nitrogen contamination, and that this concern includes the protection of potable residential wells. Hingham has for many years taken steps to attempt to protect its current and future water supplies and the drinking water of its residents, both public and privately sourced, through the BOH Rules establishing a town-wide nitrogen loading standard that is 20% higher than the state standard. Exh. 85. And, Mr. Brennan drew the connection between the BOH Rules and the concerns it supports regarding the potential health risks to abutters and neighbors of the project site. He also stated the water would flow downgradient but noted that bedrock could restrict or block that flow. Tr. III, 66, 69; Exh. 104, ¶ 5.

Here, we consider the testimony of the developer's witness, Mr. Dillon, to be more credible than that of Mr. Brennan. Mr. Dillon provided a clear, specific explanation of the geology of the area of the site and the potential impact of the project upon the surrounding area. Although he could not say for certain that the groundwater would flow in any one direction, whether toward or away from the wells, and that it could change direction if it encounters a cross fracture of the bedrock, he expected it would ultimately travel north toward the ocean. Tr. IV, 125-129. He also testified that because of the characteristics of water flow in bedrock, where he testified the wells would be situated, the flow would not reach the wells. Tr. IV, 125-126. Therefore, we find that there is only a possibility that the wastewater system would cause groundwater with elevated nitrogen levels to flow to the neighboring potable wells and the wetlands.

There is no direct evidence that the downgradient wells do not have the sanitary seals that would separate them from the soil and protect them if there were in fact a discharge at their locations. Ms. Sarni's testimony that the potable wells in the area date from the 1920s to the 1980s and may predate the use of sanitary seals does not establish the lack of such seals. Exh. 110, ¶ 4.

Finally, River Stone's argument that the homeowners in the area with private wells have the ability to connect to the public water system if they are concerned about the risk of their wells being contaminated, is discredited by *Reynolds,* where the court made clear that abutters may not be "forced to connect to an alternative water source, if one were available, so that low income housing may be developed." *Reynolds*, 88 Mass. App. Ct. at 350. *Reynolds* stated that "[w]hen faced with evidence that one or more adjacent private wells will have elevated nitrogen levels and there is no public water source in the area and no proposal to provide the abutter with clean water, it is unreasonable to conclude that the local need for affordable housing outweighs the health concerns of existing abutters." *Id. at* 350.[30]

Under these circumstances, the Board has demonstrated a possibility of serious health risks posed by nitrogen contamination of nearby wells. This likelihood is less than was seen in *Reynolds.* Here, we are required to balance a much smaller risk of an undoubtedly serious health impact against the affordable housing need. We conclude that the Board has failed to demonstrate that its local concern regarding health risks posed by nitrogen contamination of nearby wells and areas outweighs the need for low or moderate income housing. *See 9 North Walker St. Dev., Inc. v. Rehoboth*, No. 1999- 03, slip op. at 11-13 (Mass. Housing Appeals Comm. June 11, 2003) (board failed to demonstrate nitrogen loading was local concern that outweighed need for affordable housing). We therefore strike Condition C.5.[31]

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[30] While the evidence here indicated that abutters with wells in the area do have access to public water supply, *Reynolds* made it clear that it did not "mean to suggest that abutters may be forced to connect to an alternative water source, if one were available, so that low income housing may be developed." Similarly, we decline to rely on the availability to a public water connection in weighing the need for affordable housing against local health concerns. *See Reynolds*, 88 Mass. App. Ct. at 350.

[31] The Committee carefully considers all issues raised before us. The risk of adverse health impacts from excessive nitrogen loading is a local concern that Hingham has addressed over a long term and one to which we applied particular care in balancing the potential health impacts against the need for affordable housing. The record before us leads to the finding we have made here. Nevertheless, we believe it is important to state that even though we are not mandating mitigation by the developer, we do recommend that it consider and implement some mitigation measures that could benefit neighboring properties with wells and minimize the chances of controversy in the future. In particular, we recommend that River Stone take either of the following actions: (1) install an advanced nitrogen treatment facility as part of its on-site wastewater disposal system; or (2)(A) arrange and pay for annual testing of the neighboring wells for nitrogen contamination (if allowed by the respective property owner) for a period of five years from the start of occupancy of the development and provide the results of such testing to the Hingham Board of Health; and (B) if the results of testing show dangerous levels of nitrate, River Stone offer mitigation to the property owner of the potentially affected well in the form of paying the cost of connecting the

D. Traffic and Road Width

River Stone challenges conditions relating to the internal roadway, pedestrian traffic and parking requirements imposed by the Board.[32]

1. Internal Roadway, Pedestrian and Parking Improvements: Condition C.1(c); Internal Roadway Improvements: Condition E.2(a)(i)

> Condition C.1(c)(i): All internal roadways shall provide a traveled-way of 24-feet in width in order to accommodate: 1) the turning and maneuvering requirements of emergency vehicles; 2) parking maneuvers to/from the visitor parking areas; and 3) occasional on-street parking, particularly in the vicinity of Ward Street where parents may park while waiting for the school bus.
>
> Condition E.2(a)(i): All internal roads shall maintain a minimum width of 24' and a sidewalk on a minimum of one side of each roadway.

The Board argues that the 24-foot roadway width is justified by the local concern in protecting the safety of the residents in the project. The Board points to testimony of its traffic expert, Mr. Dirk, that a 24-foot wide roadway is consistent with Massachusetts Department of Transportation standards for residential access to aggregations of residential units of 10 or more dwelling units and the roadway width that is recommended by the Institute of Transportation Engineers and the American Association of State Highway and Transportation Officials for roadways that serve medium density residential developments. Exh. 92, ¶ 11. Mr. Dirk acknowledged on cross-examination that the State Fire Code specifies that the minimum roadway width for safe passage of emergency vehicles is 20 feet. Tr. III, 95. He testified further that, on a 20-foot wide roadway, if one fire apparatus vehicle is able to pass another fire apparatus vehicle, it would similarly be able to pass a delivery truck that was dropping off a package. Tr. III, 97. The Board's fire safety expert, Lt. DiNapoli, testified that, in this proposed

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property to the municipal water system. *See Ipswich Housing Auth. v. Ipswich,* No. 1991-01, slip op. at 9-10 (Mass. Housing Appeals Comm. June 14, 1993) (where board met burden of proving local concern regarding sewage disposal outweighs need for housing "by the barest of margins," Committee reinstated condition board had waived for wells to monitor groundwater to detect malfunctioning septic system, because "no matter how well on-site septic systems are designed, there is always some potential for negative effects upon adjoining properties….").

[32] The parties have agreed to modify or remove Conditions C.4(b) and (c), Condition E.2(a)(ii) and Condition E.2(b) as set forth in Exhs. 115 and 116; therefore, we consider only Conditions C.1(c)(i) and C.1(c)(vii)(1) and (3) and E.2(a)(i) and (iii) as the remaining disputed conditions regarding traffic, road width and sight lines.

development, he would anticipate that there would be vehicles such as delivery trucks parked along the side of the road that may obstruct part of the roadway. He testified that he visited another development in Hingham that has a 20-foot wide roadway and he witnessed a landscape truck parked on the right side of the road and a delivery truck making a delivery to the same address, which caused the entire width of the roadway to be obstructed. Exh. 96, ¶ 9; Tr. III, 131. On cross-examination, Lt. DiNapoli testified that he is not aware of any other requirement for more than 20 feet of unobstructed roadway in Hingham and, without parking or snow obstructions, a 20-foot wide roadway complies with state codes. Tr. III, 124-125. While he is aware that the Board imposed a condition prohibiting on-street parking in the permit, Lt. DiNapoli stated that, nevertheless, "people will park on the roadway." Tr. III, 132.

River Stone argues that it designed the interior roadways of this project to be 20 feet wide to adequately serve the project, its residents and the surrounding neighborhood with sidewalks for pedestrians and bikers, ample visitor parking to support the on-street parking prohibition and adequate turning radiuses for Hingham fire equipment. Developer brief, p. 18. Its traffic expert, Mr. Müller, testified that the 20-foot roadway width complies with the unobstructed minimum width in the State Fire Code, § 18.2.3.4.1.1. Furthermore, he stated, a 20-foot wide roadway is adequate because on-street parking is prohibited, voluminous parking is provided within the development, snow windrows will be removed, and the project includes a sidewalk. Exh. 101, ¶ 7. It was his professional opinion that the 24-foot width imposed by the Board is not justified, as the requirement is based upon speculation that the roadway would be blocked by delivery or other vehicles or snow windrows. Exh. 101, ¶¶ 7, 8.

There was no evidence presented that the project would result in a greater risk of obstruction by a parked delivery truck than there would be by any other random occurrences such as traffic accidents or construction. Mr. Dirk agreed that the project roadways met the width requirements of the State Fire Code and that the State Fire Code "assumes" that the roadway will be shared by parked vehicles, pedestrians and bicycles. Tr. III, 95-96. The project will have a sidewalk for pedestrian access and 144 parking spaces for 32 units, or 4.5 parking spaces per unit. Mr. Dirk testified that the plans provide for sufficient turning radius for a fire vehicle. Tr. III, 98-100; Exh. 2. Accordingly, we find that the Board has failed to demonstrate that the asserted potential obstructions on the project roadways represent a valid local concern that outweighs the regional need for affordable housing. Accordingly, Conditions C.1(c)(i) and

E.2(a)(i) are struck.

2. **Sight Lines: Conditions C.1(c)(vii)(1), C.1(c)(vii)(3), E.2.a(iii)**

In its brief, River Stone challenged conditions imposed by the Board relating to the sight lines. The parties agreed up on language to changes to Conditions C.4(b) and (c) and E.2(b). Those changes are accepted. The remaining conditions are:

> Condition C.1(c)(vii)(1): The object height and the driver eye height shall both be set at 3.5-feet above the pavement surface. This revision will increase the line of sight that is shown and reduce the extent of the regrading that is required.
>
> Condition C.1(c)(vii)(3): The stopping sight distance along Ward Street approaching "Road C" and along "Road C" approaching "Road D" shall be provided in both plan and profile view. The stopping sight distance is required in order to demonstrate that a motorist traveling along Ward Street and "Road C" (assumed eye height of 3.5-feet above the pavement surface) can see an object (established as 2-feet above the pavement surface) in the roadway at the intersections. A grade correction factor shall be applied to the calculated stopping sight distance requirements for "Road C" approaching "Road D" based on an 8 percent grade along "Road C.
>
> Condition E.2(a)(iii): Given the extent of the regrading activities that will be required to provide the necessary sight lines from both "Road C" and "Road D", the Applicant shall submit an affidavit from a Professional Engineer certifying that the required minimum sight lines are met at the Project site roadway intersections after the completion of the improvements.

The Board argues that these conditions were not specifically raised by River Stone in the Pre-Hearing Order, other than a generic reference made by River Stone to Condition C.1(c). Pre-Hearing Order, § IV, p. 6. It argues that River Stone did not provide any testimony demonstrating how these conditions had any adverse impact on the economics of the project; therefore, it contends that River Stone should be precluded from raising them as an issue now. Board brief, p. 33; Board reply, pp. 20-21. We agree with the Board that River Stone failed to introduce evidence regarding the impact of these two conditions on the economics of the project. Where the developer has failed to sustain its initial burden to demonstrate that a certain condition or denial of waiver in the decision would render the project uneconomic, the burden never shifts to the Board to prove a local concern that justifies the condition. *See Stoneham, supra*, No. 2014-10, slip op. at 4 n.4, 30. However, since the parties have reached agreement on these conditions, we order them modified as agreed upon by the parties in Exhs. 115 and 116.

VII. CONCLUSION

Based upon review of the entire record and upon the findings of fact and discussion above, the Housing Appeals Committee concludes that the decision of the Board is not consistent with local needs and includes provisions that are outside the scope of the Board's authority. 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.

A. Stipulated Conditions

Except as modified by this decision, the parties' stipulated conditions as set forth in Exhibit 116, are incorporated herein.

B. Committee's Conditions

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

2. The amended comprehensive permit shall conform to the application submitted to the Board, and the Board's original decision, as modified by this decision.

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

   a. The Development, consisting of 32 total units, including 8 affordable units, shall be constructed as shown on the site plans set out in and prepared by McKenzie Engineering Group, Inc., revised through December 19, 2018 (Exhibit 2), and shall be subject to those conditions and requirements imposed in the Board's decision filed with the Hingham Town Clerk on August 6, 2018 (Exhibit 1), 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 River Stone'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 Hingham town entities, staff or officials for final comprehensive permit review and approval pursuant to 760 CMR 56.05(10)(b).

e. All Hingham 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 Hingham.

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 River Stone'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 Hingham town staff, officials and boards shall take whatever steps are necessary to ensure that a building permit and other permits are issued to River Stone, without undue delay, upon presentation of construction plans, pursuant to 760 CMR 56.05(10)(b), that conform to the comprehensive permit and the Massachusetts Uniform Building Code.

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

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

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

HOUSING APPEALS COMMITTEE

September 23, 2022

Shelagh A. Ellman-Pearl, Chair

Joseph P. Henefield

James G. Stockard, Jr.

Dissent:

Rosemary Connelly Smedile, dissenting, states: "I believe that River Stone should strongly consider the option of working with the abutters to address the risks to their wells."

Dissenting:

Rosemary Connelly Smedile

Lisa V. Whelan, Counsel