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

RIVERVIEW PROPERTIES, LLC

v.

KINGSTON ZONING BOARD OF APPEALS

No. 2021-09

DIRECTED DECISION ON CROSS-MOTIONS FOR DIRECTED DECISION

January 21, 2026

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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

RIVERVIEW PROPERTIES, LLC, Appellant, v. KINGSTON ZONING BOARD OF APPEALS, Appellee.	)	No. 2021-09

DIRECTED DECISION ON CROSS-MOTIONS FOR DIRECTED DECISION

I. INTRODUCTION

This is an appeal, pursuant to G.L. c. 40B, §§ 20-23 and 760 CMR 56.00, brought by Riverview Properties, LLC (Riverview or developer), from a decision of the Kingston Zoning Board of Appeals (Board) granting with conditions a comprehensive permit application with respect to property located in Kingston. Chapter 40B requires the Housing Appeals Committee (Committee) to determine whether, in the case of an approval with conditions, the developer has proven that the challenged conditions make the building or operation of the project uneconomic and, if so, whether the Board has proven that there is a valid health, safety, environmental, design, open space, or other local concern which supports such conditions, and then, that such local concern outweighs the need for affordable housing. G.L. c. 40B, § 23. After a hearing in this matter and review of the parties' evidence and briefs, we conclude that Board's decision was not reasonable or consistent with local needs. We do so, mindful of the balance between legitimate local concerns and the regional need for low or moderate income housing, and the Committee's narrow statutory focus on consideration of local concerns. The Board's primary focus was on lack of water capacity within the Town of Kingston and the inability of the Town to provide sufficient water supply to the project without causing harm to the Town's water system. As explained further, the Board's last minute concession regarding availability of

adequate water supply to the project substantially altered the focus of this case, and, along with the developer's economic evidence and the Board's limited evidence in support of the imposed conditions and waiver denials ultimately leads us to conclude that Riverview has met its burden of proving that the project as conditioned by the Board's decision is uneconomic, and significantly more uneconomic, than the proposed project, and that the Board has not met its burden of proving that a valid local concern outweighs the regional need for affordable housing.

II. PROCEDURAL BACKGROUND

On December 3, 2020, Riverview filed an application for a comprehensive permit with the Board pursuant to G.L. c. 40B, §§ 20-23, to build a 24-unit condominium development on 1.84 acres of property located on May Avenue and Post Court in Kingston. By a decision filed with the Town Clerk on October 8, 2021, the Board granted Riverview a comprehensive permit with conditions, including one that reduced the number of units from 20 to four. On October 25, 2021, Riverview appealed the decision to the Committee, challenging the conditions imposed by the Board as rendering the project uneconomic. On December 16, 2021, the Board moved to dismiss the appeal, asserting that Riverview failed to provide for consultant peer review of a revised pro forma in violation of the local hearing requirements under 760 CMR 56.05(6). The presiding officer denied the motion.

By ruling dated October 31, 2022, intervention was granted to abutters Nathan A. Hedberg, Theresa Kuharich and Barry Figioli, Trustee of the Figioli Realty Trust, allowing them to "participate regarding the issue of site grading and stormwater management solely with respect to impacts of flooding on their properties from the project." Ruling on Motion to Intervene, p. 10. The abutters also sought to intervene on "safety impacts of the project's use of Post Court" and a ruling on their intervention on that issue was deferred until after the submission of a draft prehearing order by Riverview.[1] *Id.*

After an unsuccessful attempt at mediation, the parties continued to negotiate resolution of the matter and, subsequently, in April 2024, they filed a joint motion to stay the proceedings and remand the matter to the Board,[2] which was allowed. The remand did not yield satisfactory

[1] The Interveners did not participate in the hearing or submit any post-hearing briefs.

[2] The Interveners did not join, but did not oppose, the motion to remand.

results to the developer, and, when the developer anticipated that the Board would not approve the conceptual 12-unit proposal, it sought to withdraw that proposal. The Board denied the request for withdrawal and denied the revised conceptual project on August 26, 2024, for several reasons, including the lack of an available water supply. Following the Board's remand decision, the presiding officer held a status conference on September 5, 2024, to discuss moving forward with this appeal. Counsel for the Board and the developer agreed they should revise the pre-hearing order to modify their cases based on the Board's position that the Town has no capacity for water service. As provided in the parties' joint motion to stay the proceedings and remand, the developer elected to proceed with its appeal of the Board's October 8, 2021, grant of the permit with conditions.

On December 17, 2024, the Board filed a Motion for Modification/Clarification of the Pre-Hearing Order (PHO) to: "1) clarify the regulations under which the Board intends to defend its decision" requesting specifically "that, with respect to the issue of the availability of a public water supply, the Board intends to present its case under both 760 CMR 56.07(2)(b)(3) and 760 CMR 56.07(2)(b)(4);"[3] and 2) identify an additional witness on behalf of the Board, Kristen M. Berger, P.E. Board Motion for Modification/Clarification (Board motion for modification), p. 1. By order dated January 17, 2025, a ruling regarding whether the Board may rely on 760 CMR 56.07(2)(b)(3) and (4) in its responsive case was deferred, to be made following review of all the parties' summary decision papers, and Ms. Berger's testimony was allowed de bene.

The Board and the developer filed cross-motions for summary decision pursuant to 760 CMR 56.06(5)(d) on the issue of the capacity of the Town's water service, which were denied by order dated June 25, 2025. That order also permitted the Board to amend the PHO to raise the issue of adequacy of the Town's public water supply as part of its case pursuant to 760 CMR 56.07(2)(b)(3) and 760 CMR 56.07(2)(b)(4) and the testimony of Ms. Berger was admitted.

A site visit was conducted on October 25, 2024. In preparation for the hearing the parties submitted pre-filed direct and rebuttal testimony of 10 witnesses. The presiding officer held

[3] 760 CMR 56.07(2)(b)(3) provides that the Board's burden is to prove a "that there is a valid health, safety, environmental, design, open space, or other Local Concern which supports such conditions, and then, that such Local Concern outweighs the Housing Need." Pursuant to 760 CMR 56.07(2)(b)(4) if the denial or conditions are based upon the inadequacy of existing municipal services or infrastructure, the Board has the burden of proving that the inadequacy of services of infrastructure is a valid local concern that outweighs the regional need for housing, and that installation of adequate services to meet local needs is not technically or financially feasible.

three days of hearing on July 8 and 9 and August 1, 2025, to permit cross-examination of witnesses. Sixty-five exhibits[4] were entered into evidence.[5] By email correspondence on the eve of the August 1 hearing and on the record at the commencement of the hearing that day, the Board's counsel disclosed to the parties and the Presiding Officer that:

> I can represent to the Committee and I'll stipulate to the fact that yesterday the Kingston Water Commission voted to lift its halt on new water service connections; and that as of this time the Water Commission is going to receive and process applications for water service connections.

Tr. III, 3. The Board requested a continuance of the hearing to allow it time to reevaluate its position in this appeal. Riverview objected to the continuance and stated that earlier that morning it had filed a motion for directed decision pursuant to 760 CMR 56.06(5)(e) on the ground that the Board's evidence had failed to meet its burden of proof on local concerns.[6] The Presiding Officer denied the Board's request for a continuance, noting the filing of the developer's motion for directed decision (Developer motion) and held the final day of hearing. Following the presentation of evidence, the Board filed a response and limited opposition to the developer's motion for directed decision and cross-motion for directed decision asserting that the developer's evidence failed to meet its burden of proof on the economic effect of certain conditions it characterized as " procedural" (Board cross motion),[7] as well as a motion to reopen

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[4] *See* § III below.

[5] At the hearing, the Board argued that Exhibits 61 and 62, proffered by the developer, were not relevant. Similarly, the developer argued that Exhibit 63, proffered by the Board, was not relevant. The presiding officer admitted them de bene at the hearing. Tr. I, 13. The parties did not pursue their objections to these exhibits in their post hearing briefs. In general, the Committee, as an administrative body, has discretion to admit evidence that would not be appropriate in a court and the weight assigned to such evidence is a matter for the Committee. *See* G.L. c. 30A, § 11(2). Because the inclusion of such evidence is not prejudicial, the Committee is reluctant to strike it. Accordingly, we admit these exhibits into evidence.

[6] The developer's specific grounds are: "[s]ince the state of the evidence now conclusively establishes that it is technically feasible to connect to municipal water in Kingston, the Board has failed to meet its burden (1) to establish its conditions of approval were consistent with local needs, (2) that there are any valid health, safety, environmental, design, open space, or other local concerns that supports such denial or approval with conditions, and then, that such local concerns outweigh the housing need, or (3) that the installation of services adequate to meet local needs is not technically feasible." Developer motion, p. 2.

[7] The Board's motion states, "[t]o that end, the Board cross-moves for a Directed Decision that the procedural conditions opposed by the Applicant have not been proven to render the Project economic and

the hearing record (Board motion to reopen) to admit correspondence from the Massachusetts Department of Environmental Protection (DEP). The developer filed its reply and opposition to the Board's opposition and cross motion (Developer opposition) and the Board filed a reply to the Developer's opposition to the Board's cross motion (Board reply).[8] On September 25, 2025, the parties filed a Joint Status Report, indicating that the parties agreed that further post-hearing briefing would not "be of any assistance to the Committee and would, at most, reiterate arguments advanced in the motion for directed decision for which the Board offered limited opposition." *Id.*, ¶ 4. A conference was held on September 30, 2025, at which the parties confirmed that it was their opinion and agreement that no further post-hearing briefing would be necessary or helpful to the Committee in acting on the motion for directed decision, but, if the motion for directed decision was denied, they reserved their rights to provide post-hearing briefs at that time.

III. MOTION TO REOPEN HEARING RECORD

The Board moved for the Committee to reopen the hearing record in this appeal and admit correspondence received by the Kingston Water Department on August 11, 2025, after the hearing had closed. The correspondence is from DEP, indicating that the Water Department: "has reported water use exceeding its authorized use for each of the seven (7) calendar years from 2018 through 2024. Kingston did not comply with the [Residential Gallons Per Capita Day] requirement or the functional equivalence requirement for the years 2018, 2019, 2020, 2021, and 2022." Board motion to reopen, Exh. A. The letter goes on to state that DEP intends to take enforcement action against the Kingston Water Department, which may "include, but may not be limited to, issuance of a civil administrative penalty; enforcement order; or referral of this matter to the Massachusetts Attorney General's Office for civil or criminal prosecution." *Id*. Attached to DEP's letter is a draft Administrative Consent Order, outlining several possible penalties and requirements that may be imposed upon the Kingston Water Department, including but not limited to, fines, reporting requirements, outdoor water restrictions, performance of leak

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that, accordingly, such conditions must be determined to govern the construction of the Project." Board cross motion, p. 2.

[8] The developer also filed an opposition to the Board's motion to reopen, and the Board filed a reply to the developer's opposition to the motion to reopen.

detection surveys, and a water audit. Nothing in the DEP notice indicates imposition of a moratorium on new water connections or any other action that would prevent the Water Department from issuing a water connection permit for the project. The Board argues that the DEP notice is relevant to the issues raised in this appeal because:

> The hearing in this appeal involved extensive testimony and evidence presented upon the Town's technical ability to provide water connections to the project at issue in this appeal. Subsequent to the hearing, the Town's Water Department received correspondence from the Massachusetts Department of Environmental Protection, indicating that it is out of compliance with state permitting requirements for water extraction activities and the condition of its water distribution infrastructure.

Board motion to reopen, p. 1. Further, the Board argues that the DEP letter should be admitted because "the Town is the subject of a particular administrative enforcement action bearing upon a matter that directly affects the permits to be issued or not issued as a result of this appeal." Board reply on Board motion to reopen, p. 2.

In its opposition, Riverview argues that the uncontested testimony introduced during the hearing "conclusively established that the proposed project complies with or can comply with all state and federal laws and regulations and the case before the Committee was focused on local concerns." Developer opposition to Board motion to reopen, p. 2. It further argues that "the project will be subject to any state requirements regardless of whether they are in evidence or not further obviating the need to reopen the hearing." *Id.* Finally, Riverview cites for support a previously decided motion to reopen a hearing in *518 South Avenue, LLC v. Weston*, No. 2022-12, slip op. at 15-16 (Mass. Housing Appeals Comm. Jan. 23, 2025) in which the Committee refused to reopen its hearing to admit documents that related exclusively to matters regulated by state standards. *Id.*, p. 3.

The DEP letter may provide the Committee with some context of the Board's arguments and allowing it in as evidence does not prejudice either party nor is it dispositive of any issue in this matter. If the Kingston Water Department is out of compliance with DEP permitting requirements, the consequences of that noncompliance, and whether it affects Riverview's permitting, are matters that will be addressed at the time Riverview seeks a water connection permit for the property. As argued by the developer, the Committee's decision will include a condition that the project comply with all applicable state and federal requirements, as it is required to do. Therefore, the Board's motion to reopen is allowed and the letter dated August

11, 2025, from the DEP to the Kingston Water Department is admitted as Exhibit 66.

IV. FACTUAL BACKGROUND

The project site consists of 1.84 acres located on contiguous parcels known as 27 May Avenue, 23 May Avenue and 8 Post Court in Kingston MA. On December 3, 2020, Riverview submitted an application to the Board for a comprehensive permit for a proposed project consisting of 24 ownership units, with four different building types, including single-family, duplex, triplex and quadplex structures, with six of the units dispersed throughout the proposed project to be low or moderate income units. *See* PHO, ¶ 6. Riverview revised the project during the Board's hearing on the application to reduce the number of units to 20. *Id*. The Board's decision, dated October 7, 2021, granted a permit with conditions, including one reducing the number of units from 20 townhouse condominiums to four units, which may be townhouse condominiums or single-family homes. The Board's decision did not mention or impose any conditions regarding the project's connection to the public water supply other than a requirement that "the revised site plan shall comply with the Kingston Water Department, including the requirement to install an 8" main" and regarding possible easements that may be required for installation of water and sewer lines. Exh. 41. After the agreed-upon remand, the Board issued a decision, dated August 7, 2024, denying the project. Exh. 63.

V. DIRECTED DECISION STANDARD AND BURDENS OF PROOF

Pursuant to 760 CMR 56.06(5)(e): "Upon a party's submission of prefiled testimony, any opposing party may move for a directed decision in its favor on the ground that upon the facts or the law the original party has failed to prove a material element of its case or defense." As we stated in a directed decision issued by the Committee, an analogy to cases considering the directed verdict standard of Rule 50(a) of the Massachusetts Rules of Civil Procedure is helpful. The Committee must determine whether a party's evidence when considered in the light most favorable to the nonmoving party is legally sufficient to support a decision in favor of the moving party. *Litchfield Heights, LLC v. Peabody,* No. 2004-20, slip op. at 7, 10 (Mass. Housing Appeals Comm. Jan. 23, 2006) (directed decision granted in light of new evidence regarding water service), citing *Donaldson v. Farrakhan*, 436 Mass. 94, 96 (2002) (comparing standard to summary judgment standard). "The mere existence of a scintilla of evidence" to support the

Board's position is insufficient. *Donaldson*, 436 Mass. at 96, quoting from *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 251-252 (1986) (inquiry under each is the same: whether the evidence presents sufficient disagreement to require submission to a jury, or whether it is so one-sided that one party must prevail as matter of law). *See also Stapleton v. Macchi*, 401 Mass. 725, 728 (1988). "[T]he evidence must contain facts from which reasonable inferences based on probabilities rather than possibilities may be drawn.... And the evidence must be sufficiently concrete to remove any inference which the [fact finder] might draw from it from the realm of mere speculation and conjecture." *Alholm v. Wareham*, 371 Mass 621, 627 (1976) (citations omitted). *Cf. Dolan v. Suffolk Franklin Savings Bank*, 355 Mass. 665, 670 (1969). The motion should be denied "[i]f, upon any reasonable view of the evidence, there is found a combination of facts from which a rational inference may be drawn in favor of the [nonmoving party]." *Chase v. Roy*, 363 Mass. 402,404 (1973).

Where, as here, cross motions for directed decision are involved, we consider each motion separately, drawing inferences against each movant in turn. *Allstate Ins. Co. v. Occidental Int'l Inc*., 140 F. 3d 1, 2 (1st Cir. 1998) (cross motions for summary judgment require "Janus-like" dual perspective to view facts for purposes of each motion through lens most favorable to nonmoving party); *Mancuso v. Mass. Interscholastic Athletic Ass'n, Inc*. 453 Mass. 116, 122 (2009) (applying same standard reviewing motion for directed verdict that applies to motion for judgment notwithstanding verdict).

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 developer must first prove that the conditions and requirements in the aggregate make construction or operation of the housing uneconomic. *See* 760 CMR 56.07(1)(c)1, 56.07(2)(a)3; *Board of Appeals of Woburn v. Housing Appeals Comm.*, 451 Mass. 581, 594 (2008); *Haskins Way, LLC v. Middleborough*, No. 2009-08, slip op. at 13 (Mass. Housing Appeals Comm. Mar. 28, 2011). If the developer meets this burden, the burden then shifts to the Board to prove first, that there is a valid health, safety, environmental, or other local concern which supports the denial, and second, that such concern outweighs the regional need for low and moderate income housing. G.L. c. 40B, §§ 20, 23; 760 CMR 56.07(1)(c), 56.07(2)(b)3. We therefore review the Board's cross-motion first.

VI. BOARD'S CROSS MOTION ON ECONOMIC EFFECT OF CERTAIN SO-CALLED "PROCEDURAL" CONDITIONS

A. Board's Argument

In addition to a limited opposition to the developer's motion for directed decision on local concerns, the Board filed a partial cross motion for directed decision asserting that the developer had not met its burden of proof to show that certain of the conditions challenged by Riverview were uneconomic. In its motion, the Board asks us to retain those "reasonable procedural conditions." Board cross motion, p. 2. The Board states:

> Because the Town has since resumed issuing water connection permits, the Board concedes that the factual and legal basis for its appeal and the denial, on remand, of the Appellant's application for a comprehensive permit has been rendered moot, subject to further requirements of the Massachusetts Department of Environmental Protection. Riverview, though, seeks in its motion that the Committee issue an order "striking the conditions" challenged by Riverview, and directing a decision from the Committee resulting in the issuance of a comprehensive permit for its project in the Town of Kingston. Because a number of non-substantive conditions exist in the Board's previous decision approving the project with conditions, the Committee should only allow the motion in part, if at all, and issue a decision that incorporates the reasonable procedural conditions on the project, which have not been fully challenged herein. To that end, the Board cross-moves for a Directed Decision that the procedural conditions opposed by the Applicant have not been proven to render the Project economic and that, accordingly, such conditions must be determined to govern the construction of the Project.

Board cross motion, pp. 1-2. The Board argues that the testimony of Paul E. Cusson, Manager of Delphic Associates, LLC, a consultant for affordable housing developers, "is almost entirely devoted to the economic impact of the Board's conditions relating to a reduction in density." Board cross motion, p. 2. Its cross motion does not challenge the developer's proof on this issue, and in fact asserts that the issues in the appeal are all "moot" except with respect to certain so-called "procedural conditions" for which it argues, that "no economic analysis is supplied by […] Mr. Cusson with respect to any economic impact of other boilerplate conditions." *Id.*, pp. 1-2. It argues that Mr. Cusson's testimony asserts "a variety of non-descript conditions are costly or burdensome" but "offers no actual evidence or proof to support such position, nor does he describe the exact conditions that he is referring to." *Id.*, p. 2 n.1. *See* Exhs. 45, 45B. The Board argues that these "procedural conditions" opposed by the developer have not been proven to render the project uneconomic and that, accordingly, such conditions must be upheld and

incorporated into the Committee's decision. Board cross motion, p. 8. As to the remaining conditions and waiver denials challenged by the developer, the Board offers no cross motion or other dispute. *Id.*, p. 2. By its argument it concedes the removal or revision of the remaining conditions challenged by Riverview.

B. Developer's Proof of Economic Case in Aggregate

Under G.L. c. 40B, § 20, and pursuant to 760 CMR 56.00, *et seq*., to establish that the Board's decision makes the project uneconomic, Riverview 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 [Riverview] to proceed and still realize a reasonable return in building or operating such Project within the limitations set by the Subsidizing Agency on the size or character of the Project, or on the amount or nature of the Subsidy or on the tenants, rentals, and income permissible, and without substantially changing the rent levels and unit sizes proposed by [Riverview].

760 CMR 56.02: *Uneconomic*. *See* G.L. c. 40B, § 20; 760 CMR 56.05(8)(d). The comprehensive permit regulations define Reasonable Return "…with respect to (a) building an ownership project or continuing care retirement community, that profit to the Developer is not more than 20% and not less than 15% of the total development costs." 760 CMR 56.02: *Reasonable Return*. Therefore, the minimum reasonable return or "profit" (the economic threshold) is 15%, and the ultimate question is whether the projected profit for the project as conditioned by the Board's decision falls short of the economic threshold. *See Rising Tide Development, LLC v. Lexington*, No. 2003-05, slip op. at 17 (Mass. Housing Appeals Comm. June 14, 2005); *White Barn Lane, LLC v. Norwell*, No. 2008-05, slip op. at 14 (Mass. Housing Appeals Comm. July 18, 2011). If, as can be the case, the profit of the development as proposed in the developer's application for a comprehensive permit is also below the economic threshold, a situation we have termed "uneconomic as proposed," developers are required to show more, specifically, that the Board's conditions render the project significantly more uneconomic than the proposed project. *See HD/MW Randolph Ave., LLC v. Milton,* No. 2015-03, slip op. at 5 (Mass. Housing Appeals Comm. Dec. 20, 2018), *aff'd, Zoning Bd. of Appeals of Milton v. HD/MW Randolph Ave.,*490 Mass. 257, 263-264 (2022); *Falmouth Hospitality, LLC v. Falmouth,* No. 2017-11, slip op. at 4 (Mass. Housing Appeals Comm May 15, 2020); *Haskins Way, supra*, No. 2009-08, slip op. at 18; *Autumnwood, LLC v. Sandwich*, No. 2005-06, slip op. at 3 and n.2 (Mass. Housing Appeals Comm. Decision on Remand Mar. 8, 2010); *511 Washington*

Street, LLC v. Hanover, No. 2006-05, slip op. at 9, 12-14 (Mass. Housing Appeals Comm. Jan 22, 2008); *Cirsan Realty Trust v. Woburn*, No. 2001-22, slip op. at 3 (Mass. Housing Appeals Comm. Apr. 23, 2015); *Avalon Cohasset, Inc. v. Cohasset*, No. 2005-09, slip op. at 12-13 (Mass. Housing Appeals Comm. Sept. 18, 2007).

The Board has conceded that the developer submitted "detailed testimony on the economic viability results of a density restriction" and the resulting economic effect of the condition imposing the unit reduction. Board reply, p. 3. The Board submitted no testimony or evidence disputing the developer's case on economics pertaining to the unit reduction. By stating in its cross-motion that the issue of whether the conditions in aggregate render the project uneconomic is moot, it has conceded that the developer has met its burden to show that the conditions requiring and associated with a reduction in units together make the project uneconomic.

Furthermore, the evidence submitted by Riverview, unchallenged by the Board, shows that the developer has met this standard. Riverview argues that the Board's condition reducing the density of the project from 20 units to four units, as well as other conditions it imposed, essentially compelled Riverview to completely redesign a much smaller project, adversely and materially affecting its profit. Developer opposition, pp. 6-7; PHO, § IV. In support, the developer submitted the testimony of Mr. Cusson, who prepared several pro forma financial statements summarizing the projected costs and expenses of various iterations of the project, including—relevant here—the four-unit project approved by the Board. Exh. 60.[9] *See* Exhs. 45, 45B. Mr. Cusson testified that he prepared a pro forma for the original 24-unit project and concluded that the percentage of profit over the total development costs would be 17.68%. Exh. 45, ¶ 11. He further testified that, for the as-amended 20-unit project, the projected percentage profit would be $1,163,763 which is 14.12% of the total development costs. Exh. 45B, ¶ 5. Finally, for the ultimately approved four-unit project, Mr. Cusson "concluded that the projected Percentage Profit would be (negative) -$356,780 which is a negative -10.97% loss." Exh. 45B, ¶

[9] Typically, the pro forma for the proposed project and for the project as approved submitted for the hearing before the Committee are based on data as of the date of the issuance of the pre-hearing order. However, because of the long and unique procedural history in this case, the developer has provided multiple iterations of pro formas based upon differing unit counts and dates, none of which the Board has contested. *See* Exhs. 14, 45, 58, 59, 60.

6; Exh. 60. He testified that, "[s]ince the standard 'economic' benchmark is that the estimated developer's return must be at least fifteen (15%) percent of the estimated Total Development Cost (not including any Developer's Fee), any ZBA-imposed condition(s) that would result in the estimated developer's return, as is the case here, falling below 15% would make the project 'Uneconomic.'" Exh. 45B, ¶ 8.

The developer also submitted the testimony of Bradley McKenzie, P.E., the project manager and lead design engineer, who testified generally that the "approximately 55 conditions on this 20-unit project …preclude it from being constructed …[and] render the project uneconomic." Exh. 47, ¶¶ 31-34, 38. Riverview's Manager, Thomas Drummond, testified that the conditions necessitate a redesign of the project, which would require a new public hearing before the Board. He testified that, as permitted, the project is impossible, or completely impractical, to build without further approvals from the Board. Exh. 44, ¶¶ 7, 8. Mr. McKenzie echoed Mr. Drummond's statements. Exh. 47, ¶ 35. But he did not specifically address each of the "procedural conditions" Riverview alleges contributes to rendering the conditioned project uneconomic. Mr. Cusson testified that, with respect to the "procedural conditions" that the Board urges us to retain, Riverview provided testimony and documentary evidence relating to the financial cost of complying with the conditions. He stated that Riverview's costs to comply would include "wholly new, redesigned site plans, a brand-new drainage study, an upstream sewer study and sewer replacement work, obtaining and complying with unwaived local laws and regulations, as well as thousands of dollars to go through a new public hearing including peer review…." Exh. 45, ¶ 23. While we agree with the Board that these general statements do not establish that specific so-called procedural conditions contribute to the economic impact of the conditions as a whole, we do find, as we discuss in § VIII, *infra,* that some of the "procedural" conditions, by their terms, require specific work by Riverview that necessarily will cause it to incur expense.

C. Conclusion Regarding Economics

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

aggregate impact is shown to make the building or operation of the project uneconomic." *Id.* at 16. While the evidence presented by the developer may not have been extensive, Riverview has presented sufficient evidence to support a finding that reducing the project from 20 to four units would produce a negative profit (loss). Thus, we find the Board's conditions in the aggregate make the approved project both uneconomic and significantly more uneconomic than the developer's proposal. With respect to the remaining conditions and waiver denials, including those conditions that the Board deems "procedural," we determine that, as discussed below, many of those requirements, even though they do not have a specific adverse economic value assigned to them in the record, would also have more than a de minimis cost and thus an adverse economic impact and contribute to the adverse impact on the developer's profit. *Id.* at 15-16. *Weiss Farm Apartments, LLC v. Stoneham*, No. 2014-10, slip op. at 30 (Mass. Housing Appeals Comm. Mar. 15, 2021). For those conditions, *see* PHO, § IV, the Board's cross-motion for directed decision is denied because the evidence shows they will contribute to making the project uneconomic, and therefore the developer has met its burden of proof regarding them. We address in § VIII the Board's arguments and the developer's responses regarding all its challenges to the procedural conditions the Board seeks to retain.

VII. RIVERVIEW MOTION ON LOCAL CONCERNS

Riverview moved for a directed decision on the issue of whether the Board had established a valid local concern regarding the Town water supply. The only local concern pursued by the Board was its assertion that approval of a water supply connection for the project was impossible due to lack of available water capacity in the Town's water system and its assertion that installation of services adequate to meet local needs is not technically feasible. *See* § II, *supra*. As stated in its response, the Board concedes that the Water Commission's decision to issue new water connection permits renders the local concern issues litigated in this appeal moot.[10] Board cross motion, pp. 9-10. Since the Board has conceded that its local concerns case is moot and argues that the only remaining issue is which conditions in its original permit

[10] The Board's only request of the Committee is that, if the Committee allows the developer's motion, that it do so only subject to the conditions outlined in the Board cross motion, and that it include an express condition that "any permit is subject to DEP regulatory or administrative action with respect to the Town's ability to provide municipal water connections." Board cross motion, p. 10.

should be retained, that concession alone warrants a directed decision in favor of the developer on local concerns. G.L. c. 40B, §§ 20, 23; 760 CMR 56.07(1)(c), 56.07(2)(b)3.

The Board presented testimony solely from Christopher Veracka, Kingston's Water Superintendent, and Kristen M. Berger, PE, a consultant working for the Kingston Water Commission. Their pre-filed testimony focused on the lack of water capacity to serve the project, and, on cross-examination, they testified regarding the moratorium that the Kingston Water Commission had placed on water connections. Tr. II, 60, 64, 84, 110, 123, 124-125, 148. However, on redirect examination during day three of the hearing, Ms. Berger confirmed that, on the previous day, the Kingston Water Commission voted to lift the moratorium on new water connections and has permitted new connections to water service within the existing system. Tr. III, 19.

Riverview argues that the Board amended the PHO so that its entire case under 760 CMR 56.07(2)(b)(4) was based upon its argument that the installation of services adequate to meet local needs is not technically feasible. Therefore, the developer argues, the termination of the Town's local water moratorium conclusively establishes that there is no technical or legal impediment to the proposed project connecting to Town water—the only basis offered by the Board to justify the conditions of approval from the original decision. Developer motion, p. 2.

As noted above, the Committee's analysis must be based on a view of the evidence in the light most favorable to the Board. In this light, we look at the testimony of Ms. Berger that it is technically feasible for the project to connect to municipal water in Kingston and there is no moratorium on new water connections that would prevent the project from connecting to the public water supply. The Board's new testimony regarding the water connection disavows its earlier contrary evidence of its witnesses in pre-filed testimony and earlier cross-examination. This, along with the Board's concession that this issue is moot, warrants our issuing a directed decision in favor of the developer on this issue. We determine that the Board has not demonstrated a local concern that outweighs the regional need for low and moderate income housing and that the installation of services adequate to meet local needs is not technically feasible.

VIII. CONDITIONS THE BOARD SEEKS TO RETAIN

In its cross motion, the Board asks us to retain only the "reasonable procedural conditions on the project, which have not been fully challenged." Board cross motion, p. 2. It identifies Conditions 5-32 for retention in its motion, also stating it declines to contest the remaining conditions and waiver denials challenged by the developer, thereby conceding the removal or revision of the remaining challenged conditions. *Id.,* pp. 2-8. It argues that the conditions it seeks to retain do not affect the developer's right to proceed with any comprehensive permit that may be issued by the Committee or Board and are "standard conditions that are designed to manage construction of the project." *Id*., 2. The Board also argues that its proffered "procedural conditions" are "appropriate and reasonable" safeguards "to ensure timely, considerate, and expeditious construction" and should be upheld. Board cross motion, p. 8. In support, it argues the developer failed to demonstrate that these conditions contribute to making the project uneconomic, and they should therefore be retained.

The developer identified most of these conditions in the PHO as conditions it challenged and sought to modify or remove. In the PHO, Riverview challenged certain conditions as rendering the project uneconomic, or as unlawful, or a combination of both uneconomic and unlawful. In its opposition, the developer makes specific arguments about the Board's identified conditions, regardless of whether it had previously challenged them in the PHO. Our rules about waiver of arguments require parties to identify issues in the PHO *and* provide argument in briefs to preserve these issues for consideration. *River Stone, LLC v. Hingham*, No. 2016-15, slip op. at 24, n.19 (Mass. Housing Appeals Comm Sept. 23, 2022), *aff'd Zoning Bd. of Appeals of Hingham v. Housing Appeals Committee,* No. 24-P-828, Mass. App. Ct. Aug. 25. 2025 (Rule 23 decision); *Sugarbush Meadow, LLC v. Sunderland*, No. 2008-02, slip op. at 3 (Mass. Housing Appeals Comm. June 21, 2010), *aff'd Zoning Bd. of Appeals of Sunderland v. Sugarbush Meadows, LLC*, 464 Mass. 166 (2013). *See also Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85-86 (1995), quoting *Lolos v. Berlin*, 338 Mass. 10, 13-14 (1958).

In its opposition, the developer argues that it did challenge both the "procedural" conditions and other conditions through its pre-filed testimony, but that "the Board made a tactical decision not to contest any of these issues … and to rely on a claim that it was not technically feasible to provide public water" and, accordingly, the Board's arguments on this issue should be deemed waived. Developer opposition, p. 7. In its opposition, the developer

reviews each of the Board's proposed "procedural conditions," and provides a condition-by-condition response to each some of which are limited objections or, in a few cases, no objection. The Board relies on its argument that the developer failed to demonstrate that these conditions make the project uneconomic. It did not offer any other specific arguments or support for each individual condition, relying on its general premise that these are "procedural conditions" that are standard and do not have any financial impact on the project. As can be seen below, the developer challenged some conditions on economic grounds, some on the basis that they are unlawful, and some on multiple grounds; for conditions challenged as unlawful, no economic analysis is required. For conditions challenged as uneconomic, if the record shows economic impact, we consider the condition on local concerns grounds.

We address those conditions the Board asks to be retained which the developer has also challenged in the PHO, identifying the developer's grounds for challenge, the Board's argument as to why each should be retained, and our determination, below. For ease in reference, we address these conditions in numerical order, rather than by category of challenge.

For those conditions challenged as contributing to rendering the project uneconomic, we also look at local concerns. For those conditions challenged by the developer as unlawful conditions subsequent, it argues that those conditions improperly reserve for subsequent review matters that should have been resolved by the Board during the comprehensive permit proceeding. Such conditions include, for example, those requiring new test results or submissions for peer review, and those which may lead to disapproval of an aspect of a development project. *See Falmouth*, *supra,* No. 2017-11, slip op. at 44-45, citing *Attitash Views, LLC v. Amesbury,* No. 2006-17, slip op. at 12 (Mass. Housing Appeals Comm. Oct. 15, 2007 Summary Decision); *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); *Stoneham, supra*, No. 2014-10, slip op. at 67-70. Our precedents, as well as 760 CMR 56.05(10)(b), "permit technical review of plans before construction, and routine inspection during construction, by all local boards or, more commonly, by their staff, *e.g.*, the building inspector, the conservation administrator, the town engineer, or a consulting engineer hired for the purpose. Such review ensures compliance

with the comprehensive permit, state codes, and undisputed local restrictions, as well as any conditions included in the final written approval issued by the subsidizing agency." *Attitash*, *supra*, No. 2006-17, slip op. at 12; *LeBlanc*, *supra*, No. 2006-08, slip op. at 7–8; *Stoneham, supra*, No. 2014-10, slip op. at 67.

Since post-permit review is to determine whether submitted plans are consistent with the comprehensive permit, review should be performed by the local official or department with relevant expertise, to facilitate the practical and expeditious completion of the task. The Board is permitted to designate individuals or municipal departments that have the expertise to review various aspects of the plans for consistency with the final comprehensive permit. The Board may assist municipal departments in designation of the appropriate individuals or municipal departments to conduct the review. *See LeBlanc*, No. 2006-08, slip op. at 7-8, App. at 2. The Board may even conduct that review itself, if it has the necessary expertise, if the review is for consistency with the permit.

In *Zoning Board 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. The Amesbury court also stated, "…insofar as the board's … conditions included requirements that went to matters such as, inter alia, project funding, regulatory documents, financial documents, and the timing of sale of affordable units in relation to market rate units, they were subject to challenge as ultra vires of the board's authority under § 21." *Id*. at 758. As discussed below, some conditions are challenged as improperly interfering with the authority and role of the subsidizing agency. To the extent that conditions are inconsistent with law or the comprehensive permit regulations, or they are impermissibly vague, we strike or modify them, as appropriate. *See LeBlanc*, No. 2006-08, slip op. at 7-8, App. at 17.

Condition 5, challenged in the PHO as uneconomic and an unlawful condition subsequent, requires final site plans to be "submitted to the Board, the Board's designated engineer, the Department of Public Works, and the Building Inspector, no less than 45 days prior to the application for building permits for the commencement of construction of the Project." Exh. 41. The Board and the Board's engineer have up to 45 days, plus a possible 30-day

extension which Riverview "shall allow," to review and comment on the final site plans and "[n]o construction shall commence… until the Board's engineer has approved the Final Site Plans as being in conformance with this Decision, said approval to be in writing." *Id*. The developer argues that, where the Town employs a building inspector, designation of a review engineer with discretion to require additional plans for review is impermissible. Further, it argues that the Board should have no more than the 30 days permitted under the State Building Code to review the final site plans. A longer review period, it argues, will unduly delay construction of the project. Developer opposition, p. 9. We agree that compliance with this condition would cause the developer to incur costs and delays that are more likely than not to be more than de minimis and therefore contribute to the uneconomic nature of the approved project. *See Stoneham*, *supra*, No. 2014-10, slip op. at 30; *White Barn, supra*, No. 2008-05, slip op. 16. In addition, the portions of the condition specifically challenged by the developer contain conditions subsequent by specifying review by multiple persons or offices, rather than by a single appropriate municipal official who can determine whether referral to other officials or offices is necessary, and by extending the review period beyond the period under the building code. Moreover, the requirement allowing discretion of the Board's engineer to include other plans, without specification is improperly vague and the delay in commencing the review period until the Board's engineer deems the final site plans as complete further extends such delay, contributing to the expense of the project. *See LeBlanc*, *supra*, No. 2006-08, slip op. at 7-8, App. at 17. The condition is modified to strike the final sentence and to provide for a 30-day review period, with submission to the single 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 and such review to be made in a reasonably expeditious manner consistent with Condition 1, § X.

Condition 6, challenged in the PHO as uneconomic, requires the final site plans to depict the final design of the drainage system exhibiting compliance with DEP requirements as well as "any additional requirements that may have been imposed by an Order of Conditions or Amended Final Order of Conditions for the Project." It further requires that: "Any and all drainage infrastructure that is beyond the jurisdiction of the Conservation Commission shall be subject to the review and approval by the Board, in consultation with the Board's engineers." Exh. 41. Riverview objects "to any requirement that Final Site Plans depict drainage system that

complies with any standards other than state Stormwater Management Regulations and the state Wetlands Protection Act and regulations," and any reservation by the Board of the right "to reserve for itself the further right to review the drainage infrastructure." Developer opposition, p. 9. Because the comprehensive permit will include a condition that the project comply with all applicable unwaived municipal zoning and other bylaws, regulations and other local requirements in effect on the date of the original comprehensive permit application to the Board, as well as all applicable state and federal requirements, this condition is modified to remove the sentence, "[a]ny and all drainage infrastructure that is beyond the jurisdiction of the Conservation Commission shall be subject to the review and approval by the Board, in consultation with the Board's engineers," and shall state that "this condition is subject to Conditions 1, 4(a), (f), and (g) § X."

Condition 7, challenged in the PHO as uneconomic and an unlawful condition subsequent, requires final site plans to include the final architectural plans. The developer objects to the requirement that the Board approve design plans since the Board did not approve any design plans as a part of its original decision. Developer opposition, p. 10. In most respects, this is a typical condition; requiring final approval of architectural plans is not a condition subsequent; moreover, since this condition is subject to Condition 1, § X, final review will be conducted by the appropriate municipal official with relevant expertise to determine whether the submission is consistent with the final comprehensive permit and the requirements of the subsidizing agency. However, for clarity, this condition is modified to state that the "final architectural plans shall be substantially in conformance with the building layouts as represented in the plans for the 20-unit project proposed by the developer."

Condition 8, unchallenged by Riverview in the PHO, requires the final site plans to include a construction management plan. Exh. 41. The developer now objects "to any requirement that the Town officials, other than the Board which should be excluded from the project, not reasonably exercise their discretion." Developer opposition, p. 10. It is the Committee's long-standing rule that the pre-hearing order establishes the limit of issues for hearing before the Committee and matters that are not identified by the parties will be waived. *See River Stone, supra*, No. 2016-15, slip op. at 24, n.19; *Sunderland, supra*, No. 2008-02, slip op. at 3; see also *Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85-86 (1995), quoting *Lolos v. Berlin*, 338 Mass. 10, 13-14 (1958). Because the developer did not identify this condition as a

challenged condition in the PHO, it has waived its challenge to it. We note, however, that this condition is subject to Condition 1, § X, which addresses the developer's concern.

Condition 9, challenged in the PHO as uneconomic, requires the developer to "adhere to all terms, requirements and conditions of any other permits, licenses and/or approvals from any other agency, State or local. The terms of those permits, licenses and/or approvals are incorporated herein as if restated in this Decision. To the extent such permits, licenses and/or approvals may conflict or be inconsistent with the terms of this Decision, the Board may amend this Decision upon request by the Applicant, provided it does so in a manner consistent with 760 CMR 56.00 et seq." Exh. 41. The developer "objects to any local requirements being upheld and further allowing the Board further discretion to deny a project in compliance with federal and state approvals and permits." Developer opposition, p. 11. The developer did not challenge this condition as an impermissible condition subsequent, and it has waived a challenge on this basis. We note, however, that as a matter of course, we require the developer to comply with all unwaived local requirements and regulations that were in effect on the date of its comprehensive permit application, as well as all applicable state and federal requirements, which is consistent with this condition in all material respects. Therefore, the developer has not shown that this condition contributes to rendering the project uneconomic. This condition is retained and is subject to Conditions 1, 2(b) and 4, § X.

Condition 10, challenged in the PHO as uneconomic, an unlawful condition subsequent, and subjecting the developer to unequal treatment, requires Riverview to "follow and effectuate all recommendations of the Fire Chief which are incorporated herein as if restated in this Decision…." Exh. 41. Riverview "objects to any requirement that it be obligated to comply with any requirements from the Fire Chief excepting as indicated during the public hearing process with the Board prior to October 7, 2021, and in order to comply with the state fire code and regulations." Developer opposition, p. 11. This condition requires additional review and approval by the Fire Chief causing the developer to incur costs and delays that are likely more than de minimis and therefore contribute to the uneconomic nature of the approved project. In addition, it subjects Riverview to additional post-permit review and conditions imposed by the Fire Chief, and it is unduly vague. *See Leblanc, supra,* No. 2006-08, slip. op. at 7, 8, 10; *, White Barn, supra,* No. 2008-05, slip op. 16; *Stoneham*, *supra*, No. 2014-10, slip op. at 30. Condition 10 is modified to include the language proposed by the developer and state as follows:

> 10. The Applicant shall follow and effectuate all recommendations of the Fire Chief as submitted during the public hearing process with the Board prior to October 7, 2021, and memorialized in Exhibit 25, and it shall comply with applicable state fire code and regulations.

The condition is also modified to clarify that any references to the submission of materials for review and approval shall mean to determine consistency with the final comprehensive permit, such determination not to be unreasonably withheld, and such review to 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); Condition 1, § IX.

Condition 11, challenged in the PHO as uneconomic and subjecting the developer to unequal treatment, requires Riverview to, "prior to construction, conduct a condition assessment of all sewer infrastructure up stream of the proposed connection from the Project and shall consult with the Kingston Sewer Department regarding the same. Based on the assessment, the Final Site Plans shall include repairs and/or replacement of existing infrastructure subject to direct connections from the Project." Exh. 41. Riverview objects to any requirement that obligates it to make repairs to existing infrastructure, arguing that Riverview obtained and has been paying for 24 sewer connections since August of 2020. Developer opposition, p. 11. The developer argues that this proposed condition subjects it to "unlimited exposure to assessments associated with infrastructure that cannot be passed along to a developer alone and are a part of the Town's continuing maintenance obligations of its water mains and sewer infrastructure." *Id*., p. 12. Compliance with this condition would cause the developer to incur a cost that is likely more than de minimis and therefore contribute to the uneconomic nature of the approved project. *See White Barn, supra,* No. 2008-05, slip op. 16; *Stoneham*, *supra*, No. 2014-10, slip op. at 30. The Board submitted no evidence on this issue and has not demonstrated a valid local concern. The Legislature enacted Chapter 40B without any provision authorizing a local board to require a developer to make off-site improvements to municipal services. *Way Finders, Inc. and Fuller Future, LLC v. Ludlow,* No. 2017-13, slip op. at 31 (Mass. Housing Appeals Comm. Mar. 15, 2021); *Archstone Communities Trust v. Woburn*, No. 2001-07, slip op. at 24 (Mass. Housing Appeals Comm. June 11, 2003). This condition is struck as unlawful and because the Board has not demonstrated a valid local concern to support it.

Condition 12, unchallenged by Riverview in the PHO, states that the affordable units shall not be "substantially different in size or exterior appearance from the market-rate units; and

shall have approximately the same bedroom ratio or mix as the other units in the Project," and requires that they be constructed on a schedule that ensures they are not the last units constructed. Exh. 41. The developer failed to identify this condition in the PHO; therefore, any challenge to it is waived. However, this condition is subject to Conditions 1 and 4(b), § X, which addresses the developer's concerns.

Condition 13, unchallenged by Riverview in the PHO, states that: "No building permits may be issued unless and until the Applicant provides evidence to the Building Inspector that it has obtained any and all necessary Orders of Conditions from the Conservation Commission or a Superseding/Final Order of Conditions from the Massachusetts Department of Environmental Protection and/or Determinations of Applicability." Exh. 41. The developer argues that it sought a waiver from the Kingston Wetlands Bylaw and Regulations requiring it to obtain an Order of Conditions and it should not be subject to this condition. Developer opposition, p. 12; Exh. 2. Although this condition was not challenged in the PHO, to the extent it is inconsistent with the grant of the requested waiver, this condition is modified to specify that any required Order of Conditions from the Conservation Commission relates only to compliance with Massachusetts DEP wetlands requirements, which cannot be waived.

Condition 14, unchallenged by the developer in the PHO, requires Riverview to provide an easement to any water and sewer infrastructure on the property, subject to review by Town Counsel. Exh. 41. Riverview now states it does not object to this condition, "provided the expense is a reasonable expense at not more than the rate charged to the Town of Kingston." Developer opposition, p. 13. Because this condition was not identified in the PHO, this condition is retained.

Condition 15, unchallenged by Riverview in the PHO, requires a final landscaping plan to be submitted with the final site plans. Exh. 41. Riverview states it does not object to this condition, provided that the final plans will be consistent with the landscape plan that was provided as a part of the revised 20-unit plans. Developer opposition, p. 13; *See* Exh. 16. This condition is retained and is subject to Condition 1, § X.

Condition 16, unchallenged by Riverview in the PHO, requires review and approval by Town Counsel of condominium documents for the project. Exh. 41. Riverview states it does not object to this condition provided the expense is a reasonable expense at not more than the rate

charged to the Town of Kingston. Developer opposition, p. 13. This condition is retained subject to Condition 1, § X.

Condition 17, unchallenged by Riverview in the PHO, requires the developer to submit for approval by the Board any signage or monuments to be used during the marketing of the project and any permanent signage or monuments for the project. Exh. 41. The developer now opposes this condition to the extent it requires Board approval, as such signage or monuments should be submitted to the Building Inspector for review and approval. Developer opposition, p. 13. This condition is retained subject to Condition 1, § X, which requires that submission be made to the appropriate municipal official with relevant expertise.

Condition 18, unchallenged by Riverview in the PHO, requires the final site plans to be stamped and signed by a professional land surveyor, professional engineer, licensed architect or other qualified professional, as applicable. Exh. 41. Accordingly, this condition is retained and is subject to Condition 1, § X.

Condition 19, challenged by the developer in the PHO as uneconomic and as interfering with the programmatic requirement of the subsidizing agency, contains a provision requiring the regulatory agreement and proposed deed rider to be subject to the prior approval of Town Counsel. Exh. 41. This condition is more likely than not to cause the developer to be subject to more than de minimis additional expense that contributes to making this project uneconomic. *See White Barn , supra,* No. 2008-05, slip op. at 16; *Stoneham*, *supra*, No. 2014-10, slip op. at 30. We agree with the developer that the challenged provision in Condition 19 improperly sets requirements regarding the approval, execution and recording of the regulatory agreement, which are exclusively within the subsidizing agency's jurisdiction. *See Attitash, supra*, No. 2006-17, slip op. at 6-8; *Way Finders, Inc, supra*, No. 2017-13, slip op. at 39. Accordingly, the last sentence of Condition 19 is struck. We note that the condition is subject to Condition 1, § X.

Condition 20, unchallenged by Riverview in the PHO, requires Riverview to provide the Board with copies of "any and all correspondence, documents and statements required by any Affordable Monitoring Services Agreement, the Regulatory Agreement or any applicable laws or regulations provided by the Applicant to the Monitoring Agent or from the Monitoring Agent to the Applicant." Exh. 41. The developer argues that this condition "is a ruse for Board approval and is prohibitively expensive." However, Riverview states that it does not object to providing a monitoring agent agreement to the Board. Developer opposition, pp. 14-15. The Board has no

oversight role in reviewing and approving a regulatory agreement between Riverview and the subsidizing agency and the developer has no obligation to provide the Board with documents related to that agreement. However, the developer failed to identify this condition in the PHO; therefore, any challenge to it is waived. Nevertheless, this condition is subject to Conditions 1and 4(b), § X, and subject to the requirements of the subsidizing agency, which address the developer's concern.

Condition 21, challenged in the PHO as uneconomic and as an impermissible condition beyond the scope of the Board's authority, requires that the Board be "provided with a copy of any and all limited dividend audits and certified cost/income statements, as well as any other public records that are shared by and between the Applicant and the Monitoring Agent." Exh. 41. Riverview argues that this "is a ruse for Board approval, is prohibitively expensive and intrudes on the province of MassHousing." Riverview states that it will provide a final cost certification to MassHousing and the Town will receive a copy of that certification in accordance with MassHousing's normal procedures. Developer opposition, p. 15. Condition 21 is struck as it intrudes into areas governed by the subsidizing agency. *See Leblanc, supra*, No. 2006-08, slip op., App. at 15; *Attitash, supra*, No. 2006-17, slip op. at 9-10; *Stoneham, supra*, No. 2014-10, slip op. at 65.

Condition 22, challenged in the PHO as uneconomic and subjecting the developer to unequal treatment, states that: "The Town is responsible for the preparation and execution of any document that may be required by DHCD in order to have the affordable units in the Project included on the Town's Subsidized Housing Inventory. The applicant shall assist to the greatest extent possible in this process." Exh. 41. Compliance with this condition would cause the developer to incur a cost that is likely more than de minimis and therefore contribute to the uneconomic nature of the approved project. *See White Barn , supra,* No. 2008-05, slip op. 16; *Stoneham*, *supra*, No. 2014-10, slip op. at 30. The Board submitted no evidence on this issue and has not demonstrated a valid local concern. Riverview does not oppose this request provided the time and expense of assistance is a reasonable expense. Developer opposition, p. 15. Accordingly, this condition is modified to remove "to the greatest extent possible" and add "provided the time and expense of such assistance is reasonable."

Condition 23, challenged in the PHO as uneconomic and subjecting the developer to unequal treatment, requires that Riverview "use its best efforts to secure a building permit within

one year of the filing of this Decision with the Town Clerk to ensure that the units remain eligible for inclusion on the Town's subsidized housing inventory." Exh. 41. Riverview opposes this condition "as this project will require future permitting under the state Wetlands Protection Act and regulations and the time for a building permit may be delayed." It argues that this condition "unnecessarily intrudes on the construction means and methodology of the project." Developer opposition, p. 16. Condition 23 is inconsistent with the comprehensive permit regulations, which provide for a period of three years for construction to *commence* before a permit will lapse. Condition 24 is inconsistent with the regulations' provisions allowing developers to seek extensions. *See* 760 CMR 56.05(12)(c). *See White Barn, supra*, No. 2008-05, slip op. at 41-42. Accordingly, it is struck.

Condition 24, unchallenged by Riverview in the PHO, requires that: "Essential infrastructure for the entire project shall be completed within three (3) years from the date that construction is commenced, provided that, for good cause the Applicant may seek reasonable multiple extensions of one (1) year." Exh. 41. The developer has waived its challenge to this condition, and it is retained.

Condition 25, unchallenged by Riverview in the PHO, requires Riverview to schedule a pre-construction meeting with the Board's engineer or its assigned agent 30 days before commencement of work. Failure to do so would be grounds for a stop work order. Exh. 41. Riverview opposes this request "as this project will require further Board approvals and the Board should be excluded from any such further approvals as impermissible conditions subsequent." Developer opposition, p. 17. The developer has waived its challenge to this condition. However, such meetings, reviews and all approvals are subject to Condition 1, § X.

Condition 26, unchallenged by Riverview in the PHO, requires the developer to provide the Board with a municipal lien certificate showing all outstanding assessments and betterments on the project property have been paid in full prior to any site clearing, grading demolition or construction at the site. Exh. 41. Riverview objects to this condition because it "will require further filings with the Board" and states that it "will provide proof of payment of taxes to the Building Inspector at the time of permitting." Developer opposition, p. 17. The developer has waived its challenge to this condition; therefore, it is retained.

Condition 27, unchallenged by Riverview in the PHO, requires Riverview to schedule a meeting with the Board's' designated engineer at least once every three months to discuss the

progress of construction. Exh. 41. Riverview now states it does not oppose this condition; it is retained.

Condition 28, challenged in the PHO as uneconomic and subjecting the developer to unequal treatment, requires the developer to secure and pay for police details that may be necessary for traffic control throughout the construction process as required by the police chief. Exh. 41. Compliance with this condition would cause the developer to incur a cost that is likely more than de minimis and therefore contribute to the uneconomic nature of the approved project. *See White Barn, supra,* No. 2008-05, slip op. 16; *Stoneham*, *supra*, No. 2014-10, slip op. at 30. The Board submitted no evidence on this issue and has not demonstrated a valid local concern. Riverview opposes this request except during such times as may be required during street and piping work, arguing that the expense of a police detail during construction of units is cost prohibitive and unnecessary. Developer opposition, p. 17. We have typically prohibited boards from imposing fees that are not already established by regulation in a municipal fee schedule. Therefore, Condition 28 is modified to provide that such expenses may be imposed only if in compliance with unwaived municipal bylaws or regulations. To charge for this expense, the Board is required to produce to Riverview the local bylaw or regulation that authorizes charging such a cost in this context. *See Milton, supra*, No. 2015-03, slip op. at 52.

Condition 29, challenged in the PHO as uneconomic and subjecting the developer to unequal treatment, states that Riverview is responsible for repairing any damage to public ways and public property caused by any construction vehicles traveling to or from the site. Exh. 41. Riverview does not oppose this condition provided there is a reasonable period of time to fix such damage. Developer opposition, p. 18. Accordingly, this condition is modified to include the following "provided that the Applicant shall have a reasonable period of time to repair any such damage."

Condition 30, challenged in the PHO as uneconomic and subjecting the developer to unequal treatment, prohibits Riverview from performing work at the site on Saturdays before 9:00 a.m. and requires Riverview to obtain further approvals from the Board for extended work hours, or prohibitions on interior work hours. Exh. 41. Riverview argues that these limitations interfere with normal construction practices and will cost Riverview added construction expense and delays. Developer opposition, p. 18. Compliance with this condition would cause the developer to incur a cost that is likely more than de minimis and therefore contribute to the

uneconomic nature of the approved project. *See White Barn, supra,* No. 2008-05, slip op. 16; *Stoneham*, *supra*, No. 2014-10, slip op. at 30. The Board submitted no evidence on this issue and has not demonstrated a valid local concern. Kingston may only impose requirements that it imposes on unsubsidized housing developments. *See Milton, supra*, No. 2015-03, slip op. at 60.

Condition 31, unchallenged by Riverview in the PHO, addresses removal of loam, sand, gravel, quarry or other earth materials and requires Riverview to remove any unsuitable or contaminated materials from the site. Exh. 41. Riverview states it does not object to this condition, as long as it is allowed a reasonable period of time to remove unsuitable materials. Developer opposition, p. 19. Because it was not challenged by Riverview in the PHO, this condition is retained.

Condition 32, unchallenged by Riverview in the PHO, requires developer's engineer to provide a report to the Board's engineer certifying the project's stormwater management system was installed in accordance with the approved plans. Exh. 41. The developer states it does not oppose this condition; it is retained.

IX. OTHER CONDITIONS AND WAIVER DENIALS CHALLENGED BY RIVERVIEW

The developer challenged the conditions identified below in the PHO on different grounds. As noted in § VI, *supra,* the Board offers no cross motion or other dispute regarding these conditions, and any waiver denials the developer raised in the PHO. Board cross motion, p. 2. In specifically arguing for retention only of the "procedural conditions" identified above, the Board has by its argument conceded the removal or revision of the remaining conditions challenged by Riverview, and the grant of any waivers requested. Although it is not necessary to address each of the remaining conditions individually, we briefly comment on them below.

A. Permitted Number of Units (2)

The original application filed with the Board sought a 24-unit project, which the developer then reduced to 20 during the Board's hearing on the application. Condition 2 of the Board's decision, challenged as uneconomic in the PHO, limits the project to four units. Since the Board relies only on lack of capacity for water service to support its decision in this appeal, and admits that that defense is moot, the Board has offered no valid local concern to support the retention of this condition, which the Board has conceded renders the project uneconomic. The

Board has failed to provide any argument or evidence demonstrating that the 20-unit proposal adversely affects valid local concerns that outweigh the need for affordable housing. *See Falmouth, supra*, No. 2017-11, slip op. at 33; *Stoneham*, *supra*, No. 2014-10, slip op. at 34. Accordingly, Condition 2 is modified to state that the total number of dwelling units shall not exceed 20 units in four buildings, 25% of which shall be affordable units.

B. Other Conditions and Waiver Denials Unaddressed by the Board (33, 34, 36, 37, 40, 45, 46, 52)

The remaining conditions and waiver denials challenged by Riverview, as set forth in the PHO, are unopposed by the Board. While the Board concedes that it has waived argument on these matters, the developer provided no argument in the directed decision submittals and its pre-filed testimony addressing these conditions and waiver denials was sparse. Nevertheless, we have the authority to strike conditions unlawfully in conflict with our regulations. *Simon Hill v. Norwell*, No. 2009-07, slip op. at 44, n.20 (Mass. Housing Appeals Comm. Oct. 13, 2011); *Leblanc, supra*, No. 2006-08, slip op. at 5.

Condition 33 challenged in the PHO as uneconomic and an impermissible condition subsequent, defers the Board's determination on the requested waivers until approval of the revised site plan based upon the Board's approval of a four-unit project. Exh. 41. Because this condition relates directly to the Board's condition requiring a reduction in units, to the extent it requires additional work, this condition would contribute to rendering the project uneconomic and is not supported by a valid local concern. More importantly, it is an improper condition subsequent. Accordingly, this condition is struck.

Condition 34, challenged in the PHO as uneconomic and as unequal treatment, denies a waiver of local fees. This condition is retained, subject to modification to provide that, consistent with 760 CMR 56.05(b), any such fees must comply with requirements established by local requirements or regulations in effect on the date of Riverview's comprehensive permit application. *Falmouth, supra*, No. 2017-11, slip op. at 48; *Leblanc, supra*, No, 2006-08, slip op., App. at 33 (payment of review fees applied only "to the extent provided in municipal bylaws and regulations"); *See Milton, supra*, No. 2015-03, slip op at 52.

Condition 36, challenged in the PHO as uneconomic and as a condition beyond the scope of the Board's authority, requires, in part, "no more than seventy (70%) percent of the affordable units, shall be reserved as 'Local Preference' favoring residents of Kingston" and prohibits any

occupancy permits from being granted until the Board, in consultation with its legal counsel, has approved the lottery plan. Exh. 41. The subsidizing agency is the final arbiter of whether local preference requirements meet EOHLC's requirements. Further, the requirement in this condition which imposes further review and approval by the Board of the lottery plan prior to issuance of an occupancy permit is a condition subsequent which undermines the purpose of a single, expeditious comprehensive permit. *See Peppercorn Village, supra*, No. 2002-02, slip op. at 22; *Simon Hill, supra,* No. 2009-07, slip op. at 41. Accordingly, this condition is modified to state at the beginning: "Subject to the requirements of the subsidizing agency…" and to delete the requirement imposing further review and approval by the Board of the lottery plan prior to issuance of an occupancy permit.

Condition 37, challenged in the PHO as uneconomic, requires, in part, that "all financial security shall be an amount approved by the Board and shall include a 25% contingency." Exh. 41. This condition is modified to state that Riverview shall post such a bond or surety, subject to the requirements of the subsidizing agency and to the extent required by non-waived applicable municipal bylaws and regulations in effect on the date Riverview submitted its comprehensive permit application. *See LeBlanc, supra*, No. 2006-08, slip op., App. at 16; *Stoneham, supra*, No. 2014-10, slip op. at 77.

Condition 40, challenged in the PHO as uneconomic and an impermissible condition subsequent, states that "no occupancy permits shall be issued until the Applicant complies with any other requirements or specifications that are reasonably required by the Board's peer review engineering consultants for compliance with the Final Site Plans and this decision." Exh. 41. Because this condition is based upon the Board's four unit approval, this condition is modified to provide for submission of any required plans to the appropriate municipal official with relevant expertise for review to determine whether the submission is consistent with the final comprehensive permit, such determination not to be unreasonably withheld, and such review to be made in a reasonably expeditious manner, consistent with the timing for review of comparable submissions for unsubsidized projects in accordance with Condition 1, § X.

Condition 45, challenged in the PHO as uneconomic and as unequal treatment, states:

> Upon their construction and initial occupancy, the buildings in the proposed development shall be considered non-conforming. In no event, shall additional bedrooms be added. No loft, nook or other area within a dwelling unit, not shown on the Revised Plans as a bedroom shall be converted to a bedroom; said

> restriction shall be incorporated into and explicitly made a part of the homeowners' association document(s), deeds and lease or rental agreements for the Project, as applicable. No storage, common or other area not designated on the Revised Plans as part of a dwelling unit in the Project shall be converted to additional dwelling unit(s), or part thereof, without application to and receipt of express, written permission from the Board.

Changes after the issuance of a comprehensive permit are governed by 760 CMR 56.05(11). *See VIF II/JMC Riverview Investment Partners, LLC v. Andover,* No. 2012-02, slip op. at 13-14 (Mass. Housing Appeals Comm. Feb. 27, 2013) (modifications must be evaluated within framework established by the regulations and not as nonconforming use under G.L. c. 40A, § 6). This condition is struck and any requested modifications to the comprehensive permit shall be subject to the provisions of 760 CMR 56.05(11).

Condition 46, challenged in the PHO as uneconomic, requires Riverview to "strictly adhere to any and all agreements by and between it and the Town" and any breach of such agreements shall constitute a violation of the Permit. Exh. 41. In addition to this condition being vague, it incorporates agreements that may not be encompassed by or related to this decision. *See Falmouth, supra*, No. 2017-11, slip op. at 56. Accordingly, this condition is struck.

Condition 52, challenged in the PHO as uneconomic and unequal treatment, states that: "Duly authorized agents of the Board shall have the right, upon reasonable notice, to enter upon and onto the Site during construction to ensure continued compliance with the terms and conditions of this decision. Failure to allow entry and/or inspection or interference or obstruction of such entry or inspection shall constitute a violation of this decision and the conditions herein." Exh. 41. The role of inspection of the property should be reserved to the appropriate municipal officials with expertise to review the construction progress. Accordingly, this condition is modified to state: "The Applicant shall permit municipal officials with relevant expertise to observe and inspect the Property and construction progress for compliance with the comprehensive permit, consistent with applicable local bylaws, requirements or regulations in effect at the time of Riverview's submission of its comprehensive permit application to the Board, until such time as the Project has been completed and the final occupancy permit issued." *See Falmouth, supra*, No. 2017-11, slip op. at 52.

X. 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. 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 subject to the following conditions.

1. Any specific reference to the submission of materials to the Board, or to Town 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 and the requirements of the subsidizing agency, such determination not to be unreasonably withheld. Such officials or offices may consult with other officials or offices with relevant expertise as they deem necessary or appropriate. In addition, such reviews 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 comprehensive permit shall conform to the application submitted to the Board, as modified by the following conditions.

   a. The Development shall be constructed as shown on the Revised Site Plans entitled Revised Site Development Plans by McKenzie Engineering Group dated December 1, 2020, with revisions to through March 26, 2021 (14 pgs). Exh. 16.

   b. The developer shall comply with all applicable non-waived local requirements and regulations in effect on the date of Riverview's submission of its comprehensive permit application to the Board, consistent with this decision pursuant to 760 CMR 56.02: *Local Requirements and Regulations*.

   c. The developer shall submit final construction plans for all buildings, roadways, stormwater management systems, and other infrastructure to Kingston town entities, staff or officials for final comprehensive permit review and approval pursuant to 760 CMR 56.05(10)(b).

   d. All Kingston 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 Kingston.

3. 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.

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

a) Construction in all particulars shall be in accordance with all applicable local zoning and other bylaws, regulations and other local requirements in effect on the date of Riverview'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 Kingston town staff, officials and boards shall take whatever steps are necessary to ensure that a building permit and other permits are issued to Riverview, 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) Design and construction in all particulars shall comply with all applicable state and federal requirements, including, without limitation, the state Wetland Protection Act, and Massachusetts Department of Environmental Protection requirements pertaining to stormwater management and wastewater management.

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

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

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

HOUSING APPEALS COMMITTEE

January 21, 2026

Shelagh A. Ellman-Pearl
Shelagh A. Ellman-Pearl, Chair

Lionel G. Romain
Lionel G. Romain

James G. Stockard, Jr.
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Lisa V. Whelan
Lisa V. Whelan, Presiding Officer