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

WAY FINDERS, INC. and
FULLER FUTURE, LLC

v.

LUDLOW ZONING BOARD OF APPEALS

No. 2017-13

DECISION

March 15, 2021

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WAY FINDERS, INC. and FULLER FUTURE, LLC, Appellants,	)	
v.	)	No. 2017-13
TOWN OF LUDLOW 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 Ludlow Zoning Board of Appeals (Board) granting a comprehensive permit with conditions to the Appellants Way Finders, Inc. and Fuller Future, LLC (Way Finders). On February 15, 2017, Way Finders applied to the Board for a comprehensive permit to build a development consisting of 43 residential rental units in seven townhouse-style buildings with one accessory community building on a parcel of land containing approximately 5.3 acres at 188 Fuller Street in Ludlow. The Board held hearings on nine days between March 16, 2017 and September 11, 2017. By decision filed with the town clerk on October 12, 2017, the Board granted a comprehensive permit subject to numerous conditions.

On October 31, 2017, Way Finders filed an appeal with the Housing Appeals Committee. An initial conference of counsel was held on November 17, 2017. Following this conference, Way Finders filed a Motion for Determination of Constructive Grant pursuant to 760 CMR 56.07(5)(d), which was denied by ruling dated December 18, 2018. The presiding officer thereafter denied the Town of Ludlow's motion to intervene but subsequently allowed the Town to participate as an Interested Person pursuant to 760 CMR 56.06(2)(c).

Pursuant to 760 CMR 56.06(7)(d)(3), the parties negotiated a pre-hearing order, which the presiding officer issued on June 26, 2019. In preparation for hearing, the parties submitted pre-filed direct testimony of 11 witnesses. On October 29, 2019, the Committee conducted a site visit and two days of hearing to permit cross-examination of witnesses. A total of 56 exhibits was entered into evidence. Following the presentation of evidence, the parties submitted post-hearing briefs and reply briefs. Way Finders' brief included with its argument proposed specific modifications of contested conditions.

II. FACTUAL BACKGROUND

Way Finders received a determination of project eligibility dated January 4, 2017 from the Department of Housing and Community Development (DHCD) under the Low Income Housing Tax Credit Program. The determination was corrected and reaffirmed by email dated March 17, 2017, from DHCD. The developer has satisfied the project eligibility requirements of 760 CMR 56.04(1). Pre-Hearing Order, § II.A.3. The project has met the eligibility requirements of 760 CMR 56.07(2)(a)(1), 56.04(1), and 56.04(6).

Way Finders proposes to build 43 rental units, all of which will be low or moderate income units. Exh. 1, 6H. The development will consist of seven residential buildings and an associated community building on a 5.3-acre site on the easterly side of Fuller Street, a two-lane urban collector street which intersects with Chapin Street to the south. Exhs. 2, 3, 6E. The property is located in the Residential A zoning district. Exh. 2. The neighborhood consists mainly of residences and the Chapin Street Elementary School. There are also commercial uses located nearby on Chapin Street, including the Chapin Commons commercial building. On Fuller Street, nearby uses include residences, municipal conservation land, a business use at the intersection of Chapin Street and Fuller Street, a concrete business on Fuller Street and the Chapin Street Elementary School and associated playground and playing fields, which are located directly across Fuller Street from the project site. Exhs. 2; 3; 6; 6E.

The proposed seven residential structures include the following: Building 1 (6,475 gross square feet (gsf)), will contain 6 units (two 2-bedroom townhouse units; two 3-bedroom townhouse units; one 1-bedroom adaptable unit; and one 1-bedroom second floor unit). Building 2 (6,475 gsf), will contain 6 units (two 2-bedroom townhouse units; two 3-bedroom townhouse units; one 1-bedroom barrier-free unit; and one 1-bedroom second floor unit). Buildings 3, 6 and

7 (7,525 gsf each) will contain 7 units each (each building containing 3 two-bedroom townhouse units; two 2-bedroom townhouse units; one 1-bedroom adaptable unit; and one 1-bedroom second floor unit). Building 4 (5,622 gsf) will contain 5 units (three 2-bedroom townhouses; one 3-bedroom townhouse; and one 2-bedroom barrier-free unit). Building 5 (5,912 gsf) will contain 5 units (three 2-bedroom townhouses; one 3-bedroom townhouse; and one 3-bedroom barrier-free unit). The development will include 87 parking spaces. The one-story community building (2,602 gsf) will house a meeting room, restrooms, a coin-operated laundry for residents and a property management office for the development. Exhs. 3; 4; 6A; 6D.

The two-story residential buildings are proposed to have a height of 29 feet. Exh. 4. Exterior lighting for the parking and building is planned to be dark sky compliant. Exh. 3. The developer proposes a stormwater management system intended to comply with the Massachusetts Department of Environmental Protection (DEP) Stormwater Management Standards. Exhs. 2; 3.

III. ECONOMIC EFFECT OF THE BOARD'S DECISION

A. Standard of Review

When a developer appeals a board's grant of a comprehensive permit with conditions and requirements, the ultimate question before the Committee is whether the decision of the Board is consistent with local needs. Pursuant to the Committee's procedures, however, there is a shifting burden of proof. The appellant must first prove that 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). Way Finders argues, relying on testimony of its experts and documentary evidence, that it has provided sufficient evidence that the Board's conditions and denials of waivers in the decision render the project uneconomic. The Board contends that the developer has failed to make its prima facie showing.

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

760 CMR 56.02: *Uneconomic*. Exh. 12, *Guidelines*, p. I-5. *See* G.L. c. 40B, § 20; 760 CMR 56.05(8)(d). Pursuant to the comprehensive permit regulations, we have first applied the *Guidelines*' methodology for analyzing "reasonable return" for a rental housing project, a Return on Total Cost (ROTC) analysis.[1] 760 CMR 56.02: *Reasonable Return*; Exh. 12, pp. I-5, I-7. This ROTC methodology establishes the minimum reasonable return (the economic threshold). The ultimate question is whether the projected ROTC for the project as conditioned by the Board's decision falls short of the economic threshold. *HD/MW Randolph Ave., LLC v. Milton*, No. 2015-03, slip op. at 5 (Mass. Housing Appeals Comm. Dec. 20, 2018); *Falmouth Hospitality, LLC v. Falmouth*, No. 2017-11, slip op. at 4 (Mass. Housing Appeals Comm. May 15, 2020). If, as can be the case, the ROTC of the development as proposed in the developer's application for a comprehensive permit is also below the economic threshold established by the *Guidelines*, a situation we have termed "uneconomic as proposed," developers are required to show more, specifically, that the Board's conditions render the project significantly more uneconomic than the proposed project. *See 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 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).

Although it may be logical to assume a developer would not propose an uneconomic project, since our economic threshold represents a technical standard, it is not always identical to

[1] We have previously stated that that while "the DHCD Guidance does not have the force of law because it was not promulgated as a regulation," in considering statutory and regulatory provisions, we generally give "deference to policy statements issued by DCHD, the state's lead housing agency." *Matter of Waltham and Alliance Reality Partners*, No. 2016-01, slip op. at 22 n.22 (Mass. Housing Appeals Comm. Decision on Interlocutory Appeal Feb. 13, 2018), and cases cited. *See also* 760 CMR 56.02: *Reasonable Return*, which references calculation of reasonable return "according to guidelines issued by [DHCD]."

the standard a particular developer may use to make its business decisions. As we have noted previously, a developer may choose, under some circumstances, to proceed with an uneconomic development. *Haskins Way, supra*, No. 2009-08, slip op. at 18; *Rising Tide Dev., LLC v. Sherborn*, No. 2003-24, slip op. at 16 n.16 (Mass. Housing Appeals Comm. Mar. 27, 2006) (noting developers may accept lowered profits for developments subject to protracted litigation).

B. The Developer's Presentation

1. Conditions and Denials of Waivers Specified by Way Finders

Way Finders cites numerous conditions and waiver denials as contributing to rendering the project uneconomic, including the following modifications to the development:

1) Restriction on the form of entity: "The Applicant [and its successors and assigns] shall be and always remain a Limited Dividend Entity," and "[t]he limited dividend restrictions shall apply to the owner of the project regardless of sale, transfer, or assignment of the project." Exh. 2, Conditions A.3 and A.10.

2) Controls on the design of the project:

   a) Condition A.4. "The Project shall consist of not more than forty-one (41) rental apartment units, located in no more than six (6) residential structures, and other related residential amenities, all as shown on the Approved Plans, as modified by these Conditions. The Project shall consist of not more than ten (10) one-bedroom apartments, twenty (20) two-bedroom apartments and thirteen (13) three-bedroom apartment units for a total of eighty-nine (89) bedrooms. Notwithstanding the preceding, the total number of units shall not exceed forty-one (41)."

   b) Condition E. 24, "The Applicant shall eliminate the five-unit structure identified as Building B2 located along Fuller Street, and replace it with a children's play area containing amenities similar to the amenities located at the Applicant's project located at Easthampton. The Applicant may add up to three (3) additional units to the other developed areas of the Property (to allow a total unit count of forty-one (41) units), to replace units lost from the elimination of the five-unit structure. Upon the submittal of Final Plans depicting the location of such units (if any), the new units may be allowed as an insubstantial change pursuant to 760 CMR 56.05(11), so long as the location of such units require no new waivers of local rules, and present no significant additional site engineering concerns as agreed by the Board's peer review engineer." Exh. 2, Conditions A.4 and E.24.

3) Denial of waivers for permit and inspections fees and denial of waiver for stormwater management permit. Exh. 2, Conditions A.6, H.6.

4) Payments to retain outside experts for subsequent technical reviews. Exh. 2, Conditions A.8, C.1.a.

5) Submission of final plans, a construction mitigation plan and a landscaping plan depicting ... "[p]lans of walkways in open space and recreation areas." Exh. 2, Conditions C.1.c, d, e.

6) Submission of as-built plans for buildings to the building commissioner prior to the release of final certificates of occupancy. Exh. 2, Conditions D.2.a, b.

7) Relocation of the dumpsters, and denial of the waiver of Zoning Bylaws § 3.0.10, requiring Way Finders to submit final plans to the Board of Health for approval for all dumpsters to be located on the project site for more than 14 days. Exh. 2, Conditions E.14, and C.1.e.

8) Installation of berms and a six-foot solid panel vinyl or synthetic fence on top of the berms on the south and east property lines and installation of fencing around on-site amenities. Exh. 2, Condition E.16, E.25.

9) Installation of a sidewalk along the easterly side of Fuller Street, connecting the development to the existing sidewalk at the corner of Fuller and Chapin Streets. Exh. 2, Condition F.2.

10) Provision of "continuous video monitoring at all times (not restricted to normal business hours)," and presence of professional property management and maintenance personnel on the premises during normal business hours." Exh. 2, Condition G.1.

11) Installation of an open fence around all retention and detention basins. Exh. 2, Condition I.1.

12) Installation of permanent monuments to clearly delineate the edge of the twenty-five foot (25') no-touch zone. Exh. 2, Condition I.5.

13) If the developer builds no playground on the project site, installation of a crosswalk across Fuller Street near the 188 Fuller Street driveway, and a RRFB (rectangular rapid flash beacon) pedestrian crossing signal there. Exh. 2, Finding 26.

2. Way Finders' Testimony Regarding Economic Impact of Decision

Through its witness, Rutilious (Rudy) Perkins, an attorney employed by Way Finders as a project manager and staff attorney, Way Finders submitted testimony about the economics of the project as proposed and as approved.[2] Mr. Perkins stated that the Board approved a project for a 38-unit development. He stated that the project approved by the Board was both uneconomic and significantly more uneconomic than the 43-unit project proposed by the developer, for multiple reasons. He noted that the reduction in units below 41 causes over $1 million in loss of state Low Income Housing Tax Credits (LIHTC) equity. Mr. Perkins stated that, at the original 73-cent state LIHTC yield assumed in the project eligibility application for the project for the five years of state LIHTC, the developer's originally proposed 43-unit project may be awarded

[2] Mr. Perkins testified he was responsible for assembling and hiring development teams and generally overseeing their work, developing, revising and overseeing project *pro formas*, budgets, cost management for projects, applying for permits and funding for projects and assessing and acquiring property for affordable housing developments. Exh. 48, ¶ 1.

$700,000 in annual state LIHTC, thus generating $2,555,000 in development equity from the state LIHTC program ($700,000 in annual credits x 5 years of credits x 73 cents / dollar of credit). This $2,555,000 in state LIHTC equity was assumed for the project eligibility application development budget for the project. Exh. 48, ¶ 51.

Mr. Perkins stated that, because the Board's conditions E.24 and A.4 resulted in an approved 38-unit project, the annual state LIHTC would therefore be limited to $400,000 by DHCD, and the state LIHTC equity that results at this yield would be $1,460,000 ($400,000 x 5 years x 73 cents). Thus, Conditions E.24 and A.4 cause a loss to the project of an estimated $1,095,000 in state LIHTC development equity ($2,555,000 minus $1,460,000). This loss, he stated, significantly impairs the project's ability to obtain sufficient funding to proceed. Exh. 48, ¶ 52.

Mr. Perkins further stated that the increase in needed capitalized operating reserves to make up for rental losses also adds hundreds of thousands of dollars in development costs, creating together about a $2 million development funding gap for the project. This gap cannot be made up by additional permanent loan borrowing, because, he testified, there is already insufficient cash flow as a result of the Board's conditions even to support the $320,000 permanent loan that was originally planned for the project. He stated that it would similarly be extremely unlikely that Way Finders could make up this $2 million gap through additional DHCD public subsidy, as the project is already expecting to draw about $2.4 million in public subsidy. An additional $2 million in public subsidy, he states, would result in a $4.4 million total public subsidy, taking the project significantly over DHCD's usual Qualified Allocation Plan public subsidy cap of $100,000 per affordable unit *(i.e.,* a $3.8 million cap for a 38-affordable-unit project). Exh. 48, ¶ 24.

Third, pointing to Way Finders' asset manager Delores Scott's calculations, Mr. Perkins explained that a key test for permanent lenders of the financial viability of a project and its fundability is the Debt Service Coverage (DSC) ratio, which equals net operating income divided by annual debt service. Ms. Scott stated that Way Finders' permanent lenders always require that the project maintain a DSC of at least 1.10; that is, projected net operating income (revenues minus expenses) must be 10% over the debt service each year during the term of the loan, so that the lender knows the project is very likely to have sufficient net revenue to pay the annual debt obligation to the lender. As Ms. Scott noted, more typically, the permanent lender will insist on

a DSC of 1.15, in effect asking for a 15% cushion of extra net operating income above the amount needed to make yearly debt payments owed the permanent lender. Exhs. 40, ¶ 5; 48, ¶ 17.

Mr. Perkins testified that the annual debt service in the project's original project eligibility application *pro formas* was projected to be $55,638 and the 43-unit project was projected to achieve a net operating income of $68,121 in its first year, for a DSC of 1.22. The elimination of five units represents almost a 12% decrease in the number of units and a roughly $56,000 decrease in annual income. At the same time, Mr. Perkins stated, the Board's conditions increase the project's operating costs by 1.8%. Due to the reduction in the number of units, Mr. Perkins and Ms. Scott stated that the project's DSC drops significantly, from 1.22 to 0.07 in the first year. As a result, Mr. Perkins and Ms. Scott stated that the project will not have enough net income to meet its annual mortgage loan payments. Therefore, they each testified, the decline in net operating income caused by the Board's conditions makes the project's permanent loan unsupportable and the project would default. Exhs. 48, ¶¶ 18, 19; 40, ¶¶ 2, 6, 10.

Finally, Mr. Perkins and Ms. Scott testified that, even if Way Finders could obtain additional subsidies to replace the permanent loan, subsidy funders would want to know that the project will at least be able to pay its operating expenses each year and not go into bankruptcy or default. However, they each state, the Board's conditions make the project go underwater financially after the first year, continuing to lose money each year thereafter, a result no subsidy funder would underwrite. Exhs. 48, ¶ 22; 40, ¶ 11.

Way Finders also proffered the testimony of Michael Gagnon, senior project engineer, who testified regarding the engineering redesign costs, site related costs, including sidewalk and street-related costs, civil engineering details, and conditions bearing on site plan and planning. He testified that any significant changes to the project's layout that impact the size or location of stormwater management facilities would likely require revisions of the stormwater management design, which in turn would require an amended filing with the Ludlow Conservation Commission and, in all likelihood, further peer review. Mr. Gagnon also testified that the elimination of Building 2 and possible enlargement of other buildings to incorporate additional units would potentially create engineering issues with regard to setbacks, steep slopes and required separation distances between buildings. Exh. 44, ¶¶ 2, 9. He testified that the additional site engineering costs to implement the proposed changes to the site plan as approved

by the Board would be approximately 8% of the additional construction costs of the affected site elements (grading, drainage, and utilities), plus an additional fee associated with his regulatory review of approximately $5,000 to $8,000. Exh. 45, ¶ 5.

Way Finders' project architect, Marc Sternick, testified that reconfiguring any of the remaining buildings would create design problems, including loss of required snow storage areas, possible violation of building code building separation requirements, possible violation of zoning setback requirements, and difficulties caused by the steep grades in some areas of the site. Exh. 38, ¶ 6. He specified the following additional changes that would incur construction costs:

- Re-grading between Buildings 4 and 5 that would require significant retaining walls and terracing;
- Re-routing of utilities at Building 4;
- Building 6 would require: 8' additional height on foundation walls (a total of 13' high from footing). This would likely cause the wall to go from 8" thick to 12". Additional deck and railing on rear and side of building with all required posts every 5'-6' with footings for each;
- Re-grading on the side of certain buildings does not appear feasible, so the costs involved were uncertain. Sub-grade drainage would need to be added;
- Once the deck on one of the buildings was extended all the way to meet grade at the front, an additional concrete walkway would need to be extended to it;
- Re-grading for drainage cannot be reasonably achieved if another unit is added to the side of Building 6.

Exh. 39, ¶ 4. With regard to the grading issues, Mr. Sternick testified that re-grading would cause reduced snow storage areas and create insufficient space for the drainage swales currently shown on both sides of Building 4. Reconfiguration of Building 4 would create a situation in which access from the unit to the backyard would require higher and flatter grades where the current drainage swale is shown. He also stated there is insufficient space to move the swale or re-grade the area if the additional unit was placed in that area. Exh. 39, ¶ 2.

James Culliton, Way Finders' general contractor, testified about construction costs for the development. He based his calculations on the preliminary concept plans and the September 20, 2016 Notice of Intent site plans submitted to the Conservation Commission, stating they produced a preliminary construction cost estimate of $10,285,832, broken out as follows:

- $9,599,832 base direct construction cost estimate, using the formula of $186 / gross square foot x the estimate gross footage for the project of 51,612 gross square feet;

- $129,000 for a concrete premium for the tall rear walls of some of the residential buildings necessitated by the slope there;
- $332,000 in additional site work because the slopes on the project site necessitate the work (in contrast to work needed at another project, (the essentially flat site at Parsons Village); and
- $225,000 in additional decking costs for rear exits and rear porches for some of the residential buildings at the site that, because of the slopes, would not have level walk-outs at the rear of the units, but would be above grade at the back.

This cost estimate of $10,285,832 is what he understood to be the figure that was used in the October 2016 project eligibility application for the preliminary estimate of construction costs. [3] Exh. 37, ¶ 3. As explained by Mr. Perkins, the additional costs outlined by Mr. Culliton were based on the elimination of Building 2, which was located on the flattest, and therefore, least costly portion of the site on which to build. By eliminating Building 2, and adding back three of those units, particularly in the case of Building 6, which has more significant slopes, the costs of sitework, concrete and work related to the decks, was increased based on premium pricing over the developer's anticipated estimates. Exh. 49, ¶ 56.

Based on the estimates provided by Way Finders' witnesses, Mr. Perkins provided *pro forma* analyses of the economics of the developer's proposed 43-unit development and the Board's approved 38-unit development. The *pro forma* for the 38-unit development took into account the design changes required by the Board's decision, including, most significantly, reduction in the number of units, reduction in buildable area, change in number and design of buildings, sidewalk and parking requirements, installation of a playground, erection of a fence, installation of a crosswalk across Fuller Street at the project driveway entrance, and continuously monitored video surveillance of the property. Exhs. 48; 49; 48A-D; 49A.1-C.1.

Mr. Perkins testified that in this 100% affordable development, Way Finders' anticipated Return on Total Cost (ROTC) for its proposed 43-unit project is 0.462 and Way Finders' anticipated ROTC for the 38-unit project approved by the Board is 0.0251 – roughly a 95% reduction in ROTC. Exh. 48, ¶ 29. Net Operating Income (NOI) for the project as proposed is $68,121, while NOI for the project as approved is just $3,952. Exh. 48, ¶ 33. His *pro forma* showing the drop in NOI confirms his testimony that the drop in the project's DSC ratio would render the project unfundable. Exh. 48, ¶ 17-21. He further testified that the Board's reduction in

[3] Mr. Culliton's testimony relied in part on 2016 figures, consistent with the parties' agreement, but also in certain instances on 2018 figures. *See* note 5.

the number of units from 43 to 38 results in the loss of over $1 million in state LIHTC, creating a huge funding gap that cannot be bridged with additional borrowing. Exh. 48, ¶ 24.

Faith Williams, Way Finder's Senior Vice President for Property and Asset Management, testified regarding her involvement in the development of the *pro forma* and the economic impact that Conditions A.4 and E.24 have upon the development. She testified that these two conditions, which together reduce the project in size from 43 units to 38 units, will cause a loss of rental and related operating income (such as laundry income) for up to four 2-bedroom units and one 3-bedroom unit, which equates to a loss of about $56,595.00 (including a 7% vacancy loss factor). Exh. 42, ¶ 13.

With regard to the ROTC, Delores Scott, Way Finder's asset manager, testified that the smaller, 100% affordable rental developments that Way Finders often develops are already typically operating at return margins much lower than that which the Committee considers a minimum reasonable return. Exh. 41, ¶¶ 3, 4. She stated that the average ROTC for all of Way Finders' new developments in their first year is only .45% with a net operating income of $37,243. Thus, a drop of $60,000 in net operating income (resulting from a $56,000 reduction in rent and a $7,000 increase in expenses for a net change of $63,000) can translate to losing 100% of Way Finders' net operating income and reducing its ROTC to a negative value. This makes the project financially infeasible, she testified. Exh. 41, ¶ 4.

Way Finders argues that finding the approved project uneconomic with these ROTC results is consistent with *Milton*, *supra*, No. 2015-13, slip op. at 11 (ROTC of 1.62% lower is both uneconomic and significantly more uneconomic); *Cirsan Realty Trust*, *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 17-19 (reduction of profits by 275 basis points (2.75%) renders the project significantly more uneconomic). By contrast, in *Avalon Cohasse*t, *supra*, No. 2005-09, slip op. at 22, the Committee found a reduction of profits by only .11% (11 basis points) did not render the proposed project significantly more uneconomic.

Way Finders argues there are three ways the Board's decision renders the project uneconomic, and they all apply to both the approved 38-unit project and a 41-unit configuration that the Board argues it approved. First, the significant drop in the project's NOI due to the Board's conditions causes it to become unfundable because from year one it cannot meet its debt service, much less its DSC ratio, and would default on its permanent loan and the Board's

conditions lead to both increased total development costs of about $1.4 million and the loss of over $400,000 in federal LIHTC equity, which together cause a development funding gap of over $1.8 million. Exh. 49, ¶ 66, Exhibits A.1 - C.1. Second, the Board's conditions cause the project to become significantly more uneconomic under an ROTC analysis, cutting the already extremely modest project eligibility application ROTC of 0.462% significantly, by 60%, to approximately 0.184% for the 41-unit proposal. Third, because the Board's conditions have reduced the number of units without those conditions addressing a valid concern specified in the comprehensive permit regulations, and reduced the ROTC, the project becomes uneconomic under the regulations. For all of those reasons, Way Finders argues, both the approved 38-unit project and the Board's proposed 41-unit project become uneconomic. Exh. 49, ¶ 66.

C. The Board's Challenge and Committee Analysis

1. Approved Project Size

The Board concedes that the 38-unit development is unfundable. Board reply brief, p. 3. Dean Harrison, the Board's consultant on project economics, agreed with the testimony of Mr. Perkins that the 38-unit project is uneconomic because it is not a fundable project, while the 43-unit project (as proposed in Way Finders' application) would be a fundable project. He relied primarily on the loss of $1,095,000 in state low income housing tax credits, as the 43-unit project would receive $2,555,000 in state LIHTC, while the 38-unit project would only be eligible for $1,460,000 in state LIHTC. Exh. 50, ¶¶ 61, 62.

The Board argues, however, that its decision allows a 41-unit project, as outlined in Conditions A.4 and E.24, arguing this project is not uneconomic. Conditions A.4 and E.24 provide:

> A.4. The Project shall consist of not more than forty-one (41) rental apartment units, located in no more than six (6) residential structures, and other related residential amenities, all as shown on the Approved Plans, as modified by these Conditions. The Project shall consist of not more than ten (10) one-bedroom apartments, twenty (20) two-bedroom apartments and thirteen (13) three-bedroom apartment units for a total of eighty-nine (89) bedrooms. Notwithstanding the preceding, the total number of units shall not exceed forty-one (41).
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> E.24. The Applicant shall eliminate the five-unit structure identified as Building B2 located along Fuller Street, and replace it with a children's play area containing amenities similar to the amenities located at the Applicant's project located at Easthampton. The Applicant may add up to three (3) additional units to the other developed areas of the Property (to allow a total unit count of forty-one (41) units), to replace units lost from the

> elimination of the five-unit structure. Upon the submittal of Final Plans depicting the location of such units (if any), the new units may be allowed as an insubstantial change pursuant to 760 CMR 56.05(11), so long as the location of such units require no new waivers of local rules, and present no significant additional site engineering concerns as agreed by the Board's peer review engineer.

Exh. 2, Conditions A.4 and E.24. In support of its assertion that it approved a 41-unit development it relies on the language in Condition A.4. that "the project shall consist of not more than forty-one (41) rental apartment units." Board brief, p. 20. Condition E.24, however, states that the developer "may add up to three (3) additional units" and "[u]pon the submittal of Final Plans depicting the location of such units (if any), the new units may be allowed as an insubstantial change…as long as the location of the units require no new waivers of local rules, and present no significant additional site engineering concerns…." The Board points to the sketch plan prepared by Stephen D'Ambrosio as proof that the additional three units could be incorporated into the project, as approved with Conditions A.4 and E.24, without additional site engineering or waivers.

To determine what the permit provides, these two provisions must be read together. Condition E.24, by allowing Way Finders to "add up to three (3) additional units" that would be approved only as a modification shows that these three units are not included as part of the permit. Under 760 CMR 56.05(11)(a), a developer may request a modification after a comprehensive permit is granted by a board. The Board's analysis of whether to find a modification insubstantial is made with reference to the factors set out at 760 CMR 56.07(4).

Moreover, this condition includes another caveat, requiring that the addition of these three units, in order for the Board to consider a modification to be insubstantial, "requires no new waivers of local rules, and presents no significant additional site engineering concerns as agreed by the Board's peer review engineer." By requiring a substantive review of the impacts of the addition of three units to determine whether they constitute a substantial or insubstantial change, the Board also makes clear that inclusion of these units has not been granted in the comprehensive permit under review in this appeal. By its own terms, Condition E.24 requires Way Finders to return to the Board for additional approval of new plans, with no guarantee that

those plans would be approved. These requirements make clear that the Board has not yet approved 41 units. Thus, the maximum number of units approved without a modification is 38.[4]

2. Conditions Impacting Unit Count

Costs of Conditions Requiring 38 Units. As noted above, Way Finders' witnesses testified that Conditions A.4 and E.24 together require the reduction of approved units from 43 to 38 units. The Board disagrees, arguing, based on the 41-unit sketch plan devised by Mr. D'Ambrosio, that a 41-unit project is a fully approvable plan requiring no waivers or engineering concerns and one that could be approved by the Board as an insubstantial change pursuant to 760 CMR 56.05(11). Tr. 1, 94. Mr. Harrison acknowledged that he did not consider the reduction in units to 38 in his *pro forma*. Exh. 50, ¶ 17. Nevertheless, he agreed with Mr. Perkins that the 38-unit project is unfundable because of the loss of over $1 million in low income housing tax credits. Exhs. 50, ¶¶ 61, 62; 51, ¶ 8.

Costs of 41-Unit Alternative. The Board argues that, because Way Finders did not ask its engineers and architects to develop a revised plan based on 41 units, Way Finders cannot prove that a 41-unit project is uneconomic. The Board offered testimony of four witnesses who testified about a potential 41-unit project, including traffic and safety issues, recreation and engineering aspects of a such a project and its resulting ROTC.

The Board's peer review engineer, Steven D'Ambrosio, testified about the sketch plan he prepared showing the option for adding the three units contemplated by Condition E.24. He gave his opinion that the changes shown on the sketch plan would require no new waivers of local rules and present no significant additional site engineering. Exh. 52, ¶¶ 9, 10. However, on cross-examination, he stated that he had performed no engineering to establish the feasibility of any of the changes shown on his sketch plan and acknowledged that many of the alterations shown on the sketch plan would create additional impervious surfaces that would, in turn, require an expansion of the infiltration systems that drain the buildings' roofs. Tr. I, 86-90.

Mr. Harrison submitted a *pro forma* relying on the premise that the Board approved a 41-unit project pursuant to Condition E.24 and as shown on Steven D'Ambrosio's sketch plan. The *pro forma* on which his testimony was based utilized exclusively the economics of a 41-unit

[4] Furthermore, the evidence presented by Way Finders showed that adding back three units, after eliminating Building B2, would involve additional site engineering for site grading, the surface and subsurface drainage system, parking, snow storage, dumpster locations as well as location of the barrier-free accessible unit two-bedroom unit eliminated in Building B2. Exhs. 39, ¶¶ 2-5; 45, ¶ 2; 49, ¶¶ 53-64.

project. Tr. II, 24; Exhs. 50, ¶¶ 13, 18; 51, ¶ 7; 52.2. He testified that most of the additional costs associated with the Board's conditions cited by Mr. Perkins, are irrelevant because they are based on the premise that the Board approved a 38-unit project. Exh. 50, ¶ 15-50. We do not find Mr. D'Ambrosio's testimony on this point credible.

Mr. Perkins criticized Mr. Harrison's 41-unit *pro forma* as being irrelevant, asserting the Board's permit does not allow a 41-unit project without a separate filing of a request for a modification of the comprehensive permit that is under consideration here. Exh. 49, ¶ 4. Assuming *arguendo* that the Board's decision approved the 41-unit project as depicted in Steven D'Ambrosio's sketch plan, Mr. Perkins prepared a 41-unit *pro forma* and reviewed Mr. Harrison's 41-unit *pro forma.* He testified that the 41-unit project would still be uneconomic for multiple reasons. First, Mr. Harrison's proposed construction costs fail to include the costs of the Board's conditions, which together add an additional $934,127 in construction costs. In addition, Mr. Perkins points out that additional costs, such as architectural, engineering, permitting, legal, interest and holding costs, were omitted from Mr. Harrison's 41-unit *pro forma*, thus increasing the developer's costs for the 41-unit project by $252,107. With regard to operating expenses, the difference between Way Finders' and the Board's 41-unit *pro formas* is a result of the Board's exclusion of operating expenses required by several conditions, such as video monitoring, which are applicable whether the project is 38 units or 41 units. Once the financial impacts of the Board's conditions are included in the operating expenses for the 41-unit project, the net operating income of the 41-unit project drops significantly, according to Mr. Perkins, and the project no longer meets its debt service coverage. He testified that the Board did not account for additional funds needed for additional capitalized operating reserves to cover debt service coverage and cash flow shortfalls in its 41-unit *pro forma*. In addition, Mr. Perkins testified, the 41-unit project reduces Way Finders' LIHTC allocation by $416,500, based upon DHCD's Qualified Application Plan formula. The final result, based upon Mr. Perkins' testimony, is that the 41-unit project would have a ROTC of 0.184%. Exh. 49, ¶¶ 59 (a)-(g), 60-65, 68, 70.

As noted previously in § III.B., *supra*, we agree with Way Finders that the comprehensive permit does not allow as of right a 41-unit project, and therefore the economics of such a project configuration is not at issue.

3. Costs of Board's Other Conditions

The parties submitted specific arguments regarding their interpretation and estimated costs of particular "key" conditions requiring additional work, such as reduction in the number of units and related reconfiguration of the project, addition of a play area, construction of sidewalks, installation of traffic signals, constant video monitoring of the property and peer review fees. While acknowledging the validity of some of Way Finders' expenses, the Board also argues a significant number of the conditions to which Way Finders objects relate to costs that should have been included in the *pro forma* for the original 43-unit project because they are conditions typically imposed upon comprehensive permit projects. It argues that Way Finders' costs are based upon an erroneous interpretation of the intent of the Board's conditions.

We analyze the parties' cost estimates for the 38-unit project, for each of the contested conditions below.

a) Limited Dividend Status (Conditions A.3 and A.10)

Way Finders argues that the sales tax impact of the requirement to remain a limited dividend entity would result in a 3.75% increase, or $369,692, in projected construction costs. Exhs. 48, ¶¶ 38-44; 49, ¶¶ 11-15, 56. Mr. Perkins testified that it is not uncommon for an affordable housing developer to tailor its legal status to the stage of the development, in order to take advantage of certain tax status benefits, changing from a limited dividend organization to a non-profit during construction. Exh. 48, ¶ 39. According to Mr. Culliton, Way Finders' general contractor, the original cost estimate for the project was based on the assumption that Way Finders would be a non-profit during the construction period and the construction materials would be sales tax exempt. Exh. 37, ¶ 4. By requiring Way Finders, or its successors or assignees, to remain a limited dividend organization, Way Finders argues, the Board is effectively preventing Way Finders from accessing those tax benefits, without having to seek modification of the permit.

The Board argues that G.L. c. 40B, § 21 and 760 CMR 56.04(1)(a) require the developer to be either a public agency, a non-profit organization or a limited dividend organization and Way Finders filed its application as a limited dividend organization. The Board argues that it properly conditioned the permit on Way Finder's maintaining compliance with this requirement and that, if Way Finders would like the ability to change the type of entity, it only needs to file a request with the Board for a modification pursuant to 760 CMR 56.05(11) and such a request

would presumably not be considered substantial. The Board's witness, Mr. Harrison, therefore did not consider the increased costs related to the legal status of Way Finders in his analysis. *See* Exh. 51, ¶ 10.

Before substantial completion of a project, pursuant to 760 CMR 56.05(12)(b), a comprehensive permit may be transferred to another person or entity other than the developer, upon written confirmation from the subsidizing agency that the transferee meets the requirements of 760 CMR 56.04(1)(a) and (b), and upon written notice to the Board. Transfer of the permit by itself does not constitute a substantial change pursuant to 760 CMR 56.07(4). There is no requirement that a developer seek a modification of a comprehensive permit by the Board in order to change the applicant's legal entity status. We have stated that, "[s]o long as there is no deception involved, the final structure of the business entities that ultimately execute [an] agreement is of little importance. It is for this reason, among others, that our regulations permit transfer of permits on a fairly routine basis...." *Paragon Residential Properties, LLC v. Brookline*, No. 2004-16, slip op. at 11 (Mass. Housing Appeals Comm. Mar. 26, 2007); *quoting Delphic Associates, LLC v. Middleborough*, No. 2000-13, slip op. at 4 (Mass. Housing Appeals Committee July 17, 2002).

Accordingly, we accept as credible the testimony of Mr. Perkins and Mr. Culliton regarding the additional expense incurred by Way Finders as a result of the Board's condition requiring it to remain a limited dividend organization. The Board offered no credible evidence to refute this testimony. Therefore, we find that compliance with Conditions A.3 and A.10 would result in an increase of $369,692, in projected construction costs.

b) Walkways and Recreation Area Plans (Condition C.1.e)

Condition C.1.e requires Way Finders to submit to the Board with its final plans a landscaping plan depicting, amount other things, "[p]lans of walkways in open space and recreation areas." Way Finders states that it never proposed to install such walkways and this condition imposes a requirement to install walkways in open space and recreation areas. Way Finders brief, pp. 18-19; Exh. 3, Sheet LA. Mr. Perkins testified that this requirement would impose an additional $193,028 in direct construction development costs, plus an additional $12,960 for design and $919 in legal costs. Exh. 48, ¶¶ 69, 70. Mr. Gagnon, site engineer for Way Finders, testified that the additional cost would be for the provision of walkways meeting accessibility standards under the Fair Housing law that would require about 850 linear feet of 4-

foot-wide concrete walkway with approximately 400 linear feet of 8-foot-tall retaining walls to address slopes involved. Exh. 44, ¶ 5.

The Board argues that this condition imposes no specific requirement regarding the creation of walkways; rather, it simply requires the developer to depict any planned walkways. The Board argues that interpreting this condition as mandating the construction of walkways within the open space areas where none were planned is unreasonable and that this condition has no economic impact on the project. The Board provided no evidence regarding the cost of compliance with this condition. Exh. 51, ¶ 20.

We agree with Way Finders that even if this condition doesn't explicitly require Way Finders to add walkways to the project, by requiring the developer to depict walkways on the landscaping plans to be constructed on the open space and recreation areas can reasonably be interpreted as imposing such a requirement; otherwise, there is no purpose for requiring walkways on the recreation areas that are required by the Board's conditions. As Way Finders points out, the Board was aware that no such walkways had been proposed so the Board's argument that this is only a hypothetical requirement has little merit. Therefore, we find the developer's cost estimate to be credible and we accept it.

c) Timing of As-Built Plans (Condition D.2.a, b)

Mr. Perkins testified that the requirement in Conditions D.2.a and D.2.b to file as-built plans with the building commissioner before the issuance of the certificate of occupancy would add $44,530 in interest costs to the project, because the resulting delay in the issuance of certificates of occupancy, would further delay paying off Way Finders' construction loan and increasing interest costs. Exh. 48, ¶¶ 75-76.

The Board argues that this is a standard condition and that it was Way Finders' burden to account for this cost in the ordinary course. Further, it asserts, the condition imposes no significant additional costs on Way Finders and causes no delay in obtaining certificates of occupancy. Board brief, p. 29. The Board provided no evidence of the costs of compliance with this condition. Exh. 51, ¶ 22. Way Finders argues that the Board's witness, Mr. Harrison, admitted that he never spoke with the building commissioner to confirm that there exists such a standard requirement for as-built plans for buildings and the Board failed to prove that such a requirement exists in the Town of Ludlow. Way Finders brief, p. 19.

We find that Conditions D.2.a and D.2.b result in credible additional development costs as specified by the developer and we accept them.

d) Playground and Fencing (Condition E.24 and E.25)

Condition E.24 requires Way Finders to eliminate the 5-unit building B2 and install a children's play area in the space made available by the elimination of the building in a design similar to the playground at another of Way Finders' developments. The cost of such a playground, as testified to by Mr. Perkins, would be $99,350. Exhs. 48, ¶ 79; 49, ¶ 56. The fencing required around the playground would add $6,653 in costs to the project. Exh. 48, ¶ 81.

The Board provided no evidence regarding the costs of compliance with this condition, nor any argument that the condition does not require Way Finders to construct such a playground or associated fencing. Accordingly, we find the testimony regarding the costs to comply with this condition credible and we accept it.

e) Sidewalk (Condition F.2)

Condition F.2 requires that a "sidewalk shall be installed from the driveway entrance at 188 Fuller Street in the southerly direction along the easterly side of Fuller Street, to connect to the existing sidewalk at the corner of Fuller and Chapin Streets." Mr. Perkins calculated $11,240 in additional costs to comply with this condition (sidewalk to Chapin Street -- $6,641; retaining wall by sidewalk to Chapin Street -- $4,599).[5] Exh. 48, ¶ 84. In addition, Mr. Perkins testified that an additional estimated $8,716 in engineering, survey and legal development costs would be needed in order to address the possibility of acquisition of easements from abutters.

The Board provided no evidence to dispute these costs. In his rebuttal testimony, the Board's witness, Mr. Harrison, dismissed these additional costs, claiming that the decision does not actually require such a sidewalk. Exh. 51, ¶ 36, attachment 2. On cross-examination, Mr. Harrison acknowledged that he did not actually read the Board's decision to confirm whether it requires the sidewalk, instead relying on representations of the Board's counsel that the requirement did not exist. Tr. II, 28-29.

[5] The cost of $4,599 for the retaining wall found in Mr. Perkins pre-filed direct testimony conflicts with the cost of $9,140 listed in Exhibit B to his pre-filed testimony. Because the higher figure appears to be based on 2019 cost estimates, we have used the $4,599 cost estimate here, which is calculated based on 2016 costs. *See* Exh. 48, ¶ 84.

We agree that this condition requires the installation of a sidewalk, which was not part of the original application. Accordingly, we find the testimony regarding the costs to comply with this condition credible and we accept it.

f) Continuous Video Monitoring (Condition G.1)

Condition G.1 requires Way Finders to "provide professional property management and personnel on the premises during normal business hours" and "continuous video monitoring at all times (not restricted to normal business hours)." Way Finders' project manager, Mr. Perkins, testified regarding the following additional costs, totaling $48,281:

- $22,994 for an emergency generator back-up for security cameras;
- $757 annual servicing of generator;
- $11,530 for the first year of video monitoring service; and
- $13,000 for the first year of additional property management staffing.

Exh. 48, ¶¶ 81-91. Again, the Board argues that this condition does not actually require 24/7 video monitoring. Instead, it argues, the condition requires the video system to continue to record outside of normal business hours, but it was not intended to require personnel to monitor the video twenty-four hours per day, nor was it intended to require the expense of installing a generator solely to ensure the continuous monitoring in the event of a power failure. Board brief, p. 30. The Board did not offer evidence of costs for compliance with this condition. Exh. 51, ¶ 23.

We agree with Way Finders that the plain language of the condition requiring "continuous video monitoring" of the site requires monitoring 24 hours a day. Way Finder's interpretation of this requirement to mean compliance would also require providing personnel to actively monitor the video feed and assuring, by means of a generator, that the monitoring was maintained continuously is reasonable. Therefore, we find the testimony regarding the costs to comply with this condition credible and we accept it.

g) Miscellaneous Costs

Way Finders presented evidence regarding additional development and operating costs associated with a number of other conditions and waiver request denials that it claims contribute to the financial impact upon the project. Mr. Perkins testified regarding each of the condition's

costs and how each would impose additional costs or contribute to lost operating revenue for the project.[6]

The Board did not present any evidence regarding these costs, but rather argues that these costs should have been accounted for by the developer in its initial *pro forma* on the ground they are conditions typically imposed on comprehensive permit projects. Board brief, p. 23.

- Conditions A.6, H.6 – Stormwater installation per applicable Town protocols: $5,331. Exh. 48, ¶ 62;
- Conditions A.8, C.1.a – Payment for outside consultant for technical reviews: $10,780. Exh. 48, ¶ 64;
- Conditions C.1.c, C.1.d – Submission of final plans at least 45 days prior to commencement of construction or submission of a building permit application: $4,359. Exh. 48, ¶¶ 65, 66;
- Condition C.1.e (i) – 18-month warranty on plantings: $4,709. Exh. 48, ¶¶ 67, 68;
- Condition C.2.c – Regulatory Agreement recording: $1,200. Exh. 48, ¶¶ 72, 73;
- Conditions E.14, C.1.e – Dumpster relocation: $6,214. Exh. 48, ¶ 77;
- Conditions E.16 – Installation of berms and six-foot solid panel fence: $57,658. Exh. 48, ¶ 78;
- Condition E.26 – Identification of old growth trees: $966.00. Exh. 48, ¶ 82, $2,759. Exh. 48, ¶ 83;
- Condition I.1 – Fencing around retention/detention basins: $18,859. Exh. 48, ¶¶ 94-95; Exh. 37, ¶ 15;
- Condition I.5 – Monuments to delineate edge of wetlands: $24,111. Exh. 48, ¶ 97; Exh. 37, ¶ 16;
- Condition J.1.a – Completion of cul-de-sac: $8,871. Exh. 48, ¶¶ 99-100; Exh. 37, ¶ 17;
- Condition K.5 – Stormwater maintenance bond: $3,000.[7] Exh. 48, ¶¶ 101-102.

Way Finders argues that the following waiver denials contributed to the making the project uneconomic:

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[6] We note that, for some of Mr. Perkins' cost estimates listed below, there are certain dollar totals that differ by $1-2 in his pre-filed testimony and exhibits thereto as a result of rounding differences he has indicated. Exh. 49, ¶ 63, n.4.

[7] Mr. Perkins' pre-filed direct testimony states that the cost of Condition K.5 is $3,000 and that the additional cost of the associated waiver of Zoning Bylaw § 7.2(K) has been factored in to the cost estimate for K.5. However, Exhibit B to his testimony contains a cost of $3,750 for K.5 and the waiver of 7.2(K). We have used $3,000 for the cost of Condition K.5, as this is the amount stated in his direct testimony and is the more conservative figure. Exh. 48, ¶ 107.

- Sections 3.09, 6.4.4 – Curb cut permit from the Ludlow Department of Public Works: $1,886. Exh. 48, ¶ 104;
- Section 3.3.1(f)(1) – Temporary storage facilities permit: $750. Exh. 48, ¶ 105;
- Section 3.3.1(f)(5) – Office trailer permit from the Ludlow Board of Health: $750. Exh. 48, ¶ 106;
- Finding 26 – Crosswalk across Fuller Street if no playground installed: $38,965. Exhs. 48, ¶ 108; 37, ¶ 20.

The Board's argument that the costs of the above conditions should have been included in the initial p*ro forma* fails. The Board's conditions impose requirements beyond those that an applicant would normally anticipate as part of a routine approval process. For these conditions and waiver request denials, Way Finders has presented sufficient evidence of their cumulative contribution to the aggregate uneconomic impact of the Board's decision. *See White Barn Lane, LLC v. Norwell*, No. 2008-05, slip op. at 14-16 (Mass. Housing Appeals Committee July 8, 2011) (criticism of developer's *pro forma* evidence without producing contradicting evidence is insufficient basis for economic argument).

D. *Pro Forma* Analysis and Conclusion Regarding Economics

As discussed in § III.C.1, *supra,* we determine that the Board's permit approved only 38 units. Mr. Harrison's testimony was largely based on the premise that the decision approved 41 units; it ignored any costs associated with the approved 38-unit project. In fact, Mr. Harrison agreed with Way Finders' witnesses that a 38-unit project was uneconomic. The *pro forma* analysis he presented does not offer a credible calculation of the ROTC of the project as approved. We accept the testimony of Mr. Perkins, Ms. Scott and Mr. Culliton and Way Finders' *pro forma* for the purposes of determining whether Way Finders has met its burden of proof. Therefore, on the record, Way Finders' *pro forma* based on a 38-unit project as approved is credible and we accept it.

The yield on the 10-year Treasury note as of the date of the project eligibility application (October 2016),[8] was determined by Mr. Perkins to be 1.63%. Adding the 450 basis points as provided by the *Guidelines,* App. I.1, Mr. Perkins calculated the minimum economic threshold of the project to be 6.13%. He calculated the ROTC for the project, as proposed with 43 units, to

[8] As stipulated by the parties in the Pre-Hearing Order, evidence introduced concerning costs and revenues in relation to the economics of the project are based upon October 2016, the date of the developer's submission of a request for project eligibility determination. Exh. 48, ¶ 102, 48B.

be 0.46%, and for the project, as conditioned, including but not limited to the reduction to 38 units and the consequent reduction in project income, to have a return of 0.0251. Exh. 48, ¶¶ 27, 29. He concluded that the Board's conditions, including but not limited to the condition requiring a reduction in units, "make the Project uneconomic under this Return on Total Cost analysis." Exh. 48, ¶ 34.

The following table shows the respective ROTC estimates of the parties:

Table: ROTC Calcluation						
	Way Finders Pro Forma - 43 Units	Board Pro Forma - 43 Units	Way Finders Pro forma - 38 Units	Board Pro Forma - 38 Units	Way Finders Pro Forma 41 Units	Board Pro Forma 41 Units
Total development costs	$ 14,732,000.00	$14,670,257.00	$ 15,739,210.00	$15,739,210.00	$ 16,160,197.00	$ 14,420,549.00
Total operating expense	$ 419,527.00	$ 411,402.00	$ 427,101.00	$ 394,635.00	$ 435,392.00	$ 404,741.00
Net Operating Income	$ 68,121.00	$ 76,254.00	$ 3,951.00	$ 36,417.00	$ 29,685.00	$ 60,126.00
ROTC (=NOI/TDC)	0.462%	0.520%	0.025%	0.231%	0.184%	0.420%

Both the ROTC for the proposed project (0.462%) and Way Finders' ROTC for the approved 38-unit project (0.025%) are below the ROTC threshold of 6.13%. The ROTC for the approved project is 0.437% below that for the proposed project. We determine this to be a substantial reduction. *See Milton*, *supra*, No. 2015-03, slip op. at 7 (ROTC reduction of 1.62% is both uneconomic and significantly more uneconomic); *Cirsan Realty Trust*, *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). Thus, we find the ROTC for the approved project is both uneconomic and, significantly more uneconomic, than the ROTC for the developer's proposal.

IV. LOCAL CONCERNS

Since 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, ¶¶ 3-7. The burden on the Board is significant: the fact that Ludlow does not meet the statutory minima regarding affordable housing establishes a rebuttable presumption that a substantial regional housing need outweighs the local concerns in this instance. 760 CMR 56.07(3)(a); Pre-Hearing Order, § II, ¶ 2; G.L. c. 40B, §§ 20, 23. *See Zoning Bd. of Appeals of Lunenburg v. Housing Appeals Comm.*, 464 Mass. 38, 42 (2013) ("there is a rebuttable presumption that there is a substantial Housing Need which outweighs Local Concerns" if statutory minima are not met), quoting *Boothroyd v. Zoning Bd. of Appeals of Amherst*, 449 Mass. 333, 340 (2007), quoting *Board of Appeals of Hanover v. Housing Appeals Comm.*, 363 Mass. 339, 346, 365, 367 (1973) ("municipality's failure to meet its minimum [affordable] housing obligations defined in § 20 will provide compelling evidence that the regional need for housing does in fact outweigh the objections to the proposal").

A. Project Design Changes

Way Finders argues that the Board has improperly redesigned the project and that its changes are not supported by valid local concerns. Most significantly, it argues that the Board requires the developer to (1) eliminate Building B2; (2) reduce the number of units from 43 to 38; (4) limit the number of residential structures to six; (4) create a children's play area; (5) submit revised plans depicting an additional three units to be incorporated into the remaining six buildings;[9] and (6) if no playground is constructed, construct a crosswalk across Fuller Street near the 188 Fuller Street driveway and a RRFB (rectangular rapid flash beacon) pedestrian crossing signal there. Exh. 2, Conditions A.4, E. 24, Waiver Request No. 10 and Finding 26.

The Board argues that it has provided evidence of a clear health and safety concern in a targeted manner in support of the elimination of Building B2 and its replacement with a children's playground. The Board's traffic expert, Jennifer Conley, stated that the Board

[9] The Board's condition, which it alleges authorizes the additional three units, reads more as an invitation to the developer to re-apply to the Board for additional units which "may be allowed" as an insubstantial change.

imposed this condition "due to safety concerns related to children crossing Fuller Street from the project to access the playgrounds in the Chapin Elementary School." This condition was necessary, Ms. Conley testified, to discourage children from crossing Fuller Street where there are no traffic controls. She stated the intersection at Fuller and Chapin Streets lacked improvements to provide a safer crossing when school crossing guards are not present. The Board argues, based on her testimony, that Fuller Street is a busy street, and given safety concerns associated with crossing Fuller Street at the property, the developer has failed to provide adequate playground facilities to meet the needs of the future residents of the project. Given these safety concerns, the Board argues that the elimination of Building B2 and the requirement of a playground on the project site are supported by valid health and safety concern that outweighs the regional need for affordable housing. Exhs. 54, ¶¶ 10, 12; 56, ¶¶ 25-26.

Way Finders' traffic expert, Stephen Savaria, disagreed that there is a pedestrian safety concern regarding the intersection of Fuller Street and Chapin Street. Tr. I, 64. He stated that there is no history of pedestrian-involved incidents at that location and the fact that additional pedestrians are being introduced does not change that result. Tr. I, 65. He disagreed with the Board's position that a playground within the project is necessary to discourage children from using the Chapin Elementary playground. Tr. I, 71-72. Instead, he recommended addressing the ongoing vehicular safety and capacity problem at the Chapin Street and Fuller Street intersection that has existed for years by improving signalization. Tr. I, 72. He stated that the Town implemented a four-way stop control at the intersection ten years ago, which may be contributing to the off-peak vehicular crash history by confusing drivers about the normal hierarchy of right of way at a four-way intersection, and recommended full traffic signalization be implemented by the Town to improve traffic operations. Exh. 46, ¶¶ 6, 10. Such vehicular crash history, he stated, is not attributable to speed, nor is there any evidence that these conditions pose any threat to pedestrian safety. Exh. 47, ¶. 25. Furthermore, he suggested the possibility that the presence of recreational facilities at the project could entice children to cross Fuller Street from Chapin Elementary School to the project, to use the project's playground. Tr. I, 74. Similarly, Mr. Savaria testified that the existing playground at the elementary school is adjacent to other residential neighborhoods to the east and south accessible by pedestrian travel, and children from those neighborhoods need to cross the Fuller Street and Chapin Street intersection to reach the Chapin Elementary playground, subjecting them to the same traffic conditions as children

residing in the development would face. Such conditions have existed as long as the elementary school has occupied the current site, but the Town has not taken actions to date to implement safety precautions or improvements. Exh. 47, ¶ 25.

Although a "board must review the proposal submitted to it, and may not redesign the project from scratch," *Pyburn Realty Trust v. Lynnfield*, No. 2002-23, slip op. at 14 (Mass. Housing Appeals Comm. Mar. 22, 2004), quoting from *CMA, Inc. v. Westborough*, No. 1989-25, slip op. at 24 (Mass. Housing Appeals Comm. June 25, 1992), a board may deny requests for waivers and impose conditions even if such action would require a developer to modify its project, if the action is supported by valid local concerns that outweigh the need for affordable housing. *See Hanover, supra*, 363 Mass. 339, 349; *CMA, Inc., supra*, No. 1989-25, slip op. at 24 n. 13; *See also* 760 CMR 56.05(8)(d).

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

In this case, the Board has not identified a local requirement or regulation that supports the condition for a children's playground in the development. *See Falmouth, supra,* No. 2017-11, slip op. at 39-40*; Green View Realty, LLC v. Holliston*, No. 2006-16, slip op. at 10 (Mass. Housing Appeals Comm. Jan. 12, 2009), *aff'd Zoning Bd. of Appeals of Holliston v. Housing Appeals Comm.,* 80 Mass. App. Ct. 406, 420 (2011) (it is incumbent on zoning board to identify a local interest protected by bylaw that are stricter than state requirements and demonstrate that such interest outweighs regional need for low and moderate income housing). Furthermore, the testimony presented indicated no history of pedestrian-involved incidents at the Chapin and Fuller Street intersection and the Board did not support its premise that introduction of potential additional pedestrians as a result of the development would increase the risk of pedestrian accidents. *Canton Property Holding, LLC v. Canton*, No. 2003-17, slip op. at 18 (Mass. Housing

Appeals Comm. Sept. 20, 2005). Therefore, we conclude that the Board has not demonstrated a valid local concern requiring the elimination of Building B2 in favor of a separate children's playground at the project that outweighs the need for affordable housing, and thus has not established a valid local concern that outweighs the need for affordable housing to support its reduction in the number of permitted units for the project.

On this record the Board has not established a valid local concern that outweighs the need for affordable housing with regard to the elimination of Building B2 and its associated units, the limitation of the project to 41 units in six buildings, and the installation of a playground and crosswalk. Therefore, Condition A.4 is modified in accordance with Way Finder's proposed modification, Condition E.24 and Finding 26 are struck, and Waiver Request No. 10 is granted.

B. Continuous Video Monitoring

Condition G.1 requires the property be subject to "continuous video monitoring at all times (not restricted to normal business hours)," and professional property management and maintenance personnel present on the premises during normal business hours. Rather than demonstrate a valid local concern that this condition was intended to address, the Board argued that the condition does not, in fact, require actual continuous video monitoring of the property. We find that the Board has not demonstrated a valid local concern for this condition that outweighs the need for affordable housing. We accept Way Finder's proposed modification of this condition.

C. Installation of Fencing and Berms

Conditions E.16 and E.25 require installation of berms and a six-foot solid panel vinyl or synthetic fence on top of the berms on the south and east property lines and installation of fencing around the on-site amenities, which would include the children's play area required by Condition E.24, and the dumpster and recycling areas. Further, Condition I.1 requires Way Finders to install open fencing around all four of the site's proposed retention/detention basins.

The Board argues that fencing requirements are squarely within the authority of the Board to impose and that the local concern with protecting abutting residential properties with appropriate screening is self-evident, although it did not identify a requirement or regulation evidencing the local concern it asserts. To that end, the Board provided no evidence to support its conclusion, other than pointing to the site walk conducted as part of the hearing process and the observation of the proximity of the adjacent residential uses to the proposed large rental

buildings. The Board suggests in its brief that the fencing is necessary to "protect abutting uses," Board brief, p. 60, but it has not provided sufficient evidence to support requiring the specific kind and severity of the screening required; therefore, it has not demonstrated on this site a valid local concern that outweighs the need for affordable housing that supports the screening measures required. *See* Falmouth, *supra,* No. 2017-11, slip op. at 33 (even when board demonstrates valid local concern, we examine conditions imposed to ensure that they are supported by that local concern and may modify condition not properly tailored to local concern); *Milton, supra,* No. 2015-03, slip op. at 16-17; *Herring Brook Meadow, supra,* No. 2017-15, slip op. at 25-26. We note that the landscape plan identifies trees and shrubs in the location of the border fencing. Since we have struck the condition requiring a play area, the requirement of fencing surrounding it is also struck. Therefore, Conditions E.16 and E.25 are struck.

With regard to the fencing around the detention basins, the Board argues that the decision only requires compliance with the conditions contained in the Order of Conditions and imposes no independent requirements upon Way Finders. Condition I.1 states that: "The Applicant has obtained an Order of Conditions from the Ludlow Conservation Commission and the Order of Conditions was not appealed. All of the conditions contained in such Order of Conditions shall be adhered to, including the requirement that an open fence be placed around all retention/detention basins, and that fences around sediment forebays shall be installed in a manner to allow wildlife access to the detention basins." Exh. 2. The Order of Conditions states that the "Applicant may install a fence around detention basins without an amendment to or new Order of Conditions provided the fence will not obstruct access to detention basin area by animals and wildlife." Exh. 7, Condition 43.

Accordingly, the Board argues, if the Order of Conditions does not require fencing, the Board's decision does not create a new obligation to provide fencing. Other than pointing out that the Order of Conditions contains no requirement of fencing, the Board provides no other evidence regarding the valid health and safety concerns in support this condition. We note the Order of Conditions was issued by the Conservation Commission under the Wetlands Protection Act, and therefore establishes requirements under state law. The Board has cited to no local requirement or regulation pertaining to theses fences. Moreover, this condition is superfluous since applicable state and federal requirements must be followed regardless of whether the Board

includes them as conditions and we have ordered compliance with all applicable state and federal requirements. *See* § VII.B, Condition 5.f. Therefore, Condition I.1 is struck.

D. Sidewalk and Pedestrian Crossing

> Condition F.2: A sidewalk shall be installed from the driveway entrance at 188 Fuller Street in the southerly direction along the easterly side of Fuller Street, to connect to the existing sidewalk at the corner of Fuller and Chapin Streets. The Applicant shall construct the sidewalk, pursuant to the standards of the DPW. Such construction shall be completed prior to the issuance of occupancy permits for the first structure in the Project.
>
> Finding 26: The Board finds that, in the absence of an adequate on-site children's play area, in order to allow safe pedestrian crossing of Fuller Street from the Project to the Chapin Elementary School, it is necessary for the Applicant to construct a pedestrian crossing, at a location to be determined by the Ludlow Department of Public Works. Such crosswalk should incorporate an RRFB traffic control device which would be able to be activated from either side of the street. The Board found that such crossing is not necessary if an adequate children's play area is provided, as required herein.

Way Finders points to two comprehensive permit regulations that make Condition F.2 and Finding 26 unsupportable: First, for a condition that contributes to making the project uneconomic, 760 CMR 56.05(8)(d) prohibits any condition that requires the imposition of costs of off-site public infrastructure on a developer. Second, 760 CMR 56.07(2)(b)(4) imposes an additional burden of proof on the Board before it can require an applicant to address inadequate municipal infrastructure, a burden the Board has not met.[10] Exh. 48, ¶ 221. Furthermore, Way Finders argues that the Board does not have the authority to force it to undertake construction work on property it does not own. *Id*. Way Finders argues that the Board has failed to meet its burden under 760 CMR 56.07(2)(b)(4), which requires that if a condition is based upon the inadequacy of existing municipal services or infrastructure, the Board must prove that the installation of services adequate to meet local needs is not technically or financially feasible. *See Brierneck Realty LLC v. Gloucester,* No. 2005-05, slip op. at 19-20 (Mass. Housing Appeals Comm. Aug. 11, 2008); *Hollis Hills, LLC v. Lunenburg*, No. 2007-13, slip op. at 7-8 (Mass. Housing Appeals Comm. Dec. 4, 2009).

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[10] "In the case of either a denial or an approval with conditions, if the denial or conditions are based upon the inadequacy of existing municipal services or infrastructure, the Board shall have the burden of proving that the installation of services adequate to meet local needs is not technically or financially feasible. Financial feasibility may be considered only where there is evidence of unusual topographical, environmental, or other physical circumstances which make the installation of the needed service prohibitively costly." 760 CMR 56.07(b)(4).

Mr. Savaria, Way Finder's traffic consultant, testified that the expected increase in vehicular traffic at peak periods will not be perceptible to drivers and that the additional traffic generated by the proposed project will result in an incremental increase in peak period traffic volumes on Fuller Street and Chapin Street that will have only a minor impact on traffic operations. Exh. 46, ¶ 2. He further testified that:

> [t]raffic count data collected for the traffic impact study indicates there are several pedestrians per hour crossing through the Fuller/Chapin intersection during peak demand periods in the morning and afternoon under existing conditions. The crash history researched for the 188 Fuller and the Chapin Elementary School from Ludlow Police Department records failed to identify a single incident involving pedestrians for the multiple years of data obtained. There is no evidence that a safety concern or hazardous conditions exists for pedestrian operations in the vicinity of the Chapin School.

Exh. 46, ¶ 6. Way Finders presented further testimony that the traffic study conducted by the Town in connection with the construction of the Chapin Elementary School indicated that the school project would bring additional vehicular and pedestrian traffic to the area and that the Town had no plans to make any improvements at the Chapin and Fuller Street intersection in connection with the Chapin School project. Tr. I, 79-80; Exh. 34. The Traffic Impact Study performed by Brennan Consulting for the Chapin Elementary School, dated December 11, 2018, "show[s] that the proposed [school] will have an impact on the operational condition at the Chapin/Fuller Street intersection.... The increase in delay times and queue lengths indicate that the Fuller and Chapin Street intersection requires traffic mitigation. The mitigation would most likely require signalization (and widening to provided dedicated left-hand turning lanes)." Exh. 34, p. 12.

The Board's position on Condition F.2 and Finding 26 is inconsistent. First, it argues that Condition F.2 requires the developer to mitigate a concern directly caused by the proposed development and that Finding 26 imposes no specific requirements upon the project and has no discernable impact upon the role of the subsidizing agency. Board brief, p. 56. However, Mr. Harrison testified for the Board that the decision does not actually even require the installation of a sidewalk. Exh. 51-2; Tr. II, 28. Nevertheless, the Board argues that *Hilltop Preserve Ltd. P'ship v. Walpole,* No. 2000-11 (Mass. Housing Appeals Comm. Apr. 10, 2002) allows the Board to require a developer to "mitigate specific problems ... necessitated by the new development itself" and that Condition F.2 was within the authority of the Board to impose in order to mitigate a concern directly created by the proposed development. Board brief, p. 56.

The Board provided no evidence to show that financial infeasibility of constructing a sidewalk or installing a crosswalk in the required locations resulting from unusual topography, environmental, or other physical circumstances that make the installation of the sidewalk and crosswalk prohibitively costly to the Town, as required by 760 CMR 56.07(2)(b)(4).

The Board has not demonstrated that the development will result in increased pedestrian safety concerns necessitating construction of a sidewalk along Fuller Street or a crosswalk at the Fuller and Chapin Street intersection. The evidence shows that whatever pedestrian or traffic concerns Condition F.2 and Finding 26 are intended to mitigate already exist at the site as a result of existing conditions and the construction of the Chapin School. The Board has not demonstrated a significant change in those conditions as a result of the proposed project. Neither of the Board's witnesses on the subject, Jennifer Conley and Judith A. Barrett, provided any specific factual basis for the premise that pedestrian safety will be compromised as a direct result of the project. Exh. 54; Exh. 56. The Board has not proven that the Town's failure to install sidewalks along Fuller Street is a result of any financial or technical infeasibility. *Hilltop Preserve, supra,* No. 2000-11, slip op. at 13.

If one of the local concerns put forth by the Board to justify a condition is based on the inadequacy of existing municipal services or infrastructure, it not only has the burden of proving that inadequacy of services or infrastructure is a valid local concern that outweighs the regional need for affordable housing, but it also must prove that the installation of adequate services is not technically or financially feasible. 760 CMR 56.07(2)(b)4; *Milton, supra,* No. 2007-13, slip op. at 7-8. Further, the Legislature enacted Chapter 40B without any provision authorizing a local board to require a developer to make off-site improvements to municipal services. *Archstone Communities Trust v. Woburn*, No. 2001-07, slip op. at 24 (Mass. Housing Appeals Comm. June 11, 2003); *See Hilltop*, *supra,* slip op. at 10. Accordingly, we agree with Way Finders that the Board has failed to demonstrate that Condition F.2 and Finding 26 are supported by valid local concerns that outweigh the need for affordable housing and they are therefore struck.

E. Bond for Maintenance of Stormwater Management System

Condition K.5 and the corresponding Waiver Request No. 19 (Zoning Bylaw § 7.2.K) require a bond for the maintenance of the stormwater management system. Exh. 2. Mr. Perkins stated that there are no provisions in the bylaws clearly authorizing a maintenance bond for stormwater systems and, points out that Bylaw § 7.2.K covers construction completion bonds,

not maintenance bonds. Exh. 48, ¶ 146. He also testified that none of the cited special permits require on their face a stormwater system maintenance bond. *Id.* The Board also argues that § 7.2.K allows for the imposition of bonding requirements relating to stormwater management facilities. Board brief, p. 45; *see* Exh. 8. Furthermore, it argues that proper maintenance of stormwater facilities is a legitimate health and safety concern for which the Board may properly impose conditions.

We disagree that § 7.2.K allows for imposition of bonding for the maintenance of the stormwater management system. A review of § 7.2.K indicates that it is intended to cover construction of the system only, as § 7.2.J imposes a separate requirement of a stormwater management inspection agreement that would address ensuring continued maintenance of the system. The Board granted a waiver from § 7.2.J, finding that "[t]he submittal of Final Plans shall include an updated Operations and Maintenance Plan clearly depicting that the Applicant is responsible for the maintenance of the stormwater system." Exh. 2. This requirement, as stated by the Board in its grant of Waiver Request No. 18 (§ 7.2.J) sufficiently addresses the concerns suggested by the Board regarding the management of the stormwater management system.

F. Tree Protection

Way Finders argues that Condition E.26 requiring submission of a plan identifying old growth trees and Condition E.27 regarding disturbing abutting trees is arbitrary and unreasonable on several grounds. First, the comprehensive permit plans already identify tree protection measures for neighboring properties. Second, existing fencing along these property lines, including at some points a double row of fencing of both abutter's fencing and the developer's fencing, makes clear to construction crews where abutting property lines begin. Crews would have to breach this fencing in order to damage trees on abutting properties. The Board offered no argument in support of this condition. We agree with Way Finders that the tree identification and protection measures specified in the comprehensive permit plans govern and Conditions E.26 and E.27 are modified as proposed by the developer as follows:

> Condition E.26: Applicant shall follow the tree care provisions shown on the Site Layout & Landscaping Plan (Plan Sheet "LA"), prepared by Milone & MacBroom, dated July 10, 2017 and submitted with the revised Comprehensive Permit plans and drawings. Applicant may, but is not required to, remove trees shown for removal on Approved Plans, Milone & MacBroom "Existing Conditions and Removals Plan" (Plan Sheet "EX").
>
> E.27: The applicant shall take reasonable steps to minimize disturbance to trees, located on abutting properties and directly on the property line, including those listed on the Site Layout and

Landscaping Plan (sheet "LA") but, the foregoing notwithstanding, may prune back to the property line roots and branches of the same that extend onto the Applicant's side of the property line.

V. LAWFULNESS OF THE BOARD'S CONDITIONS

In *Zoning Board of Appeals of Amesbury v. Housing Appeals Comm.*, 457 Mass. 748 (2010) *(Amesbury)*, the Supreme Judicial Court made clear that "the local zoning board's power to impose conditions is not all encompassing but is limited to the types of conditions that the various local boards in whose stead the local zoning board acts might impose, such as those concerning matters of building construction and design, siting, zoning, health, safety, environment, and the like." *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.

Way Finders challenges a number of conditions as exceeding the authority of the Board and requests that these conditions be struck from the comprehensive permit. The Board argues that the developer provided no detail in its post-hearing brief regarding any of these issues, and instead sought to incorporate the testimony of Rudy Perkins as its legal argument. The Board argues that this was not proper, and constitutes a waiver of those issues.[11] Mr. Perkins included statements of fact, opinion regarding economics and opinion of the legal bases for Way Finders' challenges to various conditions.

We have a longstanding rule, consistent with court practice, that failure to submit evidence or argument 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); *White Barn Lane*, *supra*, No. 2008-05, slip op. at 31; *Washington Green Dev., LLC v. Groton*, No. 2004-09, slip op. at 3 n.2 (Mass. Housing Appeals Comm. Sept. 20, 2005), *An-Co, Inc. v. Haverhill*, No. 1990-11, slip op. at 19 (Mass. Housing Appeals Comm. June 28, 1994). *See also Okoli v. Okoli*, 81 Mass. App. Ct. 371, 378 (2010),

[11] Mr. Perkins testimony included both factual statements and opinions regarding economics, as well as statements of his views regarding the legal issues in this appeal. Those statements of legal opinion have no weight as expert legal opinion, and the Presiding Officer denied the Board's partial motion to strike his testimony with regard to these statements.

citing *Lolos v. Berlin*, 338 Mass. 10, 14 (1958); *Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85 (1995). *Okoli* emphasized that the obligation to provide argument includes an "implicit duty to assist the court and provide appropriate citations of authority." *Id.*, 91 Mass. App. Ct. at 378, citing *Bruno v. Seymoure*, 1 Mass. App. Ct. 857 (1973). It is incumbent on both parties to provide the Committee with sufficient argument in their briefs regarding the issues they identified in the Pre-Hearing Order, particularly as to those matters on which they bear the burden of proof. Moreover, that argument, to be sufficient to aid us in our consideration of their positions, must specifically reference the pertinent evidence in the record, and include appropriate citations to relevant specific legal authorities, as well as analysis of those authorities.

Rather than including arguments in its briefs, Way Finders generally relied on Mr. Perkins' statements in his pre-filed testimony for its arguments in support of the positions it has taken. Although that testimony was not struck, a witness's opinion regarding the ultimate decisions to be made on the issues in this case carries no weight. Therefore, at best it can be considered an articulation of the party's position. This, however, is not the practice we expect the parties to undertake; witness testimony is not a substitute for legal arguments nor should legal arguments be based on conclusions that are "obvious" or "indisputable" with no factual or legal support cited. Although the developer's, and in some instances, the Board's, conclusory or otherwise inadequate arguments have made our task more difficult, in certain instances we have decided issues that we might have considered waived. Parties in future cases should not rely on our doing the same.

A. Conditions Within the Province of the Subsidizing Agency

> Condition A.3: The Applicant shall be a Limited Dividend Entity as required by Chapter 40B and its successors and assigns, shall comply with the limited dividend and other applicable requirements of Chapter 40B and the regulations adopted thereunder.
>
> Condition A.10: The provisions of this Comprehensive Permit Decision and Conditions shall be binding upon and inure to the benefit of the successors and assigns of the Applicant, and shall run with the land. In the event that the Applicant sells, transfers, or assigns its interest in the development, this Comprehensive Permit shall be binding upon the purchaser, transferee, or assignee and any successor purchasers, transferees or assignees. The limited dividend restrictions shall apply to the owner of the project regardless of sale, transfer, or assignment of the project.

Way Finders argues that its status as the type of entity eligible for a comprehensive permit is a matter to be addressed by the subsidizing agency and is of direct programmatic concern to it. As such, this status does not fall into an area of local authority that is the proper

subject of a comprehensive permit condition.

The Board argues that these conditions do not prohibit the developer from changing its entity status nor do they dictate to the subsidizing agency which type of entity status the developer must maintain. If the developer chooses to change its entity status, it is free to seek the approval of the subsidizing agency to do so, followed by a request for modification to the Board, which would normally be allowed as an insubstantial change pursuant to 760 CMR 56.05(11).

As the Supreme Judicial Court said in *Hanover, supra*, 363 Mass. at 379, "we believe that the question of standards for eligibility as a limited dividend organization is properly left to the appropriate State or Federal funding agency. Such an interpretation does not prevent the board or the committee from requiring full disclosure of the organization's legal status and further requiring compliance with pertinent statutory and regulatory provisions." Conditions A.3 and A.10 go beyond requiring disclosure and compliance with the pertinent statutory and regulatory provisions, to requiring the developer and any of its successors in interest to be or remain a limited dividend organization. These conditions improperly interfere with the authority of the subsidizing agency and are not consistent with the comprehensive permit regulations. Way Finders proposes amending these conditions. Accordingly, we accept the developer's proposed modifications of Condition A.10, and further modify Condition A.3 as follows.

> Condition A.3: The Applicant shall be a Limited Dividend Organization, nonprofit organization or public agency, or any of these from time to time, as required by Chapter 40B and the regulations adopted thereunder, and subject to the requirements of the subsidizing agency, and its successors and assigns shall also comply with the applicable requirements of Chapter 40B, the regulations adopted thereunder.
>
> Condition A.10: The provisions of this Comprehensive Permit Decision and Conditions shall be binding upon and inure to the benefit of the successors and assigns of the Applicant, and shall run with the land.
>
> Condition B.1: A minimum of 25% of the rental units shall be low- or moderate-income units, meaning that they shall be rented to, and occupied by, households whose income is not more than eighty percent (80%) of the Area Median Income ("AMI"), as determined by the United States Department of Housing and Urban Development ("HUD") and DHCD ("Affordable Units"). The Applicant has proposed, and the Board accepts, that the Project will include a deeper level of affordability, and that one hundred percent (100%) of the units will be affordable to persons whose income is not more than sixty percent (60%) of the AMI. Affordable Units shall be dispersed throughout the Project in accordance with the guidelines of the Subsidizing Agency, except for fluctuations based on changes of income allowed by the Regulatory Agreement with the Subsidizing Agency. The Applicant shall be responsible for maintaining records sufficient to

> comply with DHCD guidelines for the location of Affordable Units in the Project and occupancy of such Affordable Units by income-eligible households.
>
> Condition B.2: All of the Project's Affordable Units shall be restricted for lease to households earning no more than the maximum allowable area median income of DHCD or any substitute Subsidizing Agency. The units shall be maintained as affordable in perpetuity, which for the purposes of this Decision shall mean for so long as the Property does not comply to applicable zoning requirements without the benefit of this Comprehensive Permit.

With regard to Conditions B.1 and B.2, Way Finders argues that the Board is specifically prohibited from "impos[ing] any condition ... that would require the project to provide more Low or Moderate Income Housing units than the minimum threshold required by [DHCD] Guidelines." 760 CMR 56.05(8)(c). The *Guidelines* set that minimum threshold at 25% of the units being affordable to households whose income is not more than 80% of area median income. *Guidelines*, § II.A.2.b, p. II-4. Further, Way Finders argues that the percentage of low and moderate income housing units within a project falls within the sole province of the subsidizing agency. Stating that these conditions were proposed by the developer, and the Board has simply accepted these conditions as proposed, the Board argues the developer may not claim that the Board's approval constitutes an improper action on the part of the Board. Board brief, p. 54.

Whether or not initially proposed by the developer, Condition B.1 interferes with the jurisdiction of the subsidizing agency and will be modified to eliminate the last two sentences and to state, with respect to the remainder of the condition that it is "subject to the requirements of the subsidizing agency…." *See Roger LeBlanc v. Amesbury,* No. 2006-08, slip op., App. at 12, 26, 27 (Mass. Housing Appeals Comm. Sept. 27, 2017 Ruling) (*LeBlanc II*). With respect to Condition B.2, the first sentence is struck as invading the authority of the subsidizing agency. The Board cites *Zoning Bd. of Appeals of Wellesley v. Ardemore Apartments Ltd. Partnership,* 436 Mass. 811, 825 (2002) in support of its second sentence. *Ardmore* stated that "unless otherwise expressly agreed to by a town, so long as the project is not in compliance with local zoning ordinances, it must continue to serve the public interest for which it was authorized." The Board's proposed language is ambiguous. We will therefore modify it to state, "subject to the requirements of the subsidizing agency, the affordable units shall be maintained as affordable for as long as the housing on the Property is not in compliance with applicable zoning requirements." *Id.* at *813*.

> Condition B.4: For the initial rent-up of the Project, the maximum number of affordable units allowed by law and the applicable subsidy program, but not to exceed seventy percent (70%) of the units, shall be reserved for households containing persons either living or working in the

> Town of Ludlow. A lottery shall be established in a form approved by the Subsidizing Agency and/or the Project's monitoring agent to effectuate this local preference, with an approved secondary lottery for all other Applicants. The Applicant shall assist the Town in the submittal of any evidence required by the Subsidizing Agency to support this local preference requirement. The Board acknowledges that it will be required to provide evidence satisfactory to the Subsidizing Agency of the need for the foregoing local preference and to obtain approval of the categories of persons qualifying for the same, and in no event shall the Applicant be in violation of the terms of this Comprehensive Permit to the extent the Subsidizing Agency disapproves the local preference requirement or any aspect thereof. The Applicant shall provide reasonable and timely assistance to the Town in providing this evidence. If the Board or its designee does not provide such information within sixty (60) days of a written request by the Applicant, its Lottery Agent, the Subsidizing Agency or DHCD, then this condition shall be void unless the Applicant has failed to provide reasonable and timely assistance as described above.

Way Finders relies on Mr. Perkins' statement that Condition B.4 improperly imposes certain conditions regarding the lease-up process for the project, including implying that it may have approval rights over a secondary lottery or that it uses language that is vague about who has such approval rights. Further, Mr. Perkins stated that Condition B.4 improperly and inaccurately restates who qualifies under a local preference and also local preference procedures that have been outlined by DHCD regulations. Exh. 48, ¶¶ 218, 219. The Board argues that this condition notes that the approval of the subsidizing agency of the local preference will be required and contains a provision voiding the condition if the Board fails to obtain such approval from the subsidizing agency. Board brief, p. 54.

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

> …although the board's condition-setting power under [G.L. c. 40B,] § 21 is not expressly confined to the four or five examples specifically mentioned in the section, that power is circumscribed in substance by those examples, and conditions imposed by the board must fit within the same kind or class of local concern or issue that the examples address. Accordingly, insofar as the … conditions included requirements that went to matters such as, inter alia, project funding, regulatory documents, financial documents, and the timing of sale of affordable units in relation to market rate units, they were subject to challenge as ultra vires of the board's authority under § 21.

Id., 457 Mass. 748, 757-758. In *Simon Hill LLC v. Norwell*, No. 2009-07, slip op. at 40 (Mass. Housing Appeals Comm. Oct. 13, 2011), we noted that "[p]ursuant to the court's direction in *Amesbury*, the Committee examines conditions that address matters within the province of the subsidizing agency carefully." When in certain instances we have allowed conditions to address

areas of subsidizing agency responsibility it is clear that such provisions remain entirely subject to the authority and requirements of the subsidizing agency, only allowing the board to state a preference, as the Board suggests here. *See, e.g., LeBlanc II, supra*, No. 2006-08, slip op., App. at 12, 26, 27; *Falmouth, supra*, No. 2017-11, slip op. at 43. Unlike the conditions in *Leblanc II*, where we merely modified a board's conditions to ensure the board's preference was subject to the requirements of the final arbiter, the subsidizing agency, this condition seeks to specify all details of a local preference requirement. Accordingly, we will modify this condition to state: "Condition B.4. A local preference for the initial rent-up of the project may be established subject to, and solely in accordance with the requirements of, the subsidizing agency and applicable law."

> Condition C.2.c: Prior to the issuance of any building permits, the Applicant shall:
>
> Submit to the Board and the Building Commissioner a certified copy of the Regulatory Agreement and, if required by the Subsidizing Agency, a Monitoring Services Agreement for the Project. Execution and recording of such Regulatory Agreement with the Department of Housing and Community Development shall be complete prior to the issuance of any building permit. To the extent necessary to complete financing for the Project, notwithstanding the above, the Applicant may obtain building permits prior to the submittal of a recorded Regulatory Agreement. No construction may commence pursuant to the issuance of such building permits, however, until evidence of the recording of the Regulatory Agreement has been submitted to the Building Commissioner.

Way Finders argues that this is a condition relating to state programmatic issues, specifically, regulatory documents, which fall outside of the authority of the Board. This condition, Way Finders argues, improperly controls the timing of the execution and recording of the regulatory agreement and will "cause issues" for the closing on the development financing for the project. Exh. 48, ¶ 220.

The Board argues that it does not seek to impose any requirements regarding the specifics of the regulatory agreement, as that, it concedes, is within the exclusive jurisdiction of the subsidizing agency. Instead, the Board simply requires that the regulatory agreement, in the form required by the subsidizing agency, be recorded prior to the issuance of building permits. Pointing to our decision in *Attitash Views, LLC v. Amesbury*, No. 2006-17, slip op. at 6-8 (Mass. Housing Appeals Comm. Oct. 15, 2007), *aff'd, Zoning Bd. of Appeals of Amesbury v. Housing Appeals Committee, 457 Mass. 748 (2010)*, the Board argues that Condition C.2.c follows the guidance in that decision and thus is a proper condition. Board brief, p. 55.

Attitash does not support the Board's argument. We agree with the developer that

Condition C.2.c improperly sets requirements regarding the execution and recording of the regulatory agreement, which are exclusively within the subsidizing agency's jurisdiction. Therefore, we will require this condition to be modified in accordance with Way Finders' proposed modification. *See Attitash, supra*, No. 2006-17, slip op. at 6-8.

Condition D.1.e requires submission of a property management plan which "shall cover, but may not be limited to, issues of building security, public access, pet policy, staffing, trash removal, and smoking policies, and other issues addressed in the conditions herein." Exh. 2, p. 15. Way Finders argues[12] that there is no requirement contained in the Zoning Bylaws to submit any management plan or management agreement to any board, except for two aspects of property management that are inapplicable here.[13] Furthermore, Way Finders argues that such matters are within the sole province of the subsidizing agency and are improper on that basis, as well. Exh. 48, ¶¶ 121-123. The Board argues that ensuring the proper management of a large-scale rental development is well within the scope of issues for which the Board may impose conditions, as it directly relates to the health and safety of local residents. Board brief, p. 42.

As we stated in *LeBlanc II*, *supra*, No. 2006-08, and *Falmouth*, No. 2017-11, the Board is entitled to receive a copy of the property management plan provided to the subsidizing agency, but it is for the subsidizing agency to dictate the terms of the management and maintenance personnel on the project site. Condition D.1.e is modified to delete the second sentence.

B. Conditions Subsequent Requiring Inappropriate Post-Permit Review

The Board is permitted to designate individuals or municipal departments with expertise to review various aspects of the plans for consistency with the final comprehensive permit. The Board may even conduct that review itself, if it has the necessary expertise, as long as the review is for consistency with the permit. "Improper conditions subsequent" are conditions that reserve for subsequent review matters that should have been resolved by the Board during the

[12] In its brief, Way Finders refers to and relies upon Mr. Perkins' testimony, and exhibits referenced therein, as support for its arguments on the contested conditions. Way Finders brief, p. 34.

[13] One affects businesses using or storing hazardous materials in the water supply protection district and the other is a stormwater management plan in connection with stormwater management systems and the stormwater management bylaw, with which Way Finders has already complied. Exh. 48, ¶ 121.

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; *LeBlanc II*, *supra*, No. 2006-08, slip op. at 7-8.

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, supra,* No. 2017-11, slip op. at 50, the "Board shall have the same power to issue permits or approvals as any Local Board which would otherwise act with respect to an application," 760 CMR 56.05(10)(a), and it "may issue directions or orders to Local Boards designed to effectuate the issuance of a Comprehensive Permit ... and the construction of the Project, in accordance with 760 CMR 56.05(10)(b)." 760 CMR 56.05(10)(c). Nevertheless, the conditions must be consistent with 760 CMR 56.05(10)(b), which requires all local boards to "take all actions necessary" to ensure consistency with the comprehensive permit. 760 CMR 56.05(10)(b).

The role of the Board at this stage, as articulated in § 56.05(10)(c), is to issue directions or orders to local boards, or more typically, local officials who act for these boards, to expedite the construction of the project. Review by the relevant local board allows the officials with the most expertise to issue permits, consistent with the requirement of expedition, and avoids the delays that would occur if the Board 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*, No. 2017-11, slip op. at 50–51.

> Condition A.4: The Project shall consist of not more than forty-one (41) rental apartment units, located in no more than six (6) residential structures, and other related residential amenities, all as shown on the Approved Plans, as modified by these Conditions. The Project shall consist of not more than ten (10) one-bedroom apartments, twenty (20) two-bedroom apartments and thirteen (13) three-bedroom apartment units for a total of eighty-nine (89) bedrooms. Notwithstanding the preceding, the total number of units shall not exceed forty-one (41) units.
>
> Condition E.24: The Applicant shall eliminate the five-unit structure identified as Building B2 located along Fuller Street, and replace it with a children's play area containing amenities similar to the amenities located at the Applicant's project located at Easthampton. The Applicant may add up to three (3) additional units to the other developed areas of the Property (to allow a total unit count of forty-one (41) units), to replace units lost from the elimination of the five-unit structure. Upon the submittal of Final Plans depicting the location of such units (if any), the new units may be allowed as an insubstantial change pursuant to 760 CMR 56.05(11), so long as the location of such units require no new waivers of local rules, and present no significant additional site engineering concerns as agreed by the Board's peer review engineer.

We have already modified Condition A.4 and struck Condition E. 24 as inconsistent with local needs. Way Finders further argues that Conditions A.4 and E.24, in combination, contravene the core purpose of the streamlined review process established by Chapter 40B and the Committee's regulations, that they are an attempt to allow a board—after issuing its permit, to put the burden on the developer to redesign its project to add units in new locations and submit new plans for further review, with no guarantee that those new plans will be approved. The "add back" provision of Condition E.24, it argues, represents a plainly unlawful condition requiring Way Finders to make subsequent submissions and receive subsequent approvals. Way Finders' brief, p. 12-13.

The Board argues that the elimination of Building 2 and its replacement with a children's playground under Condition E.24 is a requirement that is within the scope of its authority, and was directly tied to a legitimate health and safety concern that has been clearly articulated by the Board. Board brief, p. 43. The Board argues that Condition A.4 expressly states that it allows the construction of 41 residential apartment units, and Condition E.24 allows Way Finders to add up to three additional units to the other developed areas of the property to bring the total number of units back up to 41. The Board argues that the Board's peer review engineer, Mr. D'Ambrosio, would have considered the submittal of plans showing the three reintroduced units and as long as no new waivers or site engineering concerns were created, he would allow them to be approved "as an insubstantial change." Tr. I, 94; Board brief, p. 21. Mr. D'Ambrosio testified that he prepared a sketch plan depicting the three additional units to the project that he testified would not require new waivers of local rules and would not present any significant additional site engineering concerns. Exh. 52, ¶ 9.

The sketch plan created by Mr. D'Ambrosio simply shows Building 2 crossed out and extensions hand-drawn onto the ends of Buildings 4, 6 and 7, with no measurements or dimensions shown. Exh. 52.2. On cross-examination he acknowledged that: he did not do any engineering to create this sketch plan; the sketch plan does not include any dimensions for any of the additions shown to the buildings that would have units added to them; it does not indicate which of the three additional units are handicapped accessible; it does not indicate where the snow storage area would be relocated; it does not indicate where the handicapped accessible parking spaces would be; that he has not done any engineering to determine the extent of any drainage changes; it does not show the location of the relocated garbage dumpsters; he did not analyze turning movements required for emergency vehicles or other larger vehicles; and that the sketch plan is not a plan on which an engineer's stamp would be appropriate. Tr. I, 86-92. He also stated that it would be "inevitable that the stormwater management system would have to be revised" to reflect the proposed changes shown on his sketch plan. Tr. I, 100.

As we noted previously, the Board's decision approves 38 units, not 41 units. Condition E.24 is an improper condition subsequent because it requires Way Finders to take further action to obtain approval of an additional three units, which undermines the entire purpose of a single, expeditious comprehensive permit. Furthermore, Condition E.24 requires Way Finders to submit revised plans for the additional three units for approval as a modification following review

regarding whether they constitute a substantial or insubstantial change under 760 CMR 56.05(11). Accordingly, for this reason, Condition A.4 is modified as we have previously stated, and Condition E. 24 is struck.

Project Plan Review. Way Finders argues that Conditions A.7, A.12, C.1.c, C.1.d, C.1.e, E.14, F.6, H.6, J.1.a and J.1.b, and Waiver Request Denial No. 16, require submission of various plans subject to peer review and other subsequent approvals, including subsequent approval by the Board of Health of a dumpster location and review of plans of walkways which were not included in the approved plans. Way Finders argues that these conditions do not clearly state that the scope of such review and approval is limited to permissible final plan review.

The Board argues, with respect to the dumpster relocation, that it has established a process by which the developer can provide for the relocation of dumpsters without requesting a modification pursuant to 760 CMR 56.05(11), simply by including new locations on the final plans that would be reviewed by the Board of Health. Board brief, p. 48. With regard to the walkway condition, the Board argues that walkways in open space recreation areas are not actually required by the decision so this condition is moot. Exh. 51, ¶ 20; Board brief, p. 27. With regard to the remaining conditions, the Board argues that they do not constitute improper conditions subsequent and are consistent with the holding in *LeBlanc II, supra,* No. 2006-08, slip op. at 7, which states that outside consultants may be retained to ensure "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." Board's brief, p. 47.

Way Finders argues that these conditions also constitute unlawful conditions subsequent, as they require the developer to respond to and incorporate in its final plans the additional requirements of local permitting agencies having jurisdiction, where such conditions should have been incorporated and determined through the streamlined comprehensive permit process. Specifically, with regard to the dumpster location, Way Finders argues that because the dumpster location and enclosures were indicated in the comprehensive permit application plans and discussed during the hearing, and because the permitting authority of the Board of Health regarding dumpsters emerges from the local bylaws, it is therefore a local permit that should have been addressed by the Board during the hearing process. Further, Way Finders argues that these fall within those improper conditions that may lead to disapproval of an aspect of a development project and undermine the entire purpose of a single, expeditious comprehensive

permit as outlined in *LeBlanc II*.

Condition A.7 requires administrative review and approval by appropriate board or staff of all permits listed on Schedule A and Condition A.12 authorizes the Board to designate an agent to review and approve matters on its behalf. Way Finders argues that these conditions do not limit the scope of such review and approval to permissible final plan review by a qualified reviewer. Way Finders does not object to review of its final plans consistent with 760 CMR 56.05(10)(b) and the Committee's cases but argues that such conditions should be struck or revised to reflect the properly limited scope of review. Way Finders brief, p. 10, n.10. As long as such review is for consistency with the permit, the Board is permitted to designate individuals with expertise to conduct such reviews. Conditions A.7 and A.12 are modified as indicated below to permit review for consistency with the final comprehensive permit.

> Condition A.7: The permits listed on Schedule A annexed here are incorporated into and are granted as part of this Comprehensive Permit, subject to review by the appropriate municipal official with expertise to determine whether the submission is consistent with the final comprehensive permit, such determination not to be unreasonably withheld.
>
> Condition A.12: Unless otherwise indicated herein, if no municipal official has the relevant expertise, the Board may designate an agent with relevant expertise to review and approve matters on the Board's behalf for consistency with the comprehensive permit.

Conditions C.1.c, C.1.d and C.1.e all require approval either by the Board or the building commissioner of various plans (final plans, construction mitigation plans and landscaping plans, respectively). Condition C.1.c requires the developer to incorporate into the final plans "all conditions and requirements of permitting agencies having jurisdiction," as well as "comments from the peer review consultants detailed while [sic] the hearing." Way Finders argues that, in addition to being vague, this condition requires it to incorporate post-hearing comments and conditions into the final plans, improperly allowing the Board or the building inspector to retain control for further review, comment and denial of these plans. The Board argues that Way Finders ignores 760 CMR 56.05(10)(b), which "unequivocally states that building permits may be contingent upon the submittal of 'more detailed plans.'" Board brief, p. 40. We agree that the requirement in C.1.c to incorporate peer review comments into further plans is not only vague, but may incorporate new requirements that would require further review and approval. These conditions are modified to require review and approval beyond review for consistency with the

comprehensive permit, as stated below.

Condition C.1.c: Submit to the Building Commissioner for review and administrative approval Final Engineering Drawings and Plans ("Final Plans") to determine whether the submission is consistent with the final comprehensive permit, such determination not to be unreasonably withheld. Applicable sheets of the Final Plans shall be signed and sealed by the Professional Land Surveyor of record, the Professional (Civil) Engineer of record, and a Registered Landscape Architect. Final Architectural Plans shall be stamped by a Registered Architect.

Condition C.1.d. Submit to the Building Commissioner a construction mitigation plan that shall specify dust control measures, fill delivery schedules, and stockpiling areas. Other than site work and such other work as may be authorized in writing by the Building Commissioner, no other construction of units shall commence-under this Comprehensive Permit until the Building Commissioner has approved the Final Plans as being in conformance with this Decision and issued the building permit. If no written response or comments have been given to the Applicant by the Building Commissioner concerning the Final Site Plans within forty-five (45) days after the Final Site Plan Submission Date, the Final Plans, as delivered, will be deemed to have been approved.

Condition C.1.e: Submit to the Building Commissioner with the building permit application, a landscaping plan signed and sealed by a Registered Landscape Architect or Professional (Civil) Engineer, depicting the following:

i. Overall planting plan that includes a demarcation of clearing and the limits of work;

ii. Planting plans for drives showing shade trees and lighting fixture locations;

iii. Prototype planting plans for each building that include shade trees, ornamental trees, shrubs, and groundcovers;

iv. Prototype screening plans for dumpsters, depicting plantings and fencing;

v. Planting details for coniferous and deciduous shade trees, ornamental trees, and shrubs;

vi. Planting schedules listing the quantity, size, height, caliper, species, variety, and form of trees, shrubs, and groundcovers;

vii. Tree protection and preservation plans; and

viii. Construction details.

ix. Specifications for plantings, site amenities (including benches, trash cans, light fixtures, fencing).

> All plantings shall consist of non-invasive, drought-tolerant species. Autumn Olive, Russian Olive, Bittersweet, Multi Flora Rose and Barberry shall not be allowed as plantings. Plantings installed along drives and walkways shall also be salt-tolerant. The final landscaping plans shall preserve the existing perimeter tree cover to the greatest extent practicable, provided, however, that the foregoing notwithstanding, the tree removals shown in Approved Plans, Milone & MacBroom "Existing Conditions and Removals Plan" (Plan Sheet "EX") are hereby approved. Eighteen (18) months after completion of plantings, the Applicant shall remove and replace any dead or diseased plantings and trees serving as screening.

Condition E.14 refers to the Board of Health approval of the dumpster locations, a matter that should have been resolved by the Board during the comprehensive permit hearing. *See LeBlanc II, supra*, No. 2006-08, slip op. at 8. Condition E.14 is modified to state: "All dumpsters serving the Project shall be enclosed and covered (with the exception of construction dumpsters used during construction)."

Condition F.6 requires the developer to "ensure that emergency vehicles can adequately maneuver through the site. The Ludlow Fire Department shall review the final plans to ensure compliance with this condition." Way Finders argues that the fire department previously reviewed the comprehensive permit application and, in fact, the developer's plans were modified in response to that department's comments. Exh. 48, ¶ 205. This condition, Way Finders argues, impermissibly reserves for subsequent review matters that should have been resolved by the Board during the comprehensive permit proceeding. The Board argues that the fire department is required by Chapter 18 of the State Fire Code to review plans for fire vehicle access and, therefore, the developer's objection to this condition is "moot." The Board argues, the designation of the fire department to review the final plans is consistent with the *LeBlanc* decision. Board brief, p. 48-49. We agree with Way Finders that this is a matter that should have been resolved by the Board during the comprehensive permit proceeding and not left for subsequent review and approval by the fire department and the condition is modified to state: "The Applicant shall ensure that emergency vehicles can adequately maneuver through the site. The Ludlow Fire Department shall review the Final Plans for consistency with the Comprehensive Permit.

Condition H.6 states that "water and drainage utilities servicing the buildings in the Project shall be installed and tested in accordance with applicable Town requirements and protocols, except as may be waived herein." As explained further below, this condition must be read in conjunction with Waiver Request 16, in which the Board denied the requested procedural

waiver under Zoning Bylaw § 7.2, but approved the stormwater management plans. Way Finders argues that it has submitted (twice) detailed drawings and other information regarding the stormwater drainage system, both during the Conservation Commission Notice of Intent hearings and again during the Board's comprehensive permit hearings. Way Finders argues that this condition requires a subsequent de novo review of the stormwater management system by the Ludlow department of public works (DPW), a review which should have been resolved during the Board's hearing. Exh. 48, ¶ 206.

The Board argues that this condition does not require further review. Instead, it argues, it requires the developer to install and test water and drainage utilities in accordance with applicable Town requirements and protocols. The Board could not have determined at the time of its decision whether the developer had properly installed water and drainage facilities for the project. Therefore, this condition does not constitute an improper condition subsequent. Board brief, p. 49. Under Waiver Request 16, the Board approved the construction of the stormwater management system "consistent with the Approved Plans, and in compliance with DEP standards." To the extent that Condition H.6 requires further approval of the stormwater management plans, such plans were already approved under Waiver Request 16. Condition H.6 is modified as indicated below.

> Condition H.6: The water utilities servicing the buildings in the Project shall be installed and tested in accordance with applicable Town requirements and protocols, ordinarily applicable to unsubsidized multifamily residential developments in Ludlow as of the date of the Project application. The stormwater drainage infrastructure for the Project shall be installed in conformance with the Approved Plans and tested in accordance with applicable Town requirements and protocols ordinarily applicable to unsubsidized multifamily residential developments in Ludlow as of the date of the Project application.

Conditions J.1.a and J.1.b require review and approval by the Board's peer review consultant of final infrastructure plans, including any "punch list" items identified by the building inspector or Board's engineer, before any final certificates of occupancy may be issued. Way Finders argues that Condition J.1.a gives the Board's engineer or the building inspector the right to independently define infrastructure "punch list" items separate from the final plans. In addition, Condition J.1.b does not limit the reviewer's scope of review to permissible final plan review and, instead of delegating this review to the appropriate municipal official with relevant expertise, the Board has inserted an additional reviewer (the Board's peer review engineer) into the process, whose approval is necessary for the issuance of occupancy permits. Exh. 48, ¶¶ 208,

209. The Board argues that Condition J.1.a is a "typical" condition imposed in permitting decisions throughout the Commonwealth and is "clearly" within the authority of the Board to impose. Condition J.1.b, the Board argues, is an appropriate condition for review of completion of construction and does not constitute an impermissible condition subsequent. Board brief, p. 44, 49. Such conditions requiring new submissions for peer review and those which may lead to disapproval of an aspect of a development project are improper conditions subsequent. *LeBlanc II, supra,* No. 2006-08, slip op. at 8; *Attitash, supra*, No. 2006-17, slip op. at 12; *Peppercorn Village Realty Trust, supra*, No. 2002-02, slip op. at 22; *Hastings Village, Inc. v. Wellesley*, No. 1995-05, slip op. at 33-34 (Mass. Housing Appeals Committee Jan. 8, 1998), *aff'd* No. 00-P-245 (Mass. App. Ct. Apr. 25, 2002). Therefore, Conditions J.1.a and J.1.b are modified as indicated below.

> Condition J.1: No occupancy permit for a building shall be issued until:
> a. (1) the driveway shown on the Final Site Plans providing access to the subject building has been installed, excepting the final course of pavement; and (2) all other infrastructure necessary to serve the building, as approved by the Board's designee with relevant expertise, or the Building Inspector, has been constructed and installed so as to adequately serve said building. The base paving for the cul-de-sac shall be completed prior to the issuance of any occupancy permits but the final course of paving need not have been completed on the cul de sac by that time. The final infrastructure for the Project, including, but not limited to, final course of pavement and all drainage infrastructure shall be installed prior to the issuance of occupancy permits for the final apartment structure. The final infrastructure shall include base and final course of pavement, remaining landscaping, sidewalks, curbing and curb ramps, and stormwater drainage infrastructure and utilities, consistent with the Comprehensive Permit.
>
> b. The Building Inspector or the Board's designee with relevant expertise shall review the Project upon completion of all such Final Infrastructure as described above for consistency with the comprehensive permit prior to issuance of an occupancy permit.

Waiver Request No. 3 requested a waiver from § 3.0.10 of the Town Zoning Bylaws relating to permits for dumpsters. As it did in Conditions C.1.e(x) and E.14, the Board deferred to the Board of Health the approval of the dumpster locations and denied the waiver request for a Board of Health dumpster permit. Mr. Gagnon testified that relocating the dumpsters to the north side of the driveway would require reconfiguring sections of the current parking layout, which is currently configured proximate to the building units for tenant access. The two dumpsters as shown allow direct access by a refuse vehicle and are located away from the residential units. Exh. 44, ¶ 7. Way Finders argues that requiring subsequent review and approval for the dumpster locations by the Board of Health constitutes an impermissible condition

subsequent. The Board argues against the economic impact of this condition but does not present any argument regarding whether it constitutes an improper condition subsequent. Under Chapter 40B, individual permits are to be included in the comprehensive permit. *See Milton, supra*, No. 2015-03, slip op. at 58. Waiver Request No. 3 is granted.

Waiver Request Nos. 2 and 12 requested waivers from Zoning Bylaw §§ 3.09 and 6.4.4, requiring driveway entry and curb cut permits from the DPW, to allow a curb cut permit to be issued by the Board. The waivers were denied as "unnecessary" but the Board then required the developer to seek such permits from the DPW. Exh. 2, pp. 25, 27. Way Finders argues that, because the DPW's review in issuing such permits is not limited to permissible final plan review, and because the Board reserved for subsequent review matters that it should have resolved during the comprehensive permit proceeding, these waiver denials constitute impermissible conditions subsequent. Exh. 48, ¶ 211. The Board argues that these waiver decisions are consistent with the guidance provided in the *LeBlanc II* decision, as the DPW is the local entity that would typically review curb cuts. Board brief, p. 49. Under Chapter 40B, individual permits are to be included in the comprehensive permit. 760 CMR 56.07(6)(e). *See Milton, supra*, No. 2015-03, slip op. at 58. Waiver Request Nos. 2 and 12 are granted.

Waiver Request No. 6 requested a waiver from Zoning Bylaw § 3.3.1(f)(5), with respect to obtaining a permit from the Board of Health for an office trailer or combination office trailer or temporary storage facility for the site. The Board argues that it declined the waiver as unnecessary because "the comprehensive permit subsumes the need for [the site plan approval waiver]," and therefore the denial cannot be an improper condition subsequent. However, because local permits approvals and denials are to be subsumed within the comprehensive permit process, the Board's denial of the waiver is substantive, thus leaving the developer to seek the site plan approval subsequently. Board brief, p. 50. Way Finders argues that the permit is a town-issued permit pursuant to the requirements of § 3.3.1(f)(5) of the Zoning Bylaw. Section 3.3.1(f)(5) of the Zoning Bylaw states: "Office trailers and combination office/Temporary Storage facility are subject to site plan approval from the Planning Board and will need a building permit, electrical permit, a plumbing permit, and a permit from the Board of Health." Exh. 8, p. 3-8. We agree with Way Finders that the plain language of § 3.3.1(f)(5) requires a Board of Health permit, independent of the site plan review, and that the Board's argument is without merit. Therefore, Waiver Request No. 6 is granted.

Waiver Request No. 16 sought a waiver from Zoning Bylaw § 7.2 (Stormwater Management) to allow the Board to issue a stormwater management permit through the comprehensive permit without the submission of an application for a DPW-issued stormwater management permit. Exh. 5. The Board denied the "requested procedural waiver as unnecessary" and granted "the requested substantive waiver, to allow construction of the Stormwater Management System consistent with the Approved Plans, and in compliance with DEP standards." Way Finders argues that the Board confused the matter by imposing Condition H.6, which seemed to require issuance of a local stormwater management permit. Exh. 2; Exh. 48, ¶ 206.

The Board argues that it was quite clear in its decision that the procedural waivers requested by the developer were denied as unnecessary, as the underlying permits were subsumed into the comprehensive permit. This waiver decision, it argues, does not require Way Finders to seek site plan approval under this section of the Bylaw. Accordingly, the Board argues, Way Finders' claim that this constitutes an impermissible condition subsequent is without merit. Board brief, p. 50.

We agree with Way Finders that the language of Waiver Decision No. 16, deeming the stormwater management permit waiver request unnecessary, is ambiguous, when read in conjunction with Condition H.6, which requires the issuance of a local stormwater management permit. Waiver Request No. 16 is granted and the stormwater management permit is deemed to be a part of the comprehensive permit.

Finding No. 26 contains an embedded contingent condition stating that, if, "an adequate children's play area is [not] provided, as required" by Condition E.24 is not constructed then the applicant must install a RRFB-controlled crosswalk "at a location to be determined by the Ludlow Department of Public Works." Exh. 2, p. 6. Way Finders argues that this condition, by its terms, would require a subsequent determination by the Ludlow DPW of the location of the crosswalk and a subsequent determination of the adequacy of the children's play area by the Board. Exh. 48, ¶ 213. We agree that the Finding requires an impermissible subsequent determination as to the adequacy of the children's play area. We have previously struck the requirement of the addition of the play area contained in Condition E.24, but the requirement for the crosswalk remains and for that, Way Finders argues that the approval of the location of the crosswalk constitutes an improper condition subsequent. We agree and Finding 26 is struck.

C. Other Conditions Challenged as Unlawful

Way Finders argues that Conditions A.8, C.1.a, C.2.f, E.4, F.5 and I.5 are beyond the power of the Board to impose.

Conditions A.8 and C.1.a require Way Finders to provide funds for the retention of "outside consultants" for unspecified technical reviews and inspections. Way Finders argues that the consultant fees imposed by Conditions A.8 and C.1.a would be based on an ad hoc determination of fees by the building commissioner or applicable municipal department heads, rather than on a schedule of ordinary review fees applicable uniformly as established by a municipal fee schedule. Exh. 48, ¶¶ 194, 196. The Board argues it is expressly entitled to retain outside consultants for review of final plans, to ensure "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." Board brief, p. 26-27.

Under the Committee's decisions, post permit review and approvals as to consistency with the comprehensive permit are to be made by the appropriate municipal authority with expertise to conduct the review and approval regarding consistency with the comprehensive permit. Such authority may consult with others who have appropriate expertise, including other department heads, if appropriate. *See Falmouth, supra*, No. 2017-11, slip op. at 56. With regard to 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(b), 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., App. at 33 (payment of review fees applied only "to the extent provided in municipal bylaws and regulations"); *Milton, supra*, No. 2015-03, slip op at 52. See G.L. c. 44, § 53G (providing for special deposit accounts for reasonable fees for employment of outside consultants when imposed by municipalities pursuant to local rules promulgated under G.L. c. 40B, § 21). Therefore, Conditions A.8 and C.1.a., are further modified to provide that: "If municipal officials engage outside consultants for review of plans and documents, fees will be charged to the Applicant only if in compliance with municipal bylaws or regulations." In order to charge a particular fee, the Board is required to identify for Way Finders 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.

Condition C.2.f requires Way Finders, prior to obtaining building permits, to obtain "all necessary building, electrical, plumbing, and associated permits required to begin construction of the Project required by state law." As Way Finders points out, this condition creates an unreasonable Catch-22 that makes it impossible to proceed with construction because it must obtain the building permit prior to obtaining the building permit. Exh. 48, ¶ 157. The Board acknowledges that this sub-condition was awkwardly worded. However, the clear intent of this condition, it argues, was to require the developer to obtain all necessary building, electrical, plumbing and other associated permits prior to the commencement of construction of the project. The Board argues that this condition is within the authority of the Board to impose. Board brief, p. 41-42. We agree that this condition is awkwardly worded and revise it to read as follows: Condition C.2.f: The applicant shall obtain all necessary building, electrical, plumbing and other associated permits prior to the commencement of construction of the Project.

> Condition E.4: During Construction, the Applicant shall conform to all local (unless specifically waived herein), State, and Federal laws regarding noise, vibration, dust, and blocking of Town roads. The Applicant shall at all times use all reasonable means to minimize inconvenience to residents in the general area. Adequate provisions shall be made by the Applicant to control and minimize dust on the site during construction in accordance with the construction mitigation plan. The Applicant shall keep all portions of any public way used as access/egress to the Project free of soil, mud or debris deposited due to use by construction vehicles associated with the Project.

Way Finders challenges the requirement in Condition E.4 that it "minimize inconvenience to residents in the general area" and argues that such a requirement is likely to be interpreted in many different ways and is therefore unduly vague. Exh. 48, ¶ 160. The Board argues that this is a reasonable requirement. In light of the neighborhood and proximity of abutters, including the Chapin School, we consider this to be a reasonable condition. *See Milton, supra*, No. 2015-03 at 59-60.

Condition F.5 requires, in part, "that adequate snow storage is provided at the site." Way Finders argues that Condition F.5 is unreasonable because it appears to directly conflict with Condition E.17, which allows the developer to truck excess snow off-site. In addition, it argues, the meaning of the requirement of "adequate" is vague and ambiguous. It points to the comprehensive permit plans, which show where the snow will be stored. The Board argues that the developer is claiming it should be allowed to operate its project without adequate snow storage, a condition which would create a significant health and safety hazard. Because Way

Finders has identified snow storage areas on the comprehensive permit plans, and Condition E.17, permits Way Finders to truck excess snow off-site, to address the potential for conflict, we will strike the above language from Condition F.5.

Condition I.5 requires Way Finders to "install permanent monuments to clearly delineate the edge of the twenty-five foot (25') no-touch zone under the Ludlow Wetlands Bylaw. Such monuments shall be depicted on the Final Plans and subject to administrative review of the Conservation Commission." On behalf of Way Finders, Mr. Perkins testified that iron rod boundary markers at this buffer zone line are already specified under the comprehensive permit and boundary markers are required by the Conservation Commission's Order of Conditions. Exh. 48, ¶ 181; Exh. 3, Plan Sheet EX; Exh. 7, p. 7. The developer contends this should be sufficient but argues the Board's condition would require an additional requirement, beyond the iron rods, for some other form of "permanent monuments" along the wetlands no-disturb boundary, thus requiring something in excess of the requirements of the Order of Conditions. Way Finders argues that, if the Board meant to require in Condition I.5 the iron rods already required by the Order of Conditions, it could have simply said "planned iron rods" rather than "permanent monuments," but the Board did not do so. Exhs. 49, ¶ 36; 48, ¶ 96. The Board claims that there is no basis for the developer's interpretation that something other than iron rod markers is required. It asserts that it had no intention of imposing a monument requirement in excess of what was imposed by the Commission. Board brief, p. 32. Therefore, according to the Board, this condition is superfluous. Since applicable state and federal requirements must be followed regardless of whether the Board includes them as conditions and we have ordered compliance with all applicable state and federal requirements, this condition is struck. *See* § VII, Condition 5.f.

VI. UNEQUAL TREATMENT

General Laws, chapter 40B, § 20 provides that local rules and regulations cannot be deemed "consistent with local needs" unless they are "applied as equally as possible to both subsidized and unsubsidized housing." *See also* 760 CMR 56.07(2)(a)4. Way Finders carries the burden of proving such unequal treatment. 760 CMR 56.07(2)(a)4. There is no shifting of burden on this issue; the developer has the burden of proof and the Board may attempt to rebut the developer's proof. *Avalon Cohasset, supra*, No. 2005-09, slip op. at 8. One of the clearest

examples of unequal application of local requirements is if a condition is not based upon some local legislative or regulatory requirement, but rather is based on concerns not previously regulated. *Haskins Way, supra*, No. 2009-08, slip op. at 13, n.14; s*ee also, Green View Realty, supra*, No. 2006-16, slip op. at 10.

Way Finders argues that the Board has treated this project differently than unsubsidized projects in violation of G.L. c. 40B, § 20 and the comprehensive permit regulations. It claims that certain of the conditions imposed by the Board have not been equally applied to unsubsidized and subsidized housing projects. In its main brief, it provides no specific arguments, but simply points to the testimony of Mr. Perkins, who stated that he had reviewed other Planning Board files regarding other, unsubsidized multifamily developments in Ludlow, and stated that the challenged conditions have not been applied to unsubsidized developments. Exh. 48, ¶¶ 111-114, 48H, 48J.

In response to these assertions, the Board argues that Way Finders has improperly relied upon the legal arguments in the pre-filed testimony of Mr. Perkins in place of addressing these issues in its brief, but it does not address in its brief the asserted differences in treatment between the project and the unsubsidized developments. In its reply brief, Way Finders addressed only some of the above conditions and waiver denials. We have already struck or modified a number of the above conditions and waiver denials in our consideration of local concerns and lawfulness of the Board's conditions. Of the remaining ones challenged on unequal treatment grounds, only a few have been sufficiently raised to warrant discussion.

Mr. Perkins stated that Condition C.2.e, requiring copies of federal, state and local permit approvals to be provided to the building inspector, are not supported by any requirement for such filings in the Zoning Bylaws, nor does the Ludlow building permit application form for multi-family construction require that any federal, state or local permits be attached or filed. This, Mr. Perkins suggests, shows that a condition such as C.2.e has not typically been imposed for unsubsidized multifamily developments in Ludlow. Way Finders has not established unequal treatment with this condition. All applicable state and federal requirements must be followed regardless of whether the Board includes them as conditions. Our decision orders compliance with all applicable state and federal requirements, and to require the filing of such permit approvals with the building inspector is consistent with 760 CMR 56.05(10)(b) and (c).

Condition D.2.b, requires submission of as built plans prior to issuance of certificates of

occupancy. Mr. Perkins stated that there is no such requirement in the zoning bylaws, except for a requirement in the stormwater management bylaw for as built stormwater management plans. Although it does not cite a local requirement or regulation, the Board argues that this is a typical requirement imposed by building inspectors to ensure that the structures have been completed in compliance with the approved plans. The Board also points to one of the special permit decisions relied upon by Mr. Perkins that contains a requirement for as-built plans to be submitted "at the completion of each phase." Exh. 21. Mr. Perkins supplied five special permit decisions for comparison. Since only one of those plans contains such a requirement, we agree that this condition constitutes unequal treatment and strike this condition.[14]

VII. CONCLUSION AND ORDER

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 also subject to the following conditions.

A. Stipulated Conditions

By stipulation of the parties in the Pre-Hearing Order, the following conditions and waivers were revised or granted:

1. Condition A.2 shall be deemed revised to reflect that the date of the plan set from Dietz & Co. Architects that is part of the Approved Plans is July 7, 2017.

2. Condition A.7 shall be deemed revised to incorporate the list of permits entitled "Schedule A" included in the evidentiary record as Exhibit 57.[15]

[14] Condition E.7 requires the use of natural gas in the development. Mr. Perkins stated there is no requirement in the zoning bylaws or any of the cited special permits for unsubsidized multi-family developments to use natural gas. Exh. 48, ¶ 125. The Board argues that Way Finders proposed the use of natural gas in its application and cannot now make a good faith argument that the Board has subjected it to unequal treatment merely by adopted the specifications contained in its application. We agree with the Board and note that the developer would need to seek a modification of the comprehensive permit to change from natural gas whether or not this condition is imposed. This condition is retained.

[15] Schedule A was omitted from the comprehensive permit and the Pre-Hearing Order. By agreement of the parties, it was submitted as Exhibit 57 and is incorporated herein.

3. Condition D.1.b. shall be deemed revised to reflect that, prior to issuance of a certificate of occupancy for a specific portion of the project, Way Finders shall provide a letter signed by the its civil engineer, certifying that the applicable portion of the project's utilities and infrastructure has been constructed in compliance with the Final Plans in all material respects.

4. Condition E.13 shall be deemed revised to reflect that final stabilization shall be accomplished by loaming, seeding, and/or mulching and planting with shrubs, groundcovers and/or trees.

5. Condition I.3 shall be deemed revised to reflect that indoor storage of sand and/or sand and salt mixture and chemicals, whether organic or non-organic, is permitted within the 100 Foot Buffer Zone.

6. Condition K.2 shall be deemed revised to mean: Way Finders shall comply with all local regulations of the Town and its boards, commissions, and departments in effect on the date of the Comprehensive Permit application, unless specifically waived herein or as otherwise addressed in these conditions.

7. As regards the project, compliance with Zoning Bylaw § 3.2.1 is waived, solely to allow the following uses within the Residential A Zoning District: multi-family dwellings and an accessory community building, including but not limited to management office, meeting room/hall and laundry room therein, and other accessory uses, rooftop photovoltaic electricity generation, and tot lot.

8. Zoning Bylaw § 3.2.2 and any inconsistent provisions of Table 1 and Table 2 are waived to allow the proposed multi-family use and the proposed related ancillary uses in this Residential A zoning district.

9. As regards the project, to the extent Table 2 and Table 3 apply, a waiver is granted to allow the landscaping as shown on the Approved Plans, including without limitation to allow walkways, a culvert and retaining wall as shown on the Approved Plans, to be located within any 20-foot landscaped buffer or side yard, as conditions by the Comprehensive Permit.

10. As regards the project, Zoning Bylaw § 8.1.1 is waived.

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 be subject to the following conditions:

a. The Development shall be constructed as shown on the site plans set out in and prepared by Milone & MacBroom, revised July 27, 2017, Sheets 1-11 (Exhibit 3), and shall be subject to those conditions and requirements imposed in the Board's decision filed with the Ludlow Town Clerk on October 12, 2017 (Exhibit 2), 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 Way Finders' 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 Ludlow town entities, staff or officials for final comprehensive permit review and approval pursuant to 760 CMR 56.05(10)(b).

e. All Ludlow 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 Ludlow.

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 Way Finders' 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 Ludlow town staff, officials and boards shall take whatever steps are necessary to ensure that a building permit and other permits are issued to Way Finders, 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

March 15, 2021

Shelagh A. Ellman-Pearl, Chair

Marc L. Laplante

Rosemary Connelly Smedile

James G. Stockard, Jr.

Lisa V. Whelan, Counsel