COMMONWEALTH OF MASSACHUSETTS

HOUSING APPEALS COMMITTEE

HD/MW RANDOLPH AVENUE, LLC

v.

MILTON BOARD OF APPEALS

No. 2015-03

DECISION

December 20, 2018

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COMMONWEALTH OF MASSACHUSETTS

HOUSING APPEALS COMMITTEE

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v.	)	No. 2015-03
MILTON 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 Milton Board of Appeals granting a comprehensive permit with conditions to the Appellant HD/MW Randolph Avenue, LLC (HD/MW). On or about November 6, 2014, HD/MW applied to the Board for a comprehensive permit to build a development consisting of 90 residential rental units in two buildings on land at 693-711 Randolph Avenue in Milton. The Board held hearings on 11 days between December 2, 2014 and June 17, 2015. By decision filed with the town clerk on July 30, 2015, the Board granted a comprehensive permit for the construction of 35 units subject to numerous conditions. Exh. 76.

On August 18, 2015, HD/MW filed an appeal with the Housing Appeals Committee. A conference of counsel was held on September 8, 2015. With encouragement from the presiding officer, the parties engaged in mediation, but later reported that mediation was not successful. The presiding officer thereafter granted in part the motion of Jacob and Christina Carlin to intervene to "participate with regard to: 1) the issue of storm water and snow melt runoff as it may specifically affect their property only, including location of the proposed snow storage area

near the boundary of their land; 2) the 50-foot buffer and grading issues with respect to erosion, infiltration, runoff, and light and noise impacts on their property; and 3) other direct impacts of light and noise from the Project on their property." *HD/MW Randolph Ave., LLC v. Milton,* No. 2015-03, slip op at 11 (Mass. Housing Appeals Committee Dec. 9, 2015 Ruling on Motions to Intervene ...). In the same ruling, the presiding officer granted in part the motion to intervene of abutters Joseph Mullins and Charlene Mullins "with regard to the direct impacts of the hillside excavation and construction of the retaining walls on their properties."[1] *Id.*

Pursuant to 760 CMR 56.06(7)(d)(3), the parties negotiated a pre-hearing order, which the presiding officer issued on December 6, 2016. Thereafter, the developer and the Board each filed motions for summary decision. The Board's motion was denied. The developer's motion was granted with respect to Condition 17, which was struck, and was denied with respect to Conditions 18 and 19, and regarding whether the conditions rendered the project uneconomic as a matter of law. We concur with the presiding officer's ruling on the summary decision motions. In preparation for hearing, the parties submitted pre-filed direct testimony of 20 witnesses. In April 2017, the Committee conducted a site visit and four days of hearing to permit cross-examination of witnesses. A total of 121 exhibits was entered into evidence. Following the presentation of evidence, the parties submitted post-hearing briefs and reply briefs.

II. FACTUAL BACKGROUND

HD/MW received a determination of project eligibility under the New England Fund Program of the Federal Home Loan Bank of Boston (NEF), dated May 27, 2014 and reaffirmed on November 3, 2014, from the Massachusetts Housing Finance Agency (MassHousing) pursuant to 760 CMR 56.04. Pre-Hearing Order, § II, ¶ 5. The developer has satisfied the project eligibility requirements of 760 CMR 56.04(1)(b)-(c) and has agreed to become a limited dividend organization, thus satisfying 760 CMR 56.04((1)(a). Pre-Hearing Order, § II, ¶ 16.

HD/MW proposes to build 90 rental units, of which 23 units will be low or moderate income units. Exhs. 24-4; 76, p. 5. The development will consist of two buildings on a 7.81 acre site on the westerly side of Randolph Avenue, a four-lane state highway (Route 28). The

[1] The Mullins, however, chose not to participate in the evidentiary hearing or briefing of this appeal. The Board submitted testimony of Mr. Mullins as part of its case.

property is located in both Residence A and Residence C zoning districts. Pre-Hearing Order, § II, ¶¶ 14, 15. The neighborhood is predominantly residential, with a convenience store and church located within walking distance. Milton Hospital, the Milton Library and Town Hall are slightly less than a mile from the proposed development. Public bus transportation on Route 28 provides access to the MBTA red line. Exhs. 24-4; 29; Tr. III, 85-86.

Residential properties owned by the Carlins and property owners named Bautista abut the project site on the southerly side. The residential properties owned by the Mullinses and other property owners named Shea, Kingston and Lombardi abut the site to the west. The Town Department of Public Works (DPW) and the homes of several residents abut the property to the north. A bordering vegetated wetland resource area, identified by a Massachusetts Department of Environmental Protection (DEP) Superseding Order of Resource Area Delineation (SORAD), lies on the project site behind the houses fronting on Randolph Avenue from the DPW property to the Carlin property. Other wetland resources are located in the north corner of the lot and in isolated pockets elsewhere. Exhs. 17; 18; 24-4; 56; 59; 83, ¶ 31; 101, ¶ 3. The wetlands comprise 1.93 acres of the property, leaving 5.88 acres of buildable land. According to James Burke, PE, the project engineer, the project is designed so that 75 percent of the site area will remain open space. The only frontage for the development is on Randolph Avenue. Exhs. 24-6; 24-13(C); 55; 56; 79; 83, ¶ 2; 86, ¶ 5; Pre-Hearing Order § II, ¶ 18.

The project proposes a 24-foot wide access driveway from Randolph Avenue to cross the wetlands extending in an upward slope to the two apartment buildings and the exterior parking areas in the upland portion of the site. A culvert under the wetland crossing is proposed to address the impact of the access driveway over the wetland area. The wetland area will be disturbed, both on a temporary and permanent basis; the developer proposes wetland replication that will exceed the area of permanent disturbance. Exhs. 24-4; 86, ¶ 6. HD/MW's engineering report described the site topography as ranging "from a high elevation of 160 located along the westerly rear property line to a low elevation of 108 located to the south.... The properties on Randolph Avenue are at elevation 120 and slope to the west toward a wetland that is partially located on the property." Exh. 17, Project Narrative, p.1.

The proposed project consists of two buildings: Building 1 (13,600 square feet, 200 feet long and 62 feet wide), will contain 30 units and 30 garage parking spaces. Building 2 (23,500 square feet, 300 feet long and 70 feet wide), will contain 60 units and 54 garage parking spaces.

Total parking of 156 spaces, or 1.7 spaces per unit, will also include exterior parking areas, one of which is a five-car parking area near the property line with the Carlin property. The development will include one-, two- and three-bedroom units. The buildings are proposed to have a height of 45 feet. Exterior lighting for the parking and building is planned to be dark sky compliant. The project includes a small recreation area. The developer proposes a stormwater management system intended to comply with the DEP Stormwater Management Handbook. Exhs. 10; 17; 24-4; 59; 86, ¶¶ 9-11, 15, 19; Tr. IV, 113. The design of the buildings provides for breaking the exterior appearance of the buildings into sections defined by varying roof lines and projecting building elements to reduce the appearance of the overall length of the buildings. Exh. 24-4.

III. ECONOMIC EFFECT OF THE BOARD'S DECISION

When a developer appeals a board's grant of a comprehensive permit with conditions, 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 in the aggregate make construction of the housing uneconomic. *See* 760 CMR 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). HD/MW 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.

A. Return on Total Cost Analysis

1. The Developer's Presentation

HD/MW alleges that numerous conditions and denials of waivers cumulatively render the project uneconomic because it cannot achieve a reasonable return on this project. Under 760 CMR 56.00 and the DHCD *Guidelines, G.L. c. 40B Comprehensive Permit Projects, Subsidizing Housing Inventory* (Dec. 2014) (*Guidelines*), HD/MW 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 [HD/MW] 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 the Applicant.

760 CMR 56.02: *Uneconomic;* Exh. 1 (*Guidelines*), p. I-5. *See* G. L. c. 40B, § 20. We apply the *Guidelines'* methodology for analyzing "reasonable return" for a rental housing project, a Return on Total Cost (ROTC) analysis.[2] Exh. 1, pp. I-5, 7. The ultimate question is whether the projected ROTC for the project as conditioned by the Board's decision fall shorts of the minimum reasonable return in the *Guidelines* (the economic threshold). *See Autumnwood, LLC v. Sandwich*, No. 2005-06, slip op. at 3 (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).

If the ROTC of the development as proposed is below the ROTC economic threshold, as is the case here, the developer must also show that the Board's conditions render the project significantly more uneconomic than the project proposed in the developer's application for a comprehensive permit. *See Cirsan Realty Trust v. Woburn,* No. 2001-22, slip op. at 3 (Mass. Housing Appeals Comm. Apr. 23, 2015); *Haskins Way, supra,* No. 2009-08, slip op. at 18; *Avalon Cohasset, Inc. v. Cohasset,* No. 2005-09, slip op. at 13 (Mass. Housing Appeals Comm. Sept. 18, 2007).

In contending that many of the Board numerous conditions contribute to rendering the project uneconomic, HD/MW relied on testimony of three witnesses. Paul Holland, the manager of HD/MW, testified that he is an engineer and experienced builder in the development and construction of residential real estate as well as the financing and operation of rental properties, although this is his first project to build a development under Chapter 40B. Exh. 83, ¶ 1; Tr. II, 108-09. He stated that the project approved by the Board was both uneconomic and significantly more uneconomic than the proposed 90-unit project. He provided *pro forma* analyses of the economics of the developer's proposed 90-unit development and the Board's approved 35-unit

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[2] We have previously stated that that while "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. Feb. 13, 2018), and cases cited.

development. The *pro forma* for the 35-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, looped roadway, sidewalk and parking requirements, and requirement to contribute additional land and tear down a single family house to achieve adequate frontage on Randolph Avenue, but did not include costs associated with MEPA review, if that is required by the Board's conditions. Exhs. 83, ¶¶ 8; 42-47; 83-2; 83-3.

HD/MW also proffered the testimony of Lynne Sweet, a housing consultant, who testified regarding the rental market analysis and expected rents she had prepared for the proposed development and the project as conditioned by the Board's decision. Her market analysis evaluated comparable rental developments in and near Milton and included details explaining the comparison of the subject property and the comparable properties she identified. Exh. 84-3. She provided an opinion regarding the appropriate rental rate for one-, two- and three-bedroom units for the proposed 90-unit project and for one- and two-bedroom units for the approved 35-unit development. Exh. 84, ¶ 3; Tr. III, 60. During the hearing, she also addressed rents for a 35-unit project as conditioned if it included three-bedroom units. Tr. III, 83, 86-88.

Robert Engler, the developer's economic expert with experience in the permitting and development of affordable housing, relied on the evidence of Mr. Holland and Ms. Sweet to conduct his ROTC analysis. He calculated the ROTC for the 90-unit proposed project to be 5.93% and for the 35-unit project as conditioned to be 4.13%. In his rebuttal, he acknowledged minor corrections based on testimony of the Board's witness, Joseph Mullins, but stated that the modifications adjusted the difference between the proposed and conditioned project by less than one basis point, resulting in a ROTC of 5.88% for the proposed project and 4.10% for the project as conditioned. Exhs. 85, ¶¶ 5-9, 22; 104, ¶ 5; 104A, p. 5; 104-B, p. 5. He stated that the minimum economic threshold for the project would be 6.84%, based on the *Guidelines'* requirement to add 450 basis points to the applicable 10-year Treasury rate. Exhs. 1, pp. I-5, 7; 85, ¶ 13; 104-A, B. He stated that the return for the approved project would be 2.74 basis points (2.74%) below the minimum economic threshold, and would be 178 basis points (1.78%) below the return for the proposed project. He concluded that such a reduction in ROTC was significantly more uneconomic than the ROTC for the proposed project. Exhs. 104-A, B. He also testified that if the Board's decision had allowed for three-bedroom units (four units), the ROTC

for the project would increase from 4.10% to 4.15%, but this would not change his opinion that the approved project is significantly more uneconomic than the proposed project, as it would result in a change in the differential from 274 to 269 basis points, only 5 basis points. Tr. III, 103-04.

HD/MW argues that finding the approved project uneconomic with these ROTC results is consistent with *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). By contrast, in *Avalon Cohasset, 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."

2. Board's Challenge to HD/MW's ROTC Analysis

Site Acquisition Costs. The Board did not submit a contrasting ROTC analysis, but presented the testimony of Mr. Mullins, an abutter to the site who is a real estate developer.[3] The Board argues that the developer's costs to construct the project as conditioned by the Board are too high. It objects to the $450,000 acquisition cost for 711 Randolph Avenue, which HD/MW would have to acquire to attain the lot frontage required by Condition 9 of the Board's decision. Mr. Holland stated that $450,000 represented a conservative estimate of the value of the parcel. The Board argues, that since MassHousing appraised the proposed project site as $800,000, a valuation of $450,000 for 711 Randolph Avenue is excessive. It argues that Mr. Holland, who gave the opinion, lacks expertise as an appraiser to determine the value, and that the opinion was unsupported by fact. It also questions whether the original MassHousing appraisal included the entire site at 711 Randolph Avenue, therefore precluding adding additional site acquisition costs for that parcel. Exhs. 83, ¶ 45; 100-B; Tr. II, 21.

With regard to the value for 711 Randolph Avenue, we agree with the developer that a value for that property, which must be acquired, is a necessary cost of the condition for lot frontage. We find credible Mr. Holland's testimony that only a portion of the 711 Randolph Avenue lot was included in the original acquisition price of $800,000. Although we recognize

[3] Although granted intervener status, Mr. Mullins' testimony was proffered by the Board. He did not participate in the preparation of the Pre-Hearing Order, nor did he submit other evidence or argument as a party.

that some acquisition cost is a part of the developer's expenses, Mr. Holland offered insufficient explanation of his method of determining his figure of $450,000, and we do not find it credibly supported on this record. We exclude it from the site acquisition costs.

Site Development and Construction Costs. The Board argues that Mr. Holland's site development and construction cost estimates for the 90-unit and 35-unit versions of the project are not credible, relying on testimony of Mr. Mullins that construction of the 35-unit project would be "cheaper and easier because of reduced site construction costs." Exh. 100, ¶ 4. Mr. Holland testified that the site construction costs for the 35-unit development exceed those for the 90-unit development by $168,236 because of increased costs for looping and widening the access driveway and sidewalks, increasing the size of the culvert, increasing water main and gas connections, constructing additional retaining walls and demolishing the house on 711 Randolph Avenue. Exhs. 83-2; 83-3; 83, ¶¶ 39-47; 100, ¶ 4; 103, ¶¶ 5-7.

Mr. Engler responded that the specific charges objected to by the Board's witness address only minor aspects of the construction costs, and do not change the result that the Board's conditions render the project significantly more uneconomic. He testified that "fiddling with numbers here and there" does not add up; "in order to make them equally economic, you would have to take $3½ million out of the $12.6 million budget to give you the same rate of return you get" with 90 units. Tr. III, 105-06.

We accept the testimony of Mr. Holland and Mr. Engler as more credible than that of Mr. Mullins. We also find that the Board's challenges to the project development costs, even if accurate, would represent an insignificant portion of the development costs and do not materially affect the outcome of whether the conditions render the project uneconomic.

Rental Revenues. The Board challenges the testimony of the developer's consultant, Ms. Sweet, with respect to the anticipated rents attributable to the project as approved by the Board. It argues Ms. Sweet underestimated rental income for the approved project because she used only comparables with two bedrooms rather than three and said "I don't know" when asked if she would have chosen different sites for comparison if she had included three-bedroom units.[4] Tr. III, 83. On redirect, Ms. Sweet offered rental figures if two-bedroom units would be

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[4] The Board claims that Ms. Sweet admitted the decision did not prohibit three-bedroom units. Even if true, Ms. Sweet's opinion on this issue carries no weight. As we discuss in § III.B, *infra*, we find that the Board's decision did not allow three bedroom units. Therefore, appropriate comparable rents would be those for developments without three-bedroom units.

converted to three-bedroom. Tr. III, 86-88. Even if the Board's decision had permitted three bedroom units, as noted above in § III.A.1, Mr. Engler gave his opinion that in that circumstance, the change in his calculation would be "minuscule." Tr. III, 103-04.

The Board focused on Ms. Sweet's comparison of the proposed project with properties identified as Sunset Lake and 50 Eliot Street. The report prepared by Ms. Sweet compared unit amenities between the subject property and comparable small developments. Ms. Sweet's list comparing amenities between the HD/MW 35-unit configuration and the comparables, indicated 19 unit amenities for the HD/MW property and 50 Eliot Street, but only 13 for Sunset Lake. Exh. 84-3; Tr. III, 81. Ms. Sweet also compared common area amenities for smaller developments, noting that the subject property and Eliot Street each had five and Sunset Lake had four. Her report identified Sunset Lake as most comparable based on location, proximity to amenities and transportation, as well as facility amenities, although she noted that Sunset Lake is located south of Interstate 93/Route 1, and further from Boston than the project site. Exh. 84-3.

The Board also criticized Ms. Sweet's assumption there would be no added or community amenities in the 35-unit development, such as a passive recreation area or dog washing area. When she acknowledged the developer did not tell her to assume there would be no such amenities, she noted that only one of her comparable properties included these amenities. Tr. III, 71-72. Ms. Sweet also stated that smaller rental projects tend to have one building with minimal amenities, and that with "multiple buildings on a small lot ...you have smaller buildings, there tends not to be ... room for amenities ..." Tr. III, 72. The Board argues she excluded amenities because they would have added value and resulted in higher rates. We do not give credence to this argument. The Board offered no evidence that amenities would produce higher rental rates for a project this size that would outweigh the costs of such amenities.

The Board argues that Sunset Lake, the property which Ms. Sweet said she determined to be the most comparable, was not comparable. It points out that Ms. Sweet acknowledged that Sunset Lake was a renovated nursing home, rather than new construction built in 2014 as she had earlier testified, and that pictures of the project show a dated building, and she acknowledged that this difference could be a descriptor affecting rents. Tr. III, 70-71, 78, 84. Although both the project site and Sunset Lake are suburban, the Board contends that substantial differences exist between Sunset Lake, a single building directly on the street with no landscape, and the HD/MW

approved 35-unit project, which is 300 or 400 feet set back from the street. Tr. III, 79-80; IV, 26-28; Exhs. 83-4; 115. Ms. Sweet testified that 50 Eliot Street had a far superior location, located in downtown Milton, next to the trolley line and in walking distance to the supermarket and walking trails. She stated she felt "Sunset Lake was priced a bit low and [50 Eliot] a little high and we picked between those two." Tr. III, 82; Exh. 84-3. Based on the evidence, we find Ms. Sweet's evidence explaining her choice of comparable rents was credible. Accordingly, we accept her rental figures for the ROTC calculation.

Alternative Revenue Resources. Mr. Mullins challenged Mr. Engler's determination that the project was uneconomic as conditioned, because, he stated, he would consider the 35-unit project with the 4.13% return originally projected by Mr. Engler in his direct testimony to be "a viable development opportunity," stating that the developer could obtain financial support from numerous federal and state government resources that boost returns on affordable housing "well above what would be an economic return." Exhs. 85, ¶ 22; 100, ¶¶ 2-3. However, he provided no other specific factual evidence to support this assertion; therefore we do not credit Mr. Mullins' testimony on this point. Nor does it assist our analysis, as the standard for determining whether a project is uneconomic is the ROTC methodology established by our regulations and the *Guidelines.* Moreover, our regulations and the *Guidelines* do not require a developer to seek out such funding to determine whether a project is uneconomic. *See* Exh. 104, ¶ 3.

3. The Committee's Findings

With regard to the disputed aspects of the developer's economic analysis, we accept its construction costs figures, but do not accept Mr. Holland's site acquisition cost for 711 Randolph Avenue. We accept Ms. Sweet's recommended rental costs. These findings require a slight adjustment to the ROTC calculation made by Mr. Engler based on the testimony of the developer's witnesses.[5] Accordingly, below is our modification of the ROTC analysis for the 35-unit project as conditioned by the Board:

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[5] Since the developer did not provide any cost projections for complying with MEPA, even if we had found that compliance with MEPA is necessarily a cost resulting from the Board's conditions, we would include no amount as a projected expense for compliance with MEPA requirements and concomitant delays attributed to that process. *See* § VI, *infra.*

35-Unit Project

Category	Developer's Pro Forma	Committee Finding
Development Costs		
Acquisition Costs	$1,250,000	$800,000
Total Development Costs (TDC)	$12,602,531	12,152,531
Net Operating Income (NOI)	$517,185	$517,185
ROTC (=NOI/TDC)	0.410	0.426

Exh. 105-B. ROTC (Return on Total Cost) is calculated by dividing NOI (Net Operating Income) by TDC (Total Development Cost). Thus, ROTC is: $517,185 / $12,152,531 = 4.26%.

As noted above, both the 5.88% ROTC for the proposed project and this figure of 4.26% are below the ROTC threshold of 6.84%. The ROTC for the approved project is 1.62% below that for the proposed project, comparable to *Cirsan, supra,* No. 2001-22, slip op. at 15. Thus, we find the ROTC for the approved project is both uneconomic and significantly more uneconomic than the ROTC for the developer's proposal.

B. Three-Bedroom Requirement

HD/MW argues that, apart from the ROTC analysis, the Board's decision prohibits three-bedroom units in violation of the January 17, 2014 Interagency Agreement that requires affordable housing projects to contain at least 10 percent three-bedroom units. *See* Exh. 13. Condition 2 of the Board's decision provides: "[t]he Project shall include no more than thirty-five (35) units of rental housing. The Applicant shall indicate the mix of one and two bedroom units on its Site Plans. Four of the units shall be fully handicapped accessible." The developer argues that this language, by excluding a reference to three-bedroom units, prohibits them, and therefore precludes HD/MW from obtaining final approval from MassHousing, thus rendering the projected as approved uneconomic.

MassHousing, the Department of Housing and Community Development (DHCD), and two other state housing agencies have executed an Interagency Agreement that provides that "it is the intention of the State Housing Agencies that at least ten percent (10%) of the units in Affordable Production Developments funded, assisted or approved by a State Housing Agency shall have three (3) or more bedrooms except as provided herein." Exh. 13, Bedroom Mix Policy, § 1. The Bedroom Mix Policy also provides in § 5, that:

> The bedroom mix policy shall be applicable to all Production Developments provided a Subsidy as defined under 760 CMR 56.02 or otherwise subsidized, financed, and/or overseen by a State Housing Agency under the M.G.L. Chapter 40B comprehensive permit rules for which a Chapter 40B Project Eligibility letter is issued on or after March 1, 2014. The policy shall be applicable to all other Affordable Production Developments funded, assisted, or approved by a State Housing Agency on or after May 1, 2014.

Exh.13. See also *Guidelines*, Exh. 1, p. II-3, § 2.1.f. HD/MW argues that the project eligibility letter from MassHousing requires that the development comply with this requirement. Exhs. 14, pp. 3, 8; 78; 83, ¶¶ 12-17.

HD/MW argues that Condition 2 unambiguously precludes three-bedroom units. Pointing to language of a proposed decision drafted by the Town's attorney that expressly prohibited three-bedroom units, the developer argues that her participation influenced the Board's decision. Mr. Holland testified that during the Board's deliberations, the Town's attorney sat at the deliberation table with the Board members, and her proposed decision was described as a draft decision during the deliberations. The developer points out that it was required to identify the number of dwelling units and the number of bedrooms for each unit as part of its comprehensive permit application, and its architectural plans depict the number. Exhs. 24-3; 24-12B; 83, ¶ 22; 111, p. 6; Tr. II, 109-11.

The Board members were aware of the Interagency Agreement and its requirements. The developer cannot obtain a waiver of this requirement. After inquiring with MassHousing regarding the necessity of compliance with the Interagency Agreement to obtain final approval and financing from that agency, HDMW obtained a letter in response stating it must comply with the Interagency Agreement, and that MassHousing will not grant a waiver. Mr. Engler testified, that since this prohibition precludes the developer from obtaining final approval, it renders the project uneconomic. Exhs. 24-13A, p. 8; 24-13B, p. 2; 83, ¶ 19; 85, ¶ 23.

The Board claims that the decision does not prohibit three-bedroom units, claiming that the Town attorney's draft decision was not the Board's draft, and cannot be evidence of the Board's intent to prohibit three bedrooms. Tr. I, 149. It also argues that because the hearing before the Committee is *de novo*, the thinking behind the Board's action is not relevant. [6] The

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[6] HD/MW asks us to ignore the Board's reference to Board chairman John S. Leonard's affidavit which was submitted in connection with the parties' summary decision motions. We agree that since that

Board argues also that even if the Town attorney prepared a draft decision, the fact that the condition she had written eliminating three-bedroom units was excluded from the final decision is evidence there was no intent to prohibit three-bedroom units.

The Board argues that this provision must be read to effectuate the purpose of the Legislature, rather than to frustrate it, and therefore it must be read to allow three bedrooms, even though they are omitted from the listing of permitted unit types. It suggests that by showing the mix of one and two- bedroom units, the site plans will also show three-bedroom units. Otherwise, it argues, the Board's decision would be meaningless. It suggests that the omission of a specific reference to three-bedroom units can be addressed by modification.

We do not consider the Town attorney's draft to be an act of the Board. However, the Board's suggestion that we must not assume it would have omitted the subsidizing agency's requirement, even by mistake, belies the fact that the decision explicitly referenced the specific types of units that should be identified on the site plans. The Board received an application to develop an affordable housing project with a mix of unit types including three-bedrooms. Its decision states that there shall be a mix of one- and two-bedroom units but omits three-bedrooms. Given that the application requested three-bedrooms, we read the language of the condition to not grant the request to construct three-bedroom units, consistent with the rule of construction that "to express or include one thing implies the exclusion of the other." *Kitras v. Town of Aquinnah,* 474 Mass. 132, 143-44 (2016). We do not find it credible that the Board meant to include three-bedroom units when its condition deliberately omits mention of them despite the developer's inclusion of three-bedroom units in its proposal.

We conclude this condition prohibiting three-bedroom units in the project renders the project uneconomic as it prohibits final approval from the subsidizing agency. *See Delphic Associates v. Hudson,* No. 2002-11, slip op. at 4 (Mass. Housing Appeals Comm. Dec. 23, 2002) (condition which causes subsidizing agency to not fund project renders project uneconomic); *Atwater Investors, Inc. v. Ludlow,* No. 2001-09, slip op. at 10-11 (Mass. Housing Appeals Comm. Jan. 26, 2004) (developer met burden of demonstrating Board's conditions rendered

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affidavit was not entered into evidence and the affiant was not subject to cross examination, it may not be considered.

project uneconomic based on bank letter stating that Board's conditions precluded financing under NEF program).

C. Nonwaiver of Wetlands Bylaw

The final basis on which HD/MW argues that the project as approved is uneconomic is its assertion that the Board refused to waive necessary local wetlands bylaws. It argues that the denial of its requested waivers of Chapter 15 of the Wetlands-Bylaw and § IV.B of the Zoning Bylaw prevents HD/MW from constructing the access driveway across the wetlands, as the wetlands bylaw prohibits activity within the wetlands, and the zoning bylaw requires a special permit before performing construction in a wetland area. Exhs. 3, § IV.B; 4, § XI(b); 76, ¶¶ 22-23; Tr. I, 17.

The waiver denial would require the developer to construct the project without performing any work within the wetlands plus an additional 25-foot no disturb zone. The developer argues that, since work within the wetlands is required to construct the only means of access to the buildings on the site from Randolph Avenue, the prohibition on constructing the access driveway over the wetlands precludes construction of the project. The Board argues that since its decision provides conditions for the width of the access roadway over the wetlands, there is no denial of construction in the wetlands. Tr. I, 17; Exhs. 18; 83, ¶¶ 32-36; 86, ¶¶ 4-7.

Here unlike the three-bedroom condition, the Board's decision contains provisions that expressly conflict with the blanket denial of a waiver to construct in the wetlands and in the 25-foot no disturb zone. Therefore, it is appropriate to read the denial of the wetlands waiver and the special permit provision to be consistent with the more specific provisions regarding work in the wetlands. Even though the Board did not use the language, "except as otherwise provided in this decision" for this provision as it did elsewhere in its decision, we will read the language of the waiver denial to incorporate that language. Therefore, the developer has not demonstrated that it is prohibited from constructing an access driveway in the wetlands and it cannot demonstrate the project as approved is uneconomic on this basis.

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, 5. The burden on the Board is significant: the fact that Milton 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, ¶ 19; 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. Overview – Density, Intensity and Project Redesign

HD/MW 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 redesign the entire project including requirements to 1) reduce the number of units to no more than 35 (Condition 2); break two residential buildings into several smaller buildings (Condition 6); construct the internal driveway as a looped roadway (Conditions 7, 28); locate all dwelling units within 100 feet of an elevator (Condition 22); redesign the architectural style of buildings (Condition 23); add an additional right hand turning lane to the access driveway (Condition 29); add additional and wider sidewalks to the access driveway (Condition 30); and requirements regarding parking (Conditions 13, 14). The Board also denied waivers from the zoning bylaw with regard to the following matters: disturbance of wetlands

(§ IV B, wetlands regulations, and Wetlands Bylaw, Chapter 15); building height over 2½ stories or 35 feet (§ V.A.1); reduction in lot frontage to less than required 150 feet (§ VI.A.1); rear yard setbacks (§ VI.D.3); parking (§§ VII.B.2, VII.G, and VII.H.10); sidewalks in parking areas (§ VII.F.4); and site plan approval (§ VIII.D). Exhs. 3; 4; 76.

Viewing the above conditions as a group, it is clear that the Board was concerned with the density and intensity of the proposed project. The Board dramatically reduced the size of the project from 90 to a maximum of 35 units, and presented several witnesses who testified that the density of the project was excessive and expressed concerns regarding the environment, open space, density and intensity of use of the site.

We have previously emphasized that 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). *See* also *Peppercorn Village Realty Trust v. Hopkinton*, No. 2002-02, slip op. at 6 n.4 (Mass. Housing Appeals Comm. Jan. 26, 2004). However, a board is permitted to deny requests for waivers and to impose conditions even if such action would require a developer to modify its project, if the action is supported by valid local concerns that outweigh the need for affordable housing. *See Hanover, supra,* 363 Mass. 339, 346; *CMA, supra,* at 24 n.13; *See also* 760 CMR 56.05(8)(d).[7] One of the important distinctions is that the Board may not itself order a specific design. For example, in *Pyburn*, the board's condition requiring "flipping of the buildings to the opposite side of the property" in addition to requiring a reduction in the number of buildings, was struck by the Committee. *Id.*

The question to be addressed here is whether the Board's conditions appropriately address valid local concerns that outweigh the need for low and moderate income housing, or whether they go beyond properly addressing local concerns and constitute improper redesign of the project. Even when a board demonstrates a valid local concern, we examine the conditions imposed to ensure that they are supported by that local concern, and may modify a condition that

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[7] 760 CMR 56.05(8)(d) states, "[t]he Board shall not issue any order or impose any condition that would cause the building or operation of the Project to be Uneconomic, including a requirement imposed by the Board on the Applicant … 2. to reduce the number of units for reasons other than evidence of Local Concerns within the purview of the Board (*see* 760 CMR 56.05(4)(e)…."

is not properly tailored to the local concern. For the reasons set out below, we find that several of the conditions are not credibly supported and constitute improper redesign of the project and must therefore be struck or modified.

The Board argues that the 90-unit project is too dense, not consistent with the residential character of the neighborhood, damaging to the environment, and will interfere with the privacy of abutters. It relies on testimony of its engineers, planner, architect and traffic witnesses, as well as its fire and police chiefs. For example, Cheryl Tougias, AIA, LEED AP, the architect witness for the Board, also stated that a 90-unit development is not consistent with the residential character of the neighborhood. Tr. III, 158. She believed limiting the development to 35 units would likely alleviate most if not all of the local concerns, including vehicle access, protection of the environment, providing a design that is appropriate for the neighborhood and preserving open space. [8] Exh. 92, ¶ 3. Police Chief John King testified generally that the density of the project "raises significant safety concerns regarding the ability of first responders and emergency personnel to quickly and expediently address issues concerning the health and safety of the residents and guests of the proposed development, and with respect to motor vehicle traffic circulation and pedestrian use." Exh. 96, ¶ 7.

HD/MW argues that its proposed development is not too dense and is safe. As it points out, the project site comprises 7.81 acres, including 1.93 acres of wetlands. Mr. Burke, the project engineer, testified that project density is 11.5 units per acre, or 15.2 units per buildable acre.[9] Exhs. 86, ¶¶ 5, 8; 55; 56. The developer argues that this is over five times the amount of open space required by the Milton Zoning Bylaw, and the density is significantly less than at other, unsubsidized housing developments in Milton. Exhs. 3, § VI.F.2; 59, p. 4. Mr. Burke

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[8] HD/MW objected to the admission of Ms. Tougias' testimony on the ground that she lacked expertise for her opinions. Tr. III, 88. The presiding officer admitted her testimony *de bene.* In its brief, the developer renewed its argument that she had no expertise outside of architecture and argued that her testimony should be given no weight. HD/MW brief, p. 24 n.10. In addition to her experience as an architect, Ms. Tougias is a member of the Milton Planning Board. She testified that as an architect, she would coordinate the team for a project, including deciding on the consultants to include on the team, such as the civil engineer, landscape architect and others. Although we will not strike her testimony, we accord little or no weight to her opinions on technical issues within the expertise of the civil engineers, traffic engineers and wetlands specialists, which are outside her identified expertise as an architect. *See* Tr. III, 108-18.

[9] The Board's engineer, Mr. Turner, stated that the wetlands comprised 84,146 square feet. Exh. 91, ¶ 8.

testified that Milton Landing has a density of 26.5 units per acre (73 units on approximately 2.75 acres). Exhs. 86, ¶¶ 5, 8, 11; 82, p. 1.

HD/MW also argues that the Board has failed to meet its burden with respect to the unit reduction and associated conditions that address the design of the proposed project. Mr. Burke stated that the developer's proposal was designed to conform to accepted engineering practices and is safe for future residents and the general community. Exh. 86, ¶ 2. Kevin Hastings, PE, LEED AP, the developer's fire safety expert, testified that the project fully complies with the National Fire Safety Code. Exhs. 89, ¶¶ 3, 6-9; 108, ¶¶ 2, 11. Scott Morrison, PWS, RPSS, SE, an environmental and wetlands scientist, stated on behalf of the developer that the project design has been sited and includes measures to prevent negative impact on the wetland resource areas on the project site. Exhs. 88, ¶ 6; 107, ¶¶ 2, 7. Daniel Dulaski, PhD., PE, a civil engineer and associate professor at Northeastern, testified with respect to traffic safety that construction of the proposed project would not "significantly adversely impact the future inhabitants of the development or the general community." Exh. 87, ¶ 4. Therefore, HD/MW argues that the Board has not met its burden with regard to these conditions and the denial of requested waivers.

General or vague arguments alone regarding density and intensity are insufficient to warrant a reduction in a project size. *Webster Street Green, LLC v. Needham,* No. 2005-20, slip op. at 12 (Mass. Housing Appeals Comm. Sept. 18, 2007); *Princeton Development, Inc. v. Bedford,* No. 2001-19, slip op. at 6 (Mass. Housing Appeals Comm. Sept. 20, 2005), and cases cited. Our decision have discussed the difference between issues of density and intensity: "Density involves determining the impact of the development on factors ranging from municipal services and traffic to aesthetics and overall livability of the surrounding neighborhood." *Hastings Village, Inc. v. Wellesley*, No. 1995-05, slip op. at 20 (Mass. Housing Appeals Comm. Jan. 8, 1998), *aff'd, Zoning Bd. of Appeals of Wellesley v. Housing Appeals Committee,* 54 Mass. 1113 (2002). "Density usually refers to a large area or neighborhood. It may be used to compare a proposed development to the neighborhood, often in the context of the impact of a large development on municipal services or overall aesthetics." *Page Place Apartments, LLC v. Stoughton,* No. 2004-08, slip op. at 13 (Mass. Housing Appeals Comm. Feb. 1, 2005), citing *Canton Housing Authority v. Canton*, No. 1991-12, slip op. at 4 n.2 (Mass. Housing Appeals Comm. July 28, 1993). In this context, the dispute primarily addresses the impact of the project on neighboring and abutting properties.

By contrast, intensity focuses within the site:

> Intensity involves the functioning of the housing on the particular site, which includes questions such as the adequacy of open space and recreational space, the functionality of common areas, the provisions made for the privacy of the tenants, the accessibility of the site to and from other parts of the neighborhood, and related factors which look to whether the number of units are too large not for the surrounding area but for the particular parcel of land.

Id. at 15, citing *Hastings Village, supra,* No. 1995-05, slip op. at 26. "Intensity is used in discussing the adequacy of the proportion of unbuilt to built space … on a particular site." *Id.,* citing *Canton, supra,* No. 1991-12, slip op. at 4 n.2.

Thus, our discussion of the alleged specific impacts of the proposed project on emergency and general vehicle access, pedestrian safety, stormwater management and wetlands protection, will address issues of the intensity of the proposed use of the project site. However, general declarations of degradation of the environment, without more, cannot demonstrate a valid local concern. In addition to stating general concerns, the Board is obligated to show how local requirements and regulations support those concerns with respect to the project site, and how those concerns require either denials of waivers of local requirements or the imposition of conditions. *Herring Brook Meadow, LLC v. Scituate,* No. 2007-15, slip op. at 26 (Mass. Housing Appeals Comm. May 26, 2010), *aff'd, Zoning Bd. of Appeals of Scituate v. Herring Brook Meadow, LLC,* 84 Mass. App. Ct. 1132 (2014).

B. Emergency Access and Fire Safety

The Board imposed several conditions relating to fire safety and emergency access, which HD/MW has challenged: 1) 24-foot wide looped access driveway; 2) emergency access to buildings from access driveway; 3) location of elevators; and 4) fire hydrants.

1. Looped Roadway

> Condition 28. Vehicular circulation shall be looped through the Site to facilitate the movement of emergency vehicles and trucks and eliminate the necessity for back-up movements in the parking areas and driveway access.

The access driveway enters the site from Randolph Avenue, crosses the wetlands and extends to the buildings and parking areas within the site, for a total length of 350 feet. Exh. 71, p. 1. HD/MW challenges conditions dictating that the access driveway be looped through the site. Relying on several witnesses, the Board argues that emergency vehicles will not be able to maneuver and turn around in the parking lots proposed on the site but would have to back up to

the entrance of the access driveway, causing delays for emergency vehicles to respond to emergencies offsite. Jeffrey Dirk, PE, PTOE, FITE, a professional engineer with expertise in traffic engineering, transportation planning and highway and roadway design, testified for the Board that with only a single access to the development, a temporary road blockage could occur. Exh. 90, ¶ 14. Fire Chief Grant testified that Milton requires all developers to comply with the most recent edition of the Code of the National Fire Prevention Association, as amended by the Massachusetts Comprehensive Fire Safety Code[10] and to obtain written approval of the fire department to ensure compliance with federal law, the state fire code and local regulations. Exh. 94, ¶ 21; Tr. I, 77-78.

Both Fire Chief Grant and Maurice Pilette, PE, FSPE, CFPS, CET, a fire protection engineer, testified for the Board that there is inadequate turnaround space for fire apparatus, which would hinder maneuvering in an emergency, potentially damage parked and fire vehicles in the area, and cause "significant delay" in responding to a call at a different location. Exhs. 94, ¶ 17; 93, ¶ 18. Chief Grant stated that the "proposed [90] unit development would not provide sufficient turnaround area for fire apparatus to turn around and drive back down the access road in a forward direction. A ladder would need to back down the access road and back into Randolph Avenue… before making a turning movement." Exh. 94, ¶ 20. He stated that if the fire department is on site, no one would be able to leave while fire apparatus is clogging the area. Tr. I, 90. He also testified that "…as far as the parking lot goes, some of – especially in the upper end of it, you come into the lot, and you have to jog up to the left and then jog back. We are going to have significant egress problems." Tr. I, 66. When asked about the impact in an emergency if the rear parking lot is full, he further stated:

> In an emergency up there, depending on what it is, an engine is going to have to back down and come around a compound curve to the site beyond the smaller of the two buildings before it can turn around… So for us to back out, we are going to have to come down, navigate two bends in that parking lot, back further down to the end of the smaller of the two buildings and turn around there. I would go beyond that to say that if we have to put the ladder truck up into the site that the ladder truck is going to have to back all the way to the street.

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[10] During the hearing the witnesses frequently referred to the legal requirement as based upon the fire code issued by the National Fire Protection Association (NFPA-1). The Massachusetts Comprehensive Fire Safety Code, promulgated as 527 CMR 1.00, has modified the NFPA-1 and is the applicable fire safety code for the purposes here. This regulation specifically states, "NFPA-1 2015 edition is modified, on a Chapter by Chapter basis, as follows…." 527 CMR 1.05. Exhs. 94, ¶ 21; 93, ¶ 7; Tr. I, 97-98.

Tr. I, 67-68.

The Board argues that this issue supports the reduction in project size, and that the looped road is necessitated by public safety concerns. Fire Chief Grant went on to state that a 35-unit development would allow all fire apparatus to execute a turnaround maneuver at the site of the project. Exh. 94, ¶ 20. Mr. Dirk testified that a looped roadway is consistent with applicable standards since the development will have only one means of access and has challenging topography for the site layout. He stated that emergency vehicles risk being blocked by an accident, utility break, fallen tree or pole, or pavement repairs. He testified that a looped roadway will facilitate emergency movement throughout the site and is supported by the Institute of Transportation Engineers (ITE) Neighborhood Street Design Guidelines. Exhs. 90, ¶¶ 14-15; 112; 71. Scott Turner, PE, AICP, LEED AP ND, a professional engineer, testified on behalf of the Board in support of the looped roadway as reasonable to insure safe and efficient movement of emergency vehicles through the development. He stated looped systems are required in many other municipalities and will "facilitate the health and safety of the Project's occupants while driving or walking within the site" and allow for easier access for emergency vehicles. Exh. 91, ¶ 22. Police Chief King testified generally that the looped roadway would address the safety concerns he expressed regarding the ability of first responders and emergency personnel to quickly and expediently address issues of health and safety, and motor vehicle traffic circulation and pedestrian use. Exh. 96, ¶ 7. The Board argues that the Committee has previously allowed a condition requiring an additional turnout on the ground that it was warranted by concerns raised by the fire chief. *See Cozy Hearth Community Corporation v. Edgartown,* No. 2006-09, slip op. at 18 (Mass. Housing Appeals Comm. Apr. 14, 2008).

The developer argues that the Board has not demonstrated a valid local concern supporting its contention that a looped roadway is necessary to facilitate movement of emergency vehicles throughout the site, arguing that the Board did not identify a local, state or federal requirement for one. HD/MW points out that neither Fire Chief Grant nor Mr. Pilette testified in support of a looped access drive. Exhs. 93; 94. The developer also points out that neither Mr. Turner nor Mr. Pilette suggested during their peer review of the project that a looped roadway was necessary. Exhs. 57, 75.

Mr. Hastings, the developer's fire safety expert, testified that the access road complies with the Massachusetts Fire Comprehensive Fire Safety Code, 527 CMR 1.00, and that these

regulations do not require a looped roadway. He also stated that the emergency access plans provide for emergency vehicles to safely access the site and turn around. Exhs. 89, ¶¶ 3-4, 7; 67. Mr. Burke testified that the access drive and traffic pattern have been designed in accordance with accepted engineering principles, and agreed with Mr. Hastings that a looped roadway is not required by the fire safety code. Exhs. 86, ¶ 13; 60. Dr. Dulaski, the developer's traffic expert, testified that traffic impacts from construction of the proposed project would not "significantly adversely impact the future inhabitants of the development or the general community." Exh. 87, ¶ 4. He also stated that the developer's emergency access plans demonstrate compliance with the fire code requirement for provisions to allow fire vehicles to turn around on dead end roads more than 150 feet long. Exhs. 108, ¶ 8; 60; 89, ¶ 7; Tr. I, 82.

HD/MW argues that this evidence, and the lack of support for a looped road by the Fire Chief Grant and Mr. Pilette undercuts the police chief's recommendation for a looped roadway because fire vehicles are larger than police vehicles. Exh. 96, ¶¶ 14, 16; Tr. I, 82, 112-13. Dr. Dulaski testified that a looped roadway was not needed for the project and has no relationship to site access. He stated that, regardless of the number of units, vehicles will travel over the same 24-foot wide driveway, even if there is a looped roadway. Exh. 106, ¶¶ 16-17; Tr. IV, 147. Mr. Hastings pointed out that Milton Landing, another property in Milton, has one point of access, no looped roadway and no fire truck access to two sides of the building. Exhs. 108, ¶ 10, 108-A.

Under the state fire protection code, "[f]ire department access roads shall have an unobstructed width of not less than 20 ft. (6.1 m.)...." 527 CMR 1.05, § 18.2.3.4.1.1. The regulation also provides, "[t]he minimum inside turning radius of a fire department access road shall be 25 feet. The AHJ shall have the ability to increase the minimum inside turning radius to accommodate the AHJ's apparatus." 527 CMR 1.05, § 18.2.3.4.3.1. The Milton fire chief is the "authority having jurisdiction" (AHJ) with the authority to determine whether the turning radius for the project will accommodate the fire vehicles.[11] *See* Exh. 93, ¶ 16; Tr. I, 73, 100. Although Mr. Dirk testified that the ITE and the NFPA-1 recommend two means of access for safety reasons in circumstances where there will be queuing of vehicles exiting a development, testimony shows vehicle queuing should not be significant. *See* note 14. Moreover, the Board

[11] The NFPA-1 provides that "[d]ead-end fire department access roads in excess of 150 ft. (46 m) in length shall be provided with approved provisions for the fire apparatus to turn around." Exhs. 93, ¶ 8; 93-2.

has cited to no local or state requirement for a looped roadway. Exh. 90, ¶ 13. We agree that it is a safety concern that emergency vehicles be able to maneuver within the development site. However, the Board has not satisfied its burden that a requirement of a looped roadway for this development is supported by a valid local concern, as long as the project provides a sufficient turning radius for large emergency vehicles to turn around within the development, as required by the fire code. Its requirement for a looped roadway constitutes an improper redesign of the project. *See Pyburn, supra,* No. 2002-23, slip op. at 14. Condition 28 is struck and requirements for a looped roadway in other conditions are also struck.

The state fire code requires the developer to have a safe turning radius for emergency vehicles within the site. Since the Committee may not waive state requirements, the developer must comply with this requirement. However, although the state fire code gives the fire chief the authority to make determinations, we have previously noted in *Sugarbush Meadow, LLC v. Sunderland,* No. 2008-02, slip op. at. 9 (Mass. Housing Appeals Comm. June 21, 2010), that the determinations made by the fire chief are actions of a local official and hence subject to determination by the Board and the Committee:

> [I]t is precisely because the State Building Code grants the fire chief broad discretion that his recommendation here is subject to review. The developer is not seeking waiver of any specific provision of the uniform state building code, Rather, it challenges the judgment of the fire chief, who is a local official ... having supervision of the construction of buildings.... G.L. c. 40B, § 20. As such, his approval, as one who would otherwise act with respect to [the comprehensive permit] application, is within the jurisdiction, initially, of the Board and, on appeal, of this Committee. G.L. c. 40B, § 21.

Id. (Internal quotations omitted). The Supreme Judicial Court affirmed this ruling in *Sunderland Zoning Bd. of Appeals v. Sugarbush Meadow, LLC*, 464 Mass. 166 (2013) stating that "a fire chief does not have unbridled discretion effectively to deny a comprehensive permit by refusing to approve fire construction documents...." *Id.* at 182. It also noted that with respect to comprehensive permit applications, "the fire chief is a 'local board or official who would otherwise act with respect to such application,' and the board [or the Committee] in reviewing such application has the 'same power to issue ... approvals' as the fire chief. G.L. c. 40B, § 21." *Id.* at 183.

Therefore, we shall require the developer to include in its project and show on revised plans a vehicle turnaround location that meets the turning radius specifications for the Town's

largest emergency vehicle when exterior parking spaces are completely occupied. This will allow the fire chief, in the exercise of reasonable judgment, to increase the minimum turning radius to accommodate the municipality's emergency vehicles consistent with the state requirements while addressing the local safety concern.

2. Emergency Access to Buildings

The Board argues that the project does not comply with the state fire prevention requirement for emergency vehicle access to all sides of a building. The state regulation requires that where, as here, the buildings will have an automatic sprinkler system, fire department access roads shall be provided such that any portion of the facility or any portion of an exterior wall of the first story of the building is located not more than 250 feet from fire department access roads as measured by an approved route around the exterior of a building or facility. 527 CMR 1.05, § 18.2.3.2.2.1; Exhs. 93-2; 94, ¶¶ 9-10; Tr. I, 100. Fire Chief Grant expressed concern that the 90-unit project did not comply with this requirement of the state fire code. Exhs. 74; 94, ¶¶ 10-13; Tr. I, 65, 66, 70-72.

Chief Grant stated that there was inadequate room for fire apparatus to fight a fire in the rear of the larger building, potentially causing access and egress issues because the fire department responds to box alarms with a total of 4 vehicles – two engines, a ladder truck and a command vehicle. Exh. 94, ¶¶ 7-13. In response to the fire chief's concern about meeting the 250-foot distance requirement, HD/MW proposed to add an exterior stairway attached to a portion of the rear of the larger building to provide additional access to the rear of that building. Exhs. 89, ¶ 8; 89-2. Chief Grant testified that this was not adequate because "it would be poor firefighting strategy to predetermine apparatus placement for a structure such as this," that a "determination would be made based on a size up of the building to locate the size and extent of a fire," and the "preferred location of apparatus would be as close to the point of entry as possible." Exhs. 94, ¶ 13. He also stated that having one of the locations identified on the plan shown on an uphill slope of the access road may be unacceptable because "fire operations may restrict access of later arriving emergency vehicles" and [i]n a fire emergency the access road should be kept clear."[12] Exh. 94, ¶ 13. Mr. Pilette agreed with Fire Chief Grant. Exh. 93, ¶ 14.

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[12] On cross examination, Chief Grant acknowledged that during the March 31, 2015 hearing before the Board he had stated that "even with the outdoor parking lot substantially filled with parked cars that it would not in any way inhibit the fire apparatus from accessing the buildings or from extricating people

In response to Chief Grant's testimony, Mr. Hastings testified that if there was access within 250 feet, for any building and fire event the fire department could still choose its preferred location to position vehicles, whether or not within 250 feet. Exh. 108, ¶ 5. This seems to be a reasonable solution.

The proposed exterior stairs appear to facilitate some access from the roadway consistent with the 250-foot requirement. Exhs. 59, p. 5; 60; 86-2; Tr. IV, 33-37. However, we are concerned that locating multiple large fire vehicles on the access drive for a period of time for firefighting increases the risk of blockage of the access driveway. Therefore, by condition, we will require the developer to provide a paved area for placement of fire vehicles during an emergency approach on the southerly size of Building 2, as either a parking area or access driveway sufficiently wider than 24 feet wide to accommodate the largest of the fire department's vehicles.

3. Fire Hydrants

Condition 32. The buildings shall be fully sprinklered. Fire hydrants shall be placed at the discretion of the Fire Chief.

The parties agree that the buildings will be fully sprinklered. HD/MW's disagreement with this condition is with the fire chief's discretion in placement of fire hydrants. It requests Condition 32 to be modified to state: "The buildings shall be fully sprinklered and the project site shall contain two fire hydrants as previously agreed between HD/MW and the Fire Chief." Citing testimony of Mr. Burke, HD/MW argues that Chief Grant previously agreed two fire hydrants is the appropriate number. HD/MW brief, p. 30 n.15; Exh. 105, ¶ 31. Mr. Hastings testified that the Milton fire chief may not impose requirements that conflict with the state fire safety code. Tr. II, 155.

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from these buildings" and that "even with the parked cars that the fire department would be able to put its equipment where it needed to put it." Tr. I, 57-58. He was asked on cross-examination whether he had previously testified that the parking lot situation was something he had seen in other locations in Milton and that HD/MW should not be penalized for it. Upon having his recollection refreshed, he stated: "[t]o the extent that the set of the plans I was working off of at the time, yes." Tr. I, 62-63. He also acknowledged that there are other buildings in Milton where fire trucks do not have direct access to all four sides of a building. Tr. I, 69. However, on redirect, he sought to explain the discrepancy between his statements, testifying "I was off in my distances around the building... I was off on topography. So, although we do have good access to three sides of the building, as I see it, we do have a significant problem in the rear of the building. We have topographical problems back there." Tr. I, 65-68.

Fire Chief Grant testified that Milton requires developers to seek his approval when placing fire hydrants, both for subsidized and unsubsidized housing. He testified that this is consistent with Fire Safety Code § 18.1.3.2, which states that "[p]lans and specifications for fire hydrant systems shall be submitted to the fire department for review and approval prior to construction."[13] Exhs. 94, ¶ 22; 93-2.

The Board argues that since this condition is consistent with state law, it must be allowed. Nevertheless, as we noted above, fire hydrant specification decisions by the fire chief are actions in his role as a local official. In response to the developer's testimony that two fire hydrants were agreed upon by Chief Grant, the Board has given no other number of fire hydrants that should be required. Therefore, the evidence in the record supports a requirement of two hydrants, and the Board has not supported further discretion in the number of hydrants by the fire chief. We will modify Condition 32 to provide that there will be two fire hydrants, whose placement shall be determined by the fire chief, who shall exercise reasonable judgment. *See Sugarbush, supra,* No. 2008-02, slip op. at. 9; *Roger LeBlanc v. Amesbury,* No. 2006-08, App. at 23 (Mass. Housing Appeals Comm. Sept. 27, 2017 Ruling) *(LeBlanc II).*

4. Elevators

Condition 22. The design shall insure that no dwelling unit is located more than one hundred feet from an elevator.

The Board argues that Condition 22, requiring no dwelling unit to be located more than 100 feet from an elevator, is supported by public safety concerns. Police Chief King testified that with only one elevator in each building, if that elevator is not working, emergency medical transport would require the stairs. He also stated that because the floors on the larger building are approximately 300 feet long, the condition "is sound from a public safety and public health perspective. Every second saved in a medical emergency could be a matter of life and death." Exh. 96, ¶¶ 17, 19; Tr. I, 124-26. Ms. Tougias stated that elevators should be placed within a reasonable distance to all units for safe, easy and quick emergency access and egress and testified that, to her knowledge, no other residential building in Milton of this scale and type has only one elevator located at one end of a 300-foot hallway. Exh. 92, ¶ 16.

The developer argues that the Board has raised only vague statements that do not support a valid safety concern for this requirement. Mr. Hastings, its fire safety expert, testified that this

[13] This provision is located in NFPA-1. Exh. 93-2. *See* 527 CMR 1.05.

condition is not supported by any provision of the state building code, fire code, Massachusetts Architectural Access Board regulations or ADA standards regulating the maximum travel distance allowed from a dwelling unit to an elevator, and the Board has offered no information to the contrary and no citation to any local requirement supporting this condition. Exh. 108, ¶ 9; Tr. I, 113-14.

We agree with the developer that the Board has not demonstrated a valid local concern, for this condition that outweighs the need for affordable housing. It is therefore struck.

C. Traffic Safety for Vehicles and Pedestrians

The Board included a number of conditions relating to general traffic safety. Certain conditions relate to safety with regard to traffic outside the project site, and others relate to internal traffic. These conditions, other than the looped roadway addressed above, include the following requirements: 1) a right turning lane from the development to Randolph Avenue; 2) a pedestrian and vehicle waiting area on Randolph Avenue or near the exit from the development for individuals waiting for school buses; and 3) a minimum of five-foot sidewalks on both sides of the entrance driveway, rather than the single four-foot sidewalk proposed..

1. Right Hand Turning Lane

> Condition 29. A right-hand turning lane shall be provided at the exit on Randolph Avenue. The Applicant shall impose a right-turn only restriction between Monday through Friday during the morning peak commuting hours.

HD/MW objects to the Board's requirement of a right turning lane; it has agreed to establish a prohibition on left hand turns out of the development onto Randolph Avenue (State Route 28) during morning peak weekday commuting hours; therefore, this is not at issue. *See* Exhs. 87, ¶ 6; 106, ¶ 13.

The Board's primary arguments for the requirement for a right hand turning land are provided by its traffic engineer, Mr. Dirk, who stated that the right turn restriction would minimize the queuing during morning commuting hours, and during other times the right turn lane would allow traffic turning right to bypass the left turning traffic.[14] Exh. 90, ¶¶ 16-18. Police

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[14] Although Mr. Dirk testified that reducing the number of units would alleviate the queuing at the entrance to the project, due to reduced traffic volume generated by a smaller project, Exh. 90, ¶ 17, in his peer review of the TIAS, he noted the analysis results indicated the proposed project would have minimal impact on motorist delays and vehicle queuing. Exh. 57, p. 8. The police chief stated that a reduction in units would permit safer access to and from the site. Exh. 96, ¶ 16. Noting that Police Chief King was not

Chief King also supported the right turning lane, because there is no traffic light at this location. Exh. 96, ¶ 9.

The developer argues that the Board has not demonstrated a valid local concern with this condition; instead this requirement will create a more hazardous situation for vehicles exiting the site and for those traveling on Randolph Avenue. It also argues that widening the access drive would require it to be wider than permitted by Milton bylaws. Exh. 106, ¶ 10.

HD/MW relies on its traffic expert, Dr. Dulaski, who stated that the additional lane would increase the danger of exiting the development because when left turns were prohibited, two right turning lanes would result in two drivers simultaneously attempting to turn right onto Randolph Avenue resulting in the obstruction of sight lines and potential crashes. He also stated it would likely create driver confusion, as a driver might interpret the right turn lane to mean left turns could be made from the left lane. Dr. Dulaski also stated that, based on his traffic study, the right hand turning lane is unnecessary. Exhs. 106, ¶¶ 12-13; 87, ¶ 6.

We find credible Dr. Dulaski's testimony that sight lines were found to be adequate for drivers entering Randolph Avenue from the development, as well as for drivers entering the development from Randolph Avenue. He also stated that the trip generation figures showed that the expected trips from the proposed 90 unit development would not adversely impact the traffic on Randolph Avenue.[15] Exh. 106, ¶¶ 6-7. We accept his testimony that a right hand turning lane would create more safety concerns than it would solve. We also note Mr. Dirk's peer review comments that queuing would be minimally affected by the proposed project. *See* note 14. We do not find the Board has demonstrated a valid local safety concern that supports the requirement, and will require it to remove the first sentence of this condition as requested by HD/MW.[16] HD/MW brief, Exh. 1, ¶ 6.

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a traffic or transportation engineer and had not performed a traffic impact study of the project as proposed or as conditioned, the developer argues that this testimony was undercut by Dr. Dulaski and his Traffic Impact and Access Study (TIAS), as well as Mr. Dirk's peer reviews of Dr. Dulaski's findings. Tr. I, 102-03.

[15] We also find credible his testimony, based on his TIAS that there is no transportation related safety need for reducing the number of units from 90 to 35. Exhs. 106, ¶¶ 4-9; 87, ¶¶ 3-5.

[16] Dr. Dulaski also testified that the crash rates for the intersections surrounding the proposed development were significantly below state and district crash rates and a warrant study he conducted to determine whether a traffic signal is needed for the 90-unit development showed no traffic signal was

2. Sidewalk on Access Drive and Parking Areas

Condition 30. Sidewalks on the Site shall be widened to five feet and shall be provided on both sides of the driveway access. Curbing shall be low. The roadway itself shall be not less than twenty-four feet wide.

The developer's proposed access driveway is 24 feet wide, the maximum permitted in the Town's zoning bylaws, and therefore complies with this condition. Exhs. 3, § VII.F.5; 59, p. 4; 106, ¶ 10. HD/MW seeks removal of the requirement for a sidewalk five feet wide and on both sides of the access driveway. The developer also seeks the grant of a waiver of § VII.F.4 of the zoning bylaws, which requires sidewalks for pedestrian traffic in parking areas.

The Board argues that the development is not pedestrian friendly because pedestrians must cross the driveway to reach a four-foot sidewalk on only one side and the sidewalk is not adequate for accommodating parents and children waiting for a bus. It argues that reducing the project from 90 to 35 units would alleviate this issue, although it does not explain why such a large reduction would be necessary. Mr. Dirk testified that five foot sidewalks with low curbings on both sides of the driveway would be consistent with guidelines by the ITE for a residential street serving between 2.1 and 6.0 units per gross acre. Exh. 90, ¶ 20. Mr. Turner testified that five-foot sidewalks are "common and provide for better pedestrian access." Exh. 91, ¶ 23. Police Chief King expressed concern that having access to the recreational area through the parking area would present a safety concern for the public and parents and children. Exh. 96, ¶ 12.

HD/MW argues that the Town bylaws do not require five-foot minimum sidewalks and do not require sidewalks to be on both sides of a driveway.[17] Dr. Dulaski stated that the crosswalks and sidewalks in the development did not pose safety risks to persons, including children accessing the recreational area. He also stated that the four-foot sidewalk width complies with the Americans with Disabilities Act and the Massachusetts Architectural Access Board regulations. Exh. 106, ¶ 15. *See* Tr. II, 127-28, 173; Exh. 57, p. 10. Mr. Burke testified that there are market rate developments in Milton that do not have sidewalks on both sides of access driveways. Exh. 86, ¶ 14.

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warranted. Exhs. 50, pp. 14-15, 31; 106, ¶¶ 5, 8. The developer argues that Mr. Dirk reviewed the TIAS and its conclusions and agreed with them. Exhs. 57; 90; 106, ¶¶ 4-5.

[17] It also contends that this requirement would increase the permanent alteration of the wetlands by more than 700 square feet which would have an adverse environmental impact on the site and trigger a review under the Massachusetts Environmental Protection Act (MEPA). *See* § VI, *infra.*

The Board has not shown a valid local concern that supports its requirement to either construct a second sidewalk on the opposite side of the access drive or to widen the sidewalk for the development. Nor has it shown by evidence or argument a valid local concern that supports the requirement of additional sidewalks in the vicinity of the parking area. Accordingly, this condition is struck, and § VII.F.4 of the zoning bylaw is waived to the extent necessary to construct the plans as conditioned by this decision.

3. Pick-up and Drop-Off Area

Condition 31. The Applicant shall provide a vehicle and pedestrian waiting area on Randolph Avenue or at the Site entrance for the pick-up and delivery of school children.

HD/MW argues that the Board has not demonstrated a basis for requiring this waiting area. Nevertheless, it proposes to modify this condition to read: "HD/MW shall provide a pedestrian waiting area at the site entrance for pick-up and delivery of school children." HD/MW brief, Exh. 1, ¶ 7.

School buses do not pick up or drop off students on private property; therefore schoolchildren will be picked up from the development on Randolph Avenue. Exh. 99, ¶ 7. The Board's traffic engineer, Mr. Dirk, testified that this condition is required so that school children would not have to get on and off the bus in a vehicle traveled way on the access drive or alongside Randolph Avenue (Route 28). He suggested this area could be "a widened sidewalk area along the driveway at the entrance to the Project." Exh. 90, ¶ 23. He also stated a separate vehicle waiting area along the driveway or off Randolph Avenue is necessary to avoid inhibiting traffic entering and exiting the development. Police Chief King and Mr. Turner testified that this condition was necessary to protect children and parents at pickup and discharge. Chief King also expressed concern about the walking distance from the buildings to Randolph Avenue for parents and children, stating that vehicles waiting for the bus would result in traffic delays with long lines of vehicles. Exhs. 91, ¶ 24; 96, ¶ 10.

Dr. Dulaski testified that creation of a vehicular waiting area on Randolph Avenue could lead to blockages on Randolph Avenue with drivers pulling out of the site and immediately pulling into the waiting area. He stated there was no need for a vehicular waiting area along the access driveway within the development, because drop-offs would take seconds and would not interfere with traffic. Exh. 106, ¶ 14. He also testified that since most motor vehicles are 7 feet wide and the access drive is 24 feet wide, adequate width exists for two vehicles to pass a

stopped vehicle. Exh. 106, ¶ 14. The developer argues, therefore, that there is no need for a vehicular waiting area and the pedestrian area it is willing to construct is sufficient.

On the record before us, the Board has not demonstrated a valid local concern that outweighs the need for affordable housing with regard to a vehicular waiting area. With regard to the pedestrian area, the developer shall provide a widened paved area along the access driveway next to the sidewalk. HD/MW's suggestion shall be modified consistent with this requirement.

D. Stormwater Management and Wetlands Protection

1. Under Building Stormwater System

> Condition 11. The Applicant shall comply with the requirements of Milton's Rules for Comprehensive Permits, including that the Project comply with the Mass. Stormwater Handbook, including the requirement that any proposed stormwater facility not be located beneath any site building and is at least 20 feet away from any building slab or footing.
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> Condition 34. No section of the stormwater system shall be located under the buildings or located within 20 feet of the foundation of a building.

HD/MW proposes to include a portion of its infiltration system under the garages in the two buildings. The Board imposed Condition 11 to preclude this infiltration system, arguing that the ban is supported by health, safety and environmental concerns.[18] Mr. Turner testified that Condition 11 is consistent with the Massachusetts Stormwater Management Guidelines in the Massachusetts Stormwater Handbook, and referenced the Board's "Rules and Regulations for Comprehensive Permit Applications pursuant to M.G.L. c. 40B, §§ 20-23."[19] Exhs. 6; 10; 91, ¶¶ 17-18. He testified that the Handbook's site design criteria for infiltration trenches require that stormwater infiltration trenches must be a minimum of 20 feet from any building foundations including slab foundations without basements. He also stated that the setback is required to prevent stormwater from possibly undermining nearby building foundations or causing leaking into a building, and that placing stormwater infiltration systems beneath the buildings creates logistical issues for cleaning, inspection, maintenance and repairs. He stated he had never

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[18] Condition 34 is redundant and therefore unnecessary. It is struck from the permit. We note that the Board incorporated its arguments related to Condition 11 to support Condition 34. Board brief, p. 54.

[19] These local comprehensive permit regulations provide, "[i]f the proposed project exceeds four (4) house lots, or dwelling units, or exceeds one acre of construction area, the project shall conform to the Massachusetts Stormwater Policy Manual." Exh. 6, § 5.00(n).

designed or endorsed a stormwater infiltration facility beneath buildings in a suburban development. Exhs. 91, ¶¶ 17-18; 91-E, p. 97; 91-F, p. 32.

HD/MW argues that the portion of the infiltration system below the garages in the two buildings does not pose a health, safety or environmental risk. It also points out that Mr. Turner's peer review acknowledged that the project complies with the 10 standards in the Massachusetts Stormwater Handbook. Exh. 75, pp. 22-26. Mr. Burke testified that the sole purpose of the under building infiltration systems is to recharge roof generated stormwater; that the systems are located below parking areas, not adjacent to or below living space; and due to their location, there is no possibility the collected stormwater could leak into the building's living space or impact the foundations of the proposed buildings, or even abutters' buildings. He also stated that under building infiltration systems are routinely utilized by engineers and he has designed such systems for both urban and suburban areas. Exh. 105, ¶¶ 9-11. HD/MW argues that Mr. Turner's peer review did not indicate the under building stormwater system proposal would violate any local or state regulations or the Handbook, and that his only concern during peer review related to maintenance access and related concerns. HD/MW argues that it has addressed these concerns by submitting an operations manual that Mr. Turner peer reviewed. Exhs. 61-62; 75; 105, ¶ 10; Tr. II, 171. It argues that Mr. Turner's change in view in his pre-filed testimony is therefore not credible, and no health or safety basis exists for Conditions 11 and 34.

In requiring a setback for the infiltration system, the Board relies specifically in the language of the condition on its comprehensive permit regulations applicable only to comprehensive permit developments exceeding four units, not all comparable market rate construction projects in Milton. The Board has not demonstrated that the Stormwater Handbook requires the setback specified in this circumstance, and the record does not support a valid local concern for the requirement. And Mr. Turner's previous acceptance of the developer's response to concerns raised about the underbuilding infiltration system supports our determination that the Board has not shown a valid local concern with regard to this condition.[20] Exh. 75, p. 19. Conditions 11 and 34 are therefore struck.

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[20] If this infiltration system were subject to the state Wetlands Protection Act, the developer would be required to comply with the requirements of the statute and its implementing regulations.

2. Snow Storage

Condition 12. No snow from the Site shall be deposited into any wetland resource area on the Site. Applicant shall make adequate provisions for snow to be removed and transported offsite as necessary and shall store snow on the Site in a manner that avoids impacts on neighboring properties. In particular, the snow storage area proximate to the Carlin property at 11 Reed Street, Milton shall be relocated so as not to drain on or be visible from the Carlin property.

Condition 39. All snow storage areas shall be located outside the 100 foot buffer zone.

With respect to Condition 12, the dispute addressed by the developer and the Carlins related to the proposed snow storage area near the Carlin property. HD/MW has agreed to eliminate the snow storage area originally planned to be near the Carlin property. Exhs. 105, ¶ 29; 59, pp. 4-5; Tr. IV, 105. In their brief, the Carlins acknowledge the developer's position.

The developer now proposes that Condition 12 be modified to state: "The snow storage area located closest to the Carlin property line shall be eliminated. The snow storage area downgradient from the Carlins adjacent to the Bautista lot shall not be eliminated. HD/MW shall make adequate provision for snow to be removed and transported offsite as necessary." HD/MW brief, Exh. 1, ¶ 3.

Mr. Turner testified that Condition 12 is reasonable and necessary to avoid degradation of wetlands and damage to abutting property, noting that snow storage on densely developed sites is difficult because there are limited opportunities for significant snow storage. He stated that reducing the site development footprint will reduce the amount of snow that would need to be stored, while increasing the amount of area available to store snow. Exh. 91, ¶ 19.

The Board argues that Condition 39 is supported by environmental and property protection concerns. Mr. Turner testified that it is common to require snow storage areas to be located away from wetlands resources, and referred to DEP Snow Disposal Guidance, which recommends storing snow on upland areas away from water resources and drinking water wells because of the amount of pollutants that accumulate in cleared snow. Since the DEP guidance allows a buffer zone of 50 feet in emergency declarations, Mr. Turner suggested a greater setback should therefore exist for nonemergencies. Exhs. 91, ¶ 28; 91-G, p 2. The Carlins support this condition.

Mr. Burke stated, however, that the guidance cited by Mr. Turner applies to private businesses and municipalities that dispose of snow. He and HD/MW's wetland scientist, Mr. Morrison, testified generally that there would be no negative impact from the project on the wetlands or the health and safety of occupants or neighboring properties. Mr. Morrison testified

that the locations of snow storage have been sited and include construction erosion control measures to prevent negative impacts on wetland resource areas. Exhs. 88, ¶ 6; 105, ¶ 29; 107, ¶ 7.

The Board did not identify which locations proposed by the developer would be within the 100 foot limit, or how they were particularly an area of risk. Therefore, the Board has not established a local concern that outweighs the need for affordable housing with regard to the siting proposed by the developer for snow storage, now that it has agreed to eliminate the snow storage closest to the Carlin property. The proposed modification of Condition 12 by HD/MW, however, does not address the requirement to protect wetlands. Therefore, we will modify the condition, retaining the first sentence of the condition and replacing the last sentence with the final two sentences of HD/MW's proposed language. Condition 39 is hereby struck.

3. Activity in Wetland or Non-Disturbance Zone

> Condition 10. (a). No building construction activity shall occur within any wetland area or within the 25-foot non-disturbance zone created by the Milton Bylaw, Chapter 15; (b) buildings shall not be erected within any wetland area or within the 25-foot non-disturbance zone created by the Milton Wetland Bylaw, Chapter 15; ....

Activity within Wetlands or Non-Disturbance Zone. The parties have raised several issues relating to Condition 10(a): the non-disturbance zone, and lack of a waiver for the work to construct the access driveway, stormwater runoff effects on the Carlin property from upgradient properties, and wetlands inundation from the management of flow under the access driveway crossing of the wetland. The Board argues that this condition is necessary to prevent damage to environmentally sensitive areas abutting both sides of the wetland and the bridge and to protect abutting Town owned and private property.

The Board argues that purpose of the 25-foot non-disturbance zone is generally to "preserve the quality of certain wetland resources and serve the interests protected by this Bylaw," and the zone was "established to create a boundary or buffer between the activity proposed and the resource area to be protected." Exh. 4, § XI. It relies on testimony of Mr. Kiernan, Conservation Commission Chairman, that the project will negatively affect the wetlands on the site. Exh. 98, ¶ 5. Specifically he stated that the non-disturbance zone would be clear cut for construction purposes.[21] Tr. I, 40. The Board argues that the requirement for the

[21] The Board's reference in its brief to a MassHousing website identifying buffer zones in other municipalities is disregarded, as that information was not admitted into the record of this proceeding. In

buffer zone can be waived only if the granting the waiver "will not have a significant adverse impact on the interests protected by this Bylaw." Exh. 4, § XI(d). Mr. Turner testified that Condition 10 provides a reasonable level of protection for the state's wetlands resources and downstream abutters. Exh. 91, ¶ 16. *See* Exhs. 2, 6, 10. HD/MW argues that there will be no negative effect on the wetlands, citing the testimony of its wetlands expert, Mr. Morrison. Exh. 88, ¶ 6; 107, ¶ 2.

Neither the Board nor HD/MW has identified any aspects of the proposed development that would conflict with this local requirement, other than the wetland crossing. The Carlins acknowledge that some disturbance of the wetlands and the buffer zone must necessarily occur to construct the project, and state they do not object to a waiver of the wetlands regulations for this specific purpose. Their concern is that there be no more disturbance than necessary to construct the project. They argue instead that the developer's plans do not accurately depict the actual area to be impacted by the proposed wetland crossing.

Given the Board's approval of the access driveway crossing the wetlands, its denial of the waiver of Chapter 15 is unsupported by a valid local concern. To the extent it argues the developer must undertake a special permit review before construction, it mistakes the purpose of the comprehensive permit to subsume all other local permits. The hearing before the Board replaced any special permit process that would have been required before the Conservation Commission. *See* Exh. 98, ¶¶ 13-15. As we discussed in § III.C, *supra,* regarding the economic impact of this condition, Condition 10(a) will be modified consistent with the other provisions of the comprehensive permit, specifically to allow building construction activity in the wetlands and the non-disturbance zone to the extent necessary to construct and maintain the access driveway and wetland replication area. Similarly, Chapter 15 and § IV.B shall be waived to the same extent.

> Condition 38. The Applicant shall provide a hydrological study confirming that the size of the culvert located under the driveway access is adequate for the anticipated water flow without increasing the potential for off-site flooding of abutting properties.

Hydrological Study. There is no disagreement that the culvert in the wetlands under the access driveway must be correctly sized to ensure there will not be an obstruction to water flowing through the system, including during higher intensity storms. Mr. Turner testified that

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any event, the existence of buffer zones in other municipalities does not determine whether maintaining the buffer zone is supported by a valid local concern in this circumstance. Board brief, p. 32.

Milton's subdivision regulations require culverts to be designed for the 100-year storm event. He stated that "a properly sized culvert beneath the access driveway is necessary to ensure that the hydrology of the wetlands system is not significantly altered" by the permanent impact of the wetlands crossing. Otherwise, water flow will be obstructed, particularly during higher intensity storms. Exhs. 91, ¶¶ 26, 27; 91-H. The Board put forth the testimony of John Kiernan, Chairman of the Conservation Commission, that a hydrological study is appropriate because the project as designed creates a significant potential for off-site flooding, and part of the site has a history of flooding. Exh. 98, ¶ 7.

The Carlins assert that the developer has not adequately demonstrated the scope of the work in the wetlands. They contend that the plans do not accurately reflect the proposed work or the actual design of the wetlands crossing or its impacts. They argue that the requirement of the hydrological study is authorized by the Wetlands Bylaw and that the studies previously provided by the developer are flawed and cannot be relied upon. Exh. 102, ¶ 17. They also argue specifically that no evaluation was made of the outlet structure at Randolph Avenue, and if it is undersized, it will cause prolonged inundation of the wetlands causing flooding on their property, resulting in a loss of trees and vegetation. Their witness, Janet Carter Bernardo, PE, a civil engineer, testified that during construction when the site is stripped of its trees and vegetation, the natural drainage of the site will be impacted and stormwater will surface flow into the wetland resources, and when the wetlands are "seasonally full of water, the area will flood to a greater degree, including on the Carlins' property as the volume of water backs up before exiting the Carlins' property." She also stated that prolonged exposure to flooding will cause the trees and vegetation to be impacted. Exh. 102, ¶ 16.

HD/MW argues that Mr. Morrison testified that the proposed wetland crossing and 12 x 4 box culvert will not have an adverse impact on the wetlands. Tr. III, 40-41. Therefore, it argues that Chapter 15 and § IV.B should be waived and Conditions 10(a) and 38 should be struck. The developer argues that the Board has not submitted any evidence that the proposed box culvert is not properly sized or cannot adequately handle the water. It argues that Ms. Bernardo only speculated that flooding or standing water would occur on the wetlands on the Carlin property, but offered no data or analysis to support this conjecture. *See* Exh. 102, ¶ 16. It argues that it has complied with DEP stormwater standards and already submitted a hydrological study performed

by Mr. Burke which confirmed that even in the event of a 100-year storm the obstruction of water in the wetlands is *de minimis.*

Mr. Morrison, who designed the wetland replication area and protocol, disagreed with Ms. Bernardo. Although he agreed prolonged flooding would cause the impact she described, he testified that he did not think such a condition would be likely. He testified that the project-related change in hydrology of the wetlands will not result in a significant change in the vegetational community of the wetlands and that he would not expect the wetland crossing and culvert to cause a change to the wetlands or vegetation on the Carlin property. Exh. 107, ¶ 5; Tr. III, 40-41, 48. He testified that a serious blockage of the kind that could cause significant impact, such as one caused by a beaver dam blocking the outlet structure outside the project site or on part of the HD/MW development, would be unlikely. Tr. III, 47; IV, 116-17; Exh. 66.

Although Ms. Bernardo's testimony suggested the possibility of water backing up on the Carlin property, the Carlins have not demonstrated that this will occur. We find Mr. Morrison's testimony in this regard more credible. We also note that the Board has approved this development, and had it believed the hydrological study was seriously flawed, it could have sought further peer review or denied the application for a comprehensive permit. However, as noted in § V.C, *infra*, what the Board cannot do is require another study to be conducted for a further substantive review of matters that the Board should have addressed before issuing its decision. Accordingly, Condition 38 is struck.

4. Stormwater from Upgradient Properties toward Carlin Property

> Condition 10. ... (c) documentation shall be provided demonstrating that the proposed stormwater system has been designed to accommodate the runoff from properties upgradient of the project site, that the natural runoff from such upgradient properties does not cause flooding around any buildings on the Site, and that any potential increase in stormwater volume over existing conditions will not negatively impact the downgradient system.

The Carlins argue that the proposed stormwater management system is flawed because stormwater intended to be diverted from entering the smaller building (Building 1) and the southernmost parking area will be diverted from the Lombardi and Mullins properties to their property.[22] They argue the parking area proposed to be nearest their property does not comply

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[22] Their argument that this would constitute a nuisance or trespass is "not an issue within the Committee's jurisdiction." *White Barn Lane, LLC, v. Norwell,* No. 2008-15, slip op. at 23 n.15 (Mass. Housing Appeals Comm. July 18, 2011), citing *Tiffany Hill, Inc. v. Norwell,* No. 2004-15, slip op. at 3 n.4 (Mass. Housing Appeals Comm. Sept. 18, 2011).

with the zoning bylaw, §§ VII.G, VI.C.6, and VII.H.1, which prohibits runoff from being channeled so as to increase the flow of stormwater into their neighboring property. Ms. Bernardo testified that construction of an elevated berm on the project site will capture some of the drainage, but the proposed two-foot wide one-foot high earth berm located along the rear property line will direct runoff from the Mullins and Lombardi properties toward the Carlin property. She testified that during construction the site is stripped of its trees and vegetation, causing the natural drainage of the site to be impacted and stormwater to surface flow into the wetland resources. Mr. Burke, on cross-examination, acknowledged that there were no features on the plans to address the construction-related impact of stormwater onto the Carlin property, and that he had not calculated the amount of water coming from the Mullins and Lombardi properties to the Carlin property, but he stated that construction would be done to ensure that no surface water from the Lombardi and Mullins properties will enter the Carlin property. His markings during cross-examination on Exhibit 59, p. 5 indicated flow toward and along the Carlin property. Exhs. 102, ¶¶ 16, 19; 105, ¶ 28; Tr. IV, 93-96, 121, 144.

HD/MW argues that the topography of the site slopes down toward Randolph Avenue so that, with gravity, stormwater will naturally flow toward Randolph Avenue, not toward the Carlin property, and that the grading in the area closest to the Carlin property will direct stormwater and snow runoff away from the Carlin property. The developer argues that Mr. Turner's peer review confirms this testimony, and the Carlins have not shown there will be runoff onto their property from the Mullins and Lombardi properties. Exh. 75, p. 8, ¶ 20.

Citing *Weston Development Group v. Hopkinton,* No. 2000-05, slip op. at 20 (Mass. Housing Appeals Comm., May 26, 2004), the Carlins contend Mr. Burke's assertion that he will address the flow of stormwater to ensure no runoff occurs on their property is merely conjecture, because he did not know the amount of stormwater being intercepted and diverted. Tr. IV, 93, 96, 144. Mr. Burke has stated his intention to ensure compliance with this standard of the Stormwater Handbook, with the use of additional berms, if necessary. Tr. IV, 121-22. We will require this compliance by condition: HD/MW's revised stormwater management plans shall show the means by which the diversion of stormwater away from the Carlin property is managed. Condition 10(c) is retained.

E. Potential Impacts on Abutters

1. Setbacks and Buffer for Abutters

Condition 5. To protect the health and safety of the occupants of a proposed Project and of Milton, to protect the natural environment, to promote better site and building design in relation to the surroundings and municipal and regional planning, and to preserve open spaces, the Applicant shall submit the Site Plans to the Board for further approval.[23] Any such Site Plans shall provide for a vegetated buffer area along the southerly and westerly limits of the site not less than 50 feet wide.

Condition 25. To the maximum extent possible, the Applicant shall retain mature trees, particularly along the property lines to the north, west and south.

Both the Board and the Carlins ask the Committee to retain the second sentence of Condition 5, which requires a 50-foot vegetated buffer along the Carlin property line. They also ask that the denial of waivers of the zoning bylaw, §§ VII.G (parking area setbacks) and H (parking area design standards) be upheld. In support of the 50-foot buffer, the Board does not cite a local requirement or regulation that mandates such a buffer. Rather it relies on the general testimony of its witness, Ms. Tougias, that the condition strikes a balance between development and protection of the environment and preservation of open space, and allows a more gradual transition in topography, providing a less steep slope for the development. Exh. 92, ¶ 6. The Board also cites *Princeton Development, supra,* No. 2001-19, in which the Committee upheld a condition requiring a vegetated buffer for a rural bike trail on a former railroad right of way. It suggests that the buffer imposed here similarly strikes a reasonable balance between development and protection of the environment and wildlife.

The Carlins argue that the condition is based on § VIII.D.3(a), (e) and (f) of the zoning bylaw, which enables the town to impose conditions on site plans to protect adjoining premises against detrimental or offensive uses on a site, ensure proper use of the site with respect to unit density and proximity of adjacent buildings to one another, and to assure the adequacy of lighting to maintain a safe level of illumination on the site, and to shield lighting to protect adjacent properties. They refer to Ms. Tougias' testimony that proposed Building 1 is more than 40 feet higher that the two-story Carlin home (depending on the height of the roof), *see* Tr. III, 146. They argue that the parking area located near the Carlin property creates a stormwater impact as discussed above, a lighting impact from fixtures that will be visible to the Carlins even

[23] In its brief, the Board notes that the "subject matter of the first sentence of Condition 5 is addressed by Condition 1" and therefore "requests that the first sentence of Condition 5 be deleted." Board brief, p. 24. Accordingly, we will require the deletion of the first sentence of Condition 5.

if the light does not illuminate their property, light overspill from vehicle headlights, and noise impacts from an electrical transformer.

The Carlins argue that the site layout plans fail to specify the limit of work or show a setback from the parking lot and Building 1 to the Carlin property line. They also argue that the proposed construction will necessarily require all the vegetation and trees between the parking areas and the Carlin property line to be destroyed to change the grades to create the parking area, building site and access drive, noting Mr. Burke agreed there would be some disturbance to existing conditions. Tr. IV, 103. Therefore, they argue that without a 50-foot buffer, the Carlins will be completely exposed to the full mass, scale, height, noise and lighting impacts from the cars exiting the garage level, lighting of the parking area, light from the three levels of residential apartments and their decks. Exh. 102, ¶ 20. By contrast they argue, citing Ms. Bernardo's testimony, that the required buffer will slow water runoff, mitigate against noise and light impacts, provide a continuous upland corridor for wildlife habitat and minimize the heat impact of the new impervious surfaces on the Carlin property. Exh. 102, ¶ 20. They cite *Settlers Landing Realty Trust v. Barnstable,* No. 2001-08, slip op. at 5 (Mass. Housing Appeals Comm. Sept. 22, 2003 order) (noting no logical connection between Board's dramatic reduction in project size and concerns for open space, but stating 25-foot buffer around entire site was an "appropriate" approach). They also argue that such a condition is ordinarily agreed to by developers when a dense residential development is proposed to abut a single-family housing neighborhood.[24] Mr. Turner testified that maintaining mature trees is supported by concerns to preserve wildlife habitat, reduce environmental damage and provide screening for the project's occupants as well as a buffer between the project and neighboring property and is required for many projects. Exhs. 91, ¶ 21; 92, ¶ 19.

The Board and the Carlins raised additional objections to the layout, location and design of the parking area closest to the Carlin property. Exhs. 101, ¶ 14; 102, ¶¶ 21-25; 3, § VII.G. They argue that the project fails to meet parking requirements designed to protect abutters, including a zoning bylaw requirement that parking areas for five cars be "screened from the street and any lot of an adjoining owner with shrubs and trees of a size and number sufficient to provide effective screening within 3 years from the date on which shrubs and trees are

[24] The Carlins also argue that this condition would be required if the development were a conventional subdivision with less density.

established. The use of vegetated berms may be used to provide screening." Exh. 3, § VII. H.7. The Carlins also refer to the requirement that parking be designed in compatibility with the terrain and features of surrounding land, to avoid unnecessary removal of trees, and be designed to prevent lighting overspill to adjoining properties. Exh. 3, §§ VII.H.9-10.

HD/MW argues that the proposed parking area closest to the Carlin property complies with the 35-foot side yard setback and 35-foot parking lot set back requirements. Mr. Burke also stated that the closest point of either building to the Carlin property is 118.9 feet. Exhs. 59, p. 4; 86, ¶ 18; 105, ¶ 32. He stated that the "Carlin property will be appropriately screened from light, noise, dust, and stormwater during both the temporary period while HD/MW constructs its project and following the completion of construction." Exh. 105, ¶ 28. Mr. Carlin testified that he understood that the developer would construct a berm to screen the parking and buildings from his home. Exh. 101, ¶ 5.

The Board argues it has denied HD/MW's request for a waiver of a 30-foot rear yard setback requirement, citing the testimony of Ms. Tougias that the setback protects against the intrusion of taller buildings on abutting properties and protect abutters' use of their backyards. Board brief, p. 78. Exhs. 3, § VI.D.1, 3; 92, ¶ 11; Tr. III, 132-33, 158-60. HD/MW asserts that it arguably requires a waiver from the rear yard setback only to the extent that the border with the Mullins lot is considered subject to the rear yard, rather than the side yard, setback. Mr. Burke testified that the closest building on the project site is 39.2 feet away from the property line of the Mullins vacant lot and at least 190 feet away from abutting homes located in the rear yard.[25] Exh. 105, ¶ 32.

HD/MW points out that the Board's required 50-foot vegetated buffer between the project site and the Bautista, Carlin, Mullins and Lombardi properties would require the elimination of the parking areas near the Carlin and Bautista properties. Exh. 59, p. 4. It argues that there is no local bylaw requiring this condition. The Board has not demonstrated a local open space or environmental concern that supports expanding the buffer beyond the setbacks proposed for the development. As noted by the developer, the proposal includes 257,347 square feet of open space already, over five times the amount required by Milton's bylaw. Exh. 59, p. 4.

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[25] If indeed, the closest building to the Mullins property is 39.2 feet away from the property line, the record does not indicate how the project fails to meet the 30-foot rear set back referenced by the Board.

The developer also argues that neither the Board nor the Carlins submitted substantive testimony regarding the impact of light and noise from the completed development on the Carlin property and they have therefore failed to meet their burden of proof.[26] To the extent the asserted local concern involves protection of abutters from the interference of light, noise, dust and stormwater, the Carlins have not demonstrated that a local concern supports the additional 15 feet buffer sought over the buffer established by the 35-foot side yard setback, and to the extent a waiver of rear setbacks is required, the setbacks established by the proposed project design. *See* § IV.E.2, *infra.* The project site is in an established, settled neighborhood, and is bordered on one side by the DPW property, thus separating neighboring properties from the DPW site. The proposed parking lot near the Carlin property will comply with the 35-foot side yard setback requirement. The developer plans to maintain as many existing mature trees as possible. We will require a condition that the developer will take measures to ensure that, with the modifications to the earth berm described below in § IV.E.2, the Carlin property will be adequately screened by the earth berm in the parking area, fencing and additional trees to be planted following construction that will create a vegetated buffer. Exhs. 22; 86, ¶ 18; 105, ¶¶ 26, 28; Tr. II, 74-75.

We agree with the developer that the Board has not demonstrated credibly that the project must be shielded from abutters with a 50-foot buffer, as opposed to the setbacks proposed. Not only have the Board and Carlins not shown a local requirement for a 50-foot buffer, they have not demonstrated why such a large buffer is necessary in the context of this project. *Herring Brook Meadow, supra,* No. 2007-15, *supra,* slip op. at 26. Accordingly, Condition 5 is struck. Since the record is unclear regarding HD/MW's compliance with rear setbacks, we will grant a waiver of any rear setback requirements to the extent necessary to construct the project as proposed. *See* Exhs. 59, p. 4; 3, § VI.D.1, 3. We will retain Condition 25, but modify it to require that HD/MW shall retain mature trees "to the maximum extent reasonably practicable."

2. Exterior Lighting

> Condition 24. All exterior lighting on the Site shall be installed and maintained so that no light or glare shines on any nearby property and, to the maximum extent reasonably feasible, so that headlight glare from vehicles entering or exiting the parking areas and any garage shall be

[26] We note that HD/MW has offered to include a condition that if possible, and subject to approval by the utility company, it shall attempt to relocate the proposed electrical transformer closest to the Carlin property depicted on the Grading and Utility Plan, Exh. 59, to a location further away from the Carlin property. HD/MW brief, Exh. 1, ¶ 21. We will require the inclusion of this condition.

shielded so as not to shine on abutting or other nearby properties. The Site shall be dark sky compliant.

The Board and the Carlins argue that Condition 24 is supported by public safety and design concerns. They refer to Exh. 3, Zoning Bylaw § VII.H (parking design standards) which regulates offsite overspill from lighting of parking areas. Mr. Turner testified this condition is reasonable and required to reduce impacts on abutters from lights on the buildings and in parking areas as well as headlight glare. He noted that most towns require lighting fixtures that are "dark sky compliant." Exh. 91, ¶ 20. Ms. Tougias agreed, testifying that balancing a safe level of illumination and shielding of lighting to protect adjacent properties is good architectural practice and a matter of common courtesy. Exh. 92, ¶ 18. Ms. Bernardo stated that while the lighting is proposed to be directed downward, the lighting fixtures themselves will be visible from their property and the downward lighting effect will be diffused. Exh. 102, ¶¶ 23, 25.

Mr. Burke also testified that the closest building is 118.9 feet away from the Carlins' home, and that the closest light in the parking area will be 35 feet from the property line and 71 feet from the Carlins' home. HD/MW has agreed that the proposed project will be dark sky compliant, that the lights will be pointed downward, and there will be no light pollution on the Carlin property. Exhs. 86, ¶ 19; 59, p. 4; 53-54; 105, ¶ 26; 75, p. 6; 102, ¶ 23; Tr. IV, 112-13. Thus there is no dispute about its compliance with the last sentence of the condition.

The Carlins also claim that headlights from the parking area and garage exiting from Building 1 will overspill onto the Carlin property, shining onto their home, interfering with their use and enjoyment of their property. They argue that Mr. Burke acknowledged that SUVs and cars exiting the parking level with a finished elevation of 138 will have headlights that are two or three feet higher than the elevation of the finished grade south of Building 1, thereby permitting headlight glare to be directed onto the Carlin property, although he did not expect there would be a problem with light from cars shining on the Carlin property. Tr. IV, 110-12.

HD/MW proposes to place an earth berm at the edge of the parking area, sloping back toward the parking area to serve as a natural wall. Additionally, Mr. Burke stated that there will be a vegetated buffer between the parking spaces and the property line, as well as trees planted above the berm. Exhs. 86, ¶ 18; 105, ¶ 26; Tr. IV, 118. The developer also proposes a condition to require a "six foot tall cedar fence along the rear property line between its Property and the

Carlin property" to provide additional screening.[27] HD/MW brief, Exh. 1, ¶ 20. It argues that lights from cars, at about two to three feet above the ground, exiting the garage of Building 1 or the parking area closest to the Carlin property will be screened by the fence, the earth berm and trees planted above the berm, as well as the existing vegetated buffer on the Carlin property. Exh. 105, ¶ 26. Therefore it argues, citing Mr. Burke's testimony, that the Carlin property is adequately screened from the parking area and the garage in compliance with the zoning bylaws that govern parking area design. Tr. IV, 119, 125-26.

HD/MW argues that neither the Carlins nor the Board have met their burden with regard to light and noise, that no light or noise studies were submitted to show adverse impacts that will occur as a result of the development. While no studies were submitted, the concerns the condition is intended to address are valid. Although the record shows that the developer intends to comply with this condition, we agree that it is appropriate to require that the developer ensure that lights do not shine into the Carlins' home. We will retain this condition, and will require HD/MW to ensure that the fencing, vegetation and the earth berm will be sufficient to screen lights from cars and SUVs. With respect to the effects of light and noise during construction, HD/MW's construction management plan shall address these concerns.

3. Ban on Parking Lot in Deed Restricted Area

> Condition 13. No structure or parking shall be located within the Deed Restricted Area described in the Deed from Claire A. Kingston, Trustee, dated November 28, 2005 and recorded with Norfolk County Registry of Deeds in Book 23180, page 181.

The Board argues that this condition is required because the parking area proposed at the top of the development would be unsafe and hamper fire apparatus turnaround maneuvers. It argues that testimony of the fire chief and the Board's fire protection engineer witness showed an engine would need to back down around two bends in the parking lot to the end of the smaller building to turn around, and that a ladder truck would not be able to turn around and would have to back down the entire length of the driveway to Randolph Avenue. Exhs. 93, ¶ 21; 94, ¶ 20; Tr. I, 66-68, 81-83. Relying on Ms. Tougias' testimony, it argues that eliminating the 36 proposed spaces would create additional room for fire and emergency vehicles and reduce the potential for environmental damage with less regrading and retaining walls. Exh. 92, ¶ 12.

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[27] We incorporate this proposed condition by HD/MW into the comprehensive permit.

The developer argues that the purpose of this condition is to improperly rewrite a private deed restriction, and that the condition is more restrictive than the actual deed restriction, which prohibits the construction of a "commercial structure" or a "parking structure which will serve any commercial structure" in the restricted area. Exh. 12. It points out that Mr. Dirk agreed on cross-examination that the developer is not proposing to build a "parking structure." Tr. II, 126. It also notes that Mr. Holland reported that the Board stated during deliberations that the prohibition was for the purpose of saving Mr. Kingston from having to litigate whether the project violated the deed restriction. Exh. 103, ¶ 8. Therefore, it argues, the condition is not based on a valid health, safety, or other local concern that outweighs the regional need for housing and it exceeds the Board's legal authority as it does not have the authority to rewrite the terms of a private deed restriction.

HD/MW claims that neither Fire Chief Grant nor Police Chief King supports the Board's argument regarding the need for more room for emergency vehicles to turn around.

The Board has not demonstrated that this condition is supported by a valid local concern. Even if addressing an abutter's alleged property interest in the deed restriction in its conditions was within its authority, the Board has not demonstrated that a paved turning area is different from a parking lot within the meaning of the deed restriction.[28] Therefore, this condition is struck. We are mindful, however, that our requirement for sufficient turnaround space for emergency vehicles may require HD/MW to modify this parking area. *See* § IV.B, *supra.*

4. Mechanicals on Roof

> Condition 21. Any mechanicals that are installed on the roof shall not be visible from any home abutting the Site.

HD/MW argues that the Board's condition is not supported by a local regulation, and it has not demonstrated a valid local concern supporting this condition. Ms. Tougias testified that because nearby properties are at a higher elevation than the site, "good design practice" dictates that the mechanicals not be visible from adjoining property. Exh. 92, ¶ 15. As HD/MW pointed

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[28] *See* Zoning Bylaw, § VII.H.12. which provides:

> Parking Structures. Parking facilities provided in an enclosed structure shall meet all requirements of the State Building Code and other applicable law and shall be subject to the requirements of this bylaw regarding buildings except that there shall be no parking required for such a structure…." Exh. 3.

out, the homes on the abutting lots are not located within 190 feet of the project buildings. Exh. 105, ¶ 32. Therefore, the Board has not shown the likelihood that the mechanicals will be visible from neighboring homes, or that any visibility represents a valid local concern. Nevertheless, although we will strike this condition, we encourage the developer to ensure, to the extent reasonably practicable, that any mechanicals that are installed on the roof are not visible from any home abutting the site.

F. Project Design

1. Number and Configuration of Buildings and Units

> Condition 2. The Project shall include no more than thirty five (35) units of rental housing. The Applicant shall indicate the mix of one and two bedroom units on its Site Plans. Four of the units shall be fully handicapped accessible.
>
> Condition 6. To avoid deforestation of mature wooded area, preserve wildlife habitat, minimize impacts to wetlands, mitigate view and noise impacts to abutters along the rear property line, reduce the amount of impervious cover on the Site, make the project more consistent with the Commonwealth's sustainable development principles, and to render the Project more consistent with the character of the surrounding neighborhood, the development footprint shall be reduced and the massing of the buildings broken up by creating a series of smaller buildings.

As noted above in § III.B., the Board argues Condition 2 was not intended to preclude three-bedroom units, and now recommends modifying Condition to state that "The Applicant shall indicate the mix of one, two and three bedroom units on its Site Plans."

The Board specifies a precise number of units as the limit on the project size. However, the Board has not drawn any logical connection between its concerns about density, open space and the environment and the limitation of the development specifically to 35 units. *See Settlers Landing, supra,* No. 2001-08 slip op. at 5; 760 CMR 56.05(8)(d)2. The Board's reduction in project size to a maximum limit of 35 units without support for that specific figure is not consistent with local needs. Therefore, consistent with our rulings above, Condition 2 is modified to provide that the project shall include no more than 90 units and the applicable mix of units shall include three bedroom units in accordance with the Interagency Agreement.

The Board argues that Condition 6 is required by the extent of wetlands on the site and the proposed significant changes in topography. Mr. Turner stated that breaking up the buildings will make a better development because the site is steeply sloped and smaller building pads are more suitable for developments on a steeply sloped site. Exh. 91, ¶ 15. Ms. Tougias also recommended reducing the scale and footprint of the buildings and elimination of the parking

area between Building 1 and the Carlin property, and moving the building further back from adjoining properties. Exh. 92, ¶ 7.

However, making a better development is not the standard for whether the Board has shown a valid local concern that outweighs the need for affordable housing and it does not support the breakup of the two residential buildings into multiple buildings. As the condition is not credibly supported, it constitutes an improper redesign of the project. *See Webster Street Green, supra,* No. 2005-20, slip op. at 12 (general or vague arguments alone regarding density and intensity are insufficient to warrant a reduction in a project size); *Pyburn, supra,* No. 2002-23, slip op. at 14 and discussion *supra* at § IV.A. Therefore Condition 6 is struck.

2. Number and Configuration of Parking Spaces

> Condition 3. The Project shall comply with the Town of Milton's Parking Regulations contained in the Zoning By-law.
>
> Condition 14. The Project shall include not fewer than sixty (60) standard parking spaces, ten (10) compact parking spaces and ten (10) handicapped spaces. Parking shall be located as shown on a new parking plan to be submitted by the Applicant. The Applicant shall be entitled to construct below grade spaces.

The developer challenges Conditions 3 and 14, which specify the number and type of parking spaces for the project. It also challenges the denial of its requested waiver of § VII.B.2 of the zoning bylaw. HD/MW proposes to construct 156 parking spaces for its 90 units, or 1.7 spaces per unit. Its witnesses, Mr. Burke and Dr. Dulaski, testified that the proposed number of spaces is reasonable. Exhs. 86, ¶ 11; 87, ¶ 4.

The Board argues that the development must comply with the local regulation requiring two parking spaces per unit for the Residence A zoning district (Condition 3) and its specific allocation of parking spaces (Condition 14). It argues that the parking space requirement is supported by public safety concerns and concern with preserving the integrity and amenity of the residential area. Its traffic engineer, Mr. Dirk, testified that two different parking requirements apply because HD/MW's project is located in both Residence A and Residence C districts. The zoning bylaw requires two parking spaces for each unit in the Residence A district and one parking space for each unit in the Residence C district. Exhs. 90, ¶ 6; 3, § VII.B.2. Mr. Dirk nevertheless testified he believed the more stringent requirement should apply because it would not be practical to enforce both requirements. He stated that two spaces per unit was consistent with ITE's observed peak parking demand for a suburban residential apartment community, 1.94

spaces per dwelling unit. Exh. 90, ¶ 6. He testified this requirement was designed to provide sufficient parking, ensure safe access and egress for all vehicles, reduce traffic congestion, and promote vehicular and pedestrian safety, as well as promote aesthetics and convenience. Exh. 90, ¶¶ 8-9. However, during his peer review of the project, Mr. Dirk agreed that 1.7 parking spaces per unit would afford sufficient parking to accommodate the parking demands for the residents and visitors of the development. He also acknowledged that ITE indicates that suburban apartment communities with limited access to public transportation have an average parking demand of 1.23 spaces. Tr. II, 124-25; Exhs. 32, pp. 11-12; 57, p. 13. Although Mr. Turner testified that this provision is intended to reduce traffic congestion, promote motorist and pedestrian safety, and preserve the amenity of the town's residential areas, he acknowledged that during his peer review, he concurred with Mr. Dirk's and HD/MW's view that 156 spaces for 90 units was acceptable. Exh. 91, ¶ 13; Tr. II, 169-70. Ms. Tougias' general testimony that Condition 3 is supported because it has design characteristics appropriate to the neighborhood, respects the environment and avoids excessive degradation of the site is too vague to credibly support the condition. Exh. 92, ¶ 4.

Mr. Dirk stated that the zoning bylaw, §§ VII and VII.H, support Condition 14's requirement of allocation of specific types of parking spaces, and the condition is consistent with ITE findings. Although this condition requires more than 2 spaces per unit, he stated that Condition 14 will ensure adequate handicapped access and address the need for adequate parking for residents and guests, given the prohibition of parking on Randolph Avenue, and the hazard of parking along the access driveway. Exh. 90, ¶ 11.

HD/MW also argues that Condition 14 establishes 80 parking spaces, exceeding the two parking spaces per unit required by the zoning bylaw. Mr. Burke stated that Milton approved 1.5 spaces per unit at 50 Eliot Street. Exhs. 86, ¶ 11; 81, p. 7.

The Board's argument that it is prudent to require two spaces to provide sufficient parking is negated by the requirement for the Residence C district of one parking space for each unit. Exh. 90, ¶ 6; Exh. 3, § VII.B.2. Mr. Dirk's testimony that, with two different parking requirements, the more stringent one should apply to the entire site, is not credible on this record. We find therefore that Condition 3 and the Board's refusal to waive the parking space requirements of § VII.B.2 are not supported by valid local concerns. Accordingly, this condition will be modified to require 1.7 parking spaces per unit. Condition 14 is modified to require a

comparable proportion of compact and handicapped parking spaces consistent with a total of 156 parking spaces.

3. Building Height

The Board denied the developer's request for a waiver from the 2Y2 or 35 feet maximum building height requirement in § V.A.I of the zoning bylaw. Exh. 76, p. 22. The Board's architect, Ms. Tougias, stated that, viewed from Randolph Street, Building 2, the larger building, will appear to be six stories. Tr. III, 153-57. She stated that the height and length of the proposed buildings are significantly larger than for the majority of residential structures in the town, and they will tower over the neighboring single-family homes. Exh. 92, ¶ 17.

HD/MW argues that the Board is subjecting the developer to unequal treatment in comparison to unsubsidized housing developments, because there are taller unsubsidized housing developments in Milton, including Milton Landing, which is six stories and has a height of more than 60 feet, and 50 Eliot Street, which has a height of 46 feet. Fire Chief Grant acknowledged there are taller buildings in Milton used for residential purposes, and in the hearing before the Board he testified that he did not believe there was a problem with the building height from a firefighting perspective. Exhs. 81, p. 1; 82; Tr. I, 63-64. Mr. Burke testified that the development's buildings will not tower over the neighbors' homes and will comply with side yard setbacks. Exh. 105, ¶ 32.

On this record, the Board has not established a valid local concern with regard to the denial of the building height waiver that outweighs the need for affordable housing. Accordingly the denial of the waiver from this requirement is overturned.

4. Architectural Style

> Condition 23. The design shall reflect the architectural styles of the surrounding neighborhood which is a mix of single family colonials, Victorians, and mid-century split levels.

Ms. Tougias testified that this condition is supported by design considerations and consistency with the style of the single-family homes in the neighborhood, stating that the proposed buildings are significantly larger than the majority of the residential structures in Milton. She stated that Milton Hill House on Eliot Street is approximately 175 feet long and 75 feet wide. Exh. 92, ¶17; Tr. III, 158.

The developer argues that this condition requires it to redesign the architectural style of its proposed buildings, which are two garden style buildings, from both an architectural and an engineering perspective. *See* Exhs. 19, 24, 29, 30. It argues that the Board did not submit evidence of a valid local concern to justify this condition or identify a local bylaw which governs the architectural style of the buildings or that this condition is imposed on unsubsidized housing developments. HD/MW's application notes that "[t]he properties adjacent to the development site are comprised of various architectural styles, primarily single family homes sided with wood shingles or clapboard…." For the proposed development, the developer plans "[t]wo colors of vinyl clapboard, divided horizontally with trim bands sit[ting] above a stone-veneer base to define the levels of the building and help create scale. The fenestration includes various types and sizes of large durable vinyl windows and patio doors, along with balconies to provide variety to the building surfaces." It also intends to break up the lengths of the buildings into sections defined by roofs and projecting building elements at the corners and along the facades to reduce the overall length of the building. Exh. 24-4. HD/MW argues that the buildings will contain traditional building elements that are consistent with the architectural style of the homes in Milton, including projecting bays, dormers, walk-out decks, porches, columns and mansard roofs.[29] While the intent of the condition appears to address a local concern for the advancement of design consistency in the neighborhood, we note that the neighborhood includes the abutting DPW property. The condition, itself, is not supported by an identified local regulation or bylaw, and is improperly vague and ambiguous, since it identifies three distinct historical styles, spanning different time periods of residential design. The Board has not shown a valid local concern that outweighs the need for affordable housing to support this condition. It is therefore struck.

5. Lot Frontage

Condition 9. The Applicant shall comply with the lot frontage requirements of the Milton Zoning Bylaw through the use of other adjacent property it owns.

HD/MW had requested a waiver of Zoning Bylaw, § VI.A.A, lot frontage requirements. Exh. 3. It challenges both the denial of the waiver and the imposition of Condition 9.

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[29] Although this issue was not within the scope of the Carlins' intervention, their brief includes a section on this issue. We do not consider their arguments as they are outside the scope of their permitted participation.

We agree with the developer that the Board has not presented a valid local concern to support this condition and waiver denial. Ms. Tougias' general testimony that this requirement is essential for public safety, to provide safe access to the property and that lot frontage is an important factor in Milton Planning Board consideration of multi-family developments does not credibly support the condition here. Exh. 92, ¶ 9. Dr. Dulaski testified that the proposed project was designed with the 24-foot access driveway to meet the maximum permitted width. He performed a TIAS that confirmed the project is designed consistent with accepted engineering principles and does not pose a safety risk. As he noted, the Board's witness, Mr. Dirk, did not dispute the findings during his peer review. Exhs. 106, ¶¶ 2-4, 9-10; 57. Accordingly, the Board has not demonstrated a local concern that outweighs the need for affordable housing to support retaining the lot frontage requirement and the comprehensive permit will be modified to grant this requested waiver and strike Condition 9.

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. HD/MW challenges a number of conditions as exceeding the authority of the Board and requests that these conditions be struck from the comprehensive permit.

A. Conditions Imposing Fees

Condition 41. If the Building Commissioner determines that it is necessary to hire consultants to assist with the review of the building plans and proposed water, stormwater and wastewater system plans and plumbing, gas and electrical inspections, the Applicant shall pay for the reasonable cost of such review and inspection.

Condition 55. The Applicant shall pay the costs of all inspections (as may be required by the Building Commissioner) to ensure compliance with state and local regulations.[30]

With regard to Condition 41, the Board argues that public health and environmental concerns support the fees, and that it is common to require developers to pay for the use of consultants to provide or assist with required inspections of large projects, as the work may exceed the resources of the Milton Inspectional Services Department, The Board relies on general testimony from Mr. Turner and Ms. Tougias that it is common to hire consultants to review plans for the building commissioner, but cites no local regulatory requirement. *See* Exhs. 91, ¶ 29; 92, ¶ 28. It argues this condition applies only if the building commissioner determines assistance is needed for inspections.

HD/MW argues that requiring the payment of fees for a second peer review or additional consultants after the issuance of the comprehensive permit exceeds the Board's authority and is beyond the scope of fees allowed in 760 CMR 56.05(5), which establishes permitted fees for the public hearing before the Board. It also opposes any peer review for a redesigned project, as it contends the Board lacks authority to redesign the project and thus require additional peer review of changes. It also argues that Condition 55 allows the building commissioner to charge any amount for any inspection he deems necessary. In its brief, the developer offers suggested language for a condition requiring it to pay all necessary inspection fees as set out in the Town's inspection fee schedule. HD/MW brief, Exh. 1, ¶ 16. *See* Exhs. 95, ¶ 15; 95-A. It argues it should not be required to pay any other fees.

We have typically prohibited boards from imposing fees that are not already established by regulation in a municipal fee schedule. Therefore, Conditions 41 and 55 are modified to provide that such other fees are imposed only if in compliance with municipal bylaws or regulations. In order to charge a particular fee, the Board is required to produce to HD/MW 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.

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[30] The Board proposes to eliminate Condition 65, addressing reimbursement of attorneys' fees and expenses. Therefore, this condition is struck.

B. Conditions Within the Province of the Subsidizing Agency

Condition 18. The Applicant shall execute a Permanent Restriction/Regulatory Agreement, in form and substance reasonably acceptable to the Board and Town Counsel (the "Town Regulatory Agreement"). The Town Regulatory Agreement shall be recorded with the Norfolk County Registry of Deeds prior to the issuance of a building permit for the Project. The Town Regulatory Agreement: (i) shall only become effective if and when the Regulatory Agreement with the subsidizing agency is terminated, expires or is otherwise no longer in effect and is not replaced with another regulatory agreement with another subsidizing agency; (ii) shall require that at least twenty five (25%) percent of the apartments in the project shall be rented in perpetuity to low and moderate income households as that term is defined in M.G.L. Chapter 40B, Sections 20-23; and (iii) shall in no event contain any provisions restricting or limiting the dividend or profit of the Applicant. While the Regulatory Agreement with the subsidizing agency (or one with another subsidizing agency) is in effect, the subsidizing agency shall be responsible to monitor compliance with affordability requirements pursuant thereto.

Condition 19. When the Town Regulatory Agreement takes effect, the affordability requirements shall be enforceable by the Town or its designee, to the full extent allowed by M.G.L. Chapter 40B, Sections 20-23. At such time as the Town becomes responsible for monitoring the affordability requirements for the Project, the Applicant shall provide the Town with a reasonable monitoring fee.

The Board argues that in the event the subsidizing agency's regulatory agreement ceases to be in effect, unless a town regulatory agreement is in place, Milton will be unable to enforce the affordability requirements for maintenance of the units on the Subsidized Housing Inventory (SHI) thereafter. Citing *Zoning Bd. of Appeals of Wellesley v. Ardemore Apartments Ltd. Partnership*, 436 Mass. 811, 825 (2002), it notes that developments are required to remain affordable as long as they benefit from the waivers from local requirements obtained in the comprehensive permit. *Ardemore* stated, "[u]nless 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." *Id.* at 825.

The developer argues that these conditions are unsupported by local concerns, exceed the Board's authority and interfere with the regulatory discretion of MassHousing, citing *Attitash Views, LLC v. Amesbury,* No. 2006-17 (Mass. Housing Appeals Comm. Oct 15, 2007 Summary Decision), which was affirmed by *Amesbury, supra,* 457 Mass. 748, 764-65. HD/MW argues that the Board submitted no evidence to support these conditions. We note the Board has provided no evidence regarding MassHousing's position with regard to this condition. *See Delphic Associates v. Hudson, supra,* No. 2002-11, slip op. at 8 ("We find that although the Board's interest in ensuring long-term affordability is a legitimate local concern, the Board has not met its burden of proving that protection from extinguishment of the affordability restriction on foreclosure outweighs the regional need for affordable housing"), citing 760 CMR 31.06(7);

Hanover, supra, 363 Mass. 339, 367. Similarly, the Board has not sought testimony or evidence regarding DHCD's position on such a condition. Since DHCD has established guidelines regarding regulatory agreements in the Local Initiative Project (LIP) context under Chapter 40B, its view of the Board's conditions would be important. Exh. 1 (*Guidelines*), § VI.

The Board has also inadequately briefed the issue of the responsibility of the subsidizing agency and the role of DHCD with regard to maintaining the affordability obligations under the regulatory agreement. According to the *Guidelines*, the purpose of a regulatory agreement "is to memorialize the rights and responsibilities of the parties" and provide "for monitoring of the project throughout the term of affordability." Exh 1, p. VI-10. Therefore, if it would be appropriate for continued monitoring of affordability after the termination of a subsidizing agency's role, it would be important to consider DHCD's role with regard to approving and executing regulatory agreements and maintaining oversight of them. *See* Exh. 1, pp. VI-10-12.

Finally, under *Attitash,* as confirmed by *Amesbury,* two considerations are in play: First, as we noted, it is important that the Board not "impinge on the regulatory responsibilities of the subsidizing agency," *Attitash, supra,* No. 2006-17, slip op. at 7. Additionally, a requirement to execute an additional regulatory agreement subject to the review and approval of the Board and Town counsel represents "the sort of condition subsequent requiring future review and approval [by the Board] of which we have frequently disapproved." *Id.* at 9. Therefore, on the record before us, the Board has not demonstrated that requiring HD/MW to execute and record an additional regulatory agreement with the Town in the fashion it has set out is within the authority of the Board. Accordingly this condition is struck.[31]

C. Conditions Subsequent Requiring Inappropriate Post-Permit Review

The parties are in agreement that conditions that merely require post permit review for consistency with the final comprehensive permit are proper. HD/MW challenges a number of conditions on the ground that they improperly require post permit review that goes beyond review for consistency with the comprehensive permit. In its brief, the developer submitted

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[31] In addition, the Board has not addressed whether Conditions 18 and 19 would create an additional affordable housing restriction under G.L. c. 184, §§ 31-32, and would require HD/MW to convey an interest in property in exchange for the grant of a comprehensive permit, or whether it would be within the Board's authority under Chapter 40B. *See 135 Wells Avenue, LLC v. Housing Appeals Comm.*, 478 Mass. 346, 356-57 (2017). Also, affordable housing restrictions held by a city of town must be approved by the Undersecretary of DHCD. G.L. c. 184, § 32.

proposed modifications to certain of these conditions that it is willing to accept. The Board similarly offered modifications to certain conditions. Where applicable, we have applied the modifications to the conditions.

In *LeBlanc II, supra*, No. 2006-08, slip op. at 7, we noted that inappropriate conditions subsequent "undermining the purpose of a single, expeditious comprehensive permit" shall be struck or modified, and that "[t]he 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." We stated that improper conditions subsequent are "conditions that reserve for subsequent review matters that should have been resolved by the Board during the comprehensive permit proceeding. Such conditions include, for example, those requiring new test results or submissions for peer review, and those which may lead to disapproval of an aspect of a development project." *Id.* at 7-8 and cases cited. "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." *Id.* at 8, *quoting Attitash, supra,* No. 2006-17 at 12.

> Condition 1. The Project shall be constructed in conformance with the Site and Architectural Plans ("Site Plans") to be submitted for Site Plan Review in accordance with this Decision. The final Site Plan is subject to review and approval for consistency with this Decision by the Building Commissioner. Certain sections of the final Site Plans are also subject to review for consistency with this Decision by other Town officials as set forth in the Conditions below. [32]

The Board argues that it is necessary for the building commissioner or other town officials, as appropriate, to review site plans for consistency with the permit. Joseph Prondak, the Building Commissioner, testified that site plan review is applicable to Chapter 40B and unsubsidized projects in Milton and Milton requires developers to submit detailed final site plans for review to ensure that the more detailed plans comply with the final permit. Mr. Holland

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[32] The Board proposes that Condition 20 should be deleted as duplicative of Condition 1. Therefore, Condition 20 is struck.

agreed he would not have a problem submitting site plans for review for the project ultimately approved. Exhs. 95, ¶¶ 5-6; 3, § VIII.D; Tr. I, 144-45. We agree that this sort of review for consistency with the final comprehensive permit is appropriate.

Condition 1 is modified to state:

> The Project shall be constructed in accordance with the Site Development Plans prepared by DeCelle Burke & Associates, Inc., revised May 29, 2015, Sheets 1-13, Exh. 59, as modified by this Comprehensive Permit. Final detailed Site and Architectural Plans ("Site Plans") shall be submitted to the Building Commissioner for review for consistency with the final Comprehensive Permit by the Building Commissioner or other Town officials or individuals with expertise to review the plans for consistency with the Comprehensive Permit.

The Board may assist the Building Commissioner in designation of the appropriate individuals or municipal departments to conduct the review. *See LeBlanc II,* No. 2006-08, slip op. at 7-8, App. at 2.

For this condition, as with all conditions and provisions in the final comprehensive permit, 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. 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).

> Condition 35. In connection with Site Plan Review, the Applicant shall submit updated Stormwater Designs and a proposed Operation and Maintenance Plan to the Department of Public Works for review and approval.
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> Condition 38. The Applicant shall provide a hydrological study confirming that the size of the culvert located under the driveway access is adequate for the anticipated water flow without increasing the potential for off-site flooding of abutting properties.[33]

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[33] We determined, in § IV.D.3, *supra,* that Condition 38 was struck on the ground that a valid local concern had not been demonstrated to support it. A condition requiring further hydrological testing falls squarely within the category of an improper condition subsequent, a condition that reserves for subsequent review matters that should have been resolved by the Board during the comprehensive permit proceeding. Condition 38 is struck on this basis as well. HD/MW, however, is required to comply with Condition 10(c), which requires the submission of documentation demonstrating the developer has addressed the issues relating to off-site flooding of abutting properties. *See* §§ IV.D.3, 4, *supra.*

> Condition 43. Prior to the filing of a building permit, the Applicant shall provide drainage plans to the Department of Public Works. Applicant shall be solely responsible for the costs of the installation of the drainage improvements.

HD/MW argues generally that these conditions also requires it to seek a new comprehensive permit determination from the Board. Mr. Turner testified that it is standard for the DPW to review stormwater designs and operations and maintenance plans. Exh. 91, ¶ 25. Joseph Lynch, DPW Director, testified that the DPW typically requires submission of final stormwater designs and proposed operation and maintenance plans and drainage plans to the DPW for review. He also testified that the costs of drainage improvements are typically paid for by the developer. He stated that the review is for consistency with the final comprehensive permit and with local, state and federal law. He also stated that the developer is required to submit the designs and plans under the National Pollutant Discharge Elimination System Program, given the property's proximity to wetlands. He stated this review was critical because preliminary plans submitted are often not detailed. He stated this procedure applies to unsubsidized housing as well as to Chapter 40B developments. Exh. 97, ¶¶ 7, 8, 11.

The Board argues that we have required developers to submit drainage plans when none were provided to the Board with the preliminary plans for the comprehensive permit proceeding. *See An-Co, Inc. v. Haverhill,* No. 1990-11, slip op. at 18 (Mass. Housing Appeals Comm. June 28, 1994) (developer's deferral of final calculations and engineering plans is basis for condition requiring their submittal), citing *John Owens v. Belmont*, No. 1989-21, slip op. at 11-14 (Mass. Housing Appeals Comm. June 25, 1992).

Although it argues that the Board has not met its burden with regard to Condition 43, and that the stormwater system complies with the 10 DEP standards and HD/MW has already submitted peer reviewed drainage calculations, citing Exhs. 65; 75, p. 1, the developer offers a modification of Condition 43, to require drainage plans prior to the commencement of construction, and it agrees to responsibility for the costs of installation of drainage improvements. HD/MW brief, Exh. 1, ¶ 10.

Since we have required the developer to provide revised plans that ensure that stormwater runoff from upgradient properties is not diverted to the Carlin property, HD/MW must submit those plans to the DPW for review, *see* note 34, HD/MW shall be required to comply with Conditions 35 and 43, which are modified to require review for consistency with the final comprehensive permit.

> Condition 26. The Applicant shall submit a revised Landscaping Plan with the Site Plans for Site Plan Review consistent with this Comprehensive Permit.

The Board argues that the Committee has upheld review of landscaping plans in *Owens, supra. See also LeBlanc II, supra,* App. at 19. The developer's proposed alternative condition, "[t]o the extent necessary, HD/MW shall submit ... updated landscaping plans for review to ensure consistency with the Committee's decision" effectively agrees with this condition. HD/MW brief, Exh. 1, ¶ 2. We will modify this condition to require the developer to submit updated landscaping plans with the Site Plans for review for consistency with the final Comprehensive Permit.

> Condition 36. The Applicant shall apply to the DPW for a "New Drain/Excavation in Right-of-Way" Permit prior to installation.

The Board argues that this is a requirement typically made on all new properties, even those that are not Chapter 40B projects. DPW Director Lynch stated that all new properties must apply to the DPW for such a permit. Exh. 97, ¶ 9. HD/MW points out that the Board has required it to obtain a separate permit, although, under Chapter 40B, individual permits are to be included in the one comprehensive permit issued by the Board. We agree with the developer. The Board has not demonstrated that this permit should be exempted from inclusion in the comprehensive permit. Therefore, this condition is struck.

> Condition 42. All designs for connection of the Project to the municipal water system and the municipal sewer system and the designs for stormwater management shall be subject to review and approval for consistency with this Decision and for compliance with the Town's technical requirements for water and sewer system connections and stormwater management by the Department of Public Works and the Building Commissioner.

HD/MW generally objects to this condition as a condition subsequent, and proposes a modification of this condition that excludes review for compliance with technical requirements. HD/MW brief, Exh. 1, ¶ 9. Building Commissioner Prondak testified that Milton requires all developers to submit designs for connections for municipal water and sewer systems, as well as for stormwater management, to the DPW for review, and he signs off on water and sewer connection designs after the DPW reviews and approves them. He noted that he views this condition as requiring him to review the designs for consistency with the final comprehensive permit. Exh. 95, ¶ 8. Accordingly, we will add a clarification that the review for technical requirements for water and sewer system connections and stormwater management is to be for consistency with the final comprehensive permit.

Condition 46. Prior to the issuance of a Building Permit, the Building Commissioner shall review the Site Plans for consistency with this Comprehensive Permit and the Applicant shall demonstrate to the satisfaction of the Building Commissioner that:

a. all Site Plans and landscaping plans have been reviewed by the Building Commissioner for consistency with this Comprehensive Permit;
b. the Applicant has submitted all plans to the Massachusetts Department of Transportation and has obtained any necessary approvals and permits for access on Randolph Avenue
c. the applicant has paid all reasonable fees for consultant review of site, building and water, stormwater and wastewater plans to ensure that this Project complies with this Comprehensive Permit and state and local requirements (except as waived by this Comprehensive Permit) and all reasonable consultant fees required by the Town for plumbing, electrical, and gas inspections. Inspection fees incurred after the issuance of the building permit shall be paid upon invoice.
d. the Applicant has initiated and participated in a pre-construction meeting to discuss the proposed construction schedule with its contractor and the Town, including but not limited to the Building, Public Works, Police and Fire Departments.
e. the Board of Health and the Building Commissioner have approved the Construction Management Plan.

Condition 48. Prior to commencement of construction and subject to approval by the Building Commissioner, the Applicant shall provide a Construction Management Plan that shall include but not be limited to: limit of work areas, the protection of abutting properties, the locations for storage of construction materials and equipment, dust and airborne particle control, security fencing, trash areas, earthwork calculations to determine earth and rock removal, the timetable for excavation and removal of ledge on the Site, if any, and the approximate number of necessary truck trips.

The Board argues that Conditions 46 and 48 are consistent with municipal practice and are necessary to ensure compliance with the comprehensive permit and town requirements. The Board correctly points out that construction management plans are typical for all projects, both those constructed under Chapter 40B and those not subsidized. Building Commissioner Prondak testified that Milton requires such a plan for developments like this one. Exh. 95, ¶ 11. HD/MW only makes general objections regarding post permit review and proposes specific modifications of aspects of this condition. We will modify these conditions to clarify that all approvals are for consistency with the comprehensive permit, with the exception of the Mass Department of Transportation review, and that fees referenced in the permit shall be those that are substantiated by applicable bylaw or regulation.

Condition 47. During construction, the Applicant shall conform to all local, state and federal laws regarding air quality, noise, vibration, dust and blocking of any roads. The Applicant shall at all times use reasonable means to minimize inconvenience to residents in the general area. The Applicant shall provide the Police Department with the name and 24-hour telephone number for the project manager responsible for construction. The hours for operation of construction equipment, deliveries and personnel shall be determined by the Building Commissioner. Any noise or traffic complaints during these hours will be investigated by the appropriate Town agencies and departments.

The Board argues that public safety, public health and environmental concerns support this requirement because of the location of the project in a thickly settled neighborhood bordering on a well-traveled state highway, as Ms. Tougias testified. Exh. 92, ¶ 32. Building Commissioner Prondak and Mr. Turner testified that the condition is a typical requirement in a construction management plan. Exhs. 95, ¶ 10; 91, ¶ 33.

HD/MW expresses concern that the building commissioner would exercise discretion regarding work hours for the project, and argues that Milton does not publish designated construction hours applicable to all construction projects, and this was not a condition imposed on some unsubsidized projects, citing to grants of a variance or special permit. Exhs. 2-3, 81-82. In light of the neighborhood and proximity of abutters, we consider this to be a reasonable condition with a modification to require that the building commissioner shall impose reasonable requirements for hours of operation.

> Condition 50. In the event of any off-site erosion or deposition, Applicant shall be given written notice of the problem and Applicant shall use best efforts to correct the situation. If for any reason a remedy is not implemented within one week of the day of notification, work on the Site shall cease and desist until such time as remedial measures are implemented, inspected, and approved by the Town.

HD/MW suggests modifying this condition to remove the second sentence. The Board argues that this is a typical condition it includes for all construction projects. DPW Director Lynch testified that Milton typically gives developers less than a week to remedy off-site erosion or deposition. Exh. 97, ¶ 12. We consider this a reasonable condition. It is retained.

> Condition 52. Prior to commencement of construction, the Applicant shall provide a blasting/drilling plan for review and approval by the Fire Chief and the Building Commissioner that includes methods to protect buildings, residents, pedestrians, and vehicles, and coordination with the DPW, the DOT and utility companies. All drilling and blasting pertaining to the Project and/or Site shall be in accordance with federal, state and local blasting permit laws and regulations and in accordance with the conditions contained thereto.

The Board argues that this is a typical condition, and even if the developer does not expect to perform any blasting or drilling, there may be a need if it encounters unexpected ledge. HD/MW argues that there will be no blasting or drilling on the site. It offers a modified condition providing that in the event it determines it is necessary to blast or drill, it shall provide a plan, consistent with the first sentence of Condition 52. HD/MW brief, Exh. 1, ¶ 14. We will modify this condition to require that, prior to the commencement of construction, the developer shall provide either the required blasting/drilling plan, or a statement certifying that there will be no blasting or drilling on the project site. Should it thereafter determine any blasting or drilling is

necessary, it shall promptly amend its blasting and drilling report to provide the required blasting/drilling plan.

> Condition 53. Prior to the issuance of the Certificate of Occupancy, the Applicant shall submit an as-built plan stamped by a Registered Professional Engineer in Massachusetts that shows all construction, including all utilities, grading and other pertinent features. This as-built plan shall be submitted to the Building Commissioner for approval and to the Board for its files. The Applicant shall also submit a letter from the Project architect and engineer stating that the building, landscaping and site layout comply with the Site Plans, the Stormwater Management Report, and the requirements of this Comprehensive Permit.

The Board argues that this is a typical and universally accepted requirement for all major projects, and some smaller ones. Exh. 95, ¶ 14. HD/MW argues generally that this condition is an improper condition subsequent and proposes a modification which would provide for filing the as-built plan and letter as described in Condition 53, but not require the building commissioner's approval. HD/MW brief, Exh. 1, ¶ 15. We will modify the condition to require that the as-built plan is to be reviewed for consistency with the comprehensive permit.

D. Other Conditions Challenged as Unlawful

> Condition 62. This Comprehensive Permit shall expire if construction is not commenced within three years from the date of [sic] this Comprehensive Permit becomes final as provided in 760 CMR 56.05(12)(c), and subject to the tolling provisions of 760 CMR 56.05(12)(c). The Applicant may apply to the Board for extensions to this Comprehensive Permit in accordance with 760 CMR 56.05(12)(c).
>
> Condition 63. If the Applicant revises any of the Plans (or any other materials listed in Item 2 hereof), it shall present the revised plans or other materials to the Board in accordance with 760 CMR 56.05(11).

The Board argues that these conditions are intended to reflect applicable law and has proposed a modification. HD/MW argues that Conditions 62 and 63 exceed the Board's authority because they restate the Committee's regulations in an inaccurate or incomplete manner, and therefore should be struck. HD/MW is correct that the Board has inaccurately characterized the Committee's regulations as they reflect only portions of the applicable regulations. Moreover, since they are intended to reflect the Committee's regulations, they are superfluous. Accordingly, Conditions 62 and 63 are struck.[34]

> Condition 56. If any part of this Comprehensive Permit is for any reason held invalid or unenforceable, such invalidity or unenforceability shall not affect the validity of any other portion of this Decision.

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[34] HD/MW did not challenge Condition 64 in its brief. However, we accept the proposed modification suggested by the Board in its brief and incorporate it into this decision.

HD/MW argues that this condition is unlawful because a comprehensive permit is not a contract, citing *Autumnwood, supra,* No. 2005-06, slip op. at 20 (striking condition that Board's conditions "supersede all other documents or agreements concerning the development"). The developer also suggests that this condition should be struck because the Committee has the power to render the entirety of the Board's decision moot. This provision is reasonable and is retained.

> Condition 58. The Board shall retain jurisdiction over the Project to ensure compliance with the terms and conditions of this Comprehensive Permit.

The Board proposes in its brief to eliminate this condition. Condition 58 is struck.

> Condition 60. Any person aggrieved by this Comprehensive Permit may appeal pursuant to the Act.

The Board proposes in its brief to modify this condition to provide "or a Comprehensive Permit ordered as a result of an appeal therefrom." Board brief, p. 75. HD/MW also proposes a modification of this condition. Since our standard decision provides for appeal of our comprehensive permit decisions, this condition is struck.

> Condition 61. Subsequent to the expiration of all applicable appeal periods and prior to the commencement of construction, the Applicant shall record this Decision with Norfolk County Registry of Deeds and shall provide the Board and the Building Commissioner with a copy of this Decision with the applicable recording information.

The Board proposes to amend Condition 61 to replace "Decision" with "Final Comprehensive Permit as defined by 760 CMR 56.05(12)(a)." HD/MW agrees to the recording requirement but proposes eliminating the requirement of providing a copy of the recording information to the Board and the building commissioner. HD/MW brief, Exh. 1, ¶ 18. We will retain the courtesy requirement to provide copies to the Board and building commissioner.

VI. Massachusetts Environmental Protection Act (MEPA) Requirements

The Board claims that the project is subject to review by the Executive Office of Energy and Environmental Affairs (EOEEA) under the Massachusetts Environmental Protection Act (MEPA), G.L. c. 30, §§ 61-62I, because the project will meet or exceed a MEPA review threshold – that the project is expected to alter 5,000 or more square feet (sf.) of bordering or isolated vegetated wetlands. *See* 301 CMR 11.03(3)(b)1.d. The Board argues that the access

driveway crossing over the bordering vegetated wetlands will cause temporary and permanent alteration of more than 5,000 sf.[35]

The proposed access driveway crossing across the wetlands will necessitate the alteration of bordering vegetated wetlands on the project site. *See* Exh. 59, p. 5. Mr. Burke, the project engineer, determined that the project, as proposed, will only alter 4,854 sf., of which 4,344 sf. would be permanently altered and 510 sf. would be temporarily altered during construction of the access drive. Exh. 86, ¶ 6. In his original design Mr. Burke proposed using two foot-wide hay bales for erosion control. Tr. IV, 124. His calculation of a total disturbance of 4,854 sf., however, did not include the area occupied by the hay bales as part of temporarily altered wetlands, and he acknowledged that had he included that area, the total area of alteration would have exceeded 5,000 sf. Tr. IV, 71.

Using Mr. Burke's proposed layout plan, the Board's engineer, Mr. Turner, measured total altered wetlands to be 5,233 sf., of which 4,339 sf. would be permanently altered. Exhs. 91, ¶¶ 3, 9; 59; Tr. II, 167-68. In response to Mr. Turner's pre-filed testimony, Mr. Burke modified his design to replace the hay bales with an erosion control barrier consisting of geotextile fabric attached to a welded wire fence mounted on steel staked posts along the work limit boundary where the bales of hay were to be laid, maintaining a total altered area of 4,854 sf. Exhs. 105, ¶¶ 4-5; 105-1. Mr. Turner agreed that replacing the hay bales with the geotextile barrier would reduce his calculation of 5,233 sf. of total altered wetlands by the area attributable to the hay bales to less than 5,000 sf. Tr. II, 164-68.

The Carlins argue that Mr. Burke's testimony that the impact on the wetlands would be less than 5,000 square feet is not credible, and that he professed ignorance and avoided answering questions designed to elicit an admission that the wetlands disturbance would be more than 5,000 sf. They challenge his credibility generally because he said he should be trusted although detailed information is not shown on the plans he prepared. Tr. IV, 70, 142.

Much of the temporarily impacted area shown on the grading and drainage plan consists of the area 2 to 2½ feet on either side of the roadway to the work limit boundary. Tr. IV, 70, 76; Exh. 59, p. 5. The Carlins' witness, Ms. Bernardo, testified that it would not be practical to

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[35] The developer argues that the Board cannot raise this issue as it was not included in the Pre-Hearing Order. Although the Board may have waived this by not including it in the Pre-Hearing Order, the Committee must comply with 760 CMR 56.07(5)(c).

expect that construction of the roadway would remain only within the proposed work area of only two feet on either side of the access driveway, as "the walls sit on a wall base and the box culvert beneath the walls will be keyed into footings that require excavation below the finished grade and will extend outward from the walls necessarily pushing the excavation further into the wetland resource area…." Exh. 102, ¶ 13. She estimated that the increase in width of the work area would cause a disturbance closer to four feet on either side of the retaining walls bringing the amount of disturbance over the 5,000 sf. threshold. Exhs. 102, ¶ 13; 59, p. 13.[36]

On balance, we conclude that Ms. Bernardo's testimony regarding the extent of the potential temporary disturbance to the wetlands is more credible than that of Mr. Burke. We conclude that the disturbance is close enough to the MEPA threshold that there is a reasonable likelihood that the disturbance will meet or exceed the MEPA threshold.

Accordingly, HD/MW shall either file an ENF with the EOEEA pursuant to 301 CMR 11.01(4)(a) or a request for an advisory opinion from the Secretary under 301 CMR 11.01(6) within 30 days of this decision, serving a copy thereof on the Committee. If applicable, pursuant to 760 CMR 56.07(5)(c), the comprehensive permit shall not be implemented until the Committee has fully complied with MEPA, and the Committee will retain the authority to amend our decision in accordance with the findings or reports prepared in accordance with MEPA requirements.

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[36] Condition 30's requirement for the access driveway to have five-foot sidewalks on either side of the driveway would also increase the total altered area of the wetlands. HD/MW also argues that Condition 29's required addition of a right-hand turn lane would increase the wetlands altered area, although it offered no citation or explanation.

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.

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. 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. 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.

3. 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 presently applicable local zoning and other bylaws 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 shall take whatever steps are necessary to ensure that a building permit is issued to the applicant, without undue delay, upon presentation of construction plans, which conform to the comprehensive permit and the Massachusetts Uniform Building Code.

4. The comprehensive permit shall be subject to the following further conditions:

(a) The development shall be constructed as shown on the site plans set out in prepared by DeCelle Burke & Associates, revised May 29, 2015, Sheets 1-13 (Exhibit 59), as modified by this decision.

(b) All construction shall comply with all Massachusetts and federal regulations and requirements concerning noise and vibration, and with similar local requirements. Local officials and residents may take whatever actions are normally taken to ensure enforcement of such requirements.

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

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

(e) The Board shall not issue any further decision that imposes further conditions.

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 or the Land Court within 30 days of receipt of the decision.

HOUSING APPEALS COMMITTEE

December 20, 2018

Shelagh A. Ellman-Pearl, Chair

Joseph P. Henefield

Marc Laplante

Rosemary Connelly Smedile

James G. Stockard, Jr.

Certificate of Service

I, Tanya J. Reynolds, Clerk to the Housing Appeals Committee, certify that this day I caused to be mailed, first class, postage prepaid, a copy of the within Decision in the case of HD/MW Randolph Avenue, LLC v. Milton Zoning Board of Appeals, No. 2015-03, to:

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