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

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

WEISS FARM APARTMENTS, LLC

v.

TOWN OF STONEHAM ZONING BOARD OF APPEALS

No. 2014-10

DECISION

March 15, 2021

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

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

WEISS FARM APARTMENTS, LLC, Appellant, v. TOWN OF STONEHAM ZONING BOARD OF APPEALS, Appellee.	)	No. 2014-10

DECISION

I. INTRODUCTION AND PROCEDURAL BACKGROUND

This is an appeal, pursuant to G.L. c. 40B, § 22, of a decision by the Town of Stoneham Board of Appeals (Board) granting a comprehensive permit with conditions to Weiss Farm Apartments, LLC (Weiss Farm). It is the final appeal before the Housing Appeals Committee regarding the proposed development that is the subject of the comprehensive permit. On June 30, 2014, Weiss Farm applied to the Board for a comprehensive permit to build a development consisting of 264 rental dwelling units in Stoneham. Exh. 1; Pre-Hearing Order, § II.1. Pursuant to 760 CMR 56.03(8), the Board invoked two safe harbors: (1) that the Town had achieved the general land area minimum under G.L. c. 40B, § 20 and 760 CMR 56.03(3)(b); and (2) that Weiss Farm had filed a "related application" under 760 CMR 56.03(1)(e) and (7)(a). After Weiss Farm notified the Board and the Department of Housing and Community Development (DHCD) of its objection to this determination, DHCD issued a letter that Stoneham was not entitled to either safe harbor. The Board filed the first appeal, an interlocutory appeal to the Committee pursuant to 760 CMR 56.03(8)(c). That appeal was denied on June 26, 2015 and we remanded

the matter to the Board for further proceedings.[1] By a decision filed with the town clerk on April 28, 2016, the Board granted a comprehensive permit for the construction of 124 units, subject to numerous conditions. Exh. 110.

On May 16, 2016, Weiss Farm filed the current appeal with the Committee.[2] Following the initiation of this appeal, the parties prepared a joint Pre-Hearing Order for approval by the presiding officer, who issued that order on January 19, 2017. When the Board expressed interest in reopening an aspect of the earlier safe harbor appeal, which had been already decided, Weiss Farm filed a motion in limine seeking to exclude all evidence relating to the safe harbor issue from this appeal.[3] By Order dated May 2, 2017, the presiding officer granted the motion in limine for the most part, but, in her discretion, denied the motion in part, leaving open the possibility only of the Board introducing "previously unavailable evidence that may be obtained by the Board with regard to the land area applicable to Department of Mental Health (DMH) and/or Department of Developmental Services (DDS) group homes" and affected general land area calculations. The Order also directed that "that the "Board shall proceed expeditiously to obtain this information in order to avoid delay of the scheduled hearing." *Id.*

The Board commenced a legal proceeding in Superior Court to obtain confidential group home information, and requested a postponement of the hearing on the comprehensive permit appeal pending the Superior Court action. That request was denied, and in November 2017, the Committee conducted a site visit and held three days of hearing to permit cross-examination of witnesses on all matters excepting any evidence regarding the group home information. The

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[1] *See Matter of Stoneham and Weiss Farm Apartments, LLC*, No. 2014-10 (Mass. Housing Appeals Comm. Decision on Interlocutory Appeal June 26, 2015) (*Stoneham I*), and § VIII, *infra*, for further discussion of the interlocutory appeal and the Board's safe harbor claims.

[2] It was during the current appeal of the comprehensive permit decision that Weiss Farm identified Robert Engler as one of its anticipated expert witnesses. Pursuant to Housing Appeals Committee Standing Order 2005-02, the presiding officer, by order dated October 28, 2016, directed Weiss Farm to file a statement explaining the relationship of Mr. Engler to the proposed project at issue and its position regarding the participation of Committee member James G. Stockard. Following the submission of those papers by the parties, Mr. Stockard recused himself from participation in this matter.

[3] The Board, in opposing, stated it was seeking court authorization to obtain confidential group home information to supplement evidence of land area containing affordable housing. In support of its request to reopen this issue, the Board contended that the success of another community's zoning board in obtaining confidential group home information under a court-imposed protective order warranted granting it the opportunity to seek the same.

presiding officer admitted a total of 131 exhibits into evidence (with certain duplicate exhibits removed). Because the court proceeding had not been concluded when the evidentiary hearing ended, the presiding officer postponed the filing of briefs until the record was complete as to any supplementation of the record regarding group homes. Thereafter on October 9, 2018, as discussed in more detail *infra*, in § VIII, the presiding officer determined the Board had not complied with the requirement to act with expedition in providing evidence concerning group home addresses, determined the record to be complete, and barred the Board from submitting further evidence regarding group homes and set a schedule for the submission of post-hearing briefs. The parties submitted post-hearing briefs and reply briefs by November 2018. In its post-hearing brief, the Board requested that a proposed decision issue to allow the parties the opportunity to provide objections and written argument. *See* 760 CMR 56.06(7)(e)(9); G.L. c. 30A, § 11(7). A proposed decision was issued and the parties were invited to submit any objections and comments with respect thereto. Both parties submitted responses and specific objections, some of which we incorporate into this final decision.

It is important to note at the outset that for a number of issues, the parties' briefing did not submit sufficient argument in , particularly for a case such as this in which the record is voluminous, and the parties litigated dozens of the very large number of conditions imposed by the Board. In such complicated cases, our requirement that parties make clear in their briefs those issues that remain in dispute at the end of evidentiary hearing is especially important. We have a longstanding rule, consistent with court practice, that failure to submit evidence or argument on any issue constitutes waiver of that issue in proceedings before Committee. *See, e.g., Oceanside Village, LLC v. Scituate*, No. 2005-03, slip op. at 33 (Mass. Housing Appeals Comm. July 17, 2007); *White Barn Lane, LLC v. Norwell*, No. 2008-05, slip op. at 31 (Mass. Housing Appeals Comm. July 18, 2011); *Washington Green Dev., LLC v. Groton*, No. 2004-09, slip op. at 3 n.2 (Mass. Housing Appeals Comm. Sept. 20, 2005), *An-Co, Inc. v. Haverhill*, No. 1990-11, slip op. at 19 (Mass. Housing Appeals Comm. June 28, 1994). *See also Okoli v. Okoli*, 81 Mass. App. Ct. 371, 378 (2010), citing *Lolos v. Berlin*, 338 Mass. 10, 14 (1958); *Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85 (1995). *Okoli* emphasized that the obligation to provide argument includes an "implicit duty to assist the court and provide appropriate citations of authority." *Id.*, 91 Mass. App. Ct. at 378, citing *Bruno v. Seymoure*, 1 Mass. App. Ct. 857 (1973). It is incumbent on both parties to provide the Committee with sufficient argument in their briefs

regarding the issues identified in the Pre-Hearing Order that they continue to assert, particularly as to those matters on which they bear the burden of proof. Moreover, that argument, to be sufficient to aid us in our consideration of their positions, must specifically reference the pertinent evidence in the record, and include appropriate citations to relevant specific legal authorities, as well as sufficient analysis of those authorities.

Although the parties' conclusory or otherwise inadequate arguments [4] have made our task more difficult, in the interest of providing clarity with respect to certain aspects of our decision, in some instances we have decided issues that we might have considered waived. Parties in future cases should not rely on our doing the same.

II. FACTUAL BACKGROUND

Weiss Farm received a determination of project eligibility under the New England Fund Program of the Federal Home Loan Bank of Boston, dated June 23, 2014, from the Massachusetts Housing Finance Agency (MassHousing) pursuant to 760 CMR 56.04. Exh. 1, Tab 4; Pre-Hearing Order, § II.6. Weiss Farm initially proposed to build 264 rental dwelling units on a 25.657-acre parcel of land located at 170 Franklin Street in Stoneham to be called The Commons at Weiss Farm. Weiss Farm filed its application for a comprehensive permit with the Board on June 30, 2014. At some point during the application process, the number of proposed units was reduced to 259 units. *See* Exh. 29 (pro forma for 259-unit proposed project).

The project site is located in a Residence District "A" zoning district in Stoneham. Exh. 110, p. 1. Approximately 14 acres consist of upland. Exh. 113, ¶ 11. Weiss Farm states the principal project area will be sited on only a portion of the property, on approximately 10.2 contiguous upland acres located near the center of the property. Exh. 113, ¶ 12. Weiss Farm

[4] For example, in the Pre-Hearing Order, the Board provided only general citations to various local bylaws and regulations, and did not identify the specific provisions within those documents that were applicable to support its position; nor did it provide arguments in in its brief addressing the specific alleged local concerns, or legal authority supporting conditions, to show why such local requirements and requirements applied at the project site.

Similarly, Weiss Farm cited conditions and waiver denials generally in its brief, but many times afforded only conclusory statements applicable to multiple conditions, rather than explaining the reason for its particular challenges. With regard to economics, it failed with certain conditions to identify that an economic impact contributed to rendering the project as approved uneconomic. With respect to lawfulness and unequal treatment challenges, it failed to provide argument sufficiently specific to particular conditions. Arguments raised in the comments and objections to the proposed decision are not adequate to make up for the failure to argue in the post-hearing briefs.

plans to build three five-story apartment buildings, five townhome buildings, a parking garage and associated parking, a maintenance building, and a clubhouse with an outdoor swimming pool, walkways, and driveways. *Id.* The project site is located along the north side of Franklin Street. Existing structures on the site include the Weiss Farm family home and several barn buildings. Exh. 1, Tab 11, Sheet C-1. Franklin Street is a public road with two travel lanes at the proposed project entrance site. Exh. 110, pp. 19-20. The proposed entrance will be located west of the existing Weiss Farm entrance. Exh. 1, Tab 2, p. 1.

The 10.2-acre site development area is bounded on the east, north, and west by wetlands. Exh. 126, ¶ 33. A drainage ditch was excavated on the easterly side of the property, running roughly north and east, and forms a partial boundary to the 10.2-acre development area. Exh. 123, ¶ 17. A weir dam is located in the drainage ditch on the site, approximately 600 feet north of Franklin Street. A watershed on the north side of Franklin Street flows to two different culverts under Franklin Street: an 18-inch culvert located at the southeast corner of the property, and a 36-inch culvert located approximately 1,200 feet to the west of the property. Exh. 123, ¶ 19. A pump station is located near Franklin Street at the easterly end of the property, consisting of an approximately 6-foot by 7-foot wood structure. The existing pump is regulated by an on/off float system which automatically activates the pump when water reaches a certain elevation, and pumps water from the drainage ditch to the 18-inch culvert under Franklin Street. Tr. II, 77; Exhs. 126, ¶ 33; 123, ¶ 18; 66, pp. 2-4.

III. ECONOMIC EFFECT OF THE BOARD'S DECISION

A. Standard of Review

When a developer appeals a board's grant of a comprehensive permit with conditions and requirements, the ultimate question before the Committee is whether the decision of the Board is consistent with local needs. Pursuant to the Committee's procedures, however, there is a shifting burden of proof. The appellant must first prove that the conditions and requirements in the aggregate make the construction or operation of the housing uneconomic. *See* 760 CMR 56.07(1)(c)1, 56.07(2)(a)3; *Board of Appeals of Woburn v. Housing Appeals Comm.*, 451 Mass. 581, 594 (2008); *Falmouth Hospitality, LLC v. Falmouth,* No. 2017-11, slip op. at 3 (Mass. Housing Appeals Comm. May 15, 2020); *Haskins Way, LLC v. Middleborough,* No. 2009-08, slip op. at 13 (Mass. Housing Appeals Comm. Mar. 28, 2011). Weiss Farm alleges that

numerous conditions and denials of waivers in the Board's decision cumulatively render the project uneconomic because it cannot achieve a reasonable financial return on this project as conditioned by the Board. It 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 claims Weiss Farms has not met its burden.

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

760 CMR 56.02: *Uneconomic; see also* 760 CMR 56.05(8)(d); Exh. 112 (Guidelines), p. I-5.

Pursuant to the comprehensive permit regulations, we have first applied the Guidelines' methodology for analyzing "reasonable return" for a rental housing project, a Return on Total Cost (ROTC) analysis. 760 CMR 56.02: *Reasonable Return*.[5] Exh. 112, pp. I-5, I-7. This ROTC methodology establishes the minimum reasonable return (the economic threshold). If, as occasionally is the case, the ROTC of the development as proposed in the developer's application for a comprehensive permit is also below the economic threshold established by the Guidelines, which we have termed "uneconomic as proposed," developers are required to show more: specifically, that the Board's conditions render the project significantly more uneconomic

[5] 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.

than the project proposed. *See Falmouth, supra,* No. 2017-11, slip op. at 4; *Autumnwood, LLC v. Sandwich,* No. 2005-06, slip op. at 3, n.2 (Mass Housing Appeals Comm. Decision on Remand Mar. 8, 2010); *511 Washington Street, LLC v. Hanover*, No. 2006-05, slip op. at 9, 12-14 (Mass. Housing Appeals Comm. Jan. 22, 2008); *Cirsan Realty Trust v. Woburn*, No. 2001-22, slip op. at 3 (Mass. Housing Appeals Comm. Apr. 23, 2015); *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). This burden is well-established consistent with both Committee precedent and the comprehensive permit regulations.

The Board challenges this application of Chapter 40B's uneconomic analysis. It argues Weiss Farm failed to establish that the conditions imposed by the Board render the project "uneconomic" because the project, as proposed, was already uneconomic. The Board argues the terms "more uneconomic" or "substantially" or "significantly more uneconomic" do not appear in Chapter 40B or its regulations, and therefore the Committee has unlawfully created a new legal standard. It argues that if the proposed development is already uneconomic, an appellant can only show that the project has been made more expensive, rather than showing that conditions render the project uneconomic. Board brief, p. 19. To follow the Board's argument further, a "more expensive" project has no significance under Chapter 40B; thus, the developer has failed to meet its burden.

Weiss Farm counters that a developer may submit an application in which a project is uneconomic as proposed under the subsidizing agency's guidelines. *See* Weiss Farm reply brief, p. 8, citing *Paragon Residential Properties, LLC v. Brookline*, No. 2004-16, slip op. at 38 (Mass. Housing Appeals Comm. Mar. 26, 2007); *Cozy Hearth Community Corp. v. Edgartown*, No. 2006-09, slip op. at 5, n.3 (Mass. Housing Appeals Comm. April 14, 2008); *Avalon Cohasset,* slip op. at 13.

These cases show our longstanding understanding that "a developer may choose to pursue a project that would return a lower profit, even though it is 'uneconomic' within the meaning of Chapter 40B." *Paragon,* slip op. at 38. In *Cozy Hearth,* we noted that "[u]nder 760 CMR 56.04(6), the issuance of a project eligibility letter by MassHousing ... constitute[s] conclusive proof that [a developer] meets the site control, fundability and limited dividend or non-profit organization requirements." *Cozy Hearth, supra,* slip op. at 5 n.3. The comprehensive permit regulations require that the subsidizing agency, as part of its project eligibility

determination, review the applicant's pro forma and make a finding that the proposed project appears "financially feasible within the housing market in which it will be situated" and that it "appears financially feasible and consistent with [DHCD's] guidelines for Cost Examination and Limitations on Profits and Distributions." 760 CMR 56.04(4)(d), 56.04(4)(e).[6] The return calculated in conjunction with the project eligibility letter issued by the subsidizing agency therefore establishes the financial feasibility of the proposed project.

The pro formas for the proposed project and for the project as approved submitted for the hearing before the Committee are based on data as of the date of the issuance of the pre-hearing order. Exh. 120, ¶ 2. That ensures a direct comparison of costs for the proposed project and the conditioned project. Thus, if the proposed project's ROTC is below the Guidelines' economic threshold, we compare the ROTC of both pro formas to determine whether the project is uneconomic. It is not uncommon for the economics of a proposal to change somewhat between the date of the project eligibility letter and our hearing date. In addition, the "uneconomic" standard that we apply is a technical standard that is not necessarily the same as the financial analysis used by the developer in making business decisions. For these reasons, and because the developer has already invested considerable time and money in the project, the developer may choose to move forward with a proposal that is technically "uneconomic."

Weiss Farm received a project eligibility letter from MassHousing dated June 23, 2014 that determined its proposed project of 264 units was "financially feasible." Exh. 1, Tab 4.[7] Therefore, Weiss Farm met the baseline "financial feasibility" for the rental project at the time of the issuance of the project eligibility letter. The Committee thus may consider whether the Board's conditions render Weiss Farm's project—a project that is uneconomic as proposed under the Guidelines—significantly more uneconomic. In our cases we have required more than a nominal decrease in ROTC under these circumstances, under both the current comprehensive permit regulation, as well as the predecessor regulation, cited in the *Brookline* and *Avalon Cohasset* cases. Consistent with these decisions and others assessing the economics of a board's

[6] S*ee also* 760 CMR 56.02(c), which provides that a "reasonable return" on a project may be established as the rate of return determined to be feasible in the project eligibility letter provided by the subsidizing agency.

[7] As noted above, the proposed project was eventually reduced to 259 units.

decision, we require that when the ROTC of the proposed project, as of the date of the issuance of the Pre-Hearing Order, is below the Guidelines' economic benchmark, the project as conditioned by the Board's decision must have an ROTC significantly below that of the project as proposed.

B. The Developer's Presentation

In its brief, Weiss Farm argues generally that "[b]y approving less than half the number of requested units, and by adding in excess of 172 conditions and denying almost all the requested waivers, Stoneham has made this project more uneconomic than it was as originally submitted."[8]Weiss Farm brief, p. 9.

1. The Developer's Witnesses

In support of its claim that the decision renders the project uneconomic, Weiss Farm relies on the testimony of several witnesses, primarily Peter Mahoney, a senior project director for John M. Corcoran & Company and Weiss Farm's project director for this project, and Robert Engler, its economic consultant, as well as other witnesses who testified regarding the costs associated with the Board's conditions. Weiss Farm cited numerous conditions in the pre-hearing order the parties prepared, but did not follow up in its post-hearing brief by submitting argument respecting each of those conditions. Conditions not specifically identified in the brief are not before the Committee.

Peter Mahoney testified he oversaw the underwriting, cost estimating, design, and permitting, among other things, for the project. Exh. 116, ¶¶ 1, 5.[9] He testified he has been involved in the construction of over 950 residential units, giving him extensive knowledge of the multifamily development process. Exh. 116, ¶¶ 2, 3. He reviewed the Board's decision and

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[8] For ease of reference in the Pre-Hearing Order, the parties divided the challenged comprehensive permit conditions relating to the economics of the project into three groups:

- Group A Conditions (under heading "VI. Grant of Permit and Conditions Thereto");
- Group B Conditions (under heading "Conditions Precedent to Commencement of Project"); and
- Group C Conditions (under heading "Conditions Precedent to Marking Application for Building Permits").

We refer to these conditions by including their group categorization, *e.g.*, Group A Condition 10, Group B Condition 20, and so forth. We follow this convention with regard to conditions challenged on other grounds as well.

[9] The principals of Corcoran are the primary members of the project's development team. Exh. 1, Tab 2.

evaluated the economic impacts of the conditions imposed, specifically those limiting the density, height, and massing of the development, and those pertaining to traffic, site layout, and civil engineering. Exh. 116, ¶ 9. As explained in more detail below, he testified that Group A Conditions 10, 22–25, Group B Conditions 10, 60–65, 75, 79, 80, 83, and Group C Conditions 12, 13, 24–27, 30, 33, 43, 45, and 46, adversely affected the project's economics, rendering it significantly more uneconomic than as proposed by Weiss Farm. Exh. 116, ¶¶ 15(a)–(o). He testified that these conditions were vague and conflicting, and would increase project costs due to delay and uncertainty. *Id*. He also reviewed the waiver denials in Appendix B of the Board's decision, and testified the Board's withholding of necessary local approvals without justification will create additional costs due to delays and financial uncertainties. Exh. 116, ¶¶ 16(a)-(f).

James White, P.E., a registered professional civil engineer and project manager, was retained by Weiss Farm to assist in the design and permitting of the project. Exhs. 123, 124. He testified he has extensive experience in site planning and engineering of multifamily apartment developments, including many that have been approved through Chapter 40B. Exh. 123, ¶ 9. He visited the project site numerous times in his role as project manager, researched the area and site history, and reviewed the various development plans, reports, and analyses submitted by the parties. Exh. 123, ¶¶ 10, 12, 13, 14, 16, 17, 20. Mr. White specifically addressed the conditions relating to stormwater management and how they would impose additional costs. Exh. 123, ¶¶ 40–61 (referring to Group B Conditions 29-34, 36-43, 45-47, 50-55, 71-72 and 85). The total of additional costs Mr. White identified in his pre-filed testimony as necessarily incurred by the Board's decision is approximately $483,000 to $518,000. *Id*.

Dennis J. Lowry, a senior wetland ecologist and wetland scientist for Weiss Farm, testified regarding the project's wetland resource areas and the project's compliance with state and local wetlands protections regulations. Exh. 113. He testified he has served as a consulting wetland ecologist for over forty years, working on hundreds of projects involving wetlands and permitting at local, state, and federal levels. Exh. 113, ¶ 1. He reviewed the Stoneham Wetlands Protection Bylaw,[10] the state Wetlands Protection Act, and various administrative consent orders. Exh. 113, ¶¶ 4–10. He testified that he found Group B Conditions 50 through 55 would

[10] Chapter 11 of the Stoneham Town Code. Exh. 113, App. A.

significantly increase project costs, but did not assign a numerical value to these expected costs. Exh. 113, ¶¶ 16–34.

Robert Engler, a consultant for Weiss Farm, is a manager of SEB, LLC, a real estate development and consulting firm that specializes in the permitting and development of mixed income and affordable housing under G. L. c. 40B. Exh. 119, ¶ 1. He testified he has worked in over 150 Massachusetts communities regarding the permitting over 15,000 housing units over the past 40 years. Exh. 119, ¶ 1. He provided financial analysis of the project costs and revenues, as well as the financial impact of the conditions imposed by the Board. Exh. 119, ¶ 2. He testified he reviewed the project development and operating budgets and he reviewed the site development and construction costs estimates prepared by Callahan Construction, a general contractor and construction manager that had provided a cost estimate to Mr. Mahoney, including estimates for site costs and vertical development costs of the project as proposed and as conditioned by the Board. Exh.119, ¶ 6; *see* Exh. 116. Mr. Engler described Callahan as a "highly experienced and reputable contractor." Exh. 120, ¶ 6. Mr. Engler applied estimates from Callahan for hard costs and estimates from Corcoran and his own expertise for soft costs, applying his experience to evaluating these costs. Tr. I, 160.

2. Conditions Challenged

Weiss Farm argues in its brief that "by adding in excess of 172 conditions and denying almost all the requested waivers, Stoneham has made this project more uneconomic than it was as originally submitted." Weiss Farm brief, p. 9. In its brief, Weiss Farm did not address each of the individual conditions it alleges contribute to the uneconomic condition of the approved project. *See* discussion, *supra,* in § I. With respect to the following conditions, it provided, in testimony, evidence of the asserted financial cost of the conditions. Unless stated otherwise, the estimated costs asserted by Weiss Farms listed below went unchallenged. For those conditions and waiver denials for which the Board did not provide alternate estimates of costs, we accept Weiss Farm's costs of compliance with the conditions. We address specifically below those instances in which the Board submitted argument regarding the developer's estimates.

a) Project Size

Reduction in Units. The Board's reduction of the number of permitted units from the proposed 259 to the permitted 124, Group A Condition 25, p. 21, is the primary condition

challenged by Weiss Farm as rendering the project uneconomic. Exh. 110. Weiss Farm alleges this condition alone renders the project substantially more uneconomic, because it lowers the overall return to project investors by over 25 percent. We find this condition substantially contributes to the change in the return on total cost of the project from the proposed to the conditioned project.

b) Snow Management

Snow Storage Plan. The Board's decision rejected the snow management plan for placement of plowed snow "proximate to, if not within, wetland buffer zones." Exh. 110, p. 26 (Group B Condition 22). Group B Condition 72, p. 42, prohibits the storage of snow within wetland buffer zones. Mr. White, Weiss Farm's stormwater management and wetland resource areas expert, testified that to comply, the snow would need to be trucked off site, adding an estimated $10,000 per snow storm. Exh. 123, ¶ 59. Mr. Houston, P.E., the Board's civil engineering expert, testified Weiss Farm submitted no documentation for this cost assessment, and that if snow did have to be removed, the cost would most likely vary based on the amount and accumulation of snow. Exh. 126, ¶ 68. Based on the record, even if costs of snow removal are varied, we accept the testimony of Mr. White as a general estimate of costs associated with removal of snow.

c) Stormwater Management

The following table sets out the stormwater management conditions and the economic impact of each provided by Weiss Farm's witness testimony. For these conditions, the Board provided no evidence to counter that of the developer and we accept the developer's testimony.[11]

Group B Conditions	Description	Estimated Cost	Testimony
Condition 29, p. 29	Expanded Stormwater Runoff Analysis	$15,000-20,000	Exh. 123, ¶ 41
Conditions 30, 31, 34, and 36, pp. 29-30	Additional Engineering Reports	$40,000	Exh. 123, ¶ 42
Condition 33, p. 29	Runoff Analysis	$5,000	Exh. 123, ¶ 44
Condition 37, p. 30	Quantification of Tributary Areas	$15,000	Exh. 123, ¶ 45.

[11] In this and subsequent sections, the tables setting out conditions and costs with citations reflect those conditions for which the Board provided no evidence to counter that of the developer, and for which we accept the developer's witness testimony as credible.

Condition 38, p. 30	Additional Discharge Modeling	$10,000	Exh. 123, ¶ 46
Conditions 39-40, pp. 30-31	Pump Station	$100,000	Exh. 123, ¶ 47
Condition 41, p. 31	Additional Test Pits	$5,000	Exh. 123, ¶ 48
Condition 43, P. 31	Open Space Area	$60,000-80,000	Exh. 123, ¶ 50
Condition 53, p. 39	Access Roadway to Pump Station	$40,000	Exh. 123, ¶ 55
Group C Conditions	**Description**	**Estimated Cost**	**Testimony**
Conditions 45-47, pp. 31-32	Infiltration/Detention Systems	Additional unspecified costs	Exhs. 123, ¶ 51; 124, ¶ 36

Although the Board argues that these assertions were not supported, Mr. White credibly testified that the above conditions relating to stormwater management would add additional costs.[12]

d) Wetlands

The following table sets out costs of conditions we find the developer has demonstrated as credible.

Group B Conditions	**Description**	**Estimated Cost**	**Testimony**
Condition 50, pp. 36-37	Stockpile Removal/Soil Evaluation	$25,000	Exh. 123, ¶ 52
Condition 51, p. 38	Concrete Debris Removal	$60,000-$70,000	Exh. 133, ¶ 22; Exh. 123, ¶ 53[13]
Condition 52, p. 38	Drainage Study	$10,000	Exh. 123, ¶ 54

[12] Mr. White testified that the revised operation and maintenance plan, required by Group B Condition 32, p. 29, was already provided and included the required information about the existing weir dam. Exh. 123, ¶ 43. He did not provide an estimated additional cost. He further testified that the incorporation of low impact design into the project's site design, required by Group B Condition 42, has already been done, but again did not provide a specific estimate as to added costs or a clear statement that this condition would increase costs. Exh. 123, ¶ 49.

Although Weiss Farm argues generally that this condition, among "everything under the sun" conditions, contributes to making the project uneconomic, Weiss Farm Brief, p. 30, we do not find Condition 42 contributed to the uneconomic condition of the project as the argument is unsupported by evidence. We note that both Mr. White and Mr. Houston acknowledged that low impact design techniques have been incorporated into the design to some extent. Exhs. 123, ¶¶ 34, 49; 126, ¶ 60.

[13] The Board's only challenge to the estimated costs of the concrete debris removal was that Mr. White provided no documentation of his estimates. Exh. 126, ¶ 64.

Condition 54, p. 39	Dam Maintenance/Mitigation Measures	$8,000	Exh. 123, ¶ 56
Condition 55, pp. 39-40	2015 Conservation Commission Enforcement Order	Additional unspecified costs	Exh. 123, ¶¶ 52-56; 57

Therefore, regarding the foregoing stormwater and wetlands conditions—Group B Conditions 29-31, 33-34, 36-41, 43, 50-55, and Group C Conditions 45-47, as listed in §§ III.B.2.c. and d., *supra*—we find the expert testimony provided by Weiss Farm witnesses to be credible and accept it.

e) Vehicular and Pedestrian Traffic Safety and Parking

The following table sets out costs of conditions we find the developer has demonstrated are credible.

Group B Conditions	**Description**	**Estimated Cost**	**Testimony**
Condition 57, p. 40	Additional Traffic Signals	$5,000 per intersection	Exh. 127, ¶ 33
Condition 59, p. 40	HAWK Pedestrian Crossing	No specific estimate given	Exh. 127, ¶ 15
Condition 71, p. 42	Sidewalk Width	$30,000	Exhs. 123, ¶ 58; 124, ¶ 39

Second Site Access Point. Group B Condition 75, p. 42, requires the creation of a second site entrance off of Franklin Street for regular or emergency access. Mr. Mahoney testified this will force the developer to incur substantial soft costs in acquiring additional land and road design and hard costs of actual construction. Exh. 116, ¶ 15(h). The Board counters that Weiss Farm provided no cost estimate for the creation of a second site entrance, and argues a second site entrance will require "minimal effort," because Mr. Houston, the Board's engineering expert, stated it requires only extending access from the existing parking lot approximately 20-25 feet. Tr. II, 140-142. He did not provide his own cost estimate for this work. Tr. II, 142. Although Weiss Farm did not quantify the cost, we find credible and accept the testimony that there will be additional costs contributing to the financial impact of the Board's decision

Parking Ratio. Group B Condition 76, p. 42, requires the submission of a parking plan outline to be implemented if parking demand exceeds supply. The condition also notes that a parking ratio of 1.8 is "desirable." The Board refused to grant a waiver from the Zoning Bylaw's

requirement of a parking ratio of 2.1 spaces per unit. Mr. Mahoney testified that accommodating a parking ratio higher than 1.66, the ratio it seeks, such as 1.8, will add significant costs, although he did not provide a specific estimate. Tr. 1, 77-78. The Board argues Weiss Farm did not provide any alternative development scenarios with a cost analysis for a parking ratio of 1.8, or ratios higher than 1.66, to demonstrate they would significantly add to the project's costs. Tr. 1, 77–78. Although Weiss Farm did not quantify the cost, we find credible and accept the testimony that there will be additional costs contributing to the financial impact of the Board's decision.

f) Site Preparation

Regrading. Group C Condition 12, p. 46, prohibits regrading of the site that results in any finished slope exceeding 25 percent in fill (4:1) or 33 percent in cut (3:1). Mr. White stated this will add an estimated $20,000. Exh. 123, ¶ 61: *see also* Exh. 116, ¶ 15(k) (Mr. Mahoney stating this condition will have additional unenumerated associated costs). The Board argues Weiss Farm has provided no supporting cost estimate data detailing how this condition will incur significant extra costs. Tr. 1, 83. We accept the testimony of Mr. White as credible that there will be additional costs contributing to the financial impact of the Board's decision.

Blasting. Group B Conditions 79-80, and 83, p. 43, relate to on-site blasting, earth removal and rock crushing. They require a surety (79); allow blasting only if no other financially feasible option is available (80); and require final plans to address any anticipated impacts to abutters (83). Mr. Mahoney testified these conditions are vague and ambiguous and therefore will add to the project's costs because of the additional work required, and they leave the "door open to interpretation" as to additional future work that may be required. Tr. 1, 82; Exh. 116, ¶ 15(j). The Board argues Weiss Farm has provided no specific cost estimates in the record. Although Weiss Farm did not quantify the cost, we find credible and accept the testimony that there will be additional costs contributing to the financial impact of the Board's decision.

g) Sewer

The following table sets out costs of a condition we find the developer has demonstrated as credible.

Group B Conditions	Description	Estimated Cost	Testimony
Condition 85, p. 43	Sanitary Sewer Pump Station	$30,000	Exh. 123, ¶ 60

h) Fees

Group C Conditions 24-27, pp. 48-49, and Condition 33, p. 49, require Weiss Farm to pay certain costs to the Town or pay certain deposits. Fees and expenses required to be paid by Weiss Farm include Board expenses for monitoring construction, an advance deposit prior to any clearing or grading, and the posting of a performance guarantee. Condition 33 requires payment of fees for engineering reviews. Weiss Farm argues, citing testimony of Mr. Mahoney, that this would provide no limits to the Town's ability to charge fees and expenditures, and will only cause delay and excessive additional, unnecessary project costs. *See* Exh. 116, ¶ 15(l), (n). The Board argues Weiss Farm has not provided any cost estimates in the record to support its assertions. Tr. 1, 86-87. Although Weiss Farm did not quantify the costs, we find credible and accept the testimony that there will be additional costs contributing to the financial impact of the Board's decision.

i) Conditions Without Specific Amounts of Additional Costs Alleged

The following table sets out conditions we find the developer has demonstrated will contribute to the costs of the Board's decision.

Group A Conditions	**Description**	**Estimated Cost**	**Testimony**
Condition 10, p. 17	Sand and Gravel Removal	Additional unspecified costs	Exh. 116, ¶ 15(a)
Conditions 22(a) and 22(b),[14] p. 18	State and Federal Approvals	Additional unspecified costs	Exh. 116, ¶ 15(c)
Conditions 23-24, pp. 18-19	State and Federal Approvals	Additional unspecified costs	Exh. 116, ¶ 16
Group B Conditions	**Description**	**Estimated Cost**	**Testimony**
Conditions 60-65, p. 41	Revised Plans	Additional unspecified costs	Exh. 116, ¶ 15(g)
Group B Conditions	**Description**	**Estimated Cost**	**Testimony**
Condition 43, 45-46, p. 51	Board Approvals	Additional unspecified costs	Exh. 116, ¶¶ 15(k), 15(o)

[14] The decision includes two conditions numbered 22 on page 18. We refer to the first as Condition 22(a) and the second as 22(b).

Although Weiss Farm did not quantify the costs of the above conditions, we find credible and accept the testimony that there will be additional costs contributing to the financial impact of the Board's decision.

Soil Examination and Testing. Group C Condition 13, p. 46 requires Weiss Farm to "provide soil examination and testing as needed to ascertain the suitability of the parcel for development, prior to Board's approval of Final Plans." Mr. Mahoney testified this condition "certainly [has] costs associated with [it]," and that the "standards imposed by the [Board] are vague, ambiguous, and will inevitably cause confusion, delay and uncertainty." Exh. 116, ¶ 15(k). He further stated that the standards required in this condition have "no discernible meaning," making compliance difficult or impossible, and serve only to cause additional delay and costs. Exh. 116, ¶ 15(k). The Board argues Weiss Farm has provided no supporting cost estimate detailing how this condition will incur significant extra costs. Tr. 1, 83.

Although Weiss Farm did not quantify the cost, we find his testimony credible that this ambiguous condition will not only require additional costs from testing, but potentially increase those costs because of the ambiguous standard to be met, and the means of demonstrating the satisfaction of the standard. Therefore, we accept as credible the evidence of additional costs and agree that this condition contributes to the financial impact of the Board's decision.

3. Challenge to Denials of Requested Waivers

The final basis on which Weiss Farm argues the Board's decision has rendered the project uneconomic under Chapter 40B is its assertion that the Board refused to waive necessary local bylaws. Weiss Farm requested 26 waivers. The Board granted only three outright, denying the rest or granting them with conditions. Exh. 110, App. B. The Board denied Waiver Requests 5-9 and 12-14. Waiver Requests 1-4 and 10 were granted only with respect to the project as conditioned. Mr. Mahoney testified that the denials or conditioned approvals will incur additional unnecessary costs, and sometimes even directly conflict with other provisions required by the Board. Exh. 116, ¶ 16.

a) Requests for Waivers of Zoning Bylaw

Weiss Farm sought 14 waivers from the Zoning Bylaw. The Board granted one outright (11) (waiving the provision that requires one loading bay per 25,000 square feet of building). Weiss Farm challenges the denials of the remaining waiver requests. Unless stated otherwise, the

estimated costs asserted by Weiss Farms listed below went unchallenged. The following table sets out costs of conditions we find the developer has demonstrated as credible.

Waiver Requests	Description	Estimated Cost	Testimony
Waiver Request 1-4	Zoning Bylaw §§ 4.2.2 (Permitted Uses); 5.2.1 (Minimum lot area per Dwelling); 5.2.1 (Maximum Building Height); and 5.3.7.1 (Space Between Buildings)	Additional unspecified costs	Exh. 116, ¶ 16(a)(i)
Waiver Request 12	§ 6.7 (Number of Signs; Size)	Additional unspecified costs	Exh. 116, ¶ 16(a)(iii)
Waiver Request 13	§ 6.8.10 of the Town's Zoning Bylaw	Additional unspecified costs	Exh. 116, ¶ 16(a)(iv)
Waiver Request 14	Zoning Bylaw § 6.10 (Land Fill Permit)	Additional unspecified costs	Exh. 116, ¶ 16(a)(v)

Waiver Requests 5-9 relate to Zoning Bylaw §§ 6.3.3 (Parking Requirements for Multi-Unit Development); 6.3.4.1 (Parking Space Size); 6.3.5.2 (Parking Screening); 6.3.5.1, 6.6.2.1, and 6.8.7.1 (Parking Lighting); and 6.3.6. (Driveway Access Permit). Mr. Mahoney stated compliance with these conditions will incur additional soft costs in redesign and hard costs in construction. Exh. 116, ¶ 16(a)(ii). The Board argues no cost estimates have been provided to support Weiss Farm's assertions that these will increase project costs. Tr. I, 86-87.

b) Requested Waivers of Wetlands Bylaw

Weiss Farm proposes to upgrade an existing path to a pedestrian bridge, requiring temporary work within the buffer zone. Under Waiver Request 16, Weiss Farm sought a waiver from Stoneham's Wetland Protection Bylaw to do this. The Board denied Weiss Farm's request for a waiver from the bylaw prohibiting work within a 25-foot "no disturb" zone. Weiss Farm argues, citing testimony of Mr. Mahoney, that the denial of the waiver acts as a denial of the project as a whole, because, without this waiver, it cannot comply with the other conditions that require work within the no-disturb zone. Exh. 116, ¶ 16(b). It points to Group B Conditions 33-39 that require upgrading an existing pump station located in this zone; Conditions 50 and 51, which require the removal of stockpiles and debris allegedly located in this zone; and Condition

54, which requires upgrades to an existing weir dam located within the zone. Exh. 116, ¶ 16(b); *see also* Weiss Farm brief, p. 12.

We agree with Weiss Farm that these contradictory provisions of the Board's decision cannot be reconciled. The Board's denial of Waiver Request 16 precludes the developer from activities within the "no disturb zone," while Conditions 33-39, 50, 51 and 54 require activities in the same area. Such a conflict necessarily prevents the developer for proceeding without delay to construct the project, as it would be required to address the inconsistency with the Board itself, or by appeal to the Committee, as it has done here. Because the denial of Waiver Request 16 cannot be satisfied without conflicting with other provisions of the comprehensive permit, it imposes vague or impossible requirements on Weiss Farm, leading to additional unspecified costs, and contributing to rendering the project uneconomic. [15]

Accordingly, we do not find this waiver denial to be a denial of the project as a whole, but instead consider the economic impact of the denial of the waiver insofar as it relates to the activities barred by the waiver, but required by the Board's decision. *Id.*

c) Requested Waivers of Other Bylaws

The following table sets out costs of conditions we find the developer has demonstrated as credible.

Waiver Requests	Description	Estimated Cost	Testimony
Waiver Requests 17-18	Public excavation permit/street opening	Additional unspecified costs	Exh. 116, ¶ 16 (c)
Waiver Request 19	Chapter 13A (Earth Removal)	Additional unspecified costs	Exh. 116, ¶ 16 (d)
Waiver Request 26	Board of Health permit	Additional unspecified costs	Exh. 116, ¶ 16 (f)

[15] We note Weiss Farm has stated it does not object to doing the work identified in the foregoing conditions, but states it "must be granted the necessary permission in order to do so." Weiss Farm Response to Board Objections to Proposed Decision, p. 2. Accordingly, as the Board's decision contains provisions that expressly conflict with this condition and the denial of Waiver Request 16, the Committee modifies the denial of the wetlands bylaw waiver to be consistent with the more specific provisions regarding work in the wetlands. *See HD/MW Randolph Avenue, LLC v. Milton*, No. 2015-03, slip op. at 14 (Mass. Housing Appeals Comm. Dec 20, 2018). We therefore modify the Board's denial of a waiver from the bylaw prohibiting work within a 25-foot "no disturb" zone, to provide that the waiver is denied "except as otherwise provided in this decision."

Under Waiver Requests 20-24, Weiss Farm sought waivers from certain comprehensive permit submission requirements in the Stoneham Zoning Bylaw, specifically chapter 18, §§ 18-33(*l*), (k), (n), (p), and §§ 18-34. Stoneham requires comprehensive permit applicants to also file a utility plan, pro forma, Environmental Impact Analysis, statement on the project's impact on municipal services, and a filing fee consisting of a base fee of $3,000 plus $100 per unit proposed totaling $29,400 for this project. Exh. 116, ¶ 16(e). Mr. Mahoney stated these denials will lead to "unmeasurable" increased costs. Tr. 1, p. 109. The Board argues no cost estimates have been provided to support Weiss Farm's assertions. *Id*. We accept Weiss Farm's witness testimony regarding the costs of these conditions as contributing to the financial impact of the Board's decision.

We therefore find that the above conditions and waiver denials contribute to making the project significantly more uneconomic than the proposed project.

C. The Developer's Pro Forma Financial Analysis

Mr. Engler provided pro forma financial analyses of the project as proposed at 259 units, and as conditioned at 124 units. Based on his analyses for both of these development models, he testified that the ROTC for the project, as conditioned by the Board, would be significantly more uneconomic in comparison to the project as proposed. Exh. 119, ¶ 21. Using the yield on the 10-year Treasury note as of the date the Committee issued the Pre-Hearing Order for this case (January 19, 2017), which he determined to be 2.47%, and adding the 450 basis points as provided by the Guidelines, Mr. Engler calculated the minimum economic threshold of the project to be 6.97%. Exhs. 112; 119, ¶ 12. He calculated the ROTC for the project, as proposed with 259 units, to be 5.45%, and for the project, as conditioned, to be 4.02%. Exh. 119, ¶¶ 11, 21. He concluded that the Board's conditions, including but not limited to the condition requiring a reduction in units, "rendered [the project] significantly more uneconomic in comparison to the baseline condition of the original project as evaluated under current economic conditions." Exh. 119, ¶ 21.

D. Board's Challenge and Committee's Analysis

The Board raise several arguments in opposition to Weiss Farm's economic case. It disputes the estimates of construction costs of the different conditions, as well as the pro forma analysis by Mr. Engler, and argues a reduction in the unit count correlates to a proportionate

reduction in project costs. It also presented testimony from its own witnesses regarding the nature and the costs of some of the required modifications to the project.

1. Board's Motion to Strike Portions of Mr. Engler's Testimony

During the hearing the Board moved to strike portions of Mr. Engler's pre-filed testimony containing pages from a report prepared by Callahan Construction, and testimony discussing the Callahan report. *See* Exhs. 119-C, 119-D, 119-E. It also objected to witness cross-examination regarding this aspect of his testimony during the hearing. It now contends this testimony should be struck as inadmissible hearsay. Specifically, it argues that Mr. Engler testified regarding contents of documents not in evidence that were prepared by a third party unavailable for cross-examination, without any authentication or support. Tr. I, 174-175.

The presiding officer allowed questioning on the exhibits *de bene esse*, and directed both parties to prepare written argument with respect to the motion to strike, which would be decided as part of this decision. Tr. I, 203. The Board did not brief the issue in its post-hearing briefs, but instead asserts in a footnote that the presiding officer "invited written argument on this issue" but that "none is needed." Board brief, p. 20, n.11. Weiss Farm argues the Board has waived its motion. Alternatively, it argues the motion to strike should be denied because experts may base testimony on data collected and provided by others.

The Board failed to brief this issue as it was specifically instructed to do. *See* discussion, *supra*, in § I. Even considering the merits, the Board's argument fails. Under G.L. c. 30A, § 11(2), "agencies need not observe the rules of evidence observed by courts .... Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable person are accustomed to rely in the conduct of serious affairs." "[T]he admission of hearsay is discretionary under the less strict rules of evidence governing administrative proceedings," and the Committee is "experienced in evaluating opinion testimony and determining the weight to be given to the supporting evidence." *100 Burrill Street, LLC v. Swampscott*, No. 2005-21, slip op. at 2 n.2 (Mass. Housing Appeals Comm. June 9, 2008). In *Mattbob, Inc. v. Groton*, No. 2009-10, slip op. at 4 (Mass. Housing Appeals Committee, December 13, 2010), we stated:

> [I]f [the Committee was] inclined to rely on it as independent evidence, we - as an administrative body rather than a court - would undoubtedly be entitled to do so since 'it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs.' G.L. c. 30A, § 11(2). Although we might well consider this evidence, allowing its hearsay nature to

> affect the weight we give it, in this case we have no need to rely directly upon the facts or opinions in the document. But we see no need to strike it from evidence, nor will we rule that the testimony of the expert is tainted by the fact that his conclusions were based in part on this document.

In administrative proceedings, therefore, hearsay evidence is viewed through a lens of reasonableness. Hearsay that meets the administrative standard may be admitted and considered.

In its challenge to the evidence during the hearing, the Board did not provide specific arguments other than a general assertion that portions of Mr. Engler's testimony constituted hearsay.[16] In an administrative proceeding, when faced with evidence that is exclusively hearsay, the question would not be whether such evidence is admissible or inadmissible based on judicial rules of evidence, but whether the evidence has indicia of reliability and probative value. *Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n*, 401 Mass. 526, 530 (1988). *See* G. L. c. 30A, § 1(6) (defining "substantial evidence" as "such evidence as a reasonable mind might accept as adequate to support a conclusion"). However, evidence does not automatically become "insubstantial" if it is presented through hearsay sources. *See Covell v. Department of Social Servs*., 439 Mass. 766, 786 (2003). Substantial evidence may be based on hearsay alone if that hearsay has "indicia of reliability." *Embers, supra*, 401 Mass. at 530, 531.

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[16] Weiss Farm, in its argument that Mr. Engler's testimony should not be struck, frames the argument as a question of expert testimony, and on what data an expert may be expected to rely. "An expert is allowed to base an opinion on facts or data not in evidence if the facts or data are independently admissible and are a permissible basis for an expert to consider in formulating an opinion." *Department of Youth Servs. v. A Juvenile*, 398 Mass. 516, 531 (1986). "If the facts or data are admissible and of the sort that experts in that specialty reasonably rely on in forming their opinions, then the expert may state that opinion without the facts or data being admitted into evidence." *Id*. at 532.

As set forth in *Department of Youth Servs*., expert opinion may be based on facts or data not actually admitted in evidence, provided it is "independently admissible." *Id*., 398 Mass. at 531. To determine "independent admissibility," courts consider whether the underlying facts or data would be admissible through an appropriate witness. *Commonwealth v. Greineder*, 464 Mass. 580, 583 (2011) (expert opinion of doctor relying on test results obtained by non-testifying analyst to form basis of doctor's opinion admissible); *see also Commonwealth v. Markvart*, 437 Mass. 331, 337 (2002) (examiner may rely on police reports and witness statements from nol prossed criminal case); *see Covell v. Department of Social Servs*., 439 Mass. 766 (2003) (hearing officer properly relied on victim statements presented only through hearsay sources such as investigator's report and testimony and partial transcript of victim's testimony from criminal trial); *Doe v. Sexual Offender Reg. Bd.*, 459 Mass. 603 (2011) (hearing officer properly relied on victim statements in police reports). Hearsay "may be independently admissible if presented by the 'right witness' or with a proper foundation, and if it is the type of evidence on which experts customarily rely as a basis for opinion testimony." *Commonwealth v. McGrail*, 80 Mass. App. Ct. 339, 343 (2011), and cases cited. On this basis, the evidence is admissible.

Here, Mr. Engler credited the information in the Callahan report he reviewed and the pages he attached to his testimony. His testimony demonstrated that his reliance on the Callahan information was reasonable in his role as an expert witness. The numbers he applied in his pro formas were taken from the Callahan report for certain costs, and from Corcoran data and his own estimates for others. Tr. I, 160. He then reviewed the information to determine whether it aligned with "industry standards" and his own experience.[17] *Id*. He testified that, although the two pages attached as Exhibits D and E to his pre-filed testimony are not specifically labeled as such, they are summaries taken from a much longer document of approximately 20 pages prepared by Callahan and furnished to the developer. Tr. I, 200. He further testified that he had reviewed the longer document prepared by Callahan, and the summary was an accurate reflection of the data in the entire document, *id.*, stating,

> I have also reviewed the estimated site development and construction costs prepared by Callahan Construction which are based on current industry data. Site development costs are specific to individual sites in terms of roadway and parking networks, rough grading, wetlands protection, etc.; whereas construction costs for the types of building being proposed can be evaluated in comparison to other similar projects being built at approximately the same time. I have used my knowledge of these projects, several of which I am directly involved in, to review the cost estimator's estimates, and to assist in preparing my budgets.

Exh. 119, ¶ 6. Mr. Engler also relied on costs provided by Mr. Mahoney when evaluating the soft costs of the project. Tr. I, 213-214. Further, Mr. Mahoney agreed, stating he consulted with Mr. Engler in preparing the pro formas attached to his testimony, Exh. 116, ¶ 10, and that, based on his experience with similar projects, the estimates provided by Callahan were accurate. Exh. 116, ¶¶ 12-13. On cross-examination, Mr. Engler also stated:

> Q: And, Mr. Engler, think I heard you say just a moment ago that these numbers that are imputed [sic] into the pro forma, they come from Corcoran?
>
> A. Most of them do. Some come -- the hard costs come from Callahan Construction, and the soft costs are Corcoran's and mine. My job is to review them for what I consider to be industry standards and my experience. But there's

[17] Mr. Mahoney described Callahan as "one of the region's leading multifamily general contractors/construction managers," and further testified that the Callahan estimates were based on the company's "substantial knowledge of current multifamily construction costs and their in-house expertise with respect to estimating site costs and vertical construction costs for this type of development." Exh. 116, ¶¶ 11-12.

> a combination of the three sets of numbers: The hard costs, the soft cost[s], and my review of the whole thing.

Tr. I, 160. The Board had the opportunity to cross-examine both Mr. Mahoney and Mr. Engler regarding the source of the data in the Callahan report. Board counsel cross-examined Mr. Engler on the source of the data reflected in his pro formas. Tr. I, 171. The cross-examination, however limited in scope, presented the opportunity for the Board to probe the value of the evidence and its reliability.

We find Mr. Engler's testimony regarding his review and consideration of the Callahan report in light of industry data to be credible, and we accept the testimony of Mr. Mahoney as well. Therefore, their testimony supports the inclusion of Callahan report, and we accept the Callahan report as subsidiary to Mr. Engler's testimony. *See Embers, supra,* 401 Mass. 526. Moreover, we agree with Weiss Farm that under *Department of Youth Servs, supra,* 398 Mass. 516, Mr. Engler's testimony demonstrated the reasonableness of his review and confirmation of the information in the report. Tr. I, 160 (stating that the pro forma information comes, in part, from Callahan, and Mr. Engler's role is to analyze and review its conformance with industry standards). The Board's motion to strike is denied. Exhibit 119-C (the Callahan report pages) and all related testimony are admitted into evidence.

2. The Board's Testimony and Weiss Farm's Response

The Board argues Mr. Engler's conclusion that the project, as conditioned, would result in an ROTC of 4.02%, is based on inaccurate and inconsistent accounting. The Board presented expert testimony from Roger Stankus, a certified public accountant with consulting experience in affordable housing development, who reviewed the pro forma prepared by Mr. Engler. Exh. 122. Mr. Stankus is a director with CBIZ Tofias, a national accounting and consulting firm providing public and private sector clients with financial analysis, forensic accounting, and valuation services. Exh.122, ¶ 1. His consulting experience includes construction and real estate property development, including Chapter 40B projects. Exh.122, ¶ 2.

Mr. Stankus' pro forma financial statements used the same component figures as did Mr. Engler to arrive at total development costs and net operating income. He also prepared pro formas based on the project as proposed at 259 units, and as conditioned at 124 units. Exhs. 119-D, 119-E; 122-B, 122-C. While Mr. Engler's pro formas break out the components of development costs and net operating income on a per unit basis, Mr. Stankus provided a per

square foot basis. He stated he based his pro forma on the budgets, materials, and pro formas submitted by Weiss Farm as part of the public hearing process and on the testimony submitted by Mr. Engler. Exh. 122, ¶ 26. Although Board witnesses stated some of Weiss Farm's cost estimates of the impact of the Board's conditions were unsupported, neither Mr. Stankus nor any other Board witness provided their own cost estimates or other testimony that credibly contradicted the developer's costs of those conditions that contribute to the uneconomic impact of the decision. Tr. II, 38-40.

Mr. Stankus stated that the total development costs calculated by Mr. Engler are overstated and inflated. Exh. 122, ¶ 25. Agreeing with Mr. Engler, he stated the ROTC is the result of a formulaic computation, which looks at a project's total development costs (TDC) compared to the pre-debt service net rental income. Exh. 122, ¶ 20. He stated the ROTC is highly dependent on TDC; therefore, the higher the costs, the lower the formula result. Exh. 122, ¶ 21. Mr. Engler, in his rebuttal testimony, agreed that because Mr. Stankus has accepted the net operating income proposed by Weiss Farm for 124 units, and because the acquisition cost, site costs, and the majority of soft costs would remain the same in this scenario, the total development cost amount would be the amount needed to change, in order to achieve the 5.45% ROTC. Exh. 120, ¶ 8. But, Mr. Engler stated, Mr. Stankus' methodology required reducing all costs, except for the land value, "more or less proportionately" with the reduction in size. Exh. 36, p. 3 at ¶ 2. Mr. Engler criticized this as an improper methodology when dealing with project costs, as some costs, such as site development, will not be reduced proportionately if, for example, the number of buildings is reduced. Exh. 36, p. 3. at ¶ 2(a), (b). Mr. Stankus' appeared to suggest the method to determine the ROTC is to accept the ROTC of the proposed project and determine what development costs are necessary to keep the same ROTC for the conditioned project, rather than evaluating the estimated costs that would arise based on the permit as conditioned. This result-oriented approach, and his lack of cost estimates for those conditions challenged by Weiss Farm, undermines the credibility of his opinion regarding the ROTC of the project as conditioned by the Board.

The Board also argues certain estimates provided by Mr. Engler in his pro forma for both versions of the project are not credible. While Mr. Stankus did not dispute the rental revenue earnings capacity, the acquisition costs, or contingency fee, he disputed some of the line items included in Mr. Engler's pro formas. Exh. 122, ¶¶ 6, 10, 12. He also testified that Mr. Engler

provided several different budgets and pro formas throughout the Board hearing that, when compared with the pro formas Mr. Engler submitted with his pre-filed direct testimony, reflect "conflicting financial amounts and assumptions."[18] Exh. 122, ¶¶ 4(a)-(c), 16-17.

Mr. Stankus also asserted Mr. Engler measured costs on a per unit basis, as opposed to measuring per square foot metric, resulting in increases to the hard costs reflected in the budgets and an overstated TDC baseline. Exh. 122, ¶¶ 13, 23. Mr. Stankus stated that cost information for multi-unit housing is primarily measured on a "per [square foot] metric to allow comparable costing data," while "[r]eflecting costs on a per unit basis does not allow for comparable cost benchmarking." Exh. 122, ¶ 13. In Mr. Stankus' view, Mr. Engler did not take into account "the variables and attributes to unit size, configuration, and construction quality/efficiency." Exh. 122, ¶ 13.

Mr. Engler responded that although Mr. Stankus was not explicit about the type of square footage calculation he used, based on the comparative numbers, it is clear he based his estimates on rentable square feet. Exh. 120, ¶ 6, citing to Exh. 122, ¶ 8(b). Mr. Engler disagreed that it is industry standard to estimate costs based on a "per rentable square foot" metric. Exh. 36, ¶ 3; Exh. 120, ¶ 6. He stated contractors do not bid for construction jobs based on rentable square feet, but will use a gross square foot number to take into account common spaces such as hallways and stairs. Exh. 36, ¶ 3.

Viewing the pro formas submitted by Mr. Engler with his pre-filed direct testimony, Mr. Stankus stated that Weiss Farm's construction costs for a 124-unit and 259-unit project equate to $195.34 and $189.80 per square foot, respectively, while a reasonable cost, based on his industry knowledge, would range from $150.00 to $165.00 per square foot. Exh. 122, ¶¶ 8(b), 18(a). Similarly, he testified that site preparation costs up to $20.00 per square foot are not

[18] The Board takes issue with the fact that Mr. Engler's pro formas submitted for the hearing before the Committee differ from the various budgets and pro forma versions he prepared for the Board during the local hearing process, because those submitted with his pre-filed testimony contain higher costs estimates. *See* Tr. I, 135-158; Exh. 1, Tabs 14, 29, 36. For this appeal, Mr. Engler submitted with his pre-filed testimony two pro formas using the date of the Pre-Hearing Order, one for a 259-unit proposed project (Exh. 120, Tab D) (259 Unit Pro Forma), and one for the project as conditioned at 124 units (Exh. 120, Tab E) (124 Unit Pro Forma). Exh. 120, ¶ 2. The date of the Pre-Hearing Order is the operative date for any estimates and economic costs of a proposed project. *See Avalon Cohasset, supra,* No. 2005-09, slip op. at 17, n.21. Mr. Engler correctly based the pro formas submitted with his pre-filed testimony on this date. *See also* Exhs. 112, § II-A; 120, ¶ 2.

unreasonable, while Weiss Farm calculated them to be $35.60 per square foot for 124 units and $25.00 for 259 units. Exh. 122, ¶¶ 7(b), 18(b).

Mr. Stankus further testified that a review of exhibits to Mr. Engler's pre-filed testimony shows the amounts conflict with the estimates provided by Callahan, on which Mr. Engler stated he relied when preparing his pro formas, with Mr. Engler's models showing much higher amounts for "sitework" and "site preparation" line items, for example. Exh. 122, ¶ 17. However, Mr. Engler testified this difference is because his pro forma does not break out certain costs, such as Callahan's estimates for general conditions, general requirements, overhead and fees, as separate line items, but instead included them as part of the total hard costs. Exh. 120, ¶ 3. Therefore, he stated, the individual line items are not identical, but his total hard costs are equal to the Callahan estimates of total project costs after taking into account a slight difference in the calculation of the contingency fee. *Id*.

Mr. Stankus also testified that the proposed developer fee equates to 12% of the project's hard cost budget. He claims, in his experience, that developer overhead and fees typically range between 2 and 5% of direct project costs, with larger scale projects falling within the lower end of that range. Exh 122, ¶ 11(c). Mr. Engler responded that the developer overhead and fee line item are what is allowed under the underwriting standards of 40B subsidizing agencies and are not overstated. Exh. 120, ¶ 7.

Finally, Mr. Stankus asserted that an ROTC equivalent to that calculated for Weiss Farm's 259-unit project (5.45%) is "readily ascertainable" for the 124-unit project, although he did not explain how such an ROTC would be achieved for this project. Exh. 122, ¶ 26. To reach his conclusion, Mr. Stankus stated a TDC of $57,960,000 would be required to achieve the 6.97% ROTC deemed economic under the Guidelines. Exh. 122, ¶ 24.[19] He further stated he adjusted the TDC levels as calculated for the 124-unit project conditioned by the Board (replacing the $44,450,468 estimated by Mr. Engler with a TDC of $32,744,000), stating it would also result in an ROTC of 5.45%. Exh. 122, ¶ 24-26; Tr. II, 41-42.[20] Accordingly, he

[19] Mr. Stankus used budget data provided by Weiss Farm as of January 2017. Exh. 122, ¶ 24. By contrast, Mr. Engler calculated a TDC of $74,106,000. Exh. 119, Tab D.

[20] Although Mr. Stankus did not explicitly lay out his calculation of a TDC of $32,744,000, he testified that his determination was based on his professional opinion, which in turn was based on the budgets and materials provided by Weiss Farm during the Board hearings and as part of the record before the

concluded that the ROTC for both the proposed project (259 units) and the project as conditioned by the Board (124 units), remained the same at 5.45%. Exh. 122, ¶ 24(b).

Mr. Engler challenged Mr. Stankus' view that a reduction of the project to 124 units would still allow Weiss Farm the same total return of 5.45%. Exh. 120, ¶ 8. To reach Mr. Stankus' conclusion, Mr. Engler testified, the constructions costs would have to be reduced from $163.00 per gross square foot as presented in the Callahan estimate to $118.00, which is, in his opinion, impossible in today's market. Exhs. 36, ¶ 3; 120, ¶ 8; 122, ¶ 26; Tr. II, 40-41. Mr. Engler stated his estimates are based on real, comparable projects, and that the projects and data used by Mr. Stankus to support his construction cost estimates are unclear and do not reflect current costs in the area. Exh. 36, ¶ 3.

E. Conclusion Regarding Economics

With regard to the disputed aspects of Weiss Farm's economic analysis, we find Mr. Engler's testimony to be more credible overall than that of Mr. Stankus. Specifically, we accept Mr. Engler's total development costs. We also accept his estimates of rental revenue, operating expenses, and net operating income, which the Board does not dispute. Furthermore, the failure of the Board's witness to consider the costs of all changes to the project as conditioned by the Board's decision discounts the credibility of Mr. Stankus' pro forma.

To the extent Mr. Stankus challenged Mr. Engler's current pro formas as being inflated and inconsistent with pro formas submitted earlier to the Board, we find Mr. Engler's testimony credible, as he formulated his testimony using the date of the Pre-Hearing Order, in accordance with Committee precedent and the Guidelines. *Avalon Cohasset, supra,* No. 2005-09, slip op. at 17, n.21. We also find credible Mr. Engler's assertion that the alleged discrepancy between his site cost estimates and those provided by Callahan "does not materially alter" his conclusions. Exh. 120, ¶ 3. Further, we do not credit Mr. Stankus' assertion advocating the calculation of development costs on a "per square footage" rather than on a "per unit" basis, as both breakdowns may be used in residential construction.

As to Mr. Stankus' assertion that the developer fee claimed by Weiss Farm is outside the typical 2-5% range found in larger scale projects, *see* Exh. 122, ¶ 11(c), he relied on a developer fee listed in the November 25, 2015 Pro Forma rather than the fee listed in the pro forma

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Committee. His calculation was based on his knowledge of and experience with construction-related matters. Tr. II, 41-42.

attached to Mr. Engler's pre-filed testimony.[21] Mr. Engler credibly stated that the calculation of developer overhead and fee is determined by the underwriting standards of the subsidizing agencies and the 40B Guidelines, which use a "sliding scale" of percentages of certain costs that can total "well over" 2-4% of total costs. Exh. 120, ¶ 7.[22] Mr. Engler further explained that the subsidizing agency—in this case, MassHousing—uses a formula to determine what it will allow for developer overhead and fees that could range up to 8-10% of total costs of the project. Exh. 36, ¶ 1. According to Mr. Engler, "[t]he developer may choose to take out a fee of some percentage at the closing or the completion of a project and leave the rest in the deal as part of the required equity but in terms of the budget, [his] number is correct based on 40B guidelines." Exh. 36, ¶ 1.

Finally, we agree with Mr. Engler that that Mr. Stankus' ROTC calculation is not credible. We do not credit Mr. Stankus' opinion that the ROTC for the project as conditioned is 5.45%, and do not find his testimony regarding the changes in the development costs credibly support the TDC required to achieve his ROTC of 5.45%. We also do not find credible Mr. Stankus' assertion that an ROTC of 5.45% is "readily ascertainable" for both a 124-unit and 259-unit project, based on his admission that he did not analyze the conditions imposed by the Board to determine whether they result in additional costs. Tr. II, 38-39. We find Mr. Engler's opinion of the change in ROTC to be more credible.

The difference between the ROTC for the project as proposed (5.45%) and as approved by the Board (4.02%) is 1.43%. This represents a significant difference. *See Falmouth, supra,* No. 2017-11, slip op. at 29; *HD/MW Randolph Avenue, LLC v. Milton,* No. 2015-03, slip op. at 11 (Mass. Housing Appeals Comm. Dec. 20, 2018), and cases cited. Thus, we find that the ROTC for the approved project is both uneconomic and significantly more uneconomic than the ROTC for the project as proposed. The developer has demonstrated that the conditions it cites, in

[21] The developer overhead and fee from the November 25, 2015 Pro Forma is approximately $875,865 more than the fee listed in Mr. Engler's most recent pro forma.

[22] Further, developer fees and overhead are "reviewed by the Subsidizing Agency and any limitations on such amount(s) shall be as determined by the Subsidizing Agency." Guidelines, § 4.C.1.a, p. IV-8. Mr. Engler noted this in correspondence to the Board. *See* Exh. 41, p. 2 ("MassHousing has its own formula for developer overhead and fee, which was in [his] pro forma").

the aggregate, render the project uneconomic, make the project as conditioned significantly more uneconomic than the project proposed, and that each one has more than a de minimis impact.

IV. LOCAL CONCERNS

Since Weiss Farm has sustained its initial burden to demonstrate that the conditions and denials of waivers in the decision would, in the aggregate, render the project uneconomic, the burden shifts to the Board to prove, with respect to those conditions and requirements challenged on economic grounds, that, first, there is a valid health, safety, environmental, design, open space, or other local concern that supports each of the conditions imposed, and, second, that such concern outweighs the regional need for low and moderate income housing. 760 CMR 56.07(1)(c); 56.07(2)(b)(3).

A. Board's Burden

The burden on the Board is significant: the fact that Stoneham 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. G. L. c. 40B, §§ 20, 23; 760 CMR 56.07(3)(a); *see also* Pre-Hearing Order, § II. Stoneham therefore must overcome a rebuttable presumption that a substantial regional housing need outweighs the local concerns in this case. 760 CMR 56.07(3)(a); *see Zoning Bd. of Appeals of Lunenburg v. Housing Appeals Comm.*, 464 Mass. 38, 42 (2013) (stating there is a rebuttable presumption that there is a substantial housing need outweighing local concerns if statutory minima are not met), citing *Boothroyd v. Zoning Bd. of Appeals of Amherst*, 449 Mass. 333, 340 (2007) and *Board of Appeals of Hanover v. Housing Appeals Comm.*, 363 Mass. 339, 346, 365, 367 (1973).

The presiding officer required the Board to submit documentation identifying the local requirements and regulations supporting each condition challenged by Weiss Farm and the Board included a list of state and local requirements into the Pre-Hearing Order.[23] The Board argues it established valid local concerns outweighing the need for affordable housing, and refers to the list it prepared for the Pre-Hearing Order, in which state and local regulations were listed with the corresponding conditions. Pre-Hearing Order, §§ IV(1), *et seq*., p. 6 (Board's Case). The

[23] The Board objects to the presiding officer's order that it identify local "regulations" in support of its conditions, arguing it is required only to provide a "local concern," and that by requiring a regulation, the presiding officer suggests that a condition may not be imposed unless it rests upon a particular regulation, arguing this is contrary to the statute. Board brief, p. 29, n.19.

Board reserved the right to supplement the list at a later date (although it did not do so), and asserted that the list of statutory and regulatory references supported all conditions challenged by Weiss Farm. Pre-Hearing Order, §§ IV(1), pp. 6-32; *see* Board brief, pp. 28-29.

Other than its argument generally that the DEP Final Order of Conditions did not preclude the Board arguing local environmental concerns, and its argument in support of the left turning lane, raised in its reply brief, the Board presented no argument on specific matters of asserted local concern in its briefing, instead relying, as noted above, on the list of citations provided in the Pre-Hearing Order. *See* Pre-Hearing Order, § IV(1), pp. 7-32; Board brief, pp. 28-29; Board reply brief, pp. 1-3, 6. Not only did the Board's brief omit argument identifying local concerns, instead referring to a list of state and Town regulations and bylaws generally, it has not referred to testimony of its witnesses or provided an explanation of the local concerns at issue or their relevance to the project site. In *Zoning Bd. of Appeals of Holliston v. Housing Appeals Comm.*, 80 Mass. App. Ct. 406, 420 (2011), the Appeals Court stated:

> It was incumbent on the board, therefore, to identify a local interest protected by those aspects of the by-law that are stricter than the WPA and demonstrate that such interest outweighs the regional need for low and moderate income housing. The board has done nothing more than point out that the proposal violates the town's stricter by-law. It has failed to demonstrate that the safeguards the local by-law provides to wetlands interests over and above the protections afforded by the WPA outweigh the community's need for low or moderate income housing.

In *Herring Brook Meadow, LLC v. Scituate,* No. 2007-15, slip op. at 26 (Housing Appeals Comm. May 26, 2010), we made clear that a board must show that the local concern set out in local bylaws or regulations applies to the proposed development, and that the specific interests identified in the local regulation are important at the site. If the Board has not articulated the local concern, nor identified the specific applicable local requirement, and, where there is state regulation, has not shown a local requirement to be stricter than the state standard, nor explained the purpose of the stricter standard or its applicability to the project or the project site, the Board has failed to demonstrate a valid local concern applicable to the project, much less that such a concern outweighs the need for affordable housing.

Even considering evidence put forth by the Board's witnesses, as shown below, that evidence does not support a finding that local concerns outweigh the need for affordable housing. For this reason, the Board has not met its burden and the conditions found to be contributing to rendering the project uneconomic are struck on this basis.

B. Witnesses

The following expert witnesses proffered by both parties testified regarding these conditions. The Board's witness, Thomas C. Houston, is a civil professional engineer with experience in traffic and transportation engineering. Exh. 126, ¶ 5. He was retained to review matters relating to the Weiss Farm comprehensive permit application. *Id.* at 7-9. Specifically, he reviewed the site plans submitted by Weiss Farm with its comprehensive permit application as well as issues related to snow storage, site design, landscaping, and stormwater management.[24]

The Board's traffic expert, Jeffrey S. Dirk, is a registered engineer with experience in traffic engineering, transportation planning, and highway and roadway design. Exh. 129, ¶¶ 1-2. He testified regarding pedestrian and bicyclist safety, impact on traffic delays, and vehicle queuing along Franklin Street, and to driver, pedestrian and bicyclist safety within the town center. Exh. 129, ¶ 3.

Mr. White, P.E., the developer's engineer, is a registered engineer with experience in civil engineering, with a primary focus on site planning, multifamily apartment development engineer, and design of stormwater management systems. Exh. 123, ¶¶ 3-4, 9. He is the project manager at H.W. Moore Associates for this project. *Id.* at ¶ 7. He testified regarding the site and area history of the project, flooding and stormwater management issues. *Id.* at ¶¶ 14-61.

Mr. Mahoney, the developer's manager, is the project director, and is involved in the acquisition, permitting, design, financing, and construction for all new developments undertaken by developer since 2007. Exh. 116, ¶ 1. He is responsible for overseeing all aspects of the project, including underwriting, cost estimating, design, and permitting. *Id.* at ¶ 5. He testified regarding the costs associated with the project and effects of the conditions imposed by the Board. Exh. 116.

Heather Monticup, P.E., Weiss Farm's traffic expert, provided Weiss Farm with traffic analysis for the project, including a Traffic Impact and Access Study (TIAS), responses to the Board's peer reviewer comments, and traffic mitigation measures. Exh. 127, ¶¶ 1-19; Exh. 128.

[24] On June 21, 2017, Weiss Farm moved to strike paragraphs 31 through 44 of Mr. Houston's testimony and the Board filed an opposition to the motion. The presiding officer denied the motion to strike on the record at the hearing on November 14, 2017. Tr. II, 4.

Weiss Farm's witness, Steven G. Cecil, is a registered architect and landscape architect responsible for the project site planning and landscape architecture for the project. Exh. 114, ¶¶ 1-2.

Mr. Lowry, the wetland scientist for Weiss Farm, testified regarding the project's compliance with both the Town bylaw requirements and state stormwater standards. Exh. 113, ¶¶ 34-45.

C. Project Design

Weiss Farm argues that the conditions imposed by the Board are not supported by valid local concerns. It argues the Board's conditions require substantial design changes to the project, including, but not limited to: (1) a reduction in the number of units from 259 to 124 (Condition 25); (2) a prohibition of any work within a 25-foot wetland buffer zone, while also requiring certain improvements to be made within the buffer zone;[25] (3) traffic and parking requirements, including a second site entrance point (Conditions 57, 59, 71, 75, 76); and (4) environmental conditions (Conditions 13, 29, 30-43, 45-48, 50-54, 85).

The Board also denied most of Weiss Farm's requested waivers from several local bylaws relating to the following matters: parking space ratio and layout (Waivers 5–9); signage (Waiver 12); land alteration and fill (Waivers 13-14); disturbance of wetlands (Waiver 16); submission requirements for a comprehensive permit (Waivers 20, 21, 22 in part, and 23-24), and a dumpster permit (Waiver 26). The Board significantly reduced the size of the project from 259 to 124 units, and presented witness testimony that expressed concerns over, among other things, the size, compatibility, and intensity of the project.

We have stated that a "board must review the proposal submitted to it, and may not redesign the project from scratch." *Milton*, *supra*, No. 2015-03, slip op. at 16, citing *Pyburn Realty Trust v. Lynnfield*, No. 2002-23, slip op. at 14 (Mass. Housing Appeals Comm. Mar. 22, 2004), quoting *CMA, Inc. v. Westborough*, No. 1989-25, slip op. at 24 (Mass. Housing Appeals Comm. June 25, 1992); *see also Peppercorn Village Realty Trust v. Hopkinton*, No. 2002-02, slip op. at 6 n.4 (Mass. Housing Appeals Comm. Jan. 26, 2004) and cases cited. Thus, while a

[25] We need not address this argument by the developer, as we have ruled that the Board's denial of the waiver must be modified to allow the work required by the comprehensive permit decision. *See* § III.B.3.b, *supra.*

board may deny requests for waivers or impose conditions even if such action would require a developer to modify its project, it may only do so if the action is supported by valid local concerns that outweigh the needs for affordable housing. *Hanover*, *supra,* 363 Mass. at 339, 363; *CMA, Inc.* slip op. at 24 n.13; 760 CMR 56.05(8)(d). Here the Board has failed to provide appropriate argument demonstrating the following actions are supported. *Milton*, *supra,* No. 2015-03, slip op. at 16-17. Even reviewing the Board's evidence regarding local concerns, that evidence does not support a finding that valid local concerns outweigh the need for affordable housing, as shown below.

1. Unit Reduction

The primary condition challenged by Weiss Farm is Condition 25, p. 21, which limits the total number of dwelling units approved for the project to 124 units. In its decision, the Board stated that traffic safety necessitates this reduction and that 124 was the maximum number of dwelling units the project could accommodate without the installation of left turn lane on Franklin Street into the project. A turning lane would be necessary, the decision stated, to address the volume of traffic on Franklin Street during peak evening travel time, but there is no way for the developer to install an appropriate left turn lane, and, therefore, it cannot mitigate the local concern put forth by the Board. Exh. 110, pp. 19-21. In the Pre-Hearing Order, the Board generally cited a number of local bylaw and regulatory provisions, but has provided no specificity regarding the manner in which these provisions establish a local concern for this site that requires a reduction in the number of units.[26] As we noted above, this citation to various provisions, without more, is not sufficient argument to demonstrate a local concern.[27]

[26] In the Pre-Hearing Order, the Board cited, for example, in addition to Chapter 40B and the comprehensive permit regulations, the following Stoneham bylaw provisions: "Zoning," §§ 1.0, 2.0; "Board of Appeals," §§ 18-30, 18-31, 18-32; "Wetlands Protection Bylaw," § 11.1; and "Stormwater," § 11A.1." Pre-Hearing Order, § IV (Board's Case) pp. 13-14. This general reference to bylaw and regulatory provisions that refer to interests the Town has with regard to the referenced topics is made without 1) identifying the existence of a local requirement that is more stringent than a related federal or state requirement; 2) that is imposed upon the developer or the site; 3) that the Board asserts requires imposition of the unit reduction; or 4) that these concerns outweigh the regional need for affordable housing.,

[27] Simply citing a bylaw provisions is insufficient to demonstrate a valid local interest applicable to the site, or that such an interest supports the imposition of the condition challenged by the developer. This reference to bylaw provisions by the Board is similarly lacking with respect to other conditions challenged by Weiss Farm. For other challenged conditions, the Board has similarly referred to local

When traffic issues were addressed in the hearing before the Board, Weiss Farm offered several proposals to mitigate the project's traffic impacts, one of which was the construction of a left turn lane on Franklin Street. However, in its decision, the Board stated that creation of a left turn lane would require a dedication of or encumbrance on Town property, and that a left turn lane would negatively affect the width of current travel lanes on Franklin Street, thus precluding Franklin Street from safely supporting bicycle traffic. Accordingly, because the Board believed that a left turn lane would not be necessary for a project with fewer than 125 units, it approved the project on the condition it not exceed 124 units. Exh. 110, pp. 19-21.

The Board's traffic expert, Mr. Dirk, stated that, based on information provided by Weiss Farm's traffic engineer, and guided by standards published by the American Association of State Highway and Transportation Officials (AASHTO), he determined that the maximum number of vehicles turning left into the project during the weekday evening peak hour period must be less than 60 in order to fall below AASHTO's suggested criteria for installation of a left turn lane. Exh. 129, ¶¶ 7, 9. Given that 70% of traffic associated with the project was expected to enter by way of a left turn from Franklin Street, he calculated that the total volume of traffic generated by the project during the weekday evening peak hour (including both right and left turns from Franklin Street) that would correlate to the 60-vehicle maximum noted above would equal 86 vehicle trips (totaling 60 left-turning and 26 right-turning vehicles). Exh. 129, ¶ 9.

Using trip generation information from the Institute of Traffic Engineers (ITE), he concluded that a project of approximately 200 units would result in traffic volumes falling below this 60-vehicle threshold that would require a left-turn lane. While the installation of a left turn lane, in his opinion, would "facilitate safe and efficient access" to the project, Exh. 129, ¶ 16, he testified that he understood the "intent of [Condition 25] is to preserve current and future opportunities for bicycle accommodations along the segment of the Franklin Street corridor where the access to the Project is to be accommodated."[28] Exh. 129, ¶ 5. He stated that, "[a]s a

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bylaw provisions without explanation of the nature of its purported local concern, or how it justifies the imposition of the condition. Therefore, in those instances as well, the Board has failed to provide adequate argument with respect to those issues.

[28] Mr. Dirk recommended that Weiss Farm be required to construct a left-turn lane "in a manner that retains the existing public accommodations for bicycle travel at this location," and he stated that Weiss Farm had in response committed to "reserving land within the [p]roject site for use by the Town for future road widening to restore bicycle accommodations." Exh. 129, ¶ 11. He understood this to mean Weiss

result of the Applicant's proposed modifications to the public way along Franklin Street to accommodate left-turn access into the [p]roject site, approximately 250 linear feet of Franklin Street in the vicinity of the [p]roject driveway would no longer provide sufficient width to accommodate bicycle travel and on-street parking would be eliminated." Exh. 129, ¶ 5.[29] The loss of what he characterized as the "existing public accommodation" for bicyclists would post inherent risks for bicyclists traveling on Franklin Street, and would require the Town to spend public funds in the future to provide future bicycle accommodations in this area. *Id*. In order to create a left turn lane, Weiss Farm had proposed modifications to sections of Franklin Street, such as restriping to reduce the width of travel lanes, and a reduction in marked shoulder widths. Mr. Dirk argued this would eliminate existing on-street parking and would provide insufficient width to accommodate bicycle travel. Exh. 129, ¶ 5; Tr. III, 30-31. Therefore, he testified an adequate left turn lane was not possible. Since he believed it was required to safely accommodate traffic for a 259-unit project, and he stated that a left-turn lane would be unnecessary for projects with fewer than 125 units, the Board reduced the total number of allowed units. Exh. 110, p. 21; Tr. III, 80.

Weiss Farm argues that the Board's justifications for reducing the project size—its inability to create a left turn lane that is purportedly required—are unsupported by the record. The developer's traffic engineer, Ms. Monticup, stated that the 259-unit project could be built as proposed without requiring a left turn lane, with no negative impact on traffic safety. Exh. 127, ¶ 35 ("To limit the number of units to avoid a left-turn lane would be inappropriate given that the project can be accommodated along the adjacent roadway network with or without a left-turn

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Farm was committed to granting the Town an easement over project land. Tr. III, 69. He also stated that absent such preservation of bicycle accommodations, the number of units should be reduced to no more than 124, the number he determined could be reasonably accommodated without a left-turn lane on Franklin Street. Exh. 129, ¶ 12. Mr. Dirk's characterization of the requirements of Condition 25 as "preserving" current and future bicycle accommodations is confusing. Currently, there are no bicycle lanes or road markings, and cyclists currently ride in the existing road and shoulder. The Committee understands his reference to "preservation" of bicycle accommodations to mean the existing status quo on Franklin Street and its potential for bicycle accommodations in the future. Further, in Mr. Dirk's view, creating a left turn lane would require a reduction in the shoulder width, which is not preferable for cyclists. Exh. 129, ¶¶ 3-16.

[29] Mr. Dirk stated Weiss Farm's proposal includes reducing the width of the travel lanes on Franklin Street in both directions from 12 and 13 feet to 11 feet, and reducing the marked shoulders from their current range of 3 to 7 feet to 2.2 to 3.2 feet. Exh. 129, ¶ 5.

lane"); Exh. 128, ¶ 10 ("Including the left-turn lane as part of the mitigation commitment of the [259-unit] Project ... provides convenience to the traveling public by decreasing delays and improving traffic flow ... while having no discernible impact to the safety or efficacy of bicycle travel along Franklin Street ... the left-turn lane is not required as part of the full build-out of the Project[.]").

Weiss Farm argues a left turn lane is not required for the project as proposed, and the developer only proposed it as a mitigation measure during the comprehensive hearing process. [30] Ms. Monticup testified that traffic engineering principles do not require the left-turn lane for the project as proposed. In her pre-filed testimony, she noted that "just because the warrant [for installation of a left-turn lane is] is met does not mean that the left turn lane is required." Exh. 127, ¶ 22.[31] She clarified during her oral testimony that the term "warranted," in traffic engineering terms, is not synonymous with "required," but refers to the "threshold" level of permissibility. Tr. III, 48-49. She testified that other developments along Franklin Street have been approved without left turn lanes, even though they were warranted. Exh. 127, ¶¶ 22, 25-26.[32] She explained that "plenty" of intersections exist without the installation of a corresponding left turn lane or traffic signal, although data could warrant their installation, and that this has been and is acceptable. Tr. III, 47. In those particular instances, the intersection may meet the warrants for a left-turn lane or a traffic signal, but those measures are not installed for a variety of reasons, such as limited financial means of a municipality. Tr. III, 47. Thus, in accordance with the AASHTO Green Book Guidelines for Design of Left-Turn Lanes, the calculated traffic volumes on Franklin Street would provide grounds for a recommendation for a traffic signal or traffic lane, but they do not require it. *Id*. Further, according to Ms. Monticup, the initial

[30] Weiss Farm submitted a mitigation package during the Board's hearing, listing the items Weiss Farm agreed to include or implement as part of the project. Exh. 127, ¶ 13; *see* Exh. 42. This package included a Conceptual Improvement Plan, dated February 22, 2016 (Exh. 40), showing the addition of an eastbound left-turn lane on Franklin Street at the project entrance. Exh 127, ¶ 14.

[31] Ms. Monticup testified that Weiss Farm offered this left-turn lane as mitigation because, using the data projected in the TIAS prepared for the proposed project, it was anticipated that the traffic volumes at the site driveway would "exceed the warranting conditions for installation of a left-turn lane." Exh. 127, ¶ 22. She found, however, that a left turn lane would not be required for projects larger than 124 units, including the proposed 259-unit project, because the 124-unit limit is "based on an erroneous analysis" or "misunderstanding" by the Board. Exh. 128, ¶¶ 4, 5, 10.

[32] *See* § VI, *infra*, regarding Weiss Farm's claims of unequal treatment of subsidized housing projects.

recommendation for a left turn lane "was not made to accommodate left turns, as the analyses indicated only an expected queue of one vehicle or less waiting to turn left at any given time during the peak period." Exh. 128, ¶ 1. It was proposed to "eliminate additional delays for through movements along Franklin Street in the eastbound direction of the site driveway."[33] *Id*; Exh. 127, ¶ 22.

The Board argues that Mr. Dirk relied on additional industry standards and guidance in determining that a project density of 125 units or more would require a left turn lane on Franklin Street. Board reply brief, p. 6. In addition to AASHTO, Mr. Dirk relied on information published by the Institute of Transportation Engineers (ITE) and the Transportation Research Board (TRB). *See* Exh. 129, ¶ 7. Using trip generation information from ITE, he stated that a total of 60 *left-turning* vehicles could be accommodated without the need for a left turn lane. *Id*., Exh. 129, ¶ 9. He further testified TRB guidance suggests that left turn volumes as low as 5 vehicles per hour on roadways with prevailing travel speeds and peak-hour traffic volumes similar to Franklin Street may warrant the installation of a left-turn lane. Exh. 129, ¶ 10.

In response, Ms. Monticup noted Mr. Dirk's failure to distinguish between vehicles entering the project from both directions and those only making a left turn. Exh. 128, ¶ 4. In testimony at the Board's hearing, Mr. Dirk stated that "60 total entering vehicles (both eastbound and westbound) could be accommodated during the evening peak hours at the site driveway intersection without the need for a left-turn lane." units. *Id*. As noted above, however, in his pre-filed testimony, he determined that a total of 60 *left-turning* vehicles could be accommodated without the need for a left turn lane. *Id*., Exh. 129, ¶ 9. Because Ms. Monticup estimated that 70% of traffic travels to and from the site from the west along Franklin Street, she calculated this would correlate to 86 total vehicles entering during the evening peak hour, a volume consistent with up to approximately 206 residential units at the project. Exh. 128, ¶ 4.

In response to the TRB guidance, Ms. Monticup explained that information "warranting" proposed action does not mandate that action. Mr. Dirk's testimony framed the left-turn lane in

[33]Ms. Monticup explained that the line of vehicles waiting to turn without the addition of a left turn lane would be one vehicle or less. Traffic along Franklin Street is free flowing and there are expected to be enough gaps in traffic to accommodate turning into and out of the development. Exhs. 128, ¶ 8; 127, ¶ 22. She also testified that available sight distances at the proposed site entrance exceeded the minimum stopping sight distance and intersection sight distance standards in both directions as established by AASHTO.

scenarios with left-turning volume as low as 5 vehicles per hour as a possibility that "may" warrant a left turn lane, rather than a threshold that would require it. Exh. 129, ¶ 9. Ms. Monticup further stated that because the "warrant simply justifies the recommendation for a left-turn lane, engineering [judgment] needs to be used to determine if the left-turn lane is necessary." Exh. 128, ¶ 5. Thus, if Mr. Dirk's standard of requiring a left-turn lane for volumes as low as 5 vehicles per hour were applied, almost every commercial or retail establishment would require one. *Id*. In her view, installing a left-turn lane in this situation would be impractical. *Id*.

Therefore, because the queueing to turn will not be an issue without a left turn lane, and available sight distances are sufficient, Ms. Monticup stated the left turn lane is not a requirement. She also noted Mr. Dirk stated a project of approximately 200 units would result in traffic volumes lower than the amount required for a left turn lane, meaning approximately 200 units could be accommodated without the left turn lane. Exhs. 128, ¶ 8; 129, ¶ 9. Further, Ms. Monticup testified that her analysis determined that a queue of one vehicle or less would occur at the project driveway without a left-turn lane, and available sight distances would still exceed the minimum stopping sight distance and intersection sight distance required for safe operations, under AASHTO standards. Exh. 127, ¶ 22.

The Board's decision also stated a left turn lane would negatively impact traffic along Franklin Street because it would require the existing shoulder to be incorporated into a new travel lane, forcing existing bicycle traffic to travel in an even narrower travel lane, and necessarily eliminate any safe bicycle traffic on Franklin Street. Exh. 110, p. 19-20. Mr. Dirk testified that the left turn lane could not be built without jeopardizing "current and future opportunities for bicycle accommodations along the segment of the Franklin Street corridor where the access to the Project is to be accommodated." Exh. 129, ¶ 5.

Ms. Monticup stated in response that "[a]lthough a reduced shoulder width is not preferable to bicyclists, the width would not be less than that provided in other sections along Franklin Street where left turn lanes have previously been provided." Exh. 127, ¶ 23. She stated that Massachusetts Department of Transportation (MassDOT) guidelines provide that "[l]anes at least 14 feet wide are generally wide enough to permit motorists to pass bicyclists without changing lanes." Exh. 127, ¶ 27. She also pointed out that there is no dedicated bicycle lane at present, and although currently cyclists ride in the shoulder on Franklin Street, vehicles routinely park on the shoulder. Thus, cyclists are already forced to share the traffic lane with vehicles,

regardless of whether the left turn lane is created in the future. Exh. 127, ¶ 29; 128, ¶ 9. Accordingly, in Ms. Monticup's view, the addition of a left-turn lane will not impact current conditions for accommodating cyclists at the project entrance driveway.[34]

The Board's testimony that only a project of 124 units or fewer did not need a left turn lane is not credible. We find Ms. Monticup's testimony to be more credible than that of Mr. Dirk and we accept it. Accordingly, we find the Board has not established that a left turning land is required at the project site entrance for safety or other reasons, and therefore this is not a local concern that supports a reduction in project size to 124 units. [35]

We conclude therefore that the Board has not demonstrated a valid local concern with regard to the reduction of the project sized from 259 to 124 units that outweighs the regional need for low and moderate income housing. Condition 25 is modified to stated that the total number of dwelling units shall not exceed 259 units.

2. Second Site Entrance

As proposed, the project allows ingress and egress to the site at one entrance on Franklin Street. Condition 75, p. 42, requires that a "second site entrance off of Franklin Street shall be provided, either for regular or emergency access." Exh. 110, p. 42. Mr. Houston, the Board's expert, testified that a second site entrance should be provided "either for regular access or for emergency access." Exh. 126, ¶ 21. He stated the second site entrance was needed due to the number of people occupying the site and would provide "improved access and circulation alternatives," although it may require some changes to the current site design, stating a temporary second site entrance could be provided by connecting to the on-site access drives near Townhouses 1-3 or 4-6, with minimal impact on the site design. Exh. 126, ¶ 21.

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[34] She explained that in the scenario with a left-turn lane, one section of Franklin Street, extending approximately 230 feet, would not provide the MassDOT recommended 14-foot width through lane. Exh. 128, ¶ 1. This area is located approximately 150 feet west of the site entrance to the project, and is approximately one foot shy of the 14-foot width requirement due to the location of a utility pole. Exh. 128, ¶ 1. In the event that the Town decides in the future to create a bicycle lane, Weiss Farm offered to provide an easement to the Town for roadway expansion. Exh. 127, ¶ 27.

[35] We need not consider the Board's final argument in support of requiring unit reduction, in which it argues Weiss Farm cannot construct the left turn lane the Board claims is necessary for a larger project because construction of the lane would improperly require the Town to convey an interest in land.

The proposed site driveway is designed with roadway widths exceeding 18 feet, which Ms. Monticup stated would allow a vehicle to maneuver around another vehicle in the roadway. Exh. 127, ¶ 34. She testified that the single access road to the project from Franklin Street was "capable of accommodating regular and extraordinary traffic patterns as well as emergency vehicles and is therefore satisfactory and appropriate from both a traffic flow and safety perspective." Exh. 127, ¶¶ 3, 4. Weiss Farm notes that the Town's fire chief stated, in the hearing before the Board, that no second entrance was required, undercutting one of the Board's rationales that it be required for emergency access. Tr. I, 122-123; Tr. II, 137-139.[36] With respect to the condition requiring the second site entrance, we find the Board has not demonstrated a valid local concern that outweighs the regional need for low and moderate income housing. Accordingly, Condition 75 is struck.

3. Parking Ratio

The Board denied a waiver from Zoning Bylaw, § 6.3.4.1, which requires a parking ratio of 2.1 spaces per unit (Waiver Request 5). Exhs. 110, App. B; 118, Zoning Bylaw Chapter 15, § 6.3.3. Condition 76, p. 42, also states that a "parking ratio of 1.66 parking spaces per unit is provided whereas the Board has been informed that a parking ratio of 1.8+ spaces per unit is desirable. Of greater significance the Stoneham Zoning Bylaw requires 2.1 parking spaces per dwelling unit.... The applicant shall provide an outline of a Parking Plan that can be implemented if demand exceeds supply." Although this condition is somewhat vague regarding whether a parking ratio of 1.8 or 2.1 has explicitly been required, since the Board denied Weiss Farm's requested waiver from the bylaw's requirement of a 2.1 parking ratio, the 2.1 ratio remains the threshold required by this condition.

Mr. Mahoney, Weiss Farm's project director, stated both Weiss Farm's engineer and the Board's engineer had agreed the proposed ratio of 1.66 is appropriate for a development of this nature. Exh. 116, ¶ 15(i); Tr. III, 90. Weiss Farm commissioned an outside parking ratio study, which viewed similar apartment communities in other towns and demonstrated that a parking ratio of 1.69 would be sufficient to accommodate the parking needs of the project. The Board's expert, Mr. Dirk, testified that a proposed parking ratio of 1.66 would be "adequate" with a parking management plan. Tr. III, 90. Therefore, this condition and the Board's refusal to waive

[36] The fire chief was not called as a witness in the appeal to the Committee.

the parking space requirements are not supported by valid local concerns outweighing the need for affordable housing. Accordingly, this condition is modified to allow 1.66 parking spaces per unit and we grant Weiss Farm's waiver request regarding the parking ratio.

4. Traffic Signals

Additional Signal Timing Modifications. During the Board's hearing, Weiss Farm submitted a mitigation proposal that included its agreement to review and update the traffic signal timing plans at three intersections: Franklin Street at Franklin Place; Franklin Street at Summer Street, and Franklin Street at Main Street (Route 28) and Central Street. Exh. 127, ¶ 16. Group B Condition 57, p. 40, requires additional signal timing modifications at two additional intersections: Main Street/Marble Street/Summer Street, and Franklin Street and Pine Street.

Mr. Dirk testified the addition of these two intersections to the intersections for which Weiss Farm's expert already recommended traffic signal timing improvements is "appropriate to address the additional traffic burden that [he alleges] will be imposed by the Project at these locations." Exh. 129, ¶¶ 13 14. Ms. Monticup stated that traffic signal improvements at those two locations are unnecessary, because overall movement is expected to remain the same with or without the proposed project. Exh. 127, ¶ 33. Mr. Dirk's testimony that that mitigation improvements at these two intersections was "appropriate," with no further support, does not provide credible support that a valid local concern exists to support the requirement of traffic signal modifications at these two intersections. The Board identified no local requirement to support the condition for traffic signals at these two locations. Condition 57, p. 40, is accordingly modified to remove the intersections of Main Street/Marble Street/Summer Street and Franklin Street and Pine Street.

HAWK Pedestrian Crossing. In Group B Condition 59, p. 40, the Board also imposed a requirement for installation of a HAWK (High Intensity [beacon] Activated crosswalk), pedestrian crossing beacon at "an appropriate location proximate to the Project site ... to facilitate the safe conveyance of pedestrians across Franklin Street." *See* Exh. 127, ¶ 9, Ms. Monticup stated that the HAWK beacon would be installed at the proposed Franklin Street crossing, shown on the developer's updated conceptual improvement plan, dated November 4, 2015 (later updated to reflect other changes requested by the Board, dated February 22, 2016). *See* Exhs. 127, ¶¶ 10, 12, 15; 40. The Board has not met its burden to demonstrate a valid local concern to support the requirement of this HAWK pedestrian crossing. Accordingly, Condition 59 is struck.

5. Submission of Plans Showing Reconfigured Buildings

Weiss Farm carried its burden of demonstrating that Group B Conditions 60 through 65, on page 41 of the comprehensive permit, would add additional costs to the project, contributing to rendering it uneconomic. Exh. 116, ¶ 15(g). The Board identified no valid local concern to support its condition required the submission of plans showing reconfigured buildings limited to certain areas of the site. According Conditions 60 through 65 are struck.

6. Sidewalks

Group B Condition 71, p. 42 requires sidewalks within the proposed development to be widened to an 8-foot minimum. Mr. White, the developer's engineering expert, stated he has never designed nor observed a sidewalk of this width in a residential development, and the proposed 6-feet wide sidewalks meet the state's accessibility requirement. Exh. 123, ¶ 58. The Board's expert, Mr. Houston, states that although his recommendation of an 8-foot-wide sidewalk is preferred, he would accept a 7.5-foot wide one, if acceptable to the Town's handicapped compliance officer. Exh. 126, ¶ 67. The Board identified no valid local concern to support either an 8-foot or 7.5 minimum for sidewalks at the development. Accordingly, this condition is struck.

7. Grading

Group C Condition 12, p. 46 prohibits regrading of the site that results in any finished slope exceeding 25 percent in fill (4:1) or 33 percent in cut (3:1). In support, the Board's witness, Mr. Houston, testified he is familiar with subdivision regulations that require a 4:1 slope. Exh. 126, ¶ 69. However, he neither cited the specific regulations, nor named the municipalities involved. Mr. White, the developer's engineer, stated this maximum allowed slope does not conform to any engineering standard. Exh. 123, ¶ 61. Mr. Mahoney, the developer's manager, stated the standards required by the Board are vague, ambiguous and confusing. Exh. 116, ¶ 15(k). He stated the project was designed to disturb only about ten acres, and areas outside the development area will remain preserved. Further, he stated, Stoneham's subdivision regulations allow for 2:1 slopes in both fill and cut areas, and the Board's condition exceeds the Town's own requirements and is not based on any recognized engineering standard or principle. Exhs. 116, ¶ 15(k); 123, ¶ 61. A review of Appendix B to the comprehensive permit shows that Weiss Farm did not request waivers relating to local subdivision regulations, which fall under Chapter 17 of the Stoneham Bylaw. *See* Exh. 110, App. B; Exh. 118, Chapter 17.

The Board's witness testimony does not establish a valid local concern to support a slope maximum slope of 4:1 at this location. *See Herring Brook Meadow, supra,* No. 2007-15, slip op. at 9. Accordingly, we find that the Board has failed to show a valid local concern supporting its prohibition of regrading that results in finished slopes exceeding 25 percent in fill or 33 percent in cut and this condition is struck.

8. Landscaping

Group B Condition 10, p. 24 requires "[a] detailed plan showing landscaping improvements, open areas, limit of construction activity, [etc.] for verification that such plan conforms with this Decision.... A representative or agent of the Board shall have the opportunity to identify trees that need to be protected and preserved during construction." Mr. Mahoney stated this is onerous and unprecedented, and constitutes delegation of unilateral authority to a town official regarding tree preservation that will cause confusion, delay and uncertainty. Exh. 116, ¶ 15(f).

We agree with the developer. The required submission of plans for verification of their conformance to the comprehensive permit is retained. However, the Board did not produce testimony or argument demonstrating a valid local concern regarding the necessity of a Board representative to identify specific trees for preservation. Accordingly, Condition 10 is modified to strike the requirement that a Board representative be given the opportunity to identify trees for preservation during construction.

D. Environmental Concerns

The site contains wetland resource areas, specifically Bordering Vegetated Wetlands (BVW), Land Under Water Bodies and Waterways (LUW), Bordering Land Subject to Flooding (BLSF), and Bank. Exhs. 110, pp. 32, 35; 121. These categories are state resource areas defined in 310 CMR 10.00, *et seq.*, which implement the state Wetlands Protection Act, G.L. c. 131. The Stoneham wetlands protection bylaw requires a 25-foot-wide strip to be left undisturbed adjacent to any area defined as a wetland under the state Wetlands Protection Act and regulations. The wetlands bylaw also prohibits the removal, filling, dredging, building upon, or other alterations of resource areas, including, but not limited to, freshwater or coastal wetlands, marshes, reservoirs and streams. *See* Exh.118, Chapter 11, §§ 11.2; 11.12.

Weiss Farm argues several conditions imposed by the Board are unsupported by a local concern and are also redundant because these issues have been adequately conditioned by the

Department of Environmental Protection (DEP) in a Final Order of Conditions, through conditions relating to stormwater management and wetland protections. Exh. 121. Mr. Lowry, a wetlands ecologist and the wetland scientist for Weiss Farm, testified that the project plans complied with both the Stoneham wetlands bylaw requirements and state stormwater standards.[37] Exh. 113, ¶¶ 34–45.

The Board argues that the sole responsibility of the DEP within its adjudicatory hearing was to determine compliance with the state Wetlands Protection Act, and the Final Order of Conditions is irrelevant to the proceeding here. Board reply brief, p. 2. Instead, the Board argues it determined that proposed work for the project cannot be conducted in accordance with the Stoneham local wetlands bylaw, and its waiver denials were based on valid local concerns. *Id*. However, the Board does not lay out the specific local concerns on which it relies. It suggests that it has concerns over stormwater runoff from the project area into adjacent wetlands, but provides no detail regarding how the local wetlands bylaw from which such a concern would arise, provides greater protection than state wetlands requirements or how such stricter requirements relate to the asserted concern with stormwater runoff. *See* Board reply brief, p. 3, n.3. For the conditions relating to environmental concerns, specifically stormwater management, including the weir dam and the pump station, the Board failed to establish a local concern allowing it to require Weiss Farm to comply with stricter standards than already existing state requirements and its testimony did not support the conditions imposed. Moreover, those conditions requiring compliance with DEP orders or agreements are based on state, rather than local, requirements, and outside the scope of local concerns. The Board has not supported their inclusion the comprehensive permit. Accordingly, as discussed below, we find the Board has not demonstrated legitimate environmental local concerns with respect to the project site that outweigh the need for affordable housing. *See Zoning Bd. of Appeals of Holliston, supra,* 80 Mass. App. Ct. 406, 420; *Herring Brook Meadow*, No. 2007-15, slip op. at 9.

1. Stormwater Management

Stormwater Runoff Analysis. Group B Condition 29, p. 29 requires Weiss Farm "to expand the stormwater runoff analysis to encompass the wetland system north of Franklin Street extending to the Weiss Farm Culvert and the West Culvert...." The Board relies on Mr.

[37] Pursuant to 760 CMR. 56.06(8)(b), we take official notice of the Final Decision of the DEP dated September 5, 2017, attached as Exhibit A to Weiss Farm's post-hearing brief.

Houston's testimony that Condition 29 is necessary to comply with DEP Stormwater Management Standards.[38] Exh. 126, ¶ 31. He testified that Mr. White incorrectly attributed the requirement to analyze the large wetland system north of Franklin Street to the issue that the on-site dam divides the watershed. In his view, the on-site dam acts as a flow control device. To comply with DEP Stormwater Management Standards, Mr. Houston states the wetland system north of Franklin Street must be analyzed because it is the only way to set design points and runoff. Exh. 126, ¶ 52. In his opinion, the changes in stormwater runoff cannot be established, because the predevelopment flow varies month to month and year to year. Exh. 126, ¶ 31.

Weiss Farm's witness, Mr. White, testified this condition is unnecessary from an engineering standpoint, as it is premised on an incorrect assumption that the weir dam divides the watershed. Exh. 123, ¶ 41. He stated the wetland area north of Franklin Street has no impact on the project site, and that pre- and post- development stormwater calculations for the project site "conclusively demonstrate a decrease in both peak rate and volume of runoff from the site." *Id*. He further stated these stormwater calculations analyzed "the peak rate of flow at the project boundaries in compliance with DEP Stormwater Standard[s], and the project will decrease the flow to the adjacent wetlands." He stated the calculations by the Board's expert, Mr. Houston, are incorrect. Exh. 124, ¶ 26.

The Board's citation in the Pre-Hearing Order, p. 15, to Town's Wetlands Protection Bylaw §§ 11-10, 11-13, and 11-15, and its lack of citation and discussion of authorities supporting its condition in its brief, are insufficient to establish a local concern. Moreover, the Board has made no argument explaining 1) what specific local concern is asserted based on the cited local bylaw provisions; 2) how the provisions relating to the local concern are stricter than state requirements, or 3) the importance of a such a local concern based on these local requirements with respect to the project site. With regard to the testimony, we find Mr. White's testimony more credible than that of Mr. Houston. Moreover, the latter's testimony does not support a local concern, as his testimony focused primarily on DEP Stormwater Standards. He provided no reference to a local requirement or regulation that is stricter than state standards. This condition is struck.

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[38] In the Pre-Hearing Order, p. 15, the Board cited, without explanation, to the Town's Wetlands Protection Bylaw §§ 11-10, 11-13, and 11-15, as well as 760 CMR 56.05(8)(c), 56.04(1)(b) and G.L. c. 40B, § 20. It made no references to these authorities in its argument in its brief in support of this condition.

Engineering Reports. Group B Conditions 30, 31, 34 and 36, pp. 29-30, require the submission of engineering reports identifying: deficiencies in the stormwater conveyance systems (30, 31); the feasibility of reconstructing a drainage canal (34); and the feasibility of restoring and maintaining a channel upgradient of the West Culvert (36). Mr. Houston testified that no analysis or evidence has been submitted that establishes the discharge from the project site can be safely accommodated in these ditches, or whether repair is needed, and he claimed this information would be provided by the studies required under the conditions of the decision. Exh. 126, ¶ 53. In the Pre-Hearing Order, the Board cited the following sections of the Town Code, without explanation or argument: Streets and Sidewalks, §§ 13-11,13-12; Board of Appeals §§ 18-30, 18-31, 18-32; Zoning, Chapter 15, §§ 1.1, 6., 7.1.1.1; Wetlands Protection §§ 11.1, 11.02, 11.07, Stormwater, § 11A. 1, and Board of Selectmen, §§ 16-6 to 16-18.

Mr. White stated Stoneham is the party responsible for maintenance of Town culverts and ditches, and that the Town's public works department has not yet cleaned them, despite being requested to do so in 2010. Exh. 123, ¶ 42. He testified these conditions are unnecessary, as the project will not increase the "peak rate of flow or volume of stormwater runoff to the adjacent wetland," and will "therefore have no impact on the flows to the large wetland area.". Exh. 123, ¶ 42. He further stated the project will result in a decrease in peak flow and stormwater volume to the adjacent wetlands, and will have no impact on the culverts. Exh. 124, ¶ 27. We find Mr. White's testimony more credible that Mr. Houston's testimony. Here as well, the Board has not demonstrated a valid local concern to support these conditions that outweighs the need for affordable housing. *See* discussion in § IV.A, *supra.* These conditions are struck.

Quantification of Tributary Areas. Group B Condition 37, p. 30, requires quantification of inflows from all tributary areas in order to "properly model detention within the COE Channel," and states that "volumetric increases have not been modeled[.]" Mr. White testified this condition is unnecessary because the Storm Runoff Analysis and Operation and Maintenance Plan (Exh. 57) demonstrates the project will significantly decrease the volume of stormwater. Exh. 123, ¶ 45. He further testified that Condition 37 is incorrect, because the volumes have been modeled in the Operation and Maintenance Plan, which shows that the project will significantly decrease the volume of stormwater. *Id*., Exh. 124, ¶ 30. Therefore, he stated, volumetric increases have been modeled and indicate there is no increase in stormwater volume to the adjacent wetlands. Exhs. 123, ¶ 45; 124, ¶ 30.

Mr. Houston disagreed, stating although the runoff volumes are modeled, the model is incorrect because it does not model the discharges on each side of the on-site dam, which acts as a control device. Exh. 126, ¶ 56. However, Mr. White specified that although stormwater flows from the property in two directions, it flows from the site of the project to be developed in only one direction. Tr. II, 68-69; 72-73. The testimony provided by Mr. White was detailed and specific and we find it more credible. He provided calculations of the stormwater runoff with the existing conditions and proposed conditions, documenting a decrease in stormwater runoff with the proposed conditions. Exh. 124, ¶ 15. Mr. Houston did not further specify why the purported failure to model discharges on each side of the on-site dam constituted an error. The Board has not demonstrated a valid local concern to support these conditions that outweighs the need for affordable housing. This condition is struck.

Discharge. Group B Condition 38, p. 30 requires that "[t]o properly quantify detention in the Development Footprint, the design discharge characteristics of the Weiss Farm Stormwater Pump Station ... Applicant shall incorporate into the model the discharge rate, capabilities staged discharge through multiple pumps, and pump on/off elevations."

Mr. White stated this pump (at Franklin Street) has no impact on the discharge characteristics from the project and will continue to pump at the same rate as today. Exh. 123, ¶ 46. He stated the peak rate of stormwater runoff from the project site will be less than the rate under existing conditions, and will therefore have no impact on the pump or Franklin St. culvert. Exh. 124, ¶ 31. Mr. Houston stated this modeling is required by the DEP Stormwater Management Policies. Exh. 126, ¶ 57. Since the DEP stormwater management policies are state requirements, these requirements are not based on valid local concerns and the Board has failed to demonstrate a local valid concern that outweighs the need for affordable housing. The developer is required to comply with applicable state requirements in any event. Accordingly, Condition 38 is struck.

Additional Test Pits. Condition 41, p. 31 states that "the individual logging the test pits data was not a Licensed Soil Evaluator and did not record redoximorphic features such as mottles...." The condition requires "[n]o less than two additional test pits [to] be excavated at each infiltration basin ... and the results provided to the Board." The Board stated in the decision that the testing that was already conducted did not include all the information needed to accurately quantify seasonal high groundwater. Mr. Houston stated the most accurate basis for

design, both with respect to infiltration and seasonal high groundwater, is to provide test pits, as required under the Massachusetts Stormwater Handbook and, with respect to seasonal high groundwater, to compare the elevation of mottles with observed data from monitoring wells. Exh. 126, ¶ 59.

Mr. White stated that in his opinion as a DEP Licensed Soil Evaluator, this was factually incorrect and there are more appropriate testing methods that are preferable to the methods required by the Board under this condition, rendering it unnecessary. Exh. 123, ¶ 48. According to Mr. White, the Stormwater Handbook states either redoximorphic features in the soil or observation wells are to be used for the determination of seasonal groundwater elevations, and in this case, observation wells were installed at each infiltration system and monitored during the spring of 2015. Exh. 124, ¶ 33. Again, Mr. Houston's testimony referenced state, not local standards. The Board has not demonstrated a valid local concern with respect to this condition that outweighs the need for affordable housing. This condition is struck.

Stormwater Open Space. Group B Condition 43, p. 31 provides that "[s]tormwater within the interior open space between buildings shall be disconnected from the storm drain system and recharged within the open space area. Porous walkway pavement shall be used for walkways within the interior open space area. Rain gardens located within the interior open space area shall be used for infiltration of as much roof-water as practicable."

Mr. White stated the requirements imposed by this condition to stormwater management do not conform to standard engineering practice. Exh. 123, ¶ 50. Further, he claims the practice of disconnecting a storm drain system is not recommended in the DEP Stormwater Handbook. Exh. 124, ¶ 35. Mr. Houston, however, stated this practice is recommended where practicable, according to the Handbook. Exh. 126, ¶ 61. Again, if this is required by the Handbook, the Board has sought to apply a state standard as a local requirement. For the reasons stated above, the Board has not demonstrated a valid local concern supporting this condition that outweighs the need for affordable housing. Condition 43 is struck.

Infiltration/Detention Systems. Group B Conditions 45-47, pp. 31-32, address specific Infiltration/Detention Systems shown on plans near proposed buildings, and provide for specific fill materials and removal. Specifically, for the Infiltration/Detention Systems C-4 and D-3, the Board required that Weiss Farm "remove fill within 5 feet horizontally and below the bottom of the system extending from the top of the fill downward to native soil and replacement with Title

5 sand." For Infiltration/Detention System E-3, however, the Board only "recommend[ed] removing fill within 5 feet horizontally and below the bottom of the system extending from the top of the fill downward to native soil and replacement with Title 5 sand." Exh. 110, p. 32. For all three infiltration/detention systems listed in Conditions 45-47, the Board also stated that "[t]he design engineer should review this issue and determine if any special construction measures are required to provide long term stabilization and functioning of the system."[39]

Mr. Houston stated that the removal of unsuitable materials from beneath the infiltration systems is standard engineering practice, and the drawings provided by Weiss Farm appear to require such removal. Exh. 126, ¶ 62. Mr. White, however stated the unsuitable fill material beneath the infiltration systems is already noted on the Site Plan, Sheet C-5 (Exh. 53) as being removed and replaced with Title 5 sand. In his view, these conditions could be construed as requiring additional excavation beyond what is required. Exh. 123, ¶ 51; Exh. 124, ¶ 36. We find Mr. White's testimony credible, and therefore we will modify Conditions 45 and 46 to require removal of these materials consistent with Weiss Farm's site plan

Stockpiles. Group B Condition 50, pp. 36-37 requires the removal of two stockpiles shown on the Existing Conditions Plan, Exh. 53, located within 25 feet of wetlands. Once those are removed, the condition requires soil in the location where the stockpiles were placed to "be evaluated to determine whether the wetland extended interior from that shown on the Feldman plan and whether the stockpiles resulted in filling of Bordering Vegetated Wetland and Bordering Land Subject to Flooding...."

Mr. White stated the limits of the bordering vegetated wetlands were established and approved by the Conservation Commission in 2012, and the approval is still in place. He further stated test pits are not used to establish those limits and therefore the condition is unnecessary. Exh. 123, ¶ 52. Mr. Lowry stated the rationale behind this condition is flawed, because the basis for categorizing this area as "wetland" is the USDA Soil Survey, which is generalized, and not to be used for site-specific determinations of soil conditions. He stated there was no contention during the Board hearing process that the stockpile areas contained wetlands, so to require test pits now, at depths that go beyond the recommended depths, was unreasonable. Exh. 113, ¶¶ 17-

[39] A recommendation or suggestion is not a specific condition required by the comprehensive permit, and some language contained in Conditions 45-47 appear to constitute recommendations, rather than explicit conditions of the comprehensive permit. As such, the recommendation language is not a condition of the comprehensive permit.

19. He further testified that the Town's local bylaw does not define wetland soil types, which would be needed to assess the results of any soil pits. Ex. 113, ¶ 19.

Mr. Houston testified the test pits are intended to identify wetland boundaries which may have been altered by prior unauthorized work, and that restoration of altered wetlands is appropriate. Exh. 126, ¶ 63. However, Mr. Houston also stated he was not familiar with the particular location referenced in Mr. White's affidavit at paragraph 52. *Id.* Mr. Lowry testified that when the Commission reviewed the wetlands delineations for the project prior to its approval in 2012, the stockpiles at issue were not in their current location. Therefore, the location of the current stockpile would not influence the Commission's past determination of the wetlands boundary line, which legally defined the limits of certain wetland resource areas. Exh. 113, ¶ 18. We find the testimony of Mr. White and Mr. Lowry to be more credible than that of Mr. Houston. The Board has not shown that the condition is supported by a local requirement that is stricter than state wetlands requirements and therefore has not established a valid local concern that outweighs the need for affordable housing. This condition is struck.

Concrete Debris Removal. Group B Condition 51, p. 38 requires that "[c]oncrete debris shall be hand removed or removed with small equipment to minimize disturbance to vegetation. All work shall be conducted during low-flow periods. The applicant shall prepare a work plan documenting the extent of concrete debris and presenting the mitigation methods proposed...."

Mr. White stated no concrete rubble was visible during his inspections, and DEP has determined there is no need to remove it in any event. Exhs. 113, ¶ 21; 123, ¶ 53; 124, ¶ 37. In Mr. White's opinion, this condition was unnecessary. Exh. 123, ¶ 53. Mr. Lowry testified that, to the extent concrete debris was historically deposited in wetlands area, any removal now would result in a substantially greater impact than leaving it there. Exh. 113, ¶ 22.

Mr. Houston stated removal of concrete debris from wetlands is commonly required as part of wetland restoration and should be considered as falling within the administrative discretion of the Board. Exh. 126, ¶ 64. Neither the comprehensive permit nor Mr. Houston's testimony specify where concrete debris may be found at the project site. Both Mr. White and Mr. Lowry testified they never observed any concrete debris or rubble during their site inspections. Mr. Lowry further testified that his site inspections of the vegetated wetland areas exhibited no signs of disturbance. Exh. 113, ¶ 21. We find the testimony of Mr. Lowry and Mr. White to be more credible that the removal of concrete debris is unnecessary. Again, the Board

has not demonstrated that its requirement is supported by a local requirement that is stricter than state standards, and thus it has not demonstrated a valid local concern that outweighs the need for affordable housing with respect to this condition. This condition is struck.

Drainage Study. Group B Condition 52, p. 38, requires that a current drainage study be prepared that determines where, on the property, the watershed drainage divide is located, "due to changes in the hydrology associated with the dredging of a new ditch in Bordering Vegetated Wetland and Bordering Land Subject to Flooding[.]"

In its decision, the Board stated that the 2010 Administrative Consent Order required the preparation of a drainage study, which was completed in 2009, and that an abutter to the project requested a review of that study. The Board also stated the 2009 drainage study and the subsequent review differed in the assessment of the watershed divide on the property, and changes associated with dredging a new ditch in certain wetlands areas will require a new study be prepared to show where this divide is located. Exh. 110, pp. 38-39. Mr. Houston testified that the required study, a watershed study determining the point of the watershed divide from which runoff flowers to the West Culvert has never been submitted. Exh. 126, ¶ 65.

Mr. White testified a watershed study was already prepared and submitted, that it was revised on June 10, 2015, and conditions in the report have not changed. Exhs. 67; 123, ¶ 54. He stated this study was done after the ditch in question had been dredged. *Id*. Mr. Lowry further stated the June 2015 Watershed Study is satisfactory and an "accurate and appropriate" analysis of the drainage conditions on the site. He noted that dredging or excavation of the farm ditches was previously approved by DEP for the previous owner. Exh. 113, ¶¶ 25, 26. Finally, Mr. White stated that there have been no new drainage channels constructed since the Benchmark Survey and drainage studies were prepared; therefore, the project will have no impact on either study or on a watershed divide. Exh. 124, ¶ 38. Condition 52 does not refer to the June 10, 2015 Watershed Study, but refers to older ones, and Mr. Lowry testified that the June 10, 2015 study is accurate and satisfactory. Exh. 113, ¶ 24. The Board has not referenced applicable local requirements and it has not demonstrated a valid local concern that outweighs the need for affordable housing with respect to this condition. It is therefore struck.

Pump Station Access Roadway. Condition 53, p. 39 requires "[t]he access roadway shall be brought to grade such that it meets the conditions specified in the ACOP. [I]mpact to the floodplain ... shall be calculated and mitigation shall be provided as specified in the regulations

implementing the Wetlands Protection Act (310 CMR 10.57) and the Stoneham Wetlands Protection Bylaw (Town Code Section 11) ...."

Mr. White testified that the access drive to the pump station was constructed pursuant to the 2006 ACOP, that DEP has reviewed the site and determined it is compliant, and that, in his view, no further work is required for the drive. Exh. 123, ¶ 55. He further testified that an adjacent Gerald Road subdivision project was recently approved by the Stoneham Conservation Commission, which "will result in a considerable amount of filling within the same floodplain," and the Commission did not require any compensation for the displaced floodplain. *Id*. Mr. Lowry further testified that the access roadway leading to the pump station appears to have been constructed in accordance with the conditions specified in the DEP Consent Order; has a de minimis effect on flooding, and there is no justification to reconstruct it. Exh. 113, ¶¶ 28-29. The Board argues generally that the DEP Order is irrelevant, as it is limited to determining compliance with state law, and has no bearing on issues of local concern outside its jurisdiction. Board reply, p. 2. The Board, however, did not argue that there is an applicable local requirement stricter than the state requirements. Therefore, it has not demonstrated a valid local concern with respect to this condition that outweighs the need for affordable housing.[40] Accordingly, Condition 53 is struck.

Weir Dam. Group B Condition 33, p. 29, requires Weiss Farm to "reconstruct and repair the low precast dam in accordance with the [Moore Stormwater Report] so that the dam is capable of controlling the direction of flow ... in accordance with the DEP Consent decree." Mr. Houston testified that the Operation and Maintenance Plan for the on-site dam is incomplete with respect to addressing the operation of the on-site dam and that it does not provide a protocol for adjusting water flow through the flash board. Exh. 126, ¶ 54. He further stated that Weiss Farm is incorrect in thinking the on-site dam does not act as a control device, stating it is necessary to restore the on-site dam to functionality, which is why the Board imposed conditions requiring design repairs. Exh. 126, ¶ 55.

Mr. White stated this condition is unnecessary because the Operation and Maintenance Plan for Stormwater Management submitted to the Board already includes the existing weir

[40] The Board's decision referenced Chapter 11 of the Town bylaw, particularly § 11.22. *See* Exh. 110, pp. 34-35. If the Board relies on this local bylaw to support its assertion that valid local concerns justify conditions relating to stormwater management, it has provided no argument to the Committee as to why the bylaw is important for this particular project, or how it relates to this location.

structure and dam and provides for its operation and management. Exh. 123, ¶¶ 43-44. Mr. White testified no adjustment of the weir board is required, and the weir dam does not have to act as a watershed drive. Exh. 124, ¶¶ 28-29. The Board has not identified a local requirement stricter than state standards to support this condition and therefore has not demonstrated a valid local concern to support this condition that outweighs the need for affordable housing. This condition is struck.

Group B Condition 54, p. 39, requires the "backwater control dam" to be maintained to meet the conditions specified in a "2006 Administrative Consent Order with Penalty and Notice of Noncompliance," and for mitigation measures to be provided for as specified under the Wetlands Protection Act and the Stoneham Wetland Protection By-Law, which prohibits disturbances within 25 feet of a wetland resource area: specifically, "mitigation shall be provided on an increment by increment basis for displaced floodplain."

Weiss Farm's requested waiver from these provisions was denied. Exh. 110, App. B. However, in view of the Board's requirement of certain activities within the resource area, we have interpreted that waiver denial as limited to allow the activities required by the decision consistent with the specific conditions requiring work in the wetlands. *See* discussion at § III.B.3.b, *supra.* No other waivers relating to the local wetlands bylaw were requested. The 2006 ACOP referenced in Condition 54 relates to requirements under the state Wetlands Protection Act. The Board argues that it declined to waive the relevant provision of its bylaw, Chapter 11, based on local concerns, but does not provide specific details regarding the applicability of the bylaw to this site. Board reply brief, pp. 2-3.

Mr. Lowry, Weiss Farm's wetlands expert, stated that this reference to a backwater control dam is most likely a reference to the weir dam. Exh. 113, ¶ 31. The weir dam replaced an existing earthen dam. Tr. II, 79. Mr. White stated the previously existing earth dam has already been replaced by a precast concrete weir dam, resulting in a net increase in the flood storage available. Therefore, in his view, no additional mitigation is required. Exh. 123, ¶ 56.

Weiss Farm further argues it did not initially propose work within a state wetland resource area, but rather some temporary work in the buffer zone: it proposed upgrading an existing pathway, requiring some work within the first 25 feet of the state wetland buffer zone, subjecting it to the Town's local wetlands bylaw, , as discussed in § IV.D.2, *infra*. Weiss Farm argues the Board, during its public hearing, requested that Weiss Farm make repairs to a weir

dam located in the drainage ditch, which is a state wetland resource area. Weiss Farm brief, pp. 3-4. The weir dam had been installed as a result of a 2006 administrative consent order between DEP and the property's then-occupant, Weiss Farm, Inc. *See* Weiss Farm brief, Exh. A, pp. 204-205; Exh 124, ¶ 12; Tr. II, 79. Mr. Lowry testified Weiss Farm repeatedly offered to restore the weir structure to the level approved in the DEP Administrative Consent Order. Exh. 113, ¶ 31. There would be no lost flood storage or lost floodplain, since the plan simply requires replacing the existing concrete components. *Id*.

Despite Weiss Farm's assertions that the proposed weir dam work was not its responsibility or necessary in order for it to comply with state wetland laws and regulations, it agreed to make the requested repairs at the Board's request during the Board's hearing, in order to bring it into compliance with the DEP order. Tr. II, 77-79. The Final Order of Conditions included the work to be done on the weir dam. *See* Exh. 121 at 14, ¶ 46. Weiss Farm argues, therefore, that all work necessary to complete the weir dam maintenance work was part of the project at the request of the Board, and the waiver of the bylaw to allow this work should be made part of the comprehensive permit decision. It argues the work on the weir dam is the only work to be done directly within the wetland resource area. Weiss Farm brief, pp.4- 5. In order to meet the Board's request, Weiss Farm's requested waiver from the Stoneham bylaw provision prohibiting work within the wetland resource area is granted. This will allow Weiss Farm to complete the required weir dam repairs in accordance with the DEP order. As noted above, we already modified the denial of the wetlands bylaw waiver to be consistent with the more specific provisions regarding work in the wetlands. For clarity, Condition 54 is also so modified, in accordance with our ruling on the denial of Waiver Request 16, so that it allows to the extent necessary the work required for dam maintenance.

Pump Station. Similarly, the Board, during its hearing, requested additional repairs of a pump station, even though Mr. White, after a study and report he prepared, dated June 8, 2015 and submitted to the Board, concluded that only minor changes, such as replacement and elevation of an electrical box, be made. Exhs. 123, ¶¶ 46-47; Exh. 124, ¶ 19; *see* Exh. 60; Weiss Farm brief, p. 3. The Final Order of Conditions did not approve work on the pump station. Exh. 121. Therefore, Weiss Farm argues any conditions relating to the pump station or to reports relating to the pump station, specifically Conditions 38, 39, 40 and 52, should be struck as a matter of law. In its view, pump station work was not authorized by the DEP Final Order of

Conditions, and any repairs should not be included as part of the comprehensive permit. Weiss Farm brief, p. 7. These conditions are discussed individually below.

Group B Condition 38, p. 30, requires Weiss Farm to incorporate into its stormwater model "the discharge rate, capabilities staged discharge through multiple pumps, and pump on/off elevations." Group B Condition 39, p. 30, requires Weiss Farm to expand its stormwater management report to include "evaluation of the age, condition, and operation of the stormwater pump station" and to replace any "outmoded or poorly operating equipment," and, with Group B Condition 40, p. 31, requires the replacement of the pump station with alternating pumps and to add emergency power. Condition 52 requires the completion of a current drainage study to determine where on the property the watershed divide is located.

Mr. Houston stated the recommended repairs of Condition 39 are required to comply with good design principals and standard engineering practice, but did not elaborate. Exh. 126, ¶ 58. He testified the existing stormwater pump station is deficient, and that a reconstructed pump station should be provided. Exh. 126, ¶ 40. He disagrees with Mr. White that DEP Stormwater Management Standard 2 is met. Exh. 126, ¶¶ 37, 39, 40.

Mr. White testified that these alternating pumps and emergency power are unnecessary. Exh. 123, ¶ 47. He stated the pump station has been operating for many years, the rate of pumping will not change with the project, and the pump has no impact on the flow through the culvert during major storm events. Exh. 124, ¶ 32. He stated that the pump station has no impact on the discharge characteristics from the project, because the project is located above the flood elevation of the wetlands. Exh. 123, ¶ 46. In his opinion, the pump station will continue to pump at the same rate that it does currently, and therefore the expanded stormwater modeling required by Condition 38 is unnecessary and "unsupported from an engineering perspective." *Id.* He stated the peak rate of stormwater runoff from the site will be less than the rate under existing conditions, and will have no impact on the pump. Exh. 124, ¶ 31. Regarding Condition 39, Mr. White reiterated that the rate of pumping will not change as a result of the project, and the pump does not operate during major storm events such as the ones referenced in the condition. Exh. 123, ¶ 47. In his opinion, Condition 39 is unnecessary. *Id.* The Board appears to rely on DEP management standards for this condition, and has not identified a stricter local requirement. Weiss Farm is required to comply with all applicable DEP requirements, and our decision so

provides. *See* § X, Condition 6.f. Therefore, the Board has not demonstrated a valid local concern that outweighs the need for affordable housing and this condition is struck.

Condition 52 requires that a "current" drainage study be prepared to determine where the drainage divide is located on the project site. Exh. 110, pp. 38-39. Mr. White testified that a watershed study was prepared and submitted to the Board and that conclusions in this report have not changed. Exh. 123, ¶ 54.[41] No new drainage channels have been constructed since the studies referenced in Condition 52 were prepared. Exh. 124, ¶ 38. In his opinion the requirements of Condition 52 are unnecessary. Exh. 123, ¶ 54. Mr. Lowry also stated that the existing study referenced in Condition 52, the June 2015 Watershed Study, is an accurate analysis of existing drainage conditions and additional studies are unnecessary. Exh. 113, ¶¶ 25, 26.

The Board argues DEP conclusions are irrelevant in this proceeding, as they are not dispositive of issues arising under Stoneham's local wetlands bylaw. Board reply brief, p. 1-3. Further, it claims any determinations by DEP as to state law have no effect on the Board's findings under local wetlands bylaw and DEP findings cannot encroach on the Committee's jurisdiction involving determinations of issues of local concern within a comprehensive permit proceeding. However, the Board does not state which specific local concern supports this condition, or how the local wetlands bylaw that identifies the concern is stricter than state requirements.

As noted above, the Board has failed to identify the nature of the specific local concern it alleges to be at issue, its basis in a local requirement that is stricter than the state standard, or the reason for its applicability to the project site. We find the testimony of Mr. White and, that of Mr. Lowry, regarding Condition 52, to be more credible regarding the various conditions relating to the pump, Conditions 38, 39, 40, and 52. Mr. Houston argues that Condition 52 requires a study to determine the point of a watershed divide from which runoff flows to the West Culvert, but does not fully elaborate on why such a study is needed. Exh. 126, ¶ 65. Mr. Lowry credibly explained that a second study is unnecessary, given that similar property conditions have existed in this specific area of the site "for decades," and recent excavation would not "significantly"

[41] Mr. White refers to Exhibit 65 as the Watershed Study, which does not match the Exhibit List prepared by the parties, in what may have been a typographical error. The June 2015 Watershed Study is Exhibit 67.

affect the site's overall drainage conditions. Exh. 113, ¶ 26. While Mr. Houston did not agree, his testimony focused predominantly on state standards and policies, and did not provide specifics on the standard engineering practices or rationale for additional watershed studies he argues are necessary. The Board has failed to demonstrate a local valid concern that outweighs the need for affordable housing. Conditions 38, 39, 40, and 52 are struck.

Sanitary Sewer Pump. Condition 85, p. 43, requires the sanitary sewer pump station located north of Townhouses 10-12 and 13-15 to have a wet well separate from the pumps, dual-alternating grinder pumps, emergency power, and odor control filters.

Mr. White testified the proposed sewerage pump station will be designed in accordance with DEP guidelines and standard engineering practices, with dual alternating pumps in a wet well, emergency generator, and odor control filters. Exh. 123, ¶ 60. He stated a separate drywell is considered poor engineering practice that is not in conformance with DEP Guidelines, and that this condition is unnecessary. *Id*. Mr. Houston did not address this condition in his testimony. The Board has not demonstrated a valid local concern supporting this condition. Condition 85 is struck.

2. Wetlands Buffer Zone

Weiss Farm seeks a waiver from certain provisions of Chapter 11, the Stoneham wetland protection bylaw. Weiss Farm proposed upgrading an existing walking path located in the northeast corner of the property, which will require performing some temporary work within the 25-foot buffer zone. Weiss Farm brief, p. 3. Waiver Request 16, seeking a waiver of the "no disturbance" zone within 25-feet of a wetland resource area under the Town's Wetland Protection Bylaw, was denied outright.

Mr. White testified that all plans relating to stormwater management and potential impacts on wetland resource areas were carefully developed "to ensure there would be no adverse impact to wetland areas[,]" and that specifically no project work would be done with the first 25 feet of the 100 feet buffer zone closest to the Bordering Vegetated Wetlands, with the exception of a stone dust path leading to an existing pedestrian bridge across the drainage ditch Exh. 123, ¶¶ 22, 23, 30. He testified the 25-foot "no disturb" zone complied with the Town's wetlands bylaw, and that no work would be done within this "no disturb" zone with the exception of the stone dust path. Exh. 123, ¶ 24, 30. Further, Weiss Farm argues that the presiding officer overseeing the appeal by the Stoneham Conservation Commission of the

Superseding Order of Conditions issued by DEP in 2017 made a finding, later affirmed by the Commissioner of DEP in a Final Order of Conditions, that the proposed work on the path is "improving" the existing dirt path by adding a stone dust base, and that certain wetland interests could actually be "enhanced" as a result. Weiss Farm brief, Tab A, pp. 213.

The Board correctly argues any DEP determination has no bearing on the Board's consideration of issues arising under the Town's wetlands bylaw. Board's reply brief, p. 2; Exh 118. Chapter 11 of the bylaw states, in relevant part, that "a continuous strip no less than twenty-five (25) feet in width, untouched and in its natural state, shall be left undisturbed adjacent to those areas meeting the description of 'wetland' as identified in the Wetlands Protection Act, [G.L. c. 131, § 40], and regulations hereunder (310 CMR 10.00). No person shall remove, fill, dredge, alter or build upon or within this strip." Chapter 11.2 of the Wetlands Protection Bylaw provides that "[e]xcept as permitted by the Conservation Commission or as provided in this bylaw, no person shall remove, fill, dredge, build upon, degrade, or otherwise alter resource areas protected by this bylaw...." The purpose of the Wetlands Protection Bylaw is:

> to protect the wetlands, water resources, and adjoining land areas in the [Town] by controlling activities deemed by the Conservation Commission likely to have a significant or cumulative effect upon resource area values, including but limited to the following: public or private water supply, groundwater, flood control, erosion and sedimentation control, storm damage prevention including coast storm flowage, water quality, water pollution control, fisheries, shellfisheries, wildlife habitat, rare species habitat including rare plant species, agriculture, aquaculture, and recreation values, deemed important to the community....

Exh. 118 at 11-2.

On the record presented, we find the Board has not shown a local concern outweighing the need for affordable housing that justifies the outright denial of Waiver Request 16. In particular, the Board has not demonstrated that denial of a requested waiver to the extent of allowing the proposed work on the path is supported by a valid local concern that outweighs the need for affordable housing. As noted in § III.B.3.b, note 15, *supra*, we modified the denial of Waiver Request 16, prohibiting working within the 25-foot buffer zone, to provide that the waiver is denied "except as otherwise provided in this decision."

3. Snow Management

Group B Condition 22, p. 26, stated the Board rejected Weiss Farm's snow management plan "as calling for the placement of plowed snow proximate to, if not within, wetland buffer zones." Mr. Houston testified that "significant portions of the designated snow storage areas are within the jurisdictional buffer zone which has the potential to impact the resource area. The inherent potential for work in buffer zones to damage wetland resources is the basis for regulation of buffer zones in the Wetlands Protection Act Regulations (310 CMR 10.00)." Exh. 126, ¶ 20. Other than the reference to state wetlands requirements, Mr. Houston did not specify in his pre-filed testimony that he was referring to the 25-foot buffer zone required under the Stoneham bylaw.

Weiss Farm argues its updated snow plan, *see* Exh. 39, indicates that snow locations have been located "well back" from wetland resource areas, and shows that plowed snow will be divided in several places to keep the pile heights low. Weiss Farm brief, p. 27.

Our limited grant of Waiver Request 16 regarding the 25-foot buffer zone does not extend to permitting snow storage in the 25-foot buffer zone. To the extent this condition relates to the state wetlands requirements. as we have stated above, compliance with state requirements is required by this decision, and the state Wetlands Protection Act does not provide a basis for a local concern.

The Board has not provided credible evidence to clarify the meaning of its prohibition of snow placement "proximate" to wetland buffer zones. Mr. White stated that "[a]ll snow storage areas are a minimum of forty feet from Wetland Resource Areas as shown on the snow storage plan." Exh. 124, ¶ 3. Based on the record, The Board has not demonstrated a valid local concern that outweighs the need for affordable housing with respect to the second sentence of Condition 22 and it is struck.

4. Soil Examination/Testing

Group C Condition 13, p. 46 requires Weiss Farm to provide soil examination and testing as needed to ascertain the suitability of the parcel for development, prior to the Board's approval of Final Plans." The Board provided no argument regarding whether a specific local concern supports this condition. Suggestions by counsel during cross-examination that reports and plans submitted by Weiss Farm already were only preliminary, and that a board may require more detail at a later date, *see* Tr. 1, 85, do not provide such support.

Mr. Mahoney stated this standard has no discernible meaning, making compliance difficult or impossible. Exh. 116, ¶ 15(k). Mr. Mahoney further testified Weiss Farm should not be required to conduct additional soil testing as part of a final plan to be submitted in the future after securing a permit, and that the Board already has a detailed geotechnical and soil testing report submitted during the hearing process. Tr. 1, 84-85. The Board has not demonstrated a valid local concern to support this condition that outweighs the need for affordable housing. This condition is struck.

V. LAWFULNESS OF BOARD 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.

Weiss Farm argues that Mr. Mahoney and Mr. White addressed the conditions it argues fall outside the Board's authority to impose. *See* Weiss Farm brief, p. 13, citing Mr. Mahoney's testimony at Exh. 116, ¶¶ 15-16 and Mr. White's testimony at Exh. 123, ¶¶ 40-61.

A. Conditions Within the Province of the Subsidizing Agency

Weiss Farm argues Group A Conditions 1, 2, 4, 5, and 11 are matters not subject to the Board's review and instead are solely within the jurisdiction of MassHousing, the subsidizing agency. These conditions require that Weiss Farm execute the regulatory agreement within a certain time frame (1), procure a continuous extension of the project eligibility letter (2), receive final approval from MassHousing and subsidy funding (4), and to comply with a regulatory agreement with MassHousing "and/or" DHCD, before the issuance of a permit (5) and with MassHousing's conditions in its project eligibility letter, including requirements relating to the state Sustainable Development Principles (11). "[H]owever closely [conditions] may appear to

follow the current requirements of the subsidizing agency, such conditions improperly encroach on the responsibility of the subsidizing agency are therefore impermissible." *Simon Hill, LLC v. Norwell*, No. 2009-07, slip op. at 40 (Mass. Housing Appeals Comm. Oct. 13, 2011). "[I]nsofar as the board's ... conditions included requirements that went to matters such as, inter alia, project funding, regulatory documents, [and] financial documents ... they were subject to challenge as ultra vires of the board's authority under G. L. c. 40B, § 21." *Amesbury, supra,* 457 Mass. 748, 758.

Regarding Group A Condition 11, "[t]he Smart Growth Principles for ... the Commonwealth of Massachusetts Sustainable Development Principles ... are not, of themselves, local requirements. Neither are they enacted state requirements." *Herring Brook Meadow, supra,* No. 2007-15, slip op. at 6 n.4. The Board has not shown that Stoneham has incorporated these principles into the Town's local rules and requirements. Condition 11 is struck. The comprehensive permit contains some unnumbered conditions within the narrative portions of the permit; for example, on page 12 of the comprehensive permit, the Board states that it "has included as a condition of approval the submission of revised plans that comply with MassHousing's requirement," meaning the Sustainable Development Principles as incorporated into MassHousing's Smart Growth Scorecard. Exh. 110, p. 12. This language, to the extent it purports to be a condition, is struck. Group A Conditions 1, 2, 4, and 5 exceed the Board's authority, as it has no role in overseeing or implementing MassHousing policies. *See Amesbury, supra*, 457 Mass. 748, 757-758. Accordingly, these conditions are also struck.

Affordable Housing Restrictions. Group A Condition 29, p. 21, requires that "[e]ach affordable unit ... be rented pursuant to an affordable housing restriction...." Group A Condition 30 requires that "[a]n affordable housing restriction, enforceable by the Town of Stoneham, requiring that the affordable units remain affordable in perpetuity and in a form approved by the Board, shall be recorded senior to any liens on the project locus to protect the requirement for the affordable units in the event of any foreclosure, bankruptcy, refinancing or sale." By this condition, the Board requires the adoption of its own affordable housing restriction separate from that of the subsidizing agency.

The Board does not specifically address this condition in its briefs; it only generally argues that all conditions it imposed on the project were lawfully imposed and none exceeded its authority. Board brief, pp. 29-30. Further, the Board argues Weiss Farm, as the applicant, bears

the burden of proving each condition is unlawfully imposed, and has failed to do so. *Id*. Weiss Farm, as discussed more fully below, argues that the Board has no authority to impose conditions that fall within the sole jurisdiction of the subsidizing agency.

These conditions require an affordable housing restriction that is enforceable by the Town and in a form approved by the Board. Condition 29 requires that "[e]ach affordable unit shall be rented pursuant to an affordable housing restriction, more fully described [in Condition 30]." Condition 30 requires the affordable housing restriction to be enforceable by the Town and in a form approved by the Board. The Board seeks to impose its own restriction concurrently with that of the subsidizing agency. Weiss Farm argues generally that these conditions constitute "overreach" by the Board outside of areas within its jurisdiction. Weiss Farm brief, p. 15. Affordable housing restrictions are necessarily within the responsibility of the subsidizing agency and fall squarely within the kind of conditions found to be improper by the Supreme Judicial Court in *Amesbury, supra,* 457 Mass. 748, 758. Moreover, this represents the "sort of condition subsequent requiring future review and approval [by the Board] of which we have frequently disapproved." *Attitash Views, LLC v. Amesbury*, No. 2006-17, slip op. at 9 (Mass. Housing Appeals Comm. Oct. 15, 2007 Summary Decision), *aff'd Amesbury, supra,* 457 Mass. at 750-751. It is important that the Board not "impinge on the regulatory responsibilities of the subsidizing agency." *Id.*, slip op. at 7. Therefore, on the record before us, we conclude that Conditions 29 and 30, which require an affordable housing restriction subject to Town approval improperly invade the authority of the subsidizing agency and they are struck. *See Leblanc v. Amesbury*, No. 2006-08, slip op. at 5, App. at 18 (Mass. Housing Appeals Comm. Ruling and Order on Request for Enforcement…. Sept. 27, 2017).

While Weiss Farm argues Group A Conditions 26-37 are an "overreach into the jurisdiction" of others, it specifically argues that Conditions 26, 27, 28, and 31 interfere with the jurisdiction of MassHousing, as the subsidizing agency. Weiss Farm brief, p. 15. Condition 26 requires that no less than 25% of units be affordable to households earning no more than 80% of average median income, as calculated by DHCD. Conditions 26 and 27 mirror requirements found in the project eligibility letter issued by MassHousing on June 23, 2014. Exh. 1, Tab 4, ¶ 2 (stating, among other things, a minimum of 25% of units must be available for rental by households earning no more than 80% area median income). Condition 27 requires that no affordable unit be rented to anyone other than a qualified tenant, consistent with MassHousing

and DHCD policies. Condition 28 requires affordable units to be evenly distributed throughout the development and indistinguishable in exterior appearance from market rate units. Condition 31 requires written notice be provided to a tenant renting an affordable unit advising that the property is subject to an affordable housing restriction. Condition 28 is almost identical to a condition of MassHousing's Regulatory and Use Agreement. Exh. 1, Tab 8, p. 5.

Group A Conditions 26 and 28 shall be modified to state, "subject to the requirements of the subsidizing agency…." and to the extent they are inconsistent with the requirements of the subsidizing agency, they are struck. Conditions 27 and 31 are also struck as impermissibly invading the authority of the subsidizing agency.

Group A Condition 32 p. 22, require Weiss Farm to "prepare [management] documents in a form that conforms to [the decision] and applicable law and ensure that the terms and conditions of [the comprehensive permit] are enforced." Condition 3(E), p. 44, requires submission to the Board and all other relevant public agencies of a long-term property management plan for "review and final acknowledgment of consistency with the [comprehensive permit]." No specific arguments were provided in briefing, and the types of documents required to be prepared are not specified in detail greater than "management" documents. We have stated previously that the Board is entitled to receive a copy of the property management plan, but the content of the management plan is within the authority of the subsidizing agency. *Leblanc,* No. 2006-08, slip. op, App. at 25; *Falmouth, supra,* No. 2017-11, slip op. at 44. Condition 32 is therefore struck. Condition 3(E) is modified to state that a copy of the long-term property management plan provided by Weiss Farm to the subsidizing agency shall also be provided to the Board and all other relevant municipal officials and agencies. *See LeBlanc*, *supra,* No. 2006-08, App. at 25.

Group A Condition 33 requires that, within those management documents that the Town will have no legal or financial responsibility for the operation or maintenance of the roadways, landscaping and other infrastructure within the project site. Condition 33 is modified to state that "the Town will have no legal or financial responsibility for the operation or maintenance of the roadways, landscaping and other infrastructure within the project site, unless the Town is otherwise legally obligated to perform such work pursuant to applicable nonwaived local rules and requirements or other legal requirements. *See Falmouth, supra,* slip op. at 58-59.

Group A Conditions 34, 35, and 36, p. 22, deal with the "profitability" of the project, and dictate that the profit shall be limited to that allowed under the regulatory agreement with the subsidizing agency, that any excess profit shall be returned to the Town, and that Weiss Farm will provide the Board with a copy of all financial documentation required by the regulatory agreement, together with a certification of total development costs and revenues, with 30 days of the end of each tax year. Although no specific arguments were provided by the parties in briefing, Conditions 34, 35, and 36 are struck as they intrude on areas governed by the subsidizing agency. *See Leblanc, supra,* No. 2006-08, slip op., App. at 15; *Attitash, supra*, No. 2006-17, slip op. at 9-10.

Group A Condition 37 prohibits construction of any unit under the comprehensive permit until Weiss Farm submits to the Board, and all other relevant agencies, "a marketing plan for the affordable dwellings, such plan to conform to all affirmative action requirements or other requirements as imposed by federal or state regulations." No specific arguments were provided in briefing. The regulatory and use agreement provides in great detail for affirmative fair marketing, including a marketing plan approved by MassHousing. *See* Exh. 1, Tab 8. Marketing, particularly affirmative fair marketing, is also an area in which state housing agencies have extensive expertise and unique responsibility, and these matters are beyond the Board's authority. This condition is struck as it falls within the purview of the subsidizing agency. *See Leblanc, supra,* No. 2006-08, slip op., App. at 15; *Attitash, supra,* No. 2006-17, slip op. at 10.

Group B Conditions 4, and 5, p. 23,[42] state that Weiss Farm has executed certain agreements with the Town and DHCD. Specifically, Condition 4 states that Weiss Farm has executed a monitoring agreement with DHCD and the Town "similar in form to the Monitoring Agreement published by MassHousing but revised in content as required for consistency with [the comprehensive permit]" and shall be subject to review and approval by the Board. Condition 5 states that Weiss Farm has executed a regulatory agreement with the Town and DHCD that "has been recorded with [the comprehensive permit]." Each condition further states the referenced agreements are subject to review and approval by the Board.

Weiss Farm argues it has not executed a monitoring agreement with the Board or DHCD, and that while MassHousing provides form agreements on its website, these agreements are executed at a later time, between the developer and the subsidizing agency. It argues the Board

[42] Condition 13 is addressed in § V.C.1, *infra*.

is not a party to the agreement, and has no authority to claim it will be, or to require revisions to MassHousing's form agreements. Further, Weiss Farm argues the Board has no oversight role in reviewing and approving a regulatory agreement between Weiss Farm and the subsidizing agency, and that if there is a conflict between the regulatory agreement and the decision, the regulatory agreement controls. Weiss Farm brief, pp. 14-16. Because these conditions fall within the purview of the subsidizing agency, these conditions are struck.

Group C Condition 7, p. 46, imposes conditions relating to the construction of the units, specifically that "all ... units shall be built by the Applicant ... in accordance with this Permit and the Regulatory Agreement[.]" It also requires that the name and contact number of the site manager be filed with the building department, the Board, and the Town police department, and be kept current. Weiss Farm argues the Town has no authority to declare who builds the dwelling units, or to assign responsibility for another's actions. Weiss Farm brief, p. 16. The Board argues that the project is being constructed on a "congested Town road," and therefore requiring contact information for a site supervisor is a matter of "clear local concern, such as building construction ... as well as health and safety of local residents." Board brief, p. 31. The first sentence of Condition 7 is modified to state that all units shall be built in accordance with the permit and "subject to the requirements of the subsidizing agency." *See Leblanc, supra,* No. 2006-08, App. at 26. The second sentence of the condition is retained.

Group C Condition 42, p. 51, requires Weiss Farm to provide the Board with proof that an appropriate budget has been established and funded "consistent with that required by the subsidizing agency." Weiss Farm argues budget matters should be handled by Weiss Farm, the appropriate state officials, and the subsidizing agency. Project funding falls squarely under the authority of the subsidizing agency. *See LeBlanc*, 2006-08, slip op. at 5. Accordingly, Condition 42 is struck.

B. Conditions Subsequent Requiring Post-Permit Review

Conditions that require post-permit review for consistency with the final comprehensive permit are proper. *See Falmouth, supra,* No. 2017-01, slip op. at 44-45; *LeBlanc,* No. 2006-08, slip op. at 7-8, and cases cited. Weiss Farm argues, however, that many conditions contained in the decision go beyond this permissible scope of review and constitute impermissible conditions subsequent. It argues that "Stoneham has sought to retain for itself near plenary power to

continue to exert the right to review and control all aspects of the project which it has already approved." Weiss Farm brief, p. 30.

"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, or otherwise that may lead to disapproval of an aspect of a development project. *See Falmouth*, *supra,* No. 2017-11, slip op. at 44–45, citing *Attitash*, *supra,* No. 2006-17, slip op. at 12; *Peppercorn Village*, *supra,* No. 2002-02, slip op. at 22 (allowing condition for submission of additional plans concerning issues not addressed in preliminary plans submitted with comprehensive permit application as long as they do not require further hearing and approval by Board, but entail only approval by town official who customarily reviews such plans). Our precedents, as well as 760 CMR 56.05(10)(b), "permit technical review of plans before construction, and routine inspection during construction, by all local boards or, more commonly, by their staff, *e.g.,* the building inspector, the conservation administrator, the town engineer, or a consulting engineer hired for the purpose. Such review ensures compliance with the comprehensive permit, state codes, and undisputed local restrictions, as well as any conditions included in the final written approval issued by the subsidizing agency." *Attitash*, *supra*, No. 2006-17, slip op. at 12; *LeBlanc*, *supra*, No. 2006-08, slip op. at 7–8.

The Board argues the Committee's authority to strike conditions on this ground was invalidated by *Zoning Bd. of Appeals of Brookline v. Housing Appeals Committee*, 79 Mass. App. Ct. 1129 (July 14, 2011) (unpublished 1:28 decision). Therefore, the Board argues, categorizing a condition as a "condition subsequent" is irrelevant and is not grounds for striking the condition from the permit. The Board's argument is misplaced as it mischaracterizes an unpublished opinion of the Appeals Court that carries persuasive value, but is not binding precedent. *See Chace v. Curran*, 71 Mass. App. Ct. 258, 260 n.4 (2008).

In the *Brookline* case, the Appeals Court overwhelmingly upheld the Committee's decision modifying the town's comprehensive permit, only overturning the modification of three conditions, with limited and ambiguous discussion of the reasoning for the modifications. The court's ruling stated, "[t]hough the purpose of G.L. c. 40B is to promote the development of affordable housing, the fact that some delay in project execution might result from conditions requiring further review of the details of [certain plans] … or to ensure timely completion of

project infrastructure … does not place them beyond the board's authority to impose…. Conditions reserving issues of substance for future review and approval may in some instances be invalid … but that is a narrow exception that does not apply to the conditions at issue here." *Brookline*, 79 Mass. App. Ct. 1129, citing *Weld v. Board of Appeals of Gloucester*, 345 Mass. 376, 378 (1963); *Tebo v. Board of Appeals of Shrewsbury*, 22 Mass. App. Ct. 618, 624 (1986). The Rule 1:28 decision did not include the text of the conditions at issue or of the modifications made by the Committee.

The court's acknowledgement that review of a project for consistency with the permit may result in some delay, or may be to ensure timely completion of project infrastructure, indicates its concern was to allow appropriate post-permit review by local officials, not further hearings before the Board. We agree upon the importance of such post-permit review when conducted efficiently by the municipal officials with the most relevant expertise and authority. Moreover, since the Committee's issuance of the *Brookline* decision, the comprehensive permit regulations were extensively amended, and make clear that actions of municipal officials in carrying out a comprehensive permit decision should be made as efficiently as possible. 760 CMR 56.05(10)(a)-(c). Thus, conditions requiring subsequent review to determine conformance with the comprehensive permit by the appropriate municipal official or local board holding the relevant expertise are appropriate; however, conditions authorizing the Board to take further action and review beyond what is necessary to determine consistency with the comprehensive permit are not. *Weld, supra*, 345 Mass. 376, 378. *See Falmouth*, No. 2017-11, slip op. at 46.

A fundamental purpose of G. L. c. 40B, §§ 20-23, is to "expedite action on such applications where previously a builder might have suffered delays or months and even years in negotiating approvals from various boards." *Dennis Housing Corp. v. Zoning Bd. of Appeals of Dennis*, 439 Mass. 71, 78 (2003); *Standerwick v. Zoning Bd. of Appeals of Andover*, 447 Mass. 20, 29 (2006) (legislative intent of Chapter 40B is to "promote affordable housing by minimizing lengthy and expensive delays occasioned by court battles commenced by those seeking to exclude affordable housing from their own neighborhoods").

For this reason, it is important that the review for consistency with the permit be made by those with necessary expertise to perform the task expeditiously. This will also facilitate efficient use of municipal resources. As we noted in *Falmouth*, "the 'Board shall have the same power to issue permits or approvals as any Local Board which would otherwise act with respect to an

application,' 760 CMR 56.05(10)(a), and it 'may issue directions or orders to Local Boards designed to effectuate the issuance of a Comprehensive Permit ... and the construction of the Project, in accordance with 760 CMR 56.05(10)(b).'" *Falmouth, supra,* No. 2017-11, slip op. at 50, citing 760 CMR 56.05(10)(c). Nevertheless, as stated, the conditions must be consistent with § 56.05(10)(b), which requires all local boards to "take all actions necessary" to ensure consistency with the comprehensive permit. 760 CMR 56.05(10)(b).

The role of the Board at this stage, as articulated in 760 CMR 56.05(10)(c), is to issue directions or orders to local boards, or more typically, local officials who act for these boards, to expedite the construction of the project. Review by the relevant local board allows the officials with the most expertise to issue permits, consistent with the requirement of expedition, and avoids the delays that would occur if the Board itself were to review each subsidiary application and render each such determination. Thus local officials may consult with other town officials, including the Board, when they believe that such consultation will assist their review of submissions; but it is not the role of the Board to oversee construction. Generally, such oversight is by the municipal officials who have the relevant experience and authority, including the building department, not the entire Board. One exception, however, is that, rather than completely prohibiting the Board taking this role on, we generally have allowed it to do so if it is the entity with the appropriate expertise, such as with regard to zoning matters. *See Falmouth*, No. 2017-11, slip op. at 50–51.

Weiss Farm argues that the following conditions constitute improper conditions subsequent: 1) those relating to the submissions of further plans; and 2) the requirement that the project comply with the Town Center Strategic Action Plan.

1. Submission of Plans

The Board's decision contains various conditions requiring the submission of plans or other approvals to the Board. Weiss Farm challenges several of these conditions as improper conditions subsequent and argues that "[a]ll such technical plan and permit review should be expressly conditioned to be done expeditiously…." Weiss Farm reply brief, p. 6. Weiss Farm did not address each condition specifically in its briefing or testimony. However, it challenges many conditions imposed by the Board that reserve future review and approval as "imply[ing] 'the board must make a further determination of substance before the permit can issue[.]'" Weiss Farm Brief, p. 29, citing *Weld, supra,* 345 Mass. at 378 and *Tebo,*22 Mass. App. Ct. 618, 624.

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

Group A Condition 9, p. 17, states that "... where this Decision provides for the submission of plans or other documents to the Board, the Board shall review and provide a written response as to whether such plans or other documents are consistent with this Decision within [45] days of the Board's receipt of such plans[.]" Weiss Farm argues this is too vague, because the decision refers to all types of plans to be submitted, and that the Board is not permitted to require submission of additional plans for review. *See* Weiss Farm brief, p. 14. The Board did not provide specific argument.

Consistent with our practice, we modify this condition to clarify that any references to the submission of materials to the Board or other municipal officials or officers 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, and such review to be made in a reasonably expeditious manner, consistent with the timing for review of comparable submissions for unsubsidized projects. *See* § X, Condition 1, *infra; LeBlanc*, *supra*, No. 2006-08, slip op., App. at 1.

Board of Health Permit. Group A Condition 17, p. 18, requires the project to comply with the rules and regulations of the Stoneham Board of Health that were not otherwise waived in the decision and that dwelling floor plans shall be provided for review and approval by the Board of Health. No specific arguments were provided in briefing. This condition is modified to require review of dwelling plans to be for consistency with the comprehensive permit and in compliance with applicable unwaived rules, and regulations in effect on the date of the comprehensive permit application. *See* 760 CMR 56.02: *Local Requirements and Regulations*; *see also LeBlanc*,

No. 2006-08, slip op. at 11; *Hollis Hills, LLC v. Lunenburg*, No. 2007-13, slip op. at 40 (Mass. Housing Appeals Comm. Dec. 4, 2009).

Waivers. Waiver Request 26 requested a waiver from Chapter 20, §§ 20-35, of the Town Bylaws relating to permits for dumpsters. The Board approved the proposed location of dumpster but denied the waiver request for a Board of Health dumpster permit. Tr. I, 112. Mr. Mahoney testified that an on-site dumpster is necessary to serve the residences and that the project cannot, as a practical matter, be constructed without an on-site dumpster. Exh. 116, ¶ 16(f). Under Chapter 40B, individual permits are to be included in the comprehensive permit. *See Milton, supra*, No. 2015-03, slip op. at 58. Waiver Request 26 is granted.

Group B Conditions 7 through 12, pp. 24-25, require the submission of various plans, including final stormwater management plans (Condition 7), final landscaping plans (Conditions 8 and 10), identification of all proposed areas requiring vegetative clearing (Condition 9); infrastructure and operations plan (Condition 11), and a construction schedule identifying the sequence and approximate dates of all key construction stages (Condition 12). Conditions 7, 8, and 10 contain language stating that the submissions are for review by the Board and all other relevant public agencies for a final acknowledgment of consistency with the comprehensive permit, or for verification that submitted plans conform to the comprehensive permit. Conditions 9 and 12 do not contain such language.

Weiss Farm argues that these conditions are an attempt by the Board to "exert the right to review and control all aspects of the project which it has already approved." Weiss Farm brief, p. 30. Weiss Farm argues Condition 7, authorizing the Conservation Commission to review and approve a range of plans, seeks to retain the right to review and control review of the development. Condition 8 provides for review by the Board of landscaping plans and control over tree plantings, which Weiss Farm argues has already been addressed by DEP in its Final Order of Conditions. Condition 9 requires the Board to review and provide a written response as to whether any submitted plans are consistent with the comprehensive permit; Weiss Farm argues construction plans, for example, should be reviewed and approved by the building inspector, not the Board. *Id*.

Group B Conditions 7, 8, 9, 10 and 12 are modified to provide for submission of any required plans to the appropriate municipal official with relevant expertise for review to determine whether the submission is consistent with the final comprehensive permit, such

determination not to be unreasonably withheld, and such review to be made in a reasonably expeditious manner, consistent with the timing for review of comparable submissions for unsubsidized projects. We have already struck the requirement that a representative or agent of the Board have the opportunity to identify trees for protection. *See* § IV.C.8, *supra*. *See also Attitash, supra*, No. 2006-17, slip op. at 12-13 (condition required subsequent approval by "ad hoc tree preservation committee").

Group B Condition 11, p. 25, states that an Infrastructure Operations and Maintenance Plan has been submitted for review and approval by the Board. This condition is modified to mean submission for review to the appropriate municipal official with relevant expertise, to determine consistency with the comprehensive permit. *See LeBlanc*, slip op., App. at 19-20. The condition remains unchanged in all other respects, and Weiss Farm, in accordance with § X, Condition 3.d, *infra*, shall submit final construction plans for all buildings, roadways, stormwater management system, and other infrastructure to the Town board or official with relevant expertise and authority for final comprehensive permit review and approval pursuant to 760 CMR 56.05(10)(b).

Fire Chief Approvals. Group B Condition 18, p. 26, states that the interior roadway layout and parking areas "have been approved by the Fire Chief, to facilitate emergency access and increase fire safety." The parties did not provide specific argument regarding the conditions listed below pertaining to fire safety, with the exception of Group B Condition 23, p 26. A fire chief is a "local official," whose 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." *Sugarbush Meadow, LLC v. Sunderland*, No. 2008-02, slip op. at 9 (Mass. Housing Appeals Comm. June 21, 2010), citing G.L. c. 40B, §§ 20, 21, *aff'd Sunderland Zoning Bd. of Appeals v. Sugarbush Meadow, LLC*, 464 Mass. 166, 183 (2013). As such, issues relating to fire safety based on local requirements and regulations, should have been raised and addressed during the comprehensive permit hearing. The Board may not leave redesign of the project roadway to determination by the fire chief following the issuance of the comprehensive permit. Condition 18 is therefore modified to clarify that any references to the submission of materials for review and approval shall mean to determine consistency with the final comprehensive permit, such determination not to be unreasonably withheld, and such review to be made in a reasonably expeditious manner, consistent with the timing for review of

comparable submissions for unsubsidized projects." *See* 760 CMR 56.07(6); § X, Condition 1, *infra*.

Group B Condition 67, p. 42, similarly requires Weiss Farm to provide written documentation that the fire chief has approved the plans with respect to "access to each of the buildings for firefighting purposes as well as compliance with the site layout for fire truck ingress and egress." To the extent the Board relies on any municipal requirements, this is a matter that should have been addressed as part of the comprehensive permit decision. This decision already requires compliance with all applicable state requirements, including fire code requirements. With respect to any municipal requirements, Condition 67 is modified to require that the layout and parking area and other approvals are to be reviewed for consistency with the comprehensive permit. *See LeBlanc*, slip op., App. at 21-22.

Group B Condition 20, p. 26, requires that the Final Plans indicate that roadway construction materials and thickness conform to standards set forth in the Planning Board Rules and Regulations. *See* Exh. 110, p. 26. This condition is modified to state that conformance shall be to the Planning Board Rules and Regulations, as applicable, in effect at the time of Weiss Farm's application for a comprehensive permit, consistent with the plans approved in the comprehensive permit. *See LeBlanc*, No. 2006-08, slip op., App. at 21-22.

Group B Condition 23, p. 26, requires the Final Plans to be reviewed by the fire chief and water department for the hydrant and valve locations. Weiss Farm argues this condition is invalid as reserving an issue of substance for further review and approval. Weiss Farm brief, p. 29-30, citing *Weld, supra*, 345 Mass. 376, 378. Group B Conditions 68 and 69, p. 42, require that Weiss Farm submit written documentation from the fire department demonstrating its "concurrence" with respect to "hydrant locations and fire lane designations (condition 68), as well as written documentation attesting to the ability of the fire department's apparatus to reach the tallest floor of the proposed buildings (Condition 69). Weiss Farm includes these conditions as among the "everything under the sun" conditions it claims reserve for the Town "unfettered and exclusive discretion to continue to compel additional charges, delays and costs." Weiss Farm brief, p. 31. To the extent the Board relies on state law requirements for the hydrant and valve locations and apparatus access, this decision already requires Weiss Farm to comply with all applicable state law requirements. However, with respect to local requirements, review of fire lane locations and

fire apparatus safety are issues that should have been resolved during the hearing before the Board. *See Sugarbush, supra,* No. 2008-02, slip op. at 13, citing G.L. c. 40B, § 21.

Fire hydrant specification decisions by the fire chief are actions in his role as a local official, and we have allowed final hydrant location approval to be conducted by the municipal fire department. *See Milton*, No, 2015-13, slip op. at 17, 23, citing *Sugarbush, supra*, No. 2008-02, slip op. at 9; *Lever Development, LLC v. West Boylston*, No. 2004-10, slip op. at 7 (Mass. Housing Appeals Comm. Oct. 27, 2008). We will modify Condition 23 to state that Weiss Farm will provide written documentation to the fire chief regarding fire hydrants, whose placement shall be determined by the fire chief, who shall exercise reasonable judgment. *Id.; see also LeBlanc*, No. 2006-08, slip op., App. at 23.[43] Conditions 68 and 69 are is modified to require that Weiss Farm shall comply with unwaived requirements and regulations regarding fire safety. *See* § X, Condition 3.c.

Group B Condition 25, p. 27, requires Weiss Farm to submit to the Board and to any other relevant public agencies for review for consistency with the decision all requests for approval, and to forwards copies of those approvals to the Board. As requested by Weiss Farm, this condition is modified to provide that all submissions shall be made to the Board, which shall forward forthwith to the appropriate local official or office with relevant expertise, copies for their review for consistency with the comprehensive permit. Review by those local officials is to be made for consistency with the requirements of the comprehensive permit, and the relevant municipal official shall provide to the Board copies of their approvals. *See* § X., *infra*.

Group B Condition 70, p. 42 requires the submission of written documentation from the Stoneham police department stating the department's satisfaction with access and safety issues during the construction and operation of the project. Weiss Farm challenged this condition on the same basis as Conditions 68 and 69. Weiss Farm brief, p. 31. Condition 70 is modified to require that Weiss Farm shall comply with unwaived requirements and regulations regarding safety and

[43] Weiss Farm is not seeking a waiver from any specific provision of the uniform state building code, but is challenging the judgment of the fire chief with regard to future plans required to be submitted. The fire chief is a local official under G. L. c. 40B, § 20, and his approval falls within the jurisdiction of the Committee on appeal. G. L. c. 40B, § 22; *see Sugarbush, supra*, No. 2008-02, slip op. at 13. As a local official, "a fire chief does not have unbridled discretion effectively to deny a comprehensive permit by refusing to approve fire construction documents[.]" *Milton*, No. 2015-03, slip op. at 23, citing *Sunderland Zoning Board of Appeals v. Sugarbush Meadow, LLC*, 464 Mass. 166, 183 (2016).

access during construction of the project that were in effect at the time of its application for a comprehensive permit.

Condition 3(D) is modified to state that review of final utilities plans is limited to the extent consistent with the final comprehensive permit, and that such review shall be by the Board's designee, the appropriate municipal official with relevant expertise. *See LeBlanc*, No. 2006-08App. at 23-24. Conditions 3(F) is modified to state that review of the plans for all proposed signage and intersection lighting is limited to the extent consistent with the comprehensive permit decision, and that the review shall by the Board's designee, the appropriate municipal official with relevant expertise. *Id*.

Condition 22, p. 47, requires Weiss Farm to submit complete "As-Built" plans of the roadway and associated infrastructure no later than thirty days before submitting requests for certificates of occupancy for any structure, together with a certification from a professional engineer or architect that the plans comply in all substantive respects with the comprehensive permit decision. Weiss Farm includes this condition in a group it characterizes as "everything-under-the-sun" conditions that impose improper ultra vires requirements on the developer, and grant the Board "unfettered and exclusive discretion" to compel additional changes. *See* Weiss Farm brief, pp. 30-31. Weiss Farm did not identify the specific aspects of this condition that it considered unlawful. This condition is retained, but modified consistent with this decision.

2. Town Center Strategic Action Plan Compliance

The decision also requires compliance with Town Center Strategic Action Plan. The Board decision concluded that Weiss Farm "ignored this Plan in its entirety." Exh. 110, p. 10. Weiss Farm argues the plan did not exist at the time the comprehensive permit application was filed, on June 30, 2014. Mr. Mahoney testified to the extent the Board requires compliance with the Strategic Action Plan, it is unfair and unlawful, as it was released six months after the comprehensive permit filing. Exh. 116, ¶ 17; Pre-Hearing Order, § II, ¶ 10, p 3. Weiss Farm argues the plan also pertains only to a specifically identified area – the town center – and therefore cannot dictate compliance by a development outside that perimeter. Even if compliance with the Strategic Action Plan was required, Weiss Farm argues nothing in the proposed development interferes or contravenes the goals of the Plan.

As stipulated by the parties, the Town published its Town Center Strategic Action Plan in December 2014. Pre-Hearing Order, § II(10). It is well-settled that municipalities may only

impose on a project approved under Chapter 40B those non-waived local requirements and regulations that were in effect at the time of its application to the Board. *Hollis Hills*, *supra*, No. 2007-13, slip op. at 40-41, and authorities cited; *see also* 760 CMR 56.02: *Local Requirements and Regulations*. Accordingly, conditions requiring compliance with the Town Center Strategic Action Plan are struck.

3. Conditions Requiring Further Testing

Group B Conditions 30, 31, 34, and 36 require the submission of engineering reports identifying the following: 1) deficiencies in the stormwater conveyance system downgradient of the Weiss Farm Culvert to the point of free discharge; 2) deficiencies in the stormwater conveyance system downgradient of the West Culvert to the point of free discharge; 3) feasibility for reconstruction of the drainage channel through the wetland north of Franklin Street reestablishing connectivity from east to west specifically to the West Culvert; and 4) feasibility for restoration and maintenance of the channel upgradient of the West Culvert by dredging silt and debris and removing logs, trees, and other debris. Exh. 110, pp. 29-30. Weiss Farm argues these conditions fall outside the Board's authority to impose. Weiss Farm brief, p. 13.

Group C Condition 13, p. 46 requires Weiss Farm to provide soil examination and testing as needed to ascertain the suitability of the parcel for development, prior to the Board's approval of Final Plans. Weiss Farm argues generally this is an "ultra vires" requirement that exceeds the Board's authority. *See* Weiss Farm brief, pp. 29-30. Mr. Mahoney testified that he has never produced soil testing data "as part of a final approval after a permit has been issued." Tr. I, 84. Although this condition already was struck because the Board failed to demonstrate a relevant local concern, *see* § IV.D.4, *supra*, this condition also constitutes an improper condition subsequent, as it allows the Board to make a subsequent decision regarding whether the parcel is suitable for development. *See Milton*, No. 2015-13, slip op. at 56, n.33 (condition requiring further testing falls squarely within the category of an improper condition subsequent); *LeBlanc*, slip op. App. at 27.

We have already struck these conditions as the Board has not demonstrated a valid local concern that outweighs the need for affordable housing to support their inclusion in the comprehensive permit. *See* § IV.D., *supra.* Moreover, these conditions require the developer to conduct future studies and provide reports that allow the Board to engage in further substantive review potentially impacting the scope or terms of comprehensive permit. Such conditions

contradict the requirement for a single comprehensive permit, and thus constitute unlawful conditions subsequent. While Group B Conditions 30, 31, 34, and 36, and Group C Condition 13 were already struck for being unsupported by local concerns, they are also struck as unlawful conditions subsequent.

C. Other Conditions Challenged as Unlawful

1. Surety, Bonds, and Guarantees

Surety/Bond. Group B Condition 2, p. 23, requires that Weiss Farm post a bond or surety with the Town Clerk in the "amount needed to complete the ways, utilities, drainage, shade trees ... and as-built plans of the project as approved ... plus a ten percent margin of error plus an appropriate rate of inflation over a five year period." The parties did not provide specific argument. This condition is modified to state that Weiss Farm shall post such a bond or surety, subject to the requirements of the subsidizing agency, and to the extent required by non-waived applicable municipal bylaws and regulations in effect on the date Weiss Farm submitted its comprehensive permit application to the Board, as identified by the Board to the developer. *See LeBlanc, supra,* No. 2006-08, slip op., App. at 16.

Performance Guarantee. Weiss Farm also challenges what it terms "everything under the sun" conditions, including those that "compel Weiss Farm to defend and indemnify the Town of Stoneham or provide performance guarantees, giving Stoneham unfettered and exclusive discretion to continue to compel additional charges, delays and costs." Weiss Farm brief, p. 31.

Group C Condition 27, p. 48, requires Weiss Farm to "post a performance guarantee for each phase of work to be undertaken, satisfactory to and reviewed by the Board ... to ensure that any construction related damage to adjacent roads is repaired ... in a manner satisfactory to the Board." Weiss Farm challenges the post-performance guarantee condition generally as an unlawful, ultra vires attempt by the Board to retain control over the project, by compelling additional charges and costs. Weiss Farm brief, pp. 29-31.

Similarly, Group C Condition 43, p. 51 states, "[n]o building shall be occupied until the improvements specified in this Decision and set forth on the plans of record are constructed and installed so as to adequately serve said building or adequate security has been provided, acceptable to the Board, to ensure such completion. Any such performance guarantee shall be approved as to the amount and form by the Board." Mr. Mahoney testified this condition

provides "total discretion" to the Board regarding future approvals, and gives the Board ongoing oversight by giving the Board the authority to determine whether said plans "adequately serve" the project, at the Board's sole discretion. Exh. 116, ¶ 15(o).[44] Mr. Mahoney testified the same argument applies to Group C Conditions 45 and 46. *Id.*

Pursuant to 760 CMR 56.05(5)(b)4, a fee may only be imposed in compliance with applicable law and the Board's rules and, pursuant to 760 CMR 56.05(5)(a), the Board "should not impose unreasonable or unnecessary time or cost burdens on an Applicant." Generally, fees that are not already established by regulation in a municipal fee schedule are prohibited. In our past decisions, consistent with 760 CMR 56.05(b), we have made clear that such costs must be consistent with requirements established by local requirements or regulations. *See Falmouth,* No. 2017-11, slip op. at 47, citing *Leblanc, supra,* No. 2006-08, slip op., App. at 33 (payment of review fees applied only "to the extent provided in municipal bylaws and regulations"); *Milton, supra,* No. 2015-03, slip op. at 52; *Hollis Hill, supra,* No. 2007-13, slip op. at 12-13; *see also* G.L. c. 44, § 53G (providing for special deposit accounts for reasonable fees for employment of outside consultants when imposed by municipalities pursuant to local rules promulgated under G.L. c. 40B, § 21). In order to impose a performance guarantee, the Board is required to identify for Weiss Farm the local bylaw or regulation that authorizes charging such a fee in this context. *See LeBlanc, supra,* slip op. at 10. Pursuant to 760 CMR 56.05(5)(b), these conditions are modified to provide require performance guarantees only to the extent authorized by nonwaived local requirements and regulations, provided the Board identifies the regulations or bylaws requiring the performance guarantees.

Blasting/Earth Removal Surety. Group B Condition 79, p. 43, requires a surety in an amount to be determined by the Board following the Board's submission of a blasting and earth removal plan, "in order to repair structural damage to abutting properties arising from blasting activities." This condition is challenged by Weiss Farm as an attempt by the Board to grant itself "exclusive discretion" in requiring additional charges and guarantees. Weiss Farm brief, p. 31. Pursuant to 760 CMR 56.05(5)(b), the condition is modified to provide a surety is required to the

[44] The developer did not pursue in its brief its contentions, raised in the Pre-Hearing Order, that these conditions constituted either an improper condition subsequent or constituted unequal treatment. *See* Pre-Hearing Order, §§ IV, p. 5-6.

extent authorized by nonwaived local requirements and regulations, provided the Board identifies the applicable regulations or bylaws.

Indemnification. Condition 13, p, 25 (repeated as Condition 32, p. 49) states that Weiss Farm has already provided the Town with an agreement that the Town is "free of any liability for any act, omission or negligence caused by the Applicant ... with relation to this project," and indemnifying the Town and its employees, officials, agents or assigns from any harm caused by Weiss Farm relating to the project. Weiss Farm argues this is untrue, and that it has *not* provided the Town with any such indemnification agreement nor has it agreed to do so. Further, Weiss Farm argues no such agreement is required under G. L. c. 40B. Weiss Farm Brief, p. 16. The Board did not provide argument.

This condition is modified to provide that the agreement is to be provided to the Board to the extent it is required by applicable unwaived requirements and regulations, which must be identified by the Board to Weiss Farm.

2. Remaining Conditions Challenged as Unlawful

Federal and State Agency Approvals. Condition 22(a), p. 18, requires copies of all state and federal agency approvals to be submitted to the Board prior to the recording of final plans. Mr. Mahoney testified that requesting submission of these approvals falls outside the purview and authority of the Board. Exh. 116, ¶ 15(b). We have previously approved conditions requiring the submission of state and federal approvals to boards. *See Amesbury*, 457 Mass. at 765, n.21 (board can require written communication from lender and state or federal agency regarding receipt of funds and project and site approval before commencement of construction of affordable housing project); *Lever Development, supra,* No. 2004-10, slip op. at 31 ("[a]lthough compliance with state requirements does not fall within the local concerns that are the province of the Board, as is our custom we will require this comprehensive permit to be conditioned on a developer obtaining all required state and federal permits"). This condition is retained.

Davis-Bacon Act. Condition 22(b) requires development of the project to comply with requirements of the Davis-Bacon Act, 40 U.S.C. § 3142 *et seq*., 29 C.F.R. § 5.1. The Board's authority is limited to enforcement of applicable unwaived municipal requirements and regulations, not state and federal requirements. *See Green View Realty LLC v. Holliston*, No. 2007-13, slip op. at 9-11 (Mass. Housing Appeals Comm Jan. 12, 2009) and cases cited. The

Committee's general conditions, *see* § X, *infra,* require compliance with all applicable state and federal requirements. This separate condition is duplicative, and is struck.

Compliance with Bylaws and Regulations. Group A Conditions 23.1 and 23.2, pp. 18-19, state "[e]xcept as expressly waived by this Decision," the development of the project "shall comply with the Stoneham Zoning By-Law in effect at the time of this Decision and Permit," and with "all other rules, regulations, bylaws, and policies in effect at the time of this Decision and Permit."

The Committee has long held that a municipality "may only impose upon the Appellant non-waived local requirements and regulations that were in effect at the time of its application [for a comprehensive permit] to the Board." *Hollis Hills, supra,* No. 2007-13, slip op. at 40. *See* 760 CMR 56.02: *Local Requirements and Regulations*; *Paragon, supra,* No. 2004-16, slip op. at 45; *Weston Development Group v. Hopkinton,* No. 00-05, slip op. at 8-11 (Mass. Housing Appeals Committee May 26, 2004); *Northern Middlesex Housing Associates v. Billerica*, No. 89-48, slip op. at 8-12 (Mass. Housing Appeals Committee Dec. 3, 1992). This rule is equally applicable to bylaws as it is to other local requirements and regulations put forth by the Board as justification for imposing conditions on the issuance of a permit. *See Paragon,* slip op. at 45, citing *Meadowbrook Estates Ventures, LLC v. Amesbury*, No. 02-21, slip op. at 12 (Mass. Housing Appeals Committee Dec. 12, 2006). Accordingly, Condition 23 is modified to state that the development of the project shall comply with applicable unwaived requirements and regulations in effect at the time of Weiss Farm's filing of its comprehensive permit application with the Board. 760 CMR 56.02: *Local Requirements and Regulations.*

Group A Condition 24, p. 19, requires the project to comply with the rules and regulations of the Board of Health governing "private wells, storm water disposal and wastewater disposal,", except as waived by the decision. Mr. Mahoney stated the denial or conditions of Weiss Farm's waiver requests operate to preclude construction of the project, because they either conflict with other conditions in the comprehensive permit or are impossible to comply with. Exh. 116, ¶¶ 15(d), 16. Weiss Farm has not adequately argued in support of its objection to this condition as it has not specified which conditions conflict or are impossible to follow, and the Board has not submitted argument. Consistent with our determination above, Condition 24 is modified to require compliance with applicable unwaived local requirements and

regulations in effect as of the date of Weiss Farm's comprehensive permit application. *See* 760 CMR 56.02: *Local Requirements and Regulations*; *Amesbury*, 457 Mass. at 765, n.21.

Other conditions in the Board's decision similarly refer to compliance with unwaived Stoneham bylaws, regulations, rules, requirements or policies, or specifically require compliance with such of the foregoing as are in effect at the time of the Board's decision. Those conditions are all similarly modified to provide that any requirement in the Board's decision for compliance with any unwaived Town bylaws, rules, regulations, policies or requirements shall mean compliance with those requirements and regulations that were in effect at the time of the Weiss Farm's application to the Board for a comprehensive permit. 760 CMR 56.02: *Local Requirements and Regulations.*

Prohibition of Sand/Gravel Removal. Condition 10, p. 17, states "[n]othing in this Decision permits the removal of sand or gravel from the locus or waives or modifies any local by-laws, rules, regulations or requirements with respect to the removal of sand or gravel." Mr. Mahoney stated this condition conflicts with other conditions that require fill removal and replacement with sand, specifically Conditions 45-47, rendering compliance impossible as a practical matter. Exh. 116, ¶ 15(a).[45] We find that this condition is internally conflicting, and modify it to add "except as stated elsewhere in this Decision." *See LeBlanc,* App. at 9 (modifying similar conditions to state that "removal of sand or gravel from the locus is subject to any applicable non-waived local by-laws, rules, regulations or requirements with respect to removal of sand or gravel, except to the extent that such removal of sand or gravel is reasonably necessary in the normal course of construction of the project.").

VI. EQUAL TREATMENT OF UNSUBSIDIZED AND SUBSIDIZED HOUSING

General Laws, chapter 40B, § 20 provides that local requirements and regulations cannot be deemed "consistent with local needs" unless they are "applied as equally as possible to both subsidized and unsubsidized housing." *See also* 760 CMR 56.07(2)(a)4. Weiss Farm, as the appellant, carries the burden of proving such unequal treatment. 760 CMR 56.07(2)(a)4. For most of the conditions alleged to constitute unequal treatment, Weiss Farm's argument

[45] For example, Condition 45 requires Weiss Farm to "remove fill within 5 feet horizontally and below the bottom of the system extending from the top of the fill downward to native soil" and replace with sand." Exh. 110, p. 31.

essentially amounts to listing the conditions in the Pre-Hearing Order. While some conditions are addressed with a general argument through briefing or testimony, the majority of the challenged conditions are not addressed outside of the Pre-Hearing Order.

Along with the condition reducing the number of units to 124 units, based on the Board's determinations relating to a left turn and bicycle lane (which Weiss Farm argues were not applied to other developments along Franklin Street), Weiss Farm also argues that the Board has treated its subsidized housing project differently in terms of the Environmental Impact Assessment and parking ratio conditions, among other things. Although the Pre-Hearing Order lists all of the conditions Weiss Farm challenges on the basis of unequal treatment, in its briefing, Weiss Farm raises general concerns relating to only a number of these conditions, making more specific and tailored arguments for certain others. However, simply listing the conditions in the Pre-Hearing Order and in briefing without further argument or explanation is insufficient to properly raise a challenge to the condition as constituting unequal treatment. Weiss Farm's arguments as to the unequal treatment of its subsidized project are waived for those conditions that are not specifically argued in briefing. To the extent Weiss Farm has provided specific arguments, we discuss them below for each respective condition.

A. Reduction in Project Size Based on Left Turn Lane/Bicycle Accommodation

Weiss Farm argues the Board improperly reduced the unit size of the project based on an unequal application of requirements regarding left turn lanes between the project and unsubsidized housing. The Board disagrees, arguing that the example Weiss Farm used to show that other developments on Franklin Street were not required to have a left turn lane is a Dunkin' Donuts, not a housing development, and therefore cannot be compared to the project. In response, Weiss Farm's traffic expert, Ms. Monticup, testified that there are multiple other locations along this road with similarly designed lane and shoulder widths, and some without left turn lanes. She stated other developments along Franklin Street have been approved without left turn lanes, even though they were "warranted" as described above. Exh. 127, ¶¶ 25-26. However, she identified only one specifically – a Dunkin' Donuts location at 128 Franklin Street – which, as a commercial property, is not comparable to a residential project. *Id*.

Ms. Monticup further testified that, while the creation of a left turn lane would admittedly eliminate approximately 30 spaces on on-street parking on the north side of Franklin Street., other left-turn lanes eliminated on-street parking spaces and were deemed acceptable. Exhs. 127,

¶ 3; 128, ¶ 9 (specifically referencing the left turn lane on Franklin Street at Franklin Place). Weiss Farm argues these other developments along Franklin Street were not required to provide a left turn lane, nor were they required to accommodate bicycle traffic. Again, Ms. Monticup specifically referred to the commercial establishment, Dunkin' Donuts.

Ms. Monticup also noted that the Board's expert, Mr. Dirk, acknowledged there were other locations along Franklin Street that did not provide the minimum 14-foot width necessary for bicycle accommodations, such as Franklin Street at Franklin Place, and Franklin Street at Summer Street. Exhs. 127, ¶ 28; 128, ¶ 2; s*ee also* Exh. 127, Tab D (showing these six locations in red).

The Board argues the examples of other locations along Franklin Street where the 14-foot width was not provided should not be compared to Weiss Farm's project because the regulation requires a comparison of subsidized and unsubsidized housing. *See* 760 CMR 56.07(2)(a)4. It argues the other intersections along Franklin Street that Weiss Farms claims do not provide the minimum 14-foot width required are not unsubsidized housing developments: the Franklin Street at Franklin Place intersection is a turn into Stoneham High School, and Franklin Street at Summer Street is a four-way intersection. Ms. Monticup did not identify other developments along Franklin Street that were not required to have a left turn lane, other than the Dunkin' Donuts, but she did note other locations where shoulder width had been reduced to accommodate turn lanes, such as at the Franklin Street/Franklin Place and Franklin Street/Summer Street intersections. Exh. 127, ¶¶ 22, 26.

Weiss Farm's comparison of the proposed project to a commercial establishment does not meet the unequal treatment requirements of Chapter 40B. Based on the foregoing evidence, we find that the Board's assertion of failure to meet left turn lane requirements and road width does not constitute unequal treatment.

B. Snow Management

Group B Condition 22, p. 26, requires a final site plan submission that includes an acceptable snow management plan, and states the "Board rejects as unacceptable the proposed 'Snow Storage Plan' submitted by the Applicant (April 4, 2016) as calling for the placement of plowed snow proximate to if not within, wetland buffer zones." We have already struck the second sentence of Condition 22, *see* § IV.D.3. Group B Condition 72, p. 42, prohibits snow

storage areas to be located in wetland buffer zones within the project site, which is consistent with our limited waiver granted for Waiver Request 16.

Mr. White testified that other unsubsidized housing projects in Stoneham did not have this restriction. Exh. 123, ¶ 59. He did not specifically identify those projects. He stated further that in the "nearby recently approved project, the only restriction by the Town of Stoneham Conservation Commission for a large parking area's snow storage was that the snow would not be placed in a wetland resource area." Exh. 124, ¶ 3 He also stated that the developer is already complying with Condition 72. The Board argues there is no documentation for the assertion of unequal treatment, and that Mr. White failed to identify the other specific developments that were not held to this restriction. Exh. 126, ¶ 68. We agree with the Board that the evidence does not support a finding of unequal treatment. Therefore, this challenge to Condition 22 fails.

C. Environmental Impact Analysis

Weiss Farm argues that requirements for submissions of certain plans subject it to unequal treatment. *See* Pre-Hearing Order, § IV, pp. 5-6. The Board granted Waiver Request 22, a waiver from certain comprehensive permit submission requirements, for the project "as condition and approved," and denied the waiver for any activities "regulated pursuant to the Wetlands Protection Act or Stoneham Wetland Protection Bylaw." Exh. 110. Specifically, Weiss Farm argues that the Town requires an environmental impact analysis of G.L. c. 40B projects but not all projects, and that the submission requirements required for Weiss Farms exceed those required for unsubsidized projects. In general, Mr. Mahoney stated that the submittal requirements imposed on Weiss Farm "far exceed" those required for unsubsidized projects. Exh. 116, ¶ 16(a). He pointed to the Board's rules and regulations, which list the submittal requirements for both subsidized and unsubsidized projects. He stated that the environmental impact analysis required for comprehensive permit projects under § 18-33(n) of the Zoning Bylaw is not also required for unsubsidized projects. Exh. 116, ¶ 16(e), Att. D. The Board argues this is inaccurate, and that the environmental impact analysis is required for all projects, both subsidized and unsubsidized. Further, the Board argues that Weiss Farm expressly waived objections to this requirement during the public hearing before the Board, in exchange for a waiver of certain other requirements. *See* Board reply brief, pp. 4-5, citing Exh. 116, Att. D.

Mr. Mahoney testified that Weiss Farm made a public records request seeking documentation of any similar environmental studies that were required for two recent

unsubsidized multi-family developments in Stoneham—the "Fallon Road project" located at 220-225 Fallon Road, and the "Arbors" located at 140 Franklin Street. Exh. 116, ¶ 16(e), Att. D. The Town's response to the record request stated that "neither of [those] projects involved an application for a comprehensive permit and, accordingly, neither was subject to the special permit application regulations adopted by the Board of Appeals.... Section 18-33 of the Stoneham Town Code makes an explicit requirement of all such applications that [they] include the environmental studies referenced in your letter." Exh. 116, Att. D; *see also* § 18-33 of the Stoneham Town Code; Exh. 118.[46]

No provision requiring an "environmental impact analysis" comparable to the analysis required under § 18-33(n) can be found in the Zoning Bylaw, nor has the Board provided a specific citation. Based on the Town's response to the record request referenced above, this is a requirement for comprehensive permit projects only, and requiring an environmental impact analysis for a subsidized housing development, while declining to do so for unsubsidized projects, as demonstrated by the Town's response to the public records request, constitutes unequal treatment. Therefore, on this basis, the waiver request with respect to the requirement for an environmental impact analysis is granted.

D. Parking Ratio

Condition 76, p. 42, requires the submission of a parking plan outline to be implemented if parking demand exceeds supply. The condition also notes that a parking ratio of 1.8 is "desirable," and that the Town's Zoning Bylaw § 6.3.3.1 requires a parking ratio of 2.1. The Board also refused to grant a waiver from the Zoning Bylaw's requirement of a parking ratio of 2.1 spaces per unit. The Board expressed concern that the parking demand at the project site would exceed available supply. Exh. 110, p. 43. Weiss Farm, however, demonstrated that the Town had approved parking ratios for similar, non-40B apartment communities, ranging from 1.59 to 1.65 spaces per unit. Tr. III, 89-90; Exh. 30. Ms. Monticup also conducted an "outside parking ratio study," at the request of the Board. Tr. III, 90-91; Exh. 30. She determined that parking ratios at three similar apartment properties showed that at parking ratio of 1.69 spaces per unit would be sufficient to accommodate the project's parking demands. Exh. 30; Tr. III, 92. Her research demonstrated that the Town had approved parking ratios for similar, unsubsidized

[46] Section 18-33(n) requires applicants for a comprehensive permit to submit an environmental impact analysis assessing the impact of the development on the project site and adjacent land. Exh. 118.

residential projects as follows: Bell Stoughton (1.65), Woodview Legacy Farms (1.61), and Lynnfield Commons (1.59). Tr. III, 89-90; Exh. 30, p. 5. Based on the evidence in the record we find unequal treatment in the Board's parking ratio requirement. We have already determined that Condition 76 is modified to require 1.6 spaces per unit, and find that this result is warranted on this basis as well. The Zoning Bylaw, § 6.3.3.1 is waived to the extent required to allow the 1.6 ratio for parking spaces.

E. Other Conditions Challenged as Being Unequally Applied to Subsidized Housing

Several other conditions were challenged by Weiss Farms as being unequally applied to subsidized and unsubsidized housing. We address below only those conditions which Weiss Farm specifically addressed in its briefs.

Regrading. Group C Condition 12, p. 46, prohibits regrading of the site that results in any finished slope exceeding 25 percent in fill (4:1) or 33 percent in cut (3:1). It states "[s]lope stabilization methods in addition to grass shall be utilized to the extent feasible. Design of the development shall preserve existing natural features to the maximum extent possible."

In support, the Board's witness, Mr. Houston, testified he is familiar with subdivision regulations that require a 4:1 slope. Exh. 126, ¶ 69. However, he did not cite the specific regulations, nor indicate that they were issued by Stoneham. Mr. White, the developer's engineer, stated this required slope does not conform to any engineering standard. Exh. 123, ¶ 61. Mr. Mahoney, the developer's manager, stated, the Town's subdivision regulations allow for 2:1 slopes in both fill and cut areas, and the Board's condition exceeds the Town's own requirements and is not based on any recognized engineering standard or principle. Exh. 116, ¶ 15(k); Exh. 123, ¶ 61. A review of Appendix B to the comprehensive permit shows that Weiss Farm did not request waivers relating to local subdivision regulations, which fall under Chapter 17 of the Stoneham Bylaw. *See* Exh. 110, App. B; Exh. 118, Chapter 17.

Weiss Farm also argues that another project—the Gerald Road Subdivision—was approved with slopes in fill areas of 2:1, "as is standard engineering practice." Exh. 123, ¶ 61. The Board did not rebut this testimony. Accordingly, we find the developer has demonstrated unequal treatment as to the requirements for the finished slope, and this condition is struck on this basis as well on the failure to demonstrate a valid local concern that outweighs the need for affordable housing.

VII. PAYMENT OF OUTSTANDING PEER REVIEW FEES

The Board argues Weiss Farm failed to pay fees owed to the Town for peer review services. Cathy Rooney, the administrative clerk to the Board, maintained the records of all payments made by Weiss Farm relating to peer review consultant payments. Exh. 115. She submitted with her pre-filed testimony summaries of the payments made to the Town's G.L. c. 44, § 53C account and expenses incurred as part of the Weiss Farms comprehensive permit application process, as well as outstanding amounts owed to the Town by Weiss Farm for peer review consultant services. Exh. 115, ¶¶ 5-7. The Board argues Weiss Farm owes a total of $27,883.39 in unpaid fees and requests the Committee to order Weiss Farm to pay these fees and applicable statutory interest. Board brief, pp 2-3; *see* Exh. 115, App.

Weiss Farm argues the amounts the Board now seeks to be paid were not supported or appropriate under the statute. It also argues that Ms. Rooney forwarded invoices she received without reviewing them first. Exh. 117, ¶¶ 3-17; Tr. I, 38-41. Weiss Farm argues the only fees chargeable by the Board for outside review should be restricted to those for which the Board can point to a specific local bylaw or regulation authorizing such fee. The Board argues that G.L. c. 44, § 53G[47] requires an applicant to pay review fees, and allows the Board to establish an account for the deposit of funds by Weiss Farm for peer review of the proposed project. It argues the sought-after fees are for disbursements made to outside consultants, within the scope of G.L. c. 44, § 53G, with the knowledge of Weiss Farm. Further, the Board argues that under this statute, an applicant is required pay for peer review fees and the Board is under no obligation to provide pre-expenditure notifications. The Board argues the statute requires it to provide a "final report" of the account to the applicant and provides no power to veto or negotiate with a municipal board or outside consultant over costs estimates. Board brief, pp. 45-46.

Under the comprehensive permit regulations, fees must, among other things, relate to work performed in connection with the specific project. *See* 760 CMR 56.05(5)(b)2. The Committee has generally prohibited boards from imposing fees that are not already established by regulation in a municipal fee schedule. *Falmouth, supra*, No. 2017-11, slip op. at 47-49; *Milton, supra*, No. 2015-03, slip op. at 52; *Hollis Hills, supra*, No. 2007-13, slip op. at 12-13. To

[47] G.L. c. 44, § 53G provides for special deposit accounts for reasonable fees for employment of outside consultants when imposed by municipalities pursuant to local rules promulgated under G.L. c. 40B, § 21.

charge particular fees, a Board is required to identify the local bylaw or regulation that authorizes charging such a fee in this context. *Id.*; *see also LeBlanc, supra*, No. 2006-08, slip op. at 10.

Mr. Mahoney, Weiss Farm's manager, testified that he reviewed the invoices from the Town for the services provided by its peer review consultants. Exh. 117, ¶¶ 1–2. He stated that the Town used funds from Weiss Farm to fund consulting work unrelated to the comprehensive permit application proceedings, such as costs incurred with the Massachusetts Environmental Policy Act (MEPA) filing and a request for a Superseding Order of Conditions from DEP, and therefore the balance of outstanding fees claimed by the Board is not reimbursable in connection with the comprehensive permit application. Exh. 117, ¶¶ 3, 7. He testified that approximately $4,194.95 of the $110,883.39 in fees the Board claims are outstanding are related to work performed in connection with the MEPA filing or DEP appeal. He further testified that the remainder of outstanding fees is either for invoices that were never provided to Weiss Farm until this appeal, or is in an unreasonably expensive and inflated amount. Exh. 117, ¶¶ 6-7. Mr. Mahoney further testified that the Town did not keep separate accounts for the proceeding in front of the Board and the proceeding in front of the Conservation Commission, making it impossible for Weiss Farm to determine which consultant fees pertain to which proceeding. Exh. 117, ¶ 3.

Ms. Rooney acknowledged that one of the invoices may have been for a meeting relating to MEPA. Tr. II, 38. She stated she submitted copies of invoices directly to the developer for reimbursement, but did not indicate to which services they applied. Tr. II, 40. The chart of payments attached to her pre-filed testimony provides little detail on purposes of the expenses.

On this record, the Board has not demonstrated it is entitled to payment of all the fees assessed. Accordingly, we will order Weiss Farm to pay only those fees on the submission by the Board's witness that explicitly reference work relating to peer review for the comprehensive permit or a specific fee established by local rule related to the comprehensive permit application. We will order Weiss Farm to pay those fees within 30 days of the date of this decision. The other fee requests are denied. *See Falmouth, supra*, No. 2017-11, and cases cited.

With regard to conditions relating to other fees and expenses, those conditions are modified to provide that such other fees may only be imposed if the applicable municipal requirements or regulations in effect at the time of the comprehensive permit application to the Board are identified in the modified conditions. To the extent the Board asserts it is otherwise

entitled to payment of fees pursuant to G.L. c. 44, § 53G, or other state statute, it of course may pursue alternate actions available to it.

VIII. THE TOWN'S INTERLOCUTORY APPEAL AND SAFE HARBOR CLAIMS

The Board argues it was improperly and unlawfully prevented from submitting evidence establishing its decision was "consistent with local needs," as defined in G.L. c. 40B, § 20 because it was denied the opportunity to present evidence regarding the 1.5 percent general land area minimum safe harbor during the present appeal by Weiss Farm of its decision on the comprehensive permit application. In support it also cites 760 CMR 56.07(2)(b)1.[48]

This matter first came before the Committee on the Board's interlocutory appeal pursuant to 760 CMR 56.03(8)(c), in which the Board asserted that it had achieved the statutory minimum 1.5 percent general land area minimum. *See Stoneham I, supra,* No. 2014-10, slip op. at 7. In its interlocutory appeal pursuant to § 56.03(8), the Board raised the question of access to confidential information about group homes eligible to be on the DHCD Subsidized Housing Inventory (SHI), and thus countable to the general land area minimum. *See* 760 CMR 56.03(2). However, the Board did not pursue obtaining the addresses of these group homes directly from the Department of Development Services (DDS) at that time, or by means of a court action. Board counsel[49] stated the Board did not pursue obtaining the addresses directly from DDS because it believed that option would be "unavailing." *Stoneham I,* slip op. at 8. In *Stoneham I,* ultimately the Committee ruled the Board had not achieved the statutory general land area minimum safe harbor, and remanded the matter to the Board for consideration of the comprehensive permit application on the merits.[50]

Following the Board's decision on the comprehensive permit application, and after the commencement of this appeal of the grant of the comprehensive permit with conditions, Weiss

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[48] The entire record of the interlocutory appeal is incorporated into the record of this comprehensive permit appeal.

[49] Board counsel in the present appeal is the same counsel who represented the Board in the interlocutory appeal.

[50] In that decision, we found the Board had "failed to provide sufficient evidence from which a finding of the General Land Area Minimum may be made." *Stoneham I,* slip op. at 5-6. In particular, the Board failed to establish the acreage of the denominator, the "total land area zoned for residential, commercial, or industrial use" pursuant to G.L. c. 40B, § 20 and 760 CMR 56.03(3)(b). *Id.* at 5-6.

Farm filed a motion in limine to bar the Board from introducing evidence regarding the applicability of the safe harbor provisions. In the Board's opposition to the motion, it stated it had become aware of a procedure in a different interlocutory safe harbor appeal to the Committee in which another municipality had obtained a court order requiring DDS and the Department of Mental Health (DMH) to share confidential group home information. *Waltham, supra*, No. 2016-01, slip op. at 20. In that case, board counsel filed a superior court complaint seeking the confidential data, which Board counsel in *Stoneham I* had declined to do at the interlocutory stage in this appeal.

In the present appeal, Board's counsel requested another opportunity to obtain group home information through court action, since counsel in another proceeding had been successful. The presiding officer, in the exercise of her discretion, issued an order granting Weiss Farm's motion in limine to bar the Board from introducing evidence pertaining the safe harbor provisions, with a limited exception allowing the Board to submit only "previously unavailable evidence that may be obtained by the Board applicable to [DMH] and [DDS] group homes, and updated general land area calculations affected by such previously unavailable information." Order on Appellant's Motion in Limine, May 2, 2017, amended September 29, 2018. *See also* Ruling and Order on Appellant's Motion for Full Disclosure of Confidential Group Home Information (Group Home Order), August 30, 2018, amended September 28, 2018 slip op. at 3.

The presiding officer required the Board "to proceed expeditiously to obtain this information in order to avoid delay" and to provide reports to the Committee regarding whether provision of the information would be made by agreement, subpoena, or court order. *Id.* at 3. The Board was required to provide status updates on its efforts to secure the confidential group home information. *Id*.

As discussed more fully in the Group Home Order, which we adopt, the Board gave no indication to the presiding officer or opposing counsel throughout the course of its proceeding before the Superior Court that it would oppose the sharing of confidential group home information with Weiss Farm. Because the Board had invoked the court decision in the *Waltham* case to support a second opportunity to introduce group home land area evidence, the presiding officer expected the Board to follow the procedure laid out in the *Waltham* case, which led to an order providing for disclosure of the information to all parties before the Committee as well as the Committee. However, months after the Superior Court proceeding had begun, and only

immediately before oral argument before the court with regard to DDS and DMH group home information for this case, Board counsel specifically requested the exclusion of Weiss Farm from receiving the confidential group home information, and the Superior Court ordered the disclosure of confidential group home information to be limited to exclude counsel for Weiss Farm, but it permitted disclosure of the information to the Committee's presiding officer. Motion of Weiss Farm for Full Disclosure of Confidential Information, (filed July 10, 2018), Exh. A.

During multiple conferences with counsel for the parties to update the presiding officer on the status of the court proceeding, the Board had not advised that it would seek to exclude Weiss Farm's counsel from the scope of the confidential order, contrary to the circumstances in *Waltham.* After receiving the confidential information, Board counsel emailed the presiding officer inquiring about the procedure for submitting the confidential information to the Committee. That email did not address how Board counsel would comply with the requirement to serve its filing on opposing counsel, *see* 760 CMR 56.06(6)(b), or avoid communicating *ex parte* with the Committee regarding the merits of a proceeding, *see* 760 CMR 56.06(3). Group Home Order, slip op. at 4-8. The presiding officer then gave the Board an opportunity, if it wished to include confidential information in the record of this proceeding, to ensure that counsel for Weiss Farm would have access to the information. *Id.* It chose not to do so.

Accordingly, on September 28, 2018, the presiding officer issued an Amended Order, granting Weiss Farm's Motion in Limine filed February 18, 2018 and precluding the Board from introducing any further evidence regarding the 1.5 percent statutory safe harbor.[51]

The Board was given more than sufficient time and multiple opportunities to acquire confidential group home information from DDS and DMH so that it could be entered properly into the record of this appeal. As thoroughly documented in the Group Home Order, the Board ultimately did not follow the procedure laid out in *Waltham* so that the information sought could be shared with Weiss Farm and the Committee, and only made the presiding officer and opposing counsel aware of this strategy months after the initiation of the court proceeding. The Board's decision to deviate from the expected procedure without good cause and timely notification to the Committee resulted in unnecessary and undue delay. The Board failed to

[51] During the interlocutory appeal, the Board failed to provide sufficient evidence from which a calculation of the denominator could be made. *Stoneham I*, *supra*, slip op. at 5-6. Therefore, even if group home information had been admitted, the Board would have been unable to demonstrate it had achieved the statutory general land area minimum safe harbor. *See* note 50.

comply with the presiding officer's order. Accordingly, for reasons previously articulated by the presiding officer in her August 30 and September 28, 2018 orders, and for the reasons stated herein, the Board's request to reopen the hearing to accept further evidence, testimony, and briefing is denied. We concur in and adopt the presiding officer's Group Home Order and amended Group Home Order, which granted Weiss Farm's motion in limine to exclude further safe harbor evidence.

IX. VALIDITY OF PROVISIONS IN THE COMPREHENSIVE PERMIT REGULATION

The Board argues several provisions of 760 CMR 56.00 are invalid. In particular, the Board argues, with regard to its safe harbor appeal, that the regulations unlawfully 1) reduce the land area that may be included in the numerator by counting only a "portion" of sites containing SHI eligible housing; 2) require the Board to give an applicant written notice within 15 days of the opening of the local hearing for the comprehensive permit, while statute provides review of town's claim of safe harbor takes placed after it conducts hearing; 3) impose procedures not found in Chapter 40B, such as an interlocutory appeal to DHCD regarding the safe harbor, and an interlocutory appeal from DHCD's initial decision on the safe harbor appeal to the Committee by either party; and 4) deprive the Board of judicial review of a Committee decision on consistency with local needs, by requiring appeals to be taken only after Board has completed the hearing and the Committee has rendered decision on any appeal.

Weiss Farm argues these claims have not been properly noticed or argued. It argues these are constitutional challenges, and neither the Commonwealth nor any officer, agent, or employee is a party to the matter, therefore these types of claims should not be made in an administrative proceeding, but in a court.

In *Stoneham I,* when the Board first argued the invalidity of the comprehensive permit regulations with respect to that the interlocutory appeal procedure, we declined to reach the issue as it "ha[d] been inadequately briefed by the parties for consideration in this appeal." *Id.,* slip op at 12 n.7. That proceeding provided the opportunity for the Board to raise these issues. Its inadequate briefing then does not warrant another opportunity now. Additionally, when Weiss Farm's motion in limine was denied with respect to "previously unavailable evidence" related to group homes, it was made clear to the parties that the record would be reopened only for that limited purpose, which is unrelated to the Board's legal arguments. Having granted the motion in

limine in full with respect to the safe harbor appeal issues already decided in *Stoneham I*, we decline to consider the Board's arguments now as they are beyond the scope of this current appeal.

X. CONCLUSION AND ORDER

Based upon review of the entire record, and upon the findings of fact and discussion above, the Housing Appeals Committee affirms the granting of a comprehensive permit but concludes that certain of the conditions imposed and waiver requests denied in the decision of the Board exceed the authority of the Board, render the construction or operation of the project uneconomic and are not consistent with local needs, or do not treat the project equally with unsubsidized housing. 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," "this comprehensive permit," or "the final comprehensive permit" shall mean the final 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 Board, to transmit the materials forthwith to the appropriate municipal official with relevant expertise to evaluate whether the submission is consistent with the final comprehensive permit, such determination not to be unreasonably withheld. Such official may consult with other officials or offices with relevant expertise as they deem necessary or appropriate. In addition, such review shall be made in a reasonably expeditious manner, consistent with the timing for review of comparable submissions for unsubsidized projects. *See* 760 CMR 56.07(6).
2. The amended comprehensive permit shall conform to the application submitted to the Board, and the Board's original decision, as modified by this decision.
3. The comprehensive permit shall be subject to the following conditions:
    a. The development, consisting of 259 total units, including 65 affordable units, shall be constructed substantially as shown on plans entitled "Comprehensive Permit Application Submission, The Commons at Weiss Farm, Stoneham, Massachusetts," June 25, 2014, Rev. November 12, 2014," (Exhibit 53) and shall be subject to those conditions imposed in the Board's decision filed with the Stoneham Town Clerk on April 28, 2016 (Exhibit 110), as modified by this decision.
    b. The Board shall not include new, additional conditions.
    c. The Board's decision is modified to provide that the developer is required to comply with all applicable non-waived local requirements and regulations in

effect on the date of Weiss Farm's submission of its comprehensive permit application to the Board, consistent with this Decision pursuant to 760 CMR 56.02: *Local Requirements and Regulations*

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

e. The Board shall take whatever steps are necessary to ensure that building permits and other permits are issued, without undue delay, upon presentation of construction plans, pursuant to 760 CMR 56.05(10)(b), that conform to the comprehensive permit and the Massachusetts Uniform Building Code.

4. All Stoneham Town staff, officials, and boards shall promptly take whatever steps are necessary to permit construction of the proposed housing in conformity with the standard permitting practices applied to unsubsidized housing in Stoneham.

5. 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.

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

a. Construction in all particulars shall be in accordance with all applicable municipal zoning and other bylaws, regulations and other local requirements in effect on the date of the submission of Weiss Farm's application to the Board, except those waived by this decision or in prior proceedings in this case.

b. The subsidizing agency may impose additional requirements for site and building design so long as they do not result in less protection of local concerns than provided in the original design or by conditions imposed by the Board or this decision.

c. If anything in this decision should seem to permit the construction or operation of housing in accordance with standards less safe than the applicable building and site plan requirements of the subsidizing agency, the standards of such agency shall control.

d. No construction shall commence until detailed construction plans and specifications have been reviewed and have received final approval from the subsidizing agency, until such agency has granted or approved construction financing, and until subsidy funding for the project has been committed.

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

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

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

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

Housing Appeals Committee

Shelagh A. Ellman-Pearl, Chair

Joseph P. Henefield

Marc L. Laplante

Rosemary Connelly Smedile

March 15, 2021

Caitlin E. Loftus, Counsel