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

680 WORCESTER ROAD, LLC

v.

WELLESLEY ZONING BOARD OF APPEALS

No. 2019-09

DECISION

March 15, 2021

TABLE OF CONTENTS

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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

680 WORCESTER ROAD, LLC, Appellant	)	
v.	)	No. 2019-09
WELLESLEY ZONING BOARD OF APPEALS, Appellee	)	

DECISION

I. INTRODUCTION

This case and its companion case, *16 Stearns Road, LLC v. Wellesley*, No. 2019-08 (Mass. Housing Appeals Comm. Mar. 15, 2021), are not typical disputes under the Comprehensive Permit Law, in that very few issues are presented to the Committee for decision.

The developer challenges a number of conditions imposed by the Board, arguing that in aggregate they render the project uneconomic and are not supported by local concerns that outweigh the regional need for affordable housing. It also argues with regard to several of them that the Board lacks the authority to impose such conditions and that the restrictions have not been applied as equally as possible to this housing as they have been to unsubsidized housing. The challenged conditions fall into four groups. First, the Board has reduced the size of the project from 20 units to 18 units, both explicitly and also implicitly by requiring the developer to increase the setback of the top floor of the building from the property line. Second, it has imposed restrictions related to the state highway in front of the site with regard to both the permanent curb cut and construction

practices. Third, it has prohibited all construction workers from parking on the site. Fourth, it has required the developer to upgrade a six-inch sewer main to an eight-inch main.

II. PROCEDURAL HISTORY

On July 11, 2019, the Wellesley Zoning Board of Appeals issued a decision granting a comprehensive permit to 680 Worcester Road, LLC pursuant to G.L. c. 40B, §§ 20-23, to construct affordable housing on a half-acre site on Route 9 (Worcester Street) in Wellesley. The developer proposed a 20-unit rental development with 5 affordable units subsidized under the New England Fund of the Federal Home Loan Bank of Boston. The comprehensive permit approved 18 units with 5 affordable units. Exh. 2, p. 25, Conditions 3, 5. In its decision, the Board imposed many conditions and denied various requested waivers of local requirements. On August 6, 2019, the developer appealed the Board's decision, challenging a handful of conditions.

After the Committee opened its hearing, a number of neighbors filed a motion to intervene pursuant to 760 CMR 56.06(2)(b). The presiding officer ruled on July 31, 2020 that three of these people, DD and Max Marcoux and Anne Lehman, who live on Route 9 near the proposed development, were permitted to intervene solely regarding the direct impacts of the alternatives regarding work to be done to improve the sewer main running through their backyards. Ms. Lehman, who is a direct abutter to the site of the proposed development, was denied intervention with regard to issues of setback of the building both because she raised only speculative concerns and because there was no showing that the Board would not diligently represent her interests, and she therefore has not pursued this issue in her brief, nor will we consider it. The larger group of neighbors generally were denied intervention because the safety concern they raised is substantially similar to the issues that the Board addressed in its decision and continues to pursue on appeal, and because there was no showing that the Board will not diligently represent their interests. They were permitted to participate in a limited manner as interested persons.

On July 10, 2020, at the request of the parties, the presiding officer consolidated this case and *16 Stearns Road, supra*. Consolidation was appropriate not only because the developers in the two cases are closely related entities and because the development sites

are very close to one another, but also because one of the legal and factual issues raised is similar. The cases were consolidated only for the presentation of evidence—all pre-filed testimony and oral testimony is available to establish the factual record in both cases. The appeals themselves, however, remain separate, with the parties having filed separate briefs and the Committee issuing separate decisions.

A Pre-Hearing Order negotiated by the parties pursuant to 760 CMR 56.06(7)(d)(3) had been issued in this case on February 24, 2020, prior to consolidation. The parties negotiated further provisions with regard to the *16 Stearns Road* case, and a further Pre-Hearing Order was issued by the presiding officer on July 22, 2020. Seventy exhibits were admitted into evidence, and the parties then submitted pre-filed direct and, in some cases, rebuttal testimony of 16 witnesses. After a site visit, the presiding officer conducted three days of hearings to permit cross-examination of witnesses, and the parties submitted briefs.[1]

III. FACTUAL BACKGROUND

The housing proposed in this case will be sited directly on Route 9, a busy, four-lane state highway that carries about 44,000 vehicles per day to and from Boston. Immediately to the west of the site on Route 9 is a nursing home, and to the east are three single-family homes. Those homes are considered part of a distinct neighborhood of 20 homes on Stearns Road and Francis Road. Francis Road is a dead-end street that intersects with Route 9 adjacent to the third single-family home, farthest from the development site. Stearns Road is also a dead-end street that intersects with Francis Road. There is no direct access of any sort from the development site to Francis Road or Stearns Road. *See* Exh. 2, p. 3; 97.

The housing site is about one-half acre (20,029 square feet) and the building footprint is about 40% of that, and total lot coverage is almost exactly half of the site (10,020 square feet). Exh. 3, sheets C1, C4A; Tr. 77, ¶ 26. The building will be four stories—three residential floors with parking below on the first floor. During the hearing, the design evolved from the building originally proposed, which was a quite regularly

[1] Committee member James G. Stockard, Jr. did not participate in the consideration of this case.

shaped four-story building. *See* Exh. 4, sheet A5. First, the developer proposed a five-story design with the second, third, fourth, and fifth stories stepped back on the eastern end to reduce the visual impact on the abutting residence. *See* Exh. 4, sheet A7 (rev. 1.28.19). Later, there appeared to be agreement on a similarly stepped back design of only four stories. *See* Exh. 4, sheet A7 (rev. 5.21.19).[2] But the four-story design ultimately approved by the board, although it leaves the third floor stepped back as agreed, increases the fourth-floor architectural step-back. This reduces the overall size of the building, and limits it to 18 residential units.[3] Exh. 74, ¶¶ 21-24. No matter the number of units, at completion there will be 9 surface parking spaces and 23 spaces in a garage beneath the building. Exh. 2, p. 13; Exh. 73, ¶ 3.

The proposed development will be served by a six-inch sewer main which served a single-family house that used to be on the site, and continues to serve the three adjoining houses to the east on Route 9. This main runs through the backyards of those three houses, and joins another main in Francis Road.

IV. ECONOMIC EFFECT OF THE CHALLENGED CONDITIONS

A. Standard of Review

When a developer appeals the grant of a comprehensive permit with conditions, the ultimate question before the Committee is whether the decision of the Board is consistent with local needs. Among several ways that the conditions may be challenged, the most common is for the appellant to prove, as the first step of a shifting burden of proof provided for in the comprehensive permit regulations, that conditions and requirements in the aggregate make the construction or operation of such housing uneconomic. *See* 760 CMR 56.07(1)(c)(1), 56.07(2)(a)(3); *Board of Appeals of Woburn v. Housing Appeals Comm.*, 451 Mass. 581, 594 (2008); *Haskins Way, LLC v. Middleborough*, No. 2009-08, slip op. at 13 (Mass. Housing Appeals Comm. Mar. 28,

[2] Exhibit 4 contains two versions of sheet A7 of Exhibit 4, one revised 1.28.19 and one revised 5.21.19, which shows the design sketched out in red outline.

[3] The narrative of the Board's decision states that "a reasonable estimate [of the number of dwelling units] appears to be approximately eighteen, [which] is consistent with both the safety analysis and the design analysis," and the Board confirms this by explicitly limiting the size of the development to 18 units in Condition 3. Exh. 2, pp. 17, 25; *see also* Board's Brief, pp. 9-10.

2011). The developer's proof is analyzed using the methodology prescribed in the definitions of "uneconomic" and "reasonable return" in 760 CMR 56.02, as elaborated upon in the DHCD "Guidelines, G. L. c. 40B Comprehensive Permit Projects, Subsidizing Housing Inventory (Dec. 2014)" (Guidelines). *See* Exh. 35. More specifically, the DHCD Guidelines provide a methodology for analyzing what is a reasonable return for the developer of a homeownership development based upon Return on Total Cost (ROTC).[4] 760 CMR 56.02: Reasonable Return; Exh. 35 (Guidelines), §§ I-A, IV-B, IV-C. The ultimate question is whether the projected ROTC for the project as conditioned by the Board's decision falls short of the uneconomic threshold. *HD/MW Randolph Ave., LLC v. Milton*, No. 2015-03, slip op. at 5 (Mass. Housing Appeals Comm. Dec. 20, 2018), *appeal docketed*, No. 19 MISC 000037 (Land Ct. Jan. 18, 2019). If, as is sometimes the case, the ROTC of the development as proposed in the developer's application for the comprehensive permit is also below the uneconomic threshold established by the Guidelines, a situation we have termed "uneconomic as proposed," the developer is required to show more, specifically that the Board's conditions render the project significantly more uneconomic than as proposed. *See Falmouth Hospitality, LLC v. Falmouth*, No. 2017-11, slip op. at 4 (Mass. Housing Appeals Comm. May 15, 2020); *Autumnwood, LLC v. Sandwich*, No. 2005-06, slip op. at 3 and n.2 (Mass. Housing Appeals Comm. Decision on Remand Mar. 8, 2010); *511 Washington Street, LLC v. Hanover*, No. 2006-05, slip op. at 9, 12-14 (Mass. Housing Appeals Comm. Jan. 22, 2008); *Cirsan Realty Trust v. Woburn*, No. 2001-22, slip op. at 3 (Mass. Housing Appeals Comm. Apr. 23, 2015); *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). Although it may be logical to assume a developer would not propose an uneconomic project, since the Comprehensive Permit Law's uneconomic threshold represents a technical standard, it is often different from the standard a developer may use to make its business decisions. Thus, a developer may choose to proceed with a

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

development that is technically "uneconomic." *Haskins Way*, *supra*, No. 2009-08, slip op. at 18; *511 Washington Street*, *supra*, No. 2006-05, slip op. at 10-11; *Rising Tide Dev., LLC v. Sherborn*, No. 2003-24, slip op. at 16 n.16 (Mass. Housing Appeals Comm. Mar. 27, 2006) (noting developers may accept lowered profits for developments subject to protracted litigation).

If the developer proves that the project is uneconomic, the burden then shifts to the Board to prove that there is a valid local concern which supports each condition and that that local concern outweighs the regional need for affordable housing. 760 CMR 56.07(1)(c)(2), 56.07(2)(b)(3).

B. The Developer's Presentation

Hard Costs - The developer's presentation in this case was based on standard *pro forma* financial statements prepared by a consultant with over thirty years of experience, Robert Engler. He used the methodology prescribed by the DHCD Guidelines. Most of the underlying costs for the project were provided by the principal of 680 Worcester Street, LLC, Jay Derenzo. He testified that the cost of site work would remain the same—$490,000—for either the proposed 20-unit building or the approved 18-unit building. Exh. 71, ¶ 6. Construction costs would change, however. Based on estimates for construction of the building, construction of underground parking, general conditions, builder's overhead, and builder's profit, he estimated that construction of the 20-unit building would cost $7,640,018 and the 18-unit building only $6,841,739. Exh. 71, ¶ 7. To this he added an industry-standard 5% contingency amount for the respective totals of "hard costs" of $8,536,519 and $7,698,326. Exh. 71, ¶ 9. These estimates, as well as the site acquisition cost, were accepted by the Board.

Soft Costs - Mr. Derenzo also estimated increased costs resulting from the conditions imposed by the Board. These were included among the "soft costs" in the *pro formas*, and together with the acquisition cost, the hard costs, and the developer's overhead and fee they determine Total Development Costs.[5] He testified that as he had proposed the development, he would not need an off-site staging area, but that due to the

[5] Mr. Engler estimated other soft costs (as well as operating expenses) himself based on his professional experience. Exh 80, ¶ 5. He also calculated the developer's overhead and fee. These are not challenged by the Board.

conditions imposed by the board he would incur an additional cost of renting an off-site staging area. He estimated the cost for two years, based on a location available in a neighboring town. Similarly, without off-site staging, Mr. Derenzo estimated that he would have to pay for police details to control traffic on Route 9 for 50 days per year, but to comply with the Board's conditions [19(k)], he testified that a police detail would be required every day.[6] These two costs were estimated at $108,000 and $200,688 respectively. Exh. 71, ¶¶ 13, 14. Thus, the cost of lot rental and police details was carried in the initial *pro forma* prepared by Mr. Engler as $308,688. Exh. 80 (Exh. C, p. 2).

Mr. Derenzo estimated an additional cost of $60,000 to lease an off-site parking location for workers, plus $282,880 to provide for shuttle service from that site to the construction site, for a total of $342,880 in shuttle costs carried in the *pro forma*. Tr. 71, ¶¶ 20, 21; Exh. 80 (Exh. C, p.2).

Mr. Derenzo also speculated that he could have to spend "as much as $150,000" on engineering and legal services to resolve a possible conflict between the Massachusetts Department of Transportation (MassDOT) and the Board over the curb cut in Route 9. Tr. 71, ¶ 23. This was carried as a cost in the *pro forma* as $150,000. Exh. 80 (Exh. C, p. 2).

The developer's engineer estimated that the requirement to upgrade the sewer to an 8-inch pipe would cost $72,000.[7] Exh. 76, ¶ 22. For an unexplained reason, this was listed in the *pro* forma as a cost of $71,000. Exh. 80 (Exh. C, p. 2).

During the Committee's hearing, the developer modified the *pro forma* financial statements in response to criticisms contained in the pre-filed testimony of the Board's

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[6] The Board argues in its brief that the developer will be required to provide off-site staging and a police detail every day "no matter what," that is, even if the Board had not imposed conditions. Board's Brief, p. 6. It bases this on the cross-examination testimony of the developer's traffic engineer that MassDOT will not allow storage of construction materials within the layout of Route 9 and general testimony concerning the need for police details. Board's Brief, pp. 4-5. But this testimony, particularly since neither this witness nor any other witness could provide information as to how wide the layout is, is not specific enough to discredit Mr. Derenzo's estimate. *See* Tr. II, 42.

[7] The Board argues that the developer agreed to make more limited repairs, if necessary, at a cost of $20,000, and therefore the difference, $52,000, is the proper figure. Exh. 76, ¶ 22 and Exh. B; Tr. II, 19; Developer's Brief, p. 31. This is incorrect, however, since this was a voluntary accommodation—maintenance of a Town sewer main—that was not part of the developer's original proposal.

financial expert, Mr. Pelletier. In particular, in his view the assumption that construction would take 24 months was excessive, and he suggested that the development could be completed in 12 months. Exh. 94, ¶ 16. In response, the developer revised its estimate and its consultant revised the *pro forma* based upon an 18-month construction period. Exh. 72, ¶¶ 8-10. Thus, the cost of lot rental and police details was reduced from $308,688 to $230,184, the cost of shuttle service was reduced from $342,880 to $233,160, and the speculative $150,000 cost associated with review of the MassDOT permit was eliminated entirely. Exh. 81 (Exh. 1, p. 2). It is the second *pro forma*, with reduced costs associated with the conditions, that represents the position of the developer in the hearing before the Committee.

Rental Revenue - The *pro forma* financial statement also includes estimated rental revenue to be generated by the housing, which was provided to Mr. Engler by the developer. Exh. 80, ¶ 5. The revenue estimate was based on a market study done by a real estate professional, Mr. Lyman, which showed that units in the development would rent for $2.50 per square foot. Exh. 84, ¶ 5.

Calculation - Using the above figures, Mr. Engler then performed a financial analysis to estimate the anticipated return on total cost (ROTC) for the development both as proposed and as approved with conditions. Exh 80, ¶ 5. Employing standard methodology, he determined that the ROTC for the proposed development is 3.36% and for the approved development 2.80%. Exh. 81, p. 3; Exh. 81 (Exh. 1, p. 6); Exh. 81 (Exh. 2, p. 8). Based upon the DHCD Guidelines, the uneconomic threshold to which the calculated ROTC is to be compared is the applicable ten-year U.S. Treasury rate plus 4.5%, in this case, 1.56% plus 4.5% or 6.06%. Exh. 81 (Exh. 1, p. 6); Exh. 81 (Exh. 2, p. 8); *see also* Exh. 80, ¶ 8; Exh. 35, pp. I-3, I-7. Thus, ROTC for both the proposed development and the approved development are below the uneconomic threshold. The approved development's ROTC of 2.80% is 0.56% below the 3.36% ROTC of the proposed development, which is a decrease of 17%. Based upon this, it is Mr. Engler's expert opinion that the approved project is significantly more uneconomic than the proposed project. Exh. 81, ¶ 5.

C. The Board's Response

The Board challenged the developer's financial analysis on three grounds: that it overstates the additional costs resulting from the conditions by $328,448, that it understates the rents for market rate units by 10%, and that it overstates operating expenses for the approved development by 12%.[8] Board's Brief, p.1; Exh. 94, ¶ 22.

Soft Costs (Additional Costs Resulting from Conditions) – The Board argues that the developer "overstate[s] construction costs associated with the Comprehensive Permit conditions and construction schedule by an estimated $328,448. Exh. 94, ¶ 22." Board's Brief, p. 1. We have considered the rather convoluted argument presented in the Board's brief, and the testimony from its expert. *See* Board's Brief, pp. 4-6; Exh. 94, ¶¶ 16, 22. Considering the evidence presented by each party, and in particular, as discussed in section IV-A(2) above, that the developer modified the estimates in its *pro forma* analysis to address most, if not all, of the Board's arguments, we find that the developer's description of the services he will be required to provide to comply with the conditions and his estimates of the costs associated with them to be credible and we accept it.

Rents – The Board's financial consultant, Mr. Pelletier, reviewed the data and analysis concerning rents prepared by the developer's real estate expert, Mr. Lyman, and

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[8] The Board also makes an interesting argument that "to test of (sic) [the] reasonableness of the developer's operating *pro forma* and assumptions…, the net operating income conclusion… for the 20-unit *pro forma* can be capitalized at current market capitalization (cap) rates for comparable multifamily assets with the market." Board's Brief at 2; Exh. 94, ¶ 22. It argues that such an analysis "illustrates the apparent irregularities of operating and development assumptions within the Appellant's model." Exh. 94, ¶ 7. But its description of the analysis as the "Appellant's model" indicates a misunderstanding. The analysis presented by Mr. Engler is not the developer's business analysis or the *developer's* model at all. It is a unique technical analysis specified under the comprehensive permit law. It is clearly different from a business analysis since, as noted above, it is common for a developer to make the business decision to proceed with a development project even though the ROTC as measured by the analysis under the comprehensive permit process law is significantly below the "uneconomic" threshold. Further indication of this is the Board's financial expert's testimony that "[o]bviously the project makes sense, but the way it's presented in the model … is strange…." Tr. II, 129. Thus, the figures developed using the comprehensive permit methodology cannot simply be transferred into a capitalization rate analysis in a meaningful way.

Similarly, the Board offers no conclusion of its own with regard to whether the project is uneconomic using the methodology prescribed in the comprehensive permit regulations and DHCD Guidelines, but instead concludes that "further analysis… must be prepared." Exh. 94, ¶ 7; *see also* Tr. II, 90. But this is not sufficient to debunk the developer's analysis, which, in general, we find the more credible approach.

made independent inquiries as well. He questioned judgments made by Mr. Lyman based on location of comparable properties and time periods studied. Exh. 94, ¶ 8. He also argued that the developer financial consultant, Mr. Engler, used a 3% annual rent escalator in his pro forma analysis, and while he agreed that that was "consistent with industry underwriting standards and current market expectations," he argued that "the data set did not consider… recent… upward pressure on the multifamily rental market…." Exh. 94, ¶ 9. He also noted other minor "irregularities" and inconsistencies. Exh. 94, ¶¶ 10-11. He concluded that it would be "reasonable to assume an achievable market rent… in the range of $2.75 to $2.80 per square foot…." Exh. 94, ¶ 12.

Mr. Lyman responded to Mr. Pelletier's criticisms point by point in his Supplemental Pre-Filed Testimony. *See* Exh. 85. Mr. Pelletier responded in turn. *See* Exh. 95, ¶¶ 2-5; *see also* Tr. II, 95-105. We have weighed the points made by the two experts, and find the conclusion reached by the developer's expert to be the more credible. Further, the developer's financial expert, Mr. Engler, also considered the testimony of both Mr. Lyman and Mr. Pelletier, and disagreed with Mr. Pelletier's finding that "the new average rent level would average approximately $2.76 per square foot." Exh. 81, ¶ 1; Exh. 94, ¶ 11. Nevertheless, when he prepared the revised *pro forma*, he accepted the adjustment in Mr. Lyman's figures that Mr. Pelletier suggested. Exh. 81, ¶ 1. Therefore, the revised *pro forma* increased the anticipated market rents from $2.50 to $2.66. *Compare* Exh 80 (Exh. B, pp. 3, 5) *and* Exh. 80 (Exh. C, pp. 3, 5) *with* Exh. 81 (Exh. 1, pp. 2, 4) *and* Exh. 81 (Exh. 2, pp. 4, 6). We find that these estimates for market rents used in the *pro forma* analysis are not understated, as alleged by the Board. Thus, we find that the Effective Total Income estimates (which are based nearly entirely on rents) in both the revised 20-unit and 18-unit *pro-formas* are credible and accept them. *See* Exh. 81 (Exh. 1, pp. 2, 4; Exh. 2, pp. 4, 6).

Operating Expenses - The Board argues that the developer overstated operating costs.[9] First, the Board's expert, Mr. Pelletier, addressed the total operating costs in a general manner by referring to four comparable properties that he studied. He noted that

[9] Though the Board mentioned this argument in passing and challenged the developer's operating expenses obliquely with its market-capitalization-rate argument, it failed to actually brief the issue with useful specifics. *See* Board's Brief, pp. 1-3. Though we have often noted that we are not required to consider unbriefed issues, we do so in this instance.

these indicate a range of per-unit annual operating expenses in the six- to eight-thousand-dollar range rather than the ten- to eleven-thousand-dollar range estimated by the developer's expert, Mr. Engler. Exh. 94, ¶ 18. Mr. Engler noted, however, that instead of only looking at four properties, he based his estimates on per unit operating cost statistics prepared by MassHousing (Massachusetts Housing Finance Agency), which in turn are based on "hundreds of projects" that are affordable housing projects subject to annual review and approval of operating expenses, and also on his own direct experience with operating such housing. Exh. 81, ¶ 2. We find Mr. Engler's testimony the more credible, and accept his estimates.

Second, Mr. Pelletier noted calculation errors in Mr. Engler's *pro forma* financial statements. He noted a discrepancy in the per-unit and total annual operating costs for administration and maintenance for the 18-unit proposal. *See* Exh. 94, ¶ 19. Mr. Engler acknowledged the error, but testified that he listed the correct total costs, but miscalculated the per unit costs. Exh. 81, ¶ 3. He made the appropriate correction in his revised *pro forma*, and we accept his explanation that the identical total cost figures were carried intentionally and appropriately. *Cf.* Exh. 80 (Exh. C, p. 5) *and* Exh. 81 (Exh. 2, p. 6).

Finally, Mr. Pelletier noted that the total annual utility cost listed for the 18-unit project is more than twice as high as for the 20-unit project. Exh. 94, ¶ 19. Mr. Engler offered no explanation. See Exh. 81, ¶ 3-4. We find that the higher number is an error, and that the same annual cost should be carried in both *pro formas*, that is, $6,000.

We accept Mr. Engler's estimates with the corrections included in the second *pro forma*, except for the error in utility costs. Thus, overall, while the total annual operating expenses for the 20-unit project remain at $214,417, those for the 18-unit project are reduced from $210,867 to $203,867 to account for the $7,000 error in utility costs.

D. The Committee's Analysis

As noted above, the developer revised its *pro forma* financial statements during the hearing, and it is the revised versions upon which we base our own analysis. *See* Exh. 81 (Exh. 1, 2). The critical estimates in calculating Return on Total Cost are as follows:

Total Development Costs, including Soft Costs – As discussed above, the only dispute with regard to Total Development Costs (TDC) was with regard to the soft costs

resulting from the conditions imposed by the Board, and the developer removed costs. The cost of the sewer upgrade was not challenged, the $150,000 cost associated with review of the MassDOT permit was eliminated, and the costs of lot rental, police details, and shuttle service were reduced to amounts that we find reasonable and credible. Thus, we find that the estimates in both the revised 20-unit and 18-unit *pro-formas* for Total Development Costs are credible.[10] These are $12,413,195 and $12,038,062, respectively. *See* Exh. 81 (Exh. 1, 2).

Effective Total Income – As discussed in section III-A(3)(b), above, the Effective Total Income estimates in both the revised 20-unit and 18-unit *pro-formas* are credible. They are $631,586 and $548,195, respectively. *See* Exh. 81 (Exh. 1, pp. 2, 4; Exh. 2, pp. 4, 6).

Total Operating Expenses – As discussed above, Total Operating Expenses are based on a number of sub-categories, and while the total annual operating expenses for the 20-unit project remain at $214,417, those for the 18-unit project are reduced from $210,867 to $203,867 to account for the $7,000 error in utility-costs.

Calculation – Net Operating Income (NOI) is calculated by subtracting Total Operating Expenses from Effective Total Income. Return on Total Cost (ROTC) is calculated by dividing Net Operating Income (NOI) by Total Development Costs (TDC). Thus, we find that the following accurately reflects the uneconomic financial analysis for the project as proposed and as conditioned:

Simplified Rental *Pro Forma*

	20 Units	**18 Units**
Total Development Costs	$12,413,195	$12,038,062
Effective Total Income	631,586	548,195
Total Operating Expenses	214,417	203,867
Net Operating Income	417,169	344,328
Return on Total Cost	3.36%	2.86%

[10] It should be noted that even though nearly all the constituent costs remain the same in the different versions of the *pro formas*, the Total Development Cost figures vary slightly due to small differences in construction loan interest, soft-cost contingencies, and developer overhead and fee.

E. Conclusion on Economics

– The developer's financial expert testified that in his opinion, based on his revised *pro forma*, a reduction in ROTC from 3.36% to 2.80%, that is, a difference of 0.56%, made the approved project is significantly more uneconomic than the proposed project. Exh. 81, ¶ 5. The most accurate figures, as shown in our calculation above, indicate a reduction in ROTC from 3.36% to 2.86%, that is, a difference of 0.50%. This is a significant difference. *See, e.g., Weiss Farm Apts., LLC v. Stoneham*, No. 2014-10, slip op. at 33 (Mass. Housing Appeals Comm. Mar.15, 2021) (1.43% represents a significant difference); *Falmouth Hospitality, supra,* No. 2017-11, slip op. at 29 (ROTC 0.84% below that for proposed project is substantial reduction); *Milton, supra,* No. 2015-03, slip op. at 11 (ROTC 1.62% below that for proposed project is significantly more uneconomic); *Cirsan Realty Trust, supra,* No. 2001-22, slip op. at 15 (ROTC of 1.66% lower is significantly more uneconomic); *Haskins Way, supra,* No. 2009-08, slip op. at 17-18 (reduction of profits by 275 basis points (2.75%) renders project significantly more uneconomic). By contrast, in *Avalon Cohasset, supra,* No. 2005-09, slip op. at 22, the Committee found a reduction of profits by only .11% (11 basis points) did not render the proposed project "significantly more uneconomic." Thus, we find that the approved project is both uneconomic and significantly more uneconomic than the project as proposed.

V. CONDITIONS CHALLENGED

A. Height, Setback and Unit Reduction – Local Concerns

Since the developer has sustained its initial burden, the burden shifts to the Board to prove that there is a valid health, safety, environmental, or other local concern that supports each of the conditions imposed, and that such concern outweighs the regional need for low or moderate income housing. 760 CMR 56.07(2)(b)(3). The burden on the Board is significant: the fact that Wellesley 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).

Regulation of building heights and setbacks is a central, established function of zoning. The Wellesley Zoning Bylaw establishes a minimum side-yard setback of 20 feet and maximum height of 45 feet. Exh. 33, §§ XIX-B, XX. It is clearly within the authority of the Board to regulate these. The reduction in the number of units from 20 to 18 is related to height and setback since increasing the setback results in a smaller fourth floor of the building and less space for apartments.[11] Therefore, we will consider Condition 1(c) ("The fourth floor [third residential floor] shall be set back 65 feet from the eastern property line….") and Condition 3 ("This permit authorizes… no more than eighteen dwelling units.") together. *See* Exh. 2, pp. 21, 25.

The Board argues that "[i]n order to protect the nearest residential abutter on the east side of the project, it is necessary to step the fourth floor back…," noting the "diminutive scale" of the house as well as the "abrupt scale change" between the old and new buildings. Board's Brief, p. 8. It bases this argument on the very thoughtful analysis done by its architectural expert, Mr. Boehmer. *See* Exh. 92, ¶¶ 5-11. Mr. Boehmer chronicled a careful, iterative redesign of the proposed building during the local hearing, as follows.

The zoning bylaw would have permitted a building 45 high set back 20 feet from the property line, and the developer originally proposed a building with a flat wall facing the abutter located 20 feet from the property line; it would have been slightly over 49 feet tall. Exh. 4, sheet A5; 33, §§ XIX-B, XX. Because of concerns about visual impact generally, and "significant afternoon shadow impact" on the abutting house to the east, the developer redesigned the building. Exh. 92, ¶ 5. In this second design, the first two floors remained the same, but the rear section of the third floor was set back 35 feet, and the front section 60 feet; the rear portion of the fourth floor was set back 70 feet and the front portion 55 feet; and a fifth floor was added that was similar to the fourth floor. Exh. 4, sheet A7 (revised 1.28.19); 92, ¶¶ 5-7. The Board disagreed with the idea of adding a fifth floor, and therefore the developer presented a third design. Exh. 74, ¶ 17. This plan

[11] In its decision, the Board also refers to reducing the number of units in order to "free up space in the garage" to make more room for emergency vehicles when they respond to emergencies. Exh. 2, p. 17. It presented no argument in its brief with regard to this issue, however, and it is therefore waived. *Falmouth Hospitality, supra,* No. 2017-11, slip op. at 38, and cases cited; *Okoli v. Okoli*, 81 Mass. App. Ct. 371, 378 (2010), citing *Lolos v. Berlin*, 338 Mass. 10, 14 (1958); *see also* Board's Brief, p. 10.

eliminated the fifth floor, but changed the setback on the third floor to a consistent 35 feet and on the fourth floor to 45 feet. Exh. 74, ¶ 18; Exh. 4, sheet A7 (revised 5.21.19). This was not acceptable to the Board either, and it imposed a condition requiring that the fourth floor be set back 65 feet. Exh. 2, p. 21, Condition 1(c). Thus, the question before us is whether this condition, imposed upon the developer's third and final design, is consistent with local needs.

We note first that the proposed building's nonconformity with existing zoning is slight. The undisputed evidence shows that the proposed building is 5 feet taller than the 45-foot height limitation in the zoning. But the setback of the first two floors matches that required by the zoning, that is, 20 feet, and, at that point, the north elevation drawing prepared by the architect shows that the building is only about 27 feet high (the top of the second floor); at the point set back 35 feet from the property line it is about 38 feet high (the top of the third floor); and it is only the fourth floor that exceeds the permissible height, and that is set back 45 feet from the property line.[12] Exh. 4, sheet A7 (rev. 5.21.19).

More important, however, is the testimony of the architects. The Board's architect, Mr. Boehmer, testified that some modification of the massing of the third and fourth floors is the only practical way to mitigate the impact on the neighboring house.[13] Exh. 92, ¶ 8. Clearly, all of the later design iterations—both the second and third designs, and also a design based upon the Board's condition—represent that sort of modification, and are an improvement over the original design. Mr. Boehmer concluded his testimony stating that the second, five-story design "remains the most successful approach." Exh. 92, ¶ 11. The developer's architect, Mr. Velleco, also considered the different designs, and concluded that "there is no substantial benefit, from a design or utility standpoint, from further increasing the setback of the fourth floor… from 45 feet to 65 feet [as required by Condition 1(c)]." Exh. 74, ¶ 29. Based upon the evidence before us, we find that the Board

[12] Because of the slope of the land, the building's actual height above grade at the site's eastern boundary appears to be four feet less than these heights. *See* Exh. 4, sheet A7 (rev. 5.21.19). There was no testimony addressing this discrepancy, however.

[13] Mr. Boehmer testified that other than relocating the entire building, "modifying the massing …as shown on the [developer's five-story] 1.28.19 plan set is the *only* other option for mitigating the impact" (emphasis added). Exh. 92, ¶ 8. We do not interpret this as endorsing the five-story design to the exclusion of all others.

has not met its burden of proving that there is a local concern to support Conditions 1(c) and 3 that outweighs the regional need for affordable housing, and therefore they are struck from the comprehensive permit.

B. Construction Parking

Just as it did in the companion case to this case, *16 Stearns Road, LLC, supra*, No. 2019-08, the Board imposed broad conditions prohibiting parking by all construction workers on the construction site. The developer was willing to accept the limitation in part, agreeing that only supervisors be permitted to park on-site, and that trade laborers be required to park off-site, while all workers—of any description—are to be prohibited from parking on any residential street in Wellesley. But the Board imposed three conditions, which prohibit not only laborers, but also all construction workers or contractors of any sort from parking on the site, and require the developer to "arrange for adequate off-site parking for all of the construction workers/contractors… [and to] arrange for workers to be shuttled between [an] off-site parking location and the site." Exh. 2, pp. 27, 28, 30 (Conditions 19(l), 24, and 38).[14] The developer challenges these conditions on three grounds—that they are beyond the Board's authority, that the requirements have been applied unequally as compared to construction parking requirements applied to market-rate housing, and that they are not supported by a local concern that outweighs the regional need for affordable housing. We consider the last two issues and need not reach the question of the Board's authority.

1. Local Concerns

The Board states that "the proposed building covers the majority of the site," and there is no room for parking. Board's Brief, p. 17; Exh 86, ¶ 17. It argues only that "Given the absence of available parking on the site, or on adjacent residential streets during construction, there is a valid local concern…." Board's brief, p. 18. It fails to articulate clearly what that concern is. The Board's chair testified only that "…the concern is traffic. … [T]he impact of construction on [Route 9] traffic is more significant than pedestrian safety," and that "we had no assurance that the number of construction

[14] In two other conditions, Conditions 26 and 46, the Board also prohibited the use of the 680 Worcester Street site for any work related to the 16 Stearns Road project and limited construction hours. The developer has not challenged these. Developer's Brief, pp. 31-32, 41.

workers could actually fit on the site…." Tr. II, 145, 146.

The developer argues, as a preliminary matter, that the building's footprint is actually only 40% of the site. Exh. 77, ¶ 26. Throughout construction, there will be room to park at least 34 vehicles on the site. Exh. 71, ¶ 38. During the initial stages of construction there will be one or two supervisors on the site and up to 11 laborers; later, there will be as many as four supervisors and 23 laborers. Exhs. 21, p. 8; 71, ¶¶ 40-45. Further, it argues that the mitigation measures that it has agreed to are sufficient to address any local concerns. Developer's Brief, pp. 42-43.

We find that the Board has failed to establish a valid local concern that outweighs the need for affordable housing to support on-site parking restrictions, and therefore Conditions 19(l), 24, and 38 are struck.

2. Unequal Application of Parking Requirements

The developer also raises a claim of unequal application of Wellesley's construction parking requirements, citing some of the same facts that it cited in the *16 Stearns Road* case. Developer's Brief, pp. 35-36. That is, the comprehensive permit regulations provide that "the applicant may prove that Local Requirements and Regulations have not been applied as equally as possible to subsidized and unsubsidized housing, [and] shall have the burden of proving such inequality." 760 CMR 56.07(2)(a)(4); *see also* G.L. c. 20-23, § 20 (definition of "consistent with local needs"). Specifically, the developer argues that even if construction parking has been restricted for other, non-subsidized housing developments, the degree or manner in which its proposal has been restricted—specifically, prohibiting all on-site parking—amounts to unequal application of local requirements.

The developer' principal, Mr. Derenzo, who has 35 years of experience in the construction field, testified that to his knowledge, the combination of parking restrictions imposed in this case is unprecedented in Wellesley. Exh. 71, ¶ 47. He further stated, "On-site parking is generally favored and encouraged due to the resulting minimization of vehicle trips…." Exh. 73, ¶ 13. He made a public records request to the Town of Wellesley for any permits or approvals with conditions similar to those in this case, and in response received copies of project approvals for three market-rate developments: Pleasant Ridge (6-unit residential condominium), Waterstone (141-unit, mixed-use rental

housing development), and Belclare (21-unit, mixed-use residential condominium). Exh. 73, ¶¶ 14-18. The Board's decisions in those cases were entered into evidence. They contain extensive restrictions on construction parking, but each explicitly permits on-site parking. *See* Exh. 48, p. 15 (Condition 13, Pleasant Ridge); 8 p. 13 (Condition 17, Waterstone); 49 & 50, pp. 18 & 10 (Conditions 11 & 7, Belclare). A fourth decision concerning a mixed-use development was also entered into evidence, in which "[t]he Board said that there will be a condition that… construction parking will be on-site." Exh. 55, p. 10 (978 Worcester Street). A fifth decision approving a large sports complex contained a condition specifically permitting on-site parking. Exh. 88 (Exh. E, p. 24, Condition 13 (900 Worcester Street).

The Board's chair stated that the Board considers every project on its own merits, and noted that the Pleasant Ridge, Waterstone, and Belclare projects were located near commercial centers, where retaining parking for shoppers and commuters was important. Exh. 88, ¶ 14. Unlike the *16 Stearns Road* case, however, where the Board argued that there are children's safety issues because the site is located in a different setting from the other projects, the Board identifies no specific safety concerns at 680 Worcester Street. *C.f.* Exh. 90, ¶ 8. Certainly, no expert testimony was presented by the Board to attempt to quantify any local concern.

With regard to the central issue—that of consistency of application of the restrictions—as noted in the *16 Stearns Road* case, the chair of the Board testified that he was "familiar with a number of projects… subject to conditions that limit the parking construction worker's [sic] vehicles on the development site, on public ways, and in public parking lots." Exh. 90, ¶ 6. He also testified that the Board treated both of the proposed developments just like all other projects. Tr. II, 166; *see also* Exh. 90, ¶ 5. But, although his testimony and documents in evidence make it clear that the Board frequently restricts construction parking in approving new developments, and he mentioned "about a dozen" projects with similar language, he could remember only one—65 Washington Street—where on-site parking was prohibited. Tr. II, 147-148. We are reluctant to credit that recollection since the actual decisions of other developments were put in to evidence, but that of 65 Washington Street was not. See Exhs. 8, 48, 49, 55.

Clearly, any construction site, whether in a residential area or a commercial area,

results in increased traffic and some risk to pedestrians. The risk related to construction activities here is particularly small since Route 9, the busiest street in Wellesley, is not attractive to pedestrians. *See* Tr. II, 139. We find that the overall parking situations in all of the instances put before us are comparable, and that in all cases but this affordable housing development, construction parking was allowed on site. Particularly since the developer has agreed to require that most workers park off site, we find, after consideration of the facts before us and the credibility of the witnesses, that the parking restriction was not applied as equally as possible by the Board to subsidized and unsubsidized housing. For that reason, the three conditions must be struck from the permit.

C. Construction on Route 9

1. Curb Cut – Board Authority

The developer challenges three conditions which impose requirements with regard to its use of Route 9. First, during the local hearing before the Board, there was concern about the single curb cut for the entrance and exit of the proposed development. Regulation of the design of curb cuts is generally within the Board's authority since it is specifically addressed in the Wellesley Zoning Bylaw.[15] The original study prepared by the developer's traffic engineer recommended that it be 24 feet wide. Exh. 82, ¶ 12. In response to concerns raised during the local hearing about maneuvering of large vehicles, the design specification was increased to 28 feet. Exhs. 82, ¶ 12; 88, ¶ 19; Tr. II, 31-38. The Board's traffic engineer agreed that this layout "provides the minimum level of design standards for circulation and driveway design." Exh. 27. The developer's traffic engineer testified that the design is "safe and efficient." Exh. 82, ¶ 12. Nevertheless, the Board imposed Condition 18, which states:

> No construction activity shall commence until the Applicant has obtained final approval for the curb cut as shown on the Approved Plans from the Massachusetts Department of Transportation. …[A]ny change to the curb cut … shall require the approval of the ZBA.

Both parties agree that, as the Board states in its decision, "a state highway access

[15] "Access … shall be through a single driveway … not over twenty-four feet in width, and having an opening or curb cut at the street line suitable and appropriate to the driveway width." Exh. 33, § VIA-A(3)(g).

permit is required from MassDOT [the Massachusetts Department of Transportation] outside of the comprehensive permit process." Exh. 2, p. 11; *see also* Exhs. 88, ¶ 20; 83, ¶ 4. Thus, the first sentence of the condition is uncontroversial.

It is the second sentence that the developer challenges. To the extent that the Board is concerned that the developer might unilaterally change the design of the entrance after the permit is issued, but before submission to MassDOT, it is unnecessary. Any such change must be presented to the Board pursuant to 760 CMR 56.05(11).

The more troublesome implication of the requirement is that the Board is attempting to reserve for itself the right to veto action by MassDOT if the state agency requires a change in design.[16] Practically, this seems unnecessary since MassDOT accepts and considers comments from local officials. Exh. 82, ¶ 14. More to the point, however, only one authority can have final say over the design of the curb cut, and that is clearly MassDOT. G.L. c. 81, § 21, ¶ 2 (permit for access to state highway); *Sullivan v. Planning Bd. of Acton*, 38 Mass. App. Ct. 918, 920-921 (1995) ("the department has the exclusive authority to regulate… driveway openings"); *see also* Exh. 82, ¶ 15. Therefore, the first sentence of Condition 18, requiring a 28-foot curb cut "as shown on the approved plans," is upheld, and the second sentence of Condition 18 is struck.

2. Construction Operations – Board Authority

The Board also imposed two conditions to limit construction operations along Route 9. Condition 27 states:

> There shall be no queuing, idling, parking or staging of construction vehicles, construction worker vehicles, or delivery vehicles on Route 9, or any other street, under any circumstance.

Condition 19(k) imposes the same requirements in mandating a construction management plan that includes:

> Construction staging (staging areas, trailer locations, open storage areas, deliveries, truck holding locations), which shall be sufficient to ensure that there is no vehicle queuing, idling, parking or staging on Route 9 or any other streets under any circumstances.

[16] The developer cannot unilaterally change the design of the entrance after the permit is issued, but before submission to MassDOT. Any such change must be presented to the Board pursuant to 760 CMR 56.05(11).

At the outset, the developer argues that "the Board lacks the legal authority, under the town's zoning bylaw or otherwise, to impose conditions controlling traffic or other activities on the state highway."[17] Developer's Brief, p. 15. The Board, in response points to the design review section of the Wellesley Zoning Bylaw, which provides for design review of major projects in order to "protect the safety, convenience and welfare of the public [and] minimize additional congestion in public and private ways…." Exh. 33, §§ XVIA-A(2) and A(3); *see also* § XVIA-C. We do not agree that these provisions authorize the regulation of traffic operations on Route 9 during construction. The quoted sections do not constitute specific regulation of traffic or other activities on roadways during construction for two reasons. First, they appear only in the initial, general "Scope and Purpose" section of the design review chapter. Second, and more important, nowhere in the chapter is there specific reference to construction practices; rather all of the specific provisions—including those concerning vehicles and traffic—address design issues with regard to how the completed project will function. However, since the record is insufficient and neither party briefed this issue, we need not reach it.

Nevertheless, the conditions fail for two reasons. First, as with the curb cut, discussed in detail above, the jurisdiction the MassDOT supersedes that of the Board. The developer's traffic engineer testified that not only the curb cut, but all other safety matters, will be addressed by MassDOT during the approval process for a state access permit. Exh. 82, ¶¶ 13-15; 83, ¶¶ 4, 5, 7. It is clear as a matter of state regulation that when MassDOT grants the same access permit that permits a curb cut, it will impose conditions as necessary "to facilitate safe and efficient traffic operations, to mitigate traffic impacts, and…to ensure the safety of pedestrians, motorist, and those engaged in the Project." 700 CMR 13.04(2).

3. Construction Operations – Local Concerns

The testimony concerning safety issues was contradictory. As discussed above, since the developer has proven that the conditions imposed here render the project uneconomic, the Board must prove that each challenged condition is supported by a local concern that outweighs the regional need for affordable housing. On behalf of the Board,

[17] As a practical matter, what is at issue is only the operation of vehicles, not staging locations. As acknowledged by the developer's traffic engineer, staging areas are not permitted within the layout of Route 9. Tr. II, 42.

the police chief described the location of the site and Route 9, and testified generally that "the public interest requires the applicant to manage its construction on site without queuing, idling, parking or staging its construction vehicles on Route 9 due to the roadway's layout, volume of traffic and high speed limit." Exh. 93, ¶ 5. But the developer's traffic engineer responded that in his experience MassDOT "routinely approves the temporary closure of travel lanes to allow for the parking and staging of construction vehicles…." Exh. 83, ¶ 8. Further, he described in detail that in his experience in working on a number of other small and large projects on Route 9, MassDOT requires careful management of operations along the highway—including supervision by police detail officers and limitations on work hours—to ensure the safety of the public. Tr. II, 40-42, 44-51. Balancing the detailed description of traffic operations provided by the developer's traffic expert against the more general concerns expressed by the police chief, we find that the Board failed to sustain its burden of proving a local safety concern that outweighs the regional need for affordable housing.

For the above reasons, Conditions 19(k) and 27 are struck in their entirety.

D. Sewer Main

The developer also challenges the condition requiring it to install a new sewer main. The Board's decision states: "The Applicant shall install a new 8-inch PVC sewer line from the Project to the main in Francis Road." Exh. 2, p. 28, Condition 22.

In 1957, the Town of Wellesley installed a 241-foot-long sewer main to serve the single-family home that was on site of the proposed housing at that time and the three other houses between it and Francis Road. Tr. II, 54-55, 80; Exh. 86, ¶ 4. The pipe is in good condition, made of "transite" (an asbestos cement material); is six-inches in diameter (which conformed to the town standards at that time); and has a projected life of a hundred years. Exh. 86, ¶¶ 4; Tr. II, 6, 67; Tr. I, 94.

The town engineer testified that the current town standard and industry standard for new construction requires an eight-inch main, and that he believes that the existing main should be replaced by an eight-inch main. Exh. 86, ¶ 6-13; Tr. II, 53-54, 81. The primary reason for the larger size is that if there were to be a blockage, maintenance would be easier. Exh. 86, ¶ 14; Tr. II, 63-64, 66, 79. He, the developer's engineer, and the Board all agree that the existing six-inch main has capacity far in excess of that required

for the new development, and replacement is not necessary for that reason.[18] Exh. 2, p. 14 (§ 8(a)); 77, ¶ 12; Tr. II, 11, 58-59, 66.

One of the neighbors testified that in 2012 she had experienced a clogged sewer line, which she hired a contractor to clean out with a plumber's auger or snake. While she believed that the obstruction was in the main, rather than her service line, not only is there no conclusive evidence of that, but in addition, her belief is based on hearsay since she did not talk with the contractor herself. [19] Exh. 100, ¶ 6; Tr. III, 22-24, 28. The town, on the other hand, has no record of any maintenance problems with the main since it was installed. Tr. II-56.

The town engineer initially suggested that the pipe could be upgraded using a "pipe-bursting" technology, which would not require digging a trench to expose the existing pipe. Exh. 86, ¶ 16. He later realized that due to the asbestos content of transite, pipe-bursting is not permitted in Massachusetts, and though there is some intimation that yet other options may be available, the parties all assume that costly excavation, including breaking up driveways and parking areas, would be required. Tr. II, 68-69.

1. The Board's Authority to Require Installation of a New Main

The developer argues that there is no bylaw, rule, or regulation in Wellesley that requires it to upgrade the town sewer main. In response, the Board argues, and comprehensive permit states, that the developer requested a waiver of local sewer rules and regulations. Exh. 2, p. 20. This is misleading, however, since the waiver only refers very generally to "sewer connection, construction and fees pursuant to the DPW Sewer Rules and Regulations." Exh. 5, p. 3. There is no requirement or even discussion of replacement of mains in those rules and regulations. *See* Exh. 34.

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[18] The capacity of the main is 288,000 gallons per day, and the new development will add 4,510 gallons per day. Tr. II, 11.

[19] The neighbors did, however, hire their own expert civil engineer, who provided pre-filed testimony, in which he concluded that "it was reasonable and necessary for the Board to require an upgrade of the sewer." Exh. 101, ¶ 9. His testimony was quite brief, however, and concerned standards for construction of new sewers, and with no specific testimony about the need for upgrading. Exh. 101, ¶ 4. He did raise an interesting point with regard to whether the pipe meets the minimum calculated design standard for the desired velocity of effluent based on pipe diameter and slope. *See* Exh 101, ¶ 5-7. The developer's expert, however, provided a much more detailed analysis of this issue and concluded that velocity is not a problem. Exh. 77, ¶¶ 13-20. We find his testimony more credible.

The Board also suggests that Wellesley's "Rules and Regulations Governing Subdivision of Land… require new sewer mains to be a minimum of 8" in diameter." Board's Brief, p. 21-22. This argument is difficult to evaluate since the only citation in the Board's Brief is to the testimony of the town engineer, and the subdivision regulations were not entered into evidence. *See* Exh. 86, ¶ 7. But in any case, it is not persuasive since it addresses only construction of new sewer mains, not replacement of old mains. Further, the town engineer testified that the town has not uniformly required replacement of other existing six-inch pipes in Wellesley. Tr. II, 59.

The Board also argues that the zoning bylaw requires that "[t]here shall be sufficient sewer capacity to meet the flow demands of the proposed use without causing surcharge…." Board's Brief, p. 21; Exhs. 33, § XVIA-C(3)(e)(2); 86, ¶ 6. This could be justification for requiring improvement to town infrastructure. *See generally* ***Hilltop Preserve Ltd. Partnership v. Walpole,*** No. 2000-11, slip op. at 14-15 (Mass Housing Appeals Comm. Apr. 10, 2002) (town may not require developer to remedy existing infrastructure problems, but may require provision of limited off-site sewer services or mitigation of specific problems if necessitated by new development itself). But, as noted above, the Board has conceded—as a matter of fact—that capacity is not a concern.

Particularly given the context—a normally functioning sewer main that has more than enough capacity to handle the additional sewage generated by the proposed development—we find that because there is no clear requirement in Wellesley bylaws or regulations that the sewer main be upgraded, the condition imposed is beyond the Board's authority. *See Falmouth Hospitality, LLC, supra,* No. 2017-11, slip op. at 39; *Green View Realty, LLC v. Holliston*, No. 2006-16, slip op. at 10 (Mass. Housing Appeals Comm. Jan. 12, 2009), quoting *Lever Development, LLC v. West Boylston*, No. 2004-10, slip op. at 10 (Mass Housing Appeals Comm. Dec. 10, 2007).

2. Local Concerns

In addition, the developer argues that even if the Board had the authority to impose this condition, the conditions imposed have been proven to contribute to rendering the project uneconomic, and the Board has not proven that there is a local concern that outweighs the regional need for affordable housing.

The Board does state, in the most general terms, that there is a local concern that

outweighs the need for affordable housing. Board's Brief, p. 20. But it bases its argument nearly entirely on design standards, not replacement standards. It points to no practical health or safety concern resulting from continuing to use the existing main. It does, however, point out that for sewer mains that serve large facilities there is a "need to consider maintenance and operation along with pipe capacity," and that these considerations are heightened by the location of the manhole at the end of the main inside the garage of the building, where it may be difficult to use large equipment. Board's Brief, p. 23; Exh. 86, ¶ 14; Tr. II, 66, 78-79. (The town also has access from a manhole in Francis Road. Tr. II, 54; Exh. 19, p. 2 (Question 2).) In response to the town's desire to have easier access at the far end of the main, the developer changed the design of its building, increasing the ceiling height to give large vehicles, including backhoes, access through the manhole in the garage. Exh. 19, p. 2 (Question 2); Exh. 77, ¶ 21; Tr. II, 63-64. Based upon the evidence presented, we find that the Board has not sustained its burden of proving a local concern that outweighs the regional need for affordable housing.

3. Unequal Application of Local Requirement

Finally, the developer also argues that requiring sewer main upgrade for a new, more intense use that is within the capacity of the existing main is both unprecedented and constitutes unequal application of a local requirement to affordable housing development as compared to market rate developments. See Exh. 76, ¶ 21. Although evidence was introduced with regard to another development that where an upgrade was not required, the facts in this case have not been developed fully enough to warrant a finding on this issue when the condition fails on two other grounds. *See* Exh. 86, ¶15; 77, ¶ 11; Tr. II, 59-63.

VI. CONCLUSION

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 in the Board's decision, as described above, exceed the authority of the Board, do not treat the project as equally as possible to unsubsidized housing, and render the project uneconomic and are not consistent with local

needs or. The Board is directed to issue an amended comprehensive permit as provided in the text of this decision and the conditions below.

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

(a) The Board shall not include new, additional conditions.

(b) 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.

(c) All Wellesley 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 Wellesley.

(d) 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.

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

(a) The development, consisting of 20 total units, including five affordable units, shall be constructed substantially as shown on plans entitled "#680 Worcester Street, Chapter 40B Comprehensive Permit," dated May 9, 2016 (rev. 11/14/17), by Hayes Engineering, Inc. (Exhibit 3) and "680 Worcester Street," Sheet A7, dated 11.14.17 (rev. 5.21.19), by Grazado Velleco Architects (Exhibit 4), and shall be subject to those conditions imposed in the Board's decision of July 11, 2019, filed with the Wellesley Town Clerk on July 17, 2019 (Exhibit 2), as modified by this decision.

(b) The developer shall submit final construction plans for all buildings, roadways, stormwater management system, and other infrastructure to Wellesley

town staff or officials for final comprehensive permit review and approval pursuant to 760 CMR 56.05(10)(b).

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

(a) Construction in all particulars shall be in accordance with all applicable local zoning and other by-laws in effect on the date of the submission of the developer's application to the Board, except those waived by this decision or in prior proceedings in this case.

(b) The subsidizing agency or project administrator 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 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) Construction and marketing in all particulars shall be in accordance with all presently applicable state and federal requirements, including, without limitation, fair housing requirements.

(e) 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.

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

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

Housing Appeals Committee

March 15, 2021

Shelagh A. Ellman-Pearl, Chair

Marc. L. Laplante

Rosemary Connelly Smedile

Werner Lohe, Presiding Officer