COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

DAR - _____
Appeals Court No. 21-P-0908

TOWN OF MILTON BOARD OF APPEALS
PLAINTIFF-APPELLANT

v.

MASSACHUSETTS HOUSING APPEALS COMMITTEE AND
HD/MW RANDOLPH AVENUE, LLC
DEFENDANT-APPELLEES.

APPLICATION FOR DIRECT APPELLATE REVIEW ON APPEAL FROM ALLOWANCE OF MOTION FOR JUDGMENT ON THE PLEADINGS BY THE MASSACHUSETTS LAND COURT FOR DOCKET NO. 19 MISC 00037 (RBF)

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Dated: November 2, 2021

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court 1:21(a), Appellee, HD/MW Randolph Avenue, LLC states the following:

1. HD/MW Randolph Avenue, LLC does not have a parent corporation.
2. No publicly held corporation owns 10% or more of the stock or membership interest of HD/MW Randolph Avenue, LLC.

Respectfully Submitted,

HD/MW Randolph Avenue, LLC

By its Attorney

/s/ Andrew E. Goloboy

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REQUEST FOR DIRECT APPELLATE REVIEW

HD/MW Randolph Avenue, LLC ("HD/MW"), a Defendant/Appellee below, requests that the Court grant its application for direct appellate review.

The appeal filed by the Town of Milton Board of Appeal (the "Board") raises issues with respect to the Massachusetts Housing Appeals Committee's (the "HAC") jurisdiction over appeals filed by proponents of low and moderate income housing pursuant to G.L. c. 40B arising out of "approvals with conditions" from a comprehensive permitting authority. Consequently, the Board's attack on the HAC's jurisdiction raises questions of public interest requiring final determination by this Court and, if the merits of the Board's argument is reached (if it is determined it was not waived by failing to advance it in front of the HAC), this case presents a novel question of law as the Board brings a new challenge to the HAC's authority.

As demonstrated by this case, the journey of a proposed 40B development is often long, expensive, multi-leveled, and the HAC plays a vital role in the process. Consequently, when a local authority attacks the HAC's jurisdiction, and the standards employed by

the HAC, it has the potential to have significant ramifications for the HAC, developers of affordable housing, and the future of affordable housing in the Commonwealth which creates a public interest in resolving (and, ultimately, rejecting) the Board's jurisdictional attack.

In November 2014, HD/MW applied to the Board for a comprehensive permit to construct a 90-unit development containing 23 low to moderate income units. (ADD47). On July 30, 2015, the Board issued a decision granting an "approval with conditions" of HD/MW's application. (ADD48). The Board's "approval" imposed 64 conditions, including, but not limited to, reducing the number of units from 90 to 35, requiring a 50-foot vegetated buffer, increasing the number of buildings from 2, re-designing the aesthetic of all buildings, and adding a looped roadway that rendered the project uneconomic. (ADD48-49, 124) Additionally, the Board imposed a condition that prohibited three-bedroom units that made final approval from the subsidizing agency, MassHousing, impossible and also rendered the project uneconomic. (ADD54-55; 130-32).

Shortly thereafter, on August 18, 2015, HD/MW filed an appeal of the Board's approval with

conditions to the HAC. (ADD48). HD/MW's appeal to the HAC was fully litigated, including cross-motions for summary disposition, pre-filed testimony from twenty witnesses, and a four-day hearing that occurred in April 2017. (ADD49, 133). On December 20, 2018, the HAC issued a decision striking and/or modifying the conditions imposed by the Board. (ADD48, 183-254).

In January 2019, pursuant to G.L. c. 30A, §14 the Board filed an appeal of the HAC's decision to the Land Court. (ADD45). In its Motion for Judgment on the Pleadings, the Board argued – for the first time – that the HAC "lacked jurisdiction" over HD/MW's appeal of the Board's decision. (ADD51-52, 79-87).

The premise of the Board's argument to the Land Court, which it continues to advance in its appeal, is that HD/MW's proposed project was "uneconomic" at the time it obtained a Project Eligibility Letter from MassHousing and applied to the Board for a comprehensive permit; therefore, the Board was free to impose whatever conditions it wanted and HD/MW had no recourse to appeal to the HAC pursuant to G.L. c. 40B, §§ 22 and 23 and the HAC exceeded its statutory authority by applying a "significantly more uneconomic" standard. Id. The Board's argument,

however, is premised on a formula contained in the Department of Housing and Community Development's ("DHCD") Guidelines – not G.L. c. 40B or its regulations, 760 CMR 56, for calculating the "minimum return on total cost" which is one of the tests the HAC applies to determine a baseline economic threshold. (ADD52-54, 129-141).

The formula, however, cannot be calculated until the Pre-Hearing Conference at the HAC which, in this case, occurred on December 6, 2016, thirty (30) months after HD/MW obtained its Project Eligibility Letter from MassHousing, twenty-five (25) months after HD/MW applied for a comprehensive permit, and sixteen months after HD/MW filed its appeal to the HAC. After cross-motions for judgment on the pleadings, on July 30, 2021, the Land Court affirmed the HAC's ruling – except for the HAC's striking of two conditions that are not at issue in the Board's appeal (relating to a secondary regulatory agreement and monitoring fee in the event that HD/MW's regulatory agreement with MassHousing ever expires). (ADD43-63).

The Land Court correctly found that the Board's attack on the HAC's purported jurisdiction was not a jurisdictional attack, but rather a procedural issue

relating to burdens of proof and, because the Board did not raise the issue before the HAC, the argument had been waived. (ADD50-52). Indeed, as the Land Court noted, this Court previously held in Board of Appeals of Woburn v. Housing Appeals Comm, 451 Mass. 581, 590-591 (2008) that demonstrating whether the conditions render a project uneconomic is "a necessary element of the developer's prima facie case for relief." (ADD51). Similarly, this Court previously held in Town of Middleborough v. Housing Appeals Committee, 449 Mass. 514, 524 (2007) that the fundability requirement of an affordable housing project is not jurisdictional but rather part of the prima facie case for a comprehensive permit. Id. As a result, the Land Court correctly held that the Board waived its argument that the HAC exceeded its statutory authority by not raising the issue in front of the HAC. (ADD51-52).

Notwithstanding, the Land Court "in the interest of completeness" addressed the substance of the Board's argument and correctly determined that even if the argument had not been waived it failed regardless as the DHCD guidelines "are what they say they are: guidelines, intended to serve as a supplement in

interpreting G.L. c. 40B, §22" and the HAC was justified in applying a "significantly more uneconomic" standard. (ADD52-54).

Nevertheless, this Court should take this opportunity to (1) unambiguously affirm that the determination of whether conditions imposed by a local permitting authority renders the project uneconomic is a question of proof – not jurisdiction – that can be waived (and was waived by the Board); (2) affirm the Land Court's conclusion that the determination of whether a project is "uneconomic" is determined by G.L. c. 40B and its implementing regulations, 760 CMR 56, along with policies adopted through adjudication as well as rulemaking; and (3) affirm the rejection of the Board's argument that a developer can obtain a Project Eligibility Letter, submit an application for a comprehensive permit, receive an "approval with conditions" that bears no resemblance to the proposed project, and be left with no recourse because the HAC is without jurisdiction to resolve the appeal based on a formula contained in DHCD's guidelines that cannot be calculated until the Pre-Hearing Conference in the HAC.

STATEMENT OF PRIOR PROCEEDINGS

On January 18, 2019, the Board filed an appeal, pursuant to G.L. c. 30A, §14, seeking review of the HAC's December 20, 2018 decision striking and/or modifying numerous conditions imposed by the Board. (ADD62). On August 19, 2019, the Board filed a Motion for Judgment on the Pleadings. Id. On January 9, 2020, HD/MW filed an Opposition and Cross-Motion for Judgment on the Pleadings. Id. On January 9, 2020, the HAC filed an Opposition and Cross Motion for Judgment on the Pleadings. Id. On March 9, 2020, the Town filed its reply brief. (ADD62).

On June 5, 2020, the Land Court conducted a hearing on the Cross Motions for Judgment on the Pleadings. Id. On July 30, 2021, the Land Court issued a Memorandum and Order Allowing in Part and Denying in Part Motions for Judgment on the Pleadings (the "Decision").[1] (ADD43-61). On July 30, 2021, the Land Court entered Judgment. (ADD62-63).

[1] The Land Court remanded back to the HAC for further consideration of the HAC's decision to strike two discrete conditions relating to a Local Regulatory Agreement and a local monitoring fee (Conditions 18 and 19). (ADD63). The two conditions, however, do not relate to the issues presented in the Board's appeal.

On August 20, 2021, the Board filed a Notice of Appeal. (ADD41). The appeal was docketed with the Appeal's Court on October 12, 2021. Id.

FACTS RELEVANT TO APPEAL

A. Project Background

On November 3, 2014, MassHousing issued a Project Eligibility Letter under G.L. c. 40B for HD/MW's proposal for a two-building, ninety-unit affordable housing project in Milton, Massachusetts (the "Project"). (ADD47). On or about November 6, 2014, HD/MW applied to the Board for a comprehensive permit to build the Project at 693-711 Randolph Avenue in Milton. Id. The Project, as proposed, consists of two buildings, each approximately forty-five feet high. (ADD48). There is proposed a total of ninety residential units, twenty-three will be low or moderate income, eighty-three garage parking spaces, seventy-three outdoor spaces, and a fifteen foot high retaining wall. Id.

Between December 2, 2014 and June 17, 2015, the Board held eleven public hearings concerning HD/MW's application for a comprehensive permit. On July 30, 2015, the Board granted the comprehensive permit with conditions (the "Comprehensive Permit"). Id. On

August 18, 2015, HD/MW filed an appeal with the HAC, entered as proceeding No. 2015-03, HD/MW Randolph Avenue, LLC v. Milton Board of Appeals ("Appeal"), arguing that certain conditions imposed by the Board in the Comprehensive Permit rendered the Project uneconomic. Id. Some of the conditions imposed by the Board included reducing the number of total units to 35, requiring a 50-foot vegetated buffer area, breaking up the buildings into smaller buildings, requiring more elevators, requiring the architectural style to reflect the surrounding neighborhood, and adding a looped driveway. (ADD48-49).

Following the submission of pre-filed testimony from 20 witnesses, a site visit, and a four day hearing, the HAC issued a decision on December 20, 2018 striking or modifying the Board's conditions. (ADD49; 183-254).

B. Land Court Proceeding

In moving for Judgment on the Pleadings in its 30A appeal to the Land Court, the Board asserted that because the Project was purportedly "uneconomic" at the time it was originally proposed and, therefore, HD/MW could not demonstrate that any of the Board's conditions rendered the Project uneconomic and the HAC

lacked jurisdiction to hear HD/MW's appeal and exceeded its statutory authority by applying the "significantly more uneconomic" standard. (ADD49-50) Additionally, the Board argued that the HAC erred in finding that the Board's imposition of a condition prohibiting three-bedroom units that prevented HD/MW from receiving funding from MassHousing rendered the project uneconomic. (ADD50). Alternatively, the Board argued that there was not "substantial evidence" for the HAC to strike or modify certain conditions. (ADD55-61).

The Land Court distilled the Board's arguments with respect to economics into four issues:

> First, is the requirement under §§ 22 and 23 that the conditions render the Project uneconomic a matter of subject matter jurisdiction? Second, if not, did the Board waive its argument regarding the minimum ROTC? Third, did HAC err in finding the conditions of the comprehensive permit render the Project uneconomic? Fourth, did HAC err in finding that the Board prohibited three-bedroom units in the Project.

(ADD50).

With respect to Question 1, the "jurisdictional argument," the Land Court held that:

> The requirement that HD/MW demonstrate that the conditions render the project uneconomic is

> 'a necessary element of the developers prima facie case for relief. Board of Appeals of Woburn v. Housing Appeals Comm, 451 Mass. 581, 590-591 (2008). It is not a jurisdictional requirement.

(ADD51).

With respect to Question 2, whether the Board waived its argument, the Land Court held that because the uneconomic conditions requirement is not jurisdictional, the Board had waived the argument about the ROTC because it was "never made to the HAC." (ADD51-52).

With respect to Question 3, which the Land Court only addressed "in the interest of completeness," whether the conditions imposed by the Board rendered the Project uneconomic, the Land Court found that the HAC did not exceed its statutory authority and "could reasonably look to the Project's ROTC and determine if the reduction in ROTC, if any, made the Project more uneconomic." (ADD52-54; quote on ADD54). Further, "HAC's use of the 'significantly more uneconomic' standard to determine if the conditions of the comprehensive permit rendered the Project uneconomic is within its discretion." (ADD54).

Finally, with respect to Question No. 4, the prohibition of the three bedroom units, the HAC's alternative basis to find that the conditions imposed by the Board rendered the project uneconomic, the Land Court found that, after hearing from both the Board and HD/MW, the HAC had sufficient evidence to conclude that the Board's conditions effectively banned three bedroom units, and that the "HAC was within its statutory authority in finding that this ban would render the Project uneconomic by causing the subsidizing agency to not fund the Project." (ADD54-55, quote on ADD55).

Additionally, the Land Court affirmed the striking and/or modification of the conditions because there was "substantial evidence" to support the HAC's findings, except with respect to Conditions 18 and 19. (ADD55-63).

STATEMENT OF ISSUES RAISED ON APPEAL

The following issues were raised and properly preserved in the Land Court in connection with the Plaintiff/Appellant, the Board's G.L. c. 30A appeal of the HAC's decision:

1. Whether the determination that the conditions imposed by a permitting authority when granting

an “approval with conditions” for a comprehensive permit pursuant to G.L. c 40B renders a project uneconomic is a requirement in order for the HAC to possess subject matter jurisdiction of an appeal or whether it is a procedural – burden of proof – issue that can be waived if not raised in front of the HAC;

2. If the Answer to Issue No. 1 is that it is a procedural issue that can be waived, whether the Board waived its argument that the HAC exceeded its statutory authority by applying a “significantly more uneconomic” test by not raising the issue in front of the HAC;
3. If the Board’s argument was not waived, whether the HAC exceeded its statutory authority by determining the conditions imposed by the Board rendered the project both uneconomic and “significantly more uneconomic;” and
4. Whether the HAC’s finding that the Board’s condition prohibiting three bedroom units rendered the project uneconomic because it precludes final approval and funding from MassHousing was supported by substantial evidence.

A copy of the Board's "Docketing Statement" filed with the Appeals Court is located in the Addendum. (ADD180-182).

ARGUMENT

In affirming the HAC's decision and rejecting the Board's purported challenge to the HAC's jurisdiction, the Land Court reached the proper conclusion. Due to the importance of affordable housing and G.L. c. 40B to the Commonwealth, the Court should grant direct appellate review and affirm the Land Court and HAC's findings and reject the Board's attempt divest the HAC of its authority.

I. THE LAND COURT CORRECTLY HELD THAT THE REQUIREMENT THAT HD/MW DEMONSTRATE THE CONDITIONS IMPOSED BY THE BOARD RENDER THE PROJECT UNECONOMIC IS NOT A JURISDICTIONAL REQUIREMENT.

The Land Court correctly rejected the Board's argument "that the standard in [G.L. c. 40B] §§ 22 and 23 that a project proponent must demonstrate to the HAC that conditions render a project uneconomic is a jurisdictional requirement." (ADD49-51). This Court previously held in Woburn, 451 Mass. at 590-591 that demonstrating whether the conditions render a project uneconomic is "a necessary element of the developer's prima facie case for relief." Similarly, this Court

previously held in Middleborough, 449 Mass. at 524 that the fundability requirement of an affordable housing project is not jurisdictional but rather part of the prima facie case for a comprehensive permit.

Indeed, both of these decisions, along with the Land Court's decision, are firmly grounded in the text of both G.L. c. 40B, §§22, 23 and the accompanying regulations, 760 CMR 56.07(1)(c)(1)("Scope of Hearing") and 56.07(2)(a)(3)("Burdens of Proof"). The determination of whether HD/MW satisfied its burden of demonstrating whether the conditions imposed by the Board rendered the Project uneconomic is a procedural issue and not a jurisdictional requirement.

G.L. c. 40B, §23 states:

> The hearing by the housing appeals committee in the department of housing and community development shall be limited to the issue of whether, …, in the case of an approval of an application with conditions and requirements imposed, whether such conditions and requirements make the construction or operation of such housing uneconomic and whether they are consistent with local needs

Further, the language of 760 CMR 56.07(1)(c)(1), mirrors the language found in §23 in defining the "Scope of Hearing" for an "Approval with Conditions" and states:

> In the case of the approval of a Comprehensive Permit with conditions or requirements imposed, the issues shall be: **1.** first, whether the conditions and/or requirements considered in aggregate make the building or operation of the Project Uneconomic;

Moreover, the procedural nature of whether the conditions imposed by the Board render a project uneconomic is further proven through 760 CMR 56.07(2)(a)(3), entitled "Burdens of Proof," and states, "[i]n the case of an approval with conditions, the Applicant shall have the burden of proving that the conditions make the building or operation of the Project Uneconomic."

Accordingly, both the language of the G.L. c. 40B, its regulations, 760 CMR, 56, and this Court's precedent establish that the determination regarding whether the conditions imposed by the Board render the Project uneconomic is not a jurisdictional requirement.

II. THE LAND COURT CORRECTLY DETERMINED THAT THE BOARD WAIVED THE ARGUMENT THAT THE HAC EXCEEDED ITS STATUTORY AUTHORITY.

The Land Court correctly held that the Board waived any argument that the HAC exceeded its statutory authority. (ADD51-52). It is well

established that "a party is not entitled to raise arguments on appeal that he could have raised, but did not raise, before the administrative agency." Albert v. Municipal Court of Boston, 388 Mass. 491, 493-494, (1983). Indeed, issues and arguments that are not raised before an administrative agency are waived. City of Springfield v. Department of Telecommunications and Cable, 457 Mass. 562, 573 (2010)("Because the city did not raise these arguments before the department, we do not consider them on appeal.").

For the first time, in its G.L. c. 30A appeal of the HAC's Decision to the Land Court, the Board argued that the "HAC lacked jurisdiction" to hear HD/MW's appeal of the Board's decision because the Project's ROTC was below the minimum ROTC calculation contained in the DHCD Guidelines (which could only be calculated years after HD/MW applied for a comprehensive permit). Consistent with Albert, however, the Board's failure to raise this issue before the HAC constituted a waiver and could not be raised for the first time in its 30A appeal to the Land Court. (ADD50-52, 132-136, 161-162).

In the two years from the time HD/MW initiated its appeal to the HAC, in August 2015 through the post-hearing briefing that concluded in August 2017, the Board never raised the issue that the "HAC lacked jurisdiction" to hear HD/MW's appeal. (ADD51-52, 133). Accordingly, the Board waived any argument that the "HAC lacked jurisdiction" to hear HD/MW's appeal of the Board's decision.

In fact, in front of the HAC, not only did the Board not assert that the "HAC lacked jurisdiction" to hear the appeal, in its post-hearing brief to the HAC, the Board acknowledged that the HAC's "significantly more uneconomic" standard was an appropriate standard for the HAC to employ. Specifically, in its Post-Hearing Brief to the HAC, the Board asserted that:

> 'to sustain its burden the developer must establish also that its profit return on total costs is such that the project[as permitted or conditioned by the Board of Appeals] is significantly more uneconomic than the development it proposes to build.'

(ADD133-134). Further, the Board's Post-Hearing Brief to the HAC acknowledged the "significantly more uneconomic" terminology by saying "[a]ccordingly, HD/MW has not met its burden of proving that the Board's conditions make the 35-unit development

permitted significantly more uneconomic than HD/MW's proposed 90-unit development." Id. As such, the Board not only waived the argument that the "HAC lacked jurisdiction" to hear HD/MW's appeal or that it could not apply a "significantly more uneconomic" analysis, but it agreed that was the appropriate standard for the HAC to employ while the HAC was exercising its jurisdiction.

III. SUBSTANTIVELY THE BOARD'S ARGUMENT THAT THE HAC EXCEEDED ITS STATUTORY AUTHORITY BY APPLYING THE "SIGNIFICANTLY MORE UNECONOMIC" STANDARD IS INCORRECT.

The Land Court correctly rejected the merits of the Board's argument that the Project was uneconomic when it was proposed, therefore the conditions imposed by the Board did not render it uneconomic and the HAC exceeded its statutory authority by employing the "significantly more uneconomic" standard. (ADD52-54). Since the Board's argument is wholly based on a formula for minimum ROTC found in DHCD's Guidelines, the Land Court dispatched with the Board's argument stating:

> There are no DHCD rules and regulations defining what constitutes rendering a project "uneconomic" under G.L. c 40B, §22. The DHCD guidelines are 'rules and regulations established by" DHCD. They are what they say they are: guidelines,

> intended to serve as a supplement to interpreting G.L. c. 40B and the applicable regulations. In any conflict between the terms in the DHCD guidelines and either c. 40B or the regulations, the latter control. Therefore, HAC has discretion not only to follow the guidelines, but also to adopt 'policies through adjudication as well as through rulemaking' when the guidelines do not help the agency determine when conditions render a project uneconomic. Board of Appeals of Woburn, 451 Mass. at 593. Such discretion includes applying the standard of a project being rendered 'significantly more uneconomic' by a board's conditions. Id. at 592-593.

(ADD53). Further, the Land Court correctly held that using the ROTC calculation to determine when a project becomes uneconomic is not compulsory, "rather the ROTC methodology serves as one way of calculating whether conditions rendered a project uneconomic." (ADD53-54).

The HAC's jurisdiction is established by G.L. c. 40B which contains a specific definition of the term "uneconomic," which delegates to the subsidizing agency to determine the reasonable return that makes a project economic. See G.L. c. 40B, §20. Consequently, despite the Board's argument, once a proposed 40B rental project obtains a Project Eligibility Letter from a subsidizing agency, the

Project can never be "uneconomic." (ADD54). In practice, the subsidizing agency issues a Project Eligibility Letter to the developer determining that a project is financially feasible. 760 CMR 56.04. As the Land Court noted, the determination of financial feasibility by MassHousing "was conclusive evidence that the Project satisfied eligibility requirements and was an irrebutable presumption before the Board and HAC. 760 CMR 56.04(6), 56.07(3)(a)." (ADD54).

Further, the regulations, provide a definition of "reasonable return" which is undefined in the statute, but is found in the statutory definition of "uneconomic." G.L. c. 40B, §20, 760 CM 56.02 ("Reasonable Return"). The regulations define "reasonable return", in relevant part, for a rental project as the profit that the developer will make at either the (1) issuance of a Project Eligibility Letter; or (2) the local board imposes a condition reducing the number of units. See 760 CMR 56.02, Definition of "reasonable return" parts (c)-(d). As such, it is impossible for any developer, including HD/MW, to propose a project that is "uneconomic" as defined by the statute and regulations if they have received a Project Eligibility Letter and/or an

approval with conditions that includes a decrease in units. Consequently, the HAC did not, nor can it ever, lack jurisdiction based on the proposed return for a rental project that has received a Project Eligibility Letter and/or an approval with conditions that includes a decrease in units. This indisputable fact is fatal to the Board's position.

In this case, since the subsidizing agency, MassHousing, determined that HD/MW's proposal was "financially feasible" and the Board imposed a condition decreasing the number of units, the formula set forth in the guidelines was not the baseline utilized by the HAC to determine whether the project had been rendered "uneconomic." Pursuant to the regulations, the HAC found that the economic baseline for "reasonable return" in this case was 5.88% even though the formula in the guidelines calculates a minimum ROTC as 6.84%. (ADD136-139). Based on the evidence submitted by both HD/MW and the Board, the HAC found that as a result of the conditions imposed by the Board, the ROTC for the 35 unit project was 4.26% which was 1.62% lower than the ROTC for HD/MW's proposed 90 unit project. (ADD139-140). In other words, the conditions imposed by the Board reduced

HD/MW's "reasonable return" by 27.5%, which led the HAC to "find the ROTC for the approved project is both uneconomic and significantly more uneconomic than the ROTC for the developer's proposal." (ADD197)(emphasis added). Consequently, the HAC's decision is in accord with the statute, regulations, and the HAC's authority to adopt policies through adjudication.

IV. THE LAND COURT CORRECTLY HELD THAT THE HAC'S DECISION THAT THE BOARD'S CONDITION PROHIBITING THREE BEDROOM UNITS RENDERED THE PROJECT UNECONOMIC WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

The HAC found that Condition No. 2 imposed by the Board prohibits three-bedroom units because it only directs HD/MW to identify "one bedroom" and "two bedroom units" on its plan, but not "three bedroom" units. (ADD54-5; 130-132, 197-200). In affirming the HAC's decision on this issue, the Land Court correctly held that the HAC's interpretation of Condition No. 2 was based on evidence presented at the hearing and its factual determination that Condition No. 2 precludes three bedroom units which also precludes MassHousing from funding the Project renders the project uneconomic was within the HAC's authority. (ADD54-55). Consequently, regardless of the Board's "jurisdictional argument" with respect to ROTC, the

HAC had jurisdiction over HD/MW's appeal because the imposition of the condition precluding three bedroom units rendered the Project "uneconomic."

REASONS WHY DIRECT APPELLATE REVIEW IS APPROPRIATE

Direct appellate review is appropriate in this case because it presents a question of public interest requiring a final determination by the Court and novel questions of law arising out of the interpretation of G.L. c. 40B, its regulations 760 CMR 56, DHCD Guidelines, and the HAC's rulemaking authority through adjudicatory proceedings.

As this Court has previously stated, the legislature enacted G.L. c. 40B to "streamline and accelerate the permitting process for developers of low or moderate income housing in order to meet the pressing need for affordable housing and streamlining application procedures and overriding local zoning restrictions." See Taylor *v.* Board of Appeals of Lexington, 451 Mass. 270, 277-278 (2008) citing Middleborough, 449 Mass. at 521. The Board's attack on the HAC's jurisdiction is wholly inconsistent with not only the express language of G.L. c. 40B, but also its express legislative intent.

This case presents the Court with the opportunity to not only affirm the decisions of the Land Court and HAC and reject the Board's attack on the HAC's jurisdiction, but it also presents an opportunity, if the Court reaches the merits of the Board's argument, to unambiguously define the relationship between G.L. c. 40B, its regulations, DHCD guidelines, and the HAC's authority to enact rulemaking through its adjudicatory decisions. Consequently, this Court should grant direct appellate review in this case to provide clarity to developers of low and moderate income housing, local permitting authorities, and the HAC with respect to process during the journey of a 40B project once an application for a comprehensive permit is filed with local permitting authority.

CONCLUSION

For the foregoing reasons, HD/MW respectfully requests that the Court grant this application for direct appellate review.

Respectfully Submitted,

HD/MW Randolph Avenue, LLC

By its attorney,

/s/ Andrew E. Goloboy

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Dated: November 2, 2021

CERTIFICATION PURSUANT TO MASS. R. A. P. 16(K)

I, Andrew E. Goloboy, hereby certify that the foregoing application for direct appellate review complies with the rules of court that pertain to filing of briefs, including but not limited to: Mass. R. App. P. 16(a)(6)(pertinent findings or memorandum or decision); Mass. R. App. P. 16(e) (references to the record); Mass. R. App. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. App. P. 16(h) (length of briefs); Mass. R. App. P. 18 (appendix to the briefs); and Mass. R. App. P. 20 (form of briefs, appendices, and other papers).

/s/ Andrew E. Goloboy

Andrew E. Goloboy, BBO#663514

CERTIFICATE OF SERVICE

Pursuant to Mass. R.A.P. 13(d), I, Andrew E. Goloboy, Esquire, hereby certify that a copy of this application for Direct Appellate Review was served upon all counsel of record via the eFile-MA system on this 2nd day of November 2021 and via e-mail.

/s/ Andrew E. Goloboy

Andrew E. Goloboy, Esquire

Dated: November 2, 2021

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-

Property Information

525 Canton Avenue
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More Party Information

Events

Date	Session	Location	Type	Event Judge	Result
03/18/2019 10:30 AM	J. Foster	Courtroom 1101 - Eleventh Floor	Case Management Conference	Foster, Hon. Robert B.	Case Management Conference held
04/18/2019 09:30 AM	J. Foster	Courtroom 401 - Fourth Floor	Telephone Conference Call	Foster, Hon. Robert B.	Conference held.
06/03/2019 10:30 AM	J. Foster	Courtroom 401 - Fourth Floor	Telephone Conference Call	Foster, Hon. Robert B.	Conference held.
07/24/2019 09:15 AM	J. Foster	Courtroom 401 - Fourth Floor	Hearing	Foster, Hon. Robert B.	Held

Date	Session	Location	Type	Event Judge	Result
11/13/2019 10:00 AM	J. Foster		Hearing	Foster, Hon. Robert B.	Continued
01/27/2020 10:00 AM	J. Foster		Hearing	Foster, Hon. Robert B.	Continued
02/06/2020 10:30 AM	J. Foster		Hearing	Foster, Hon. Robert B.	Continued
03/24/2020 10:00 AM	J. Foster		Hearing	Foster, Hon. Robert B.	Rescheduled-Covid-19 emergency
05/14/2020 10:00 AM	J. Foster		Telephone Conference Call	Foster, Hon. Robert B.	Rescheduled-Covid-19 emergency
06/04/2020 10:00 AM	J. Foster		Hearing	Foster, Hon. Robert B.	Rescheduled-Covid-19 emergency
06/05/2020 02:00 PM	J. Foster	Courtroom 403 - Fourth Floor	Hearing	Foster, Hon. Robert B.	Held via video

Docket Information

Docket Date	*Docket Text*	Amount Owed	*Image Avail.*
01/18/2019	Complaint filed.		Image
01/18/2019	Case assigned to the Average Track per Land Court Standing Order 1:04.		
01/18/2019	Land Court miscellaneous filing fee Receipt: 398568 Date: 01/18/2019	$240.00	
01/18/2019	Land Court surcharge Receipt: 398568 Date: 01/18/2019	$15.00	
01/18/2019	Land Court summons Receipt: 398568 Date: 01/18/2019	$10.00	
01/18/2019	Uniform Counsel Certificate for Civil Cases filed by Plaintiff.		
01/19/2019	Appearance of John P Flynn, Esq., Kevin S Freytag, Esq. for Town of Milton Board of Appeals, filed		
01/24/2019	The case has been assigned to the A Track. Notice sent.		Image
01/24/2019	Event Scheduled Judge: Foster, Hon. Robert B. Event: Case Management Conference Date: 03/18/2019 Time: 10:30 AM (Notice sent to Attorney Freytag)		Image
02/25/2019	Summons returned to Court with service on The Massachusetts Housing Appeals Committee, HD/HW Randolph Avenue, LLC filed.		Image
02/25/2019	Affidavit of Acceptance of Service of Process, filed.		
03/04/2019	Appearance of Ronald W Dunbar, Jr., Esq., Andrew E Goloboy, Esq. for HD/HW Randolph Avenue, LLC, filed		Image
03/04/2019	Appearance of Timothy James Casey, Esq. for The Massachusetts Housing Appeals Committee, filed		Image
03/13/2019	Joint Case Management Conference Statement, filed.		Image
03/18/2019	Case Management Conference Held: Case Management Conference scheduled on: 03/18/2019 10:30 AM Has been: Case Management Conference held. Attorneys John Flynn, Kevin Freytag, Timothy Casey, and Andrew Goloboy appeared. Parties to report any objections regarding the Court's recusal by March 25, 2019. Administrative Record to be filed by May 31, 2019. Defendants Answer to Complaint is waived and they will rely on the Administrative Record. Plaintiff to file Motion for Interdepartmental Assignment and/or Motion to Transfer with regard to related case in Norfolk Superior Court. A telephone status conference is scheduled for April 18, 2019 at 9:30 A.M. (Notice to Attorneys John Flynn, Kevin Freytag, Timothy Casey, and Andrew Goloboy)		

Docket Date	Docket Text	Amount Owed	Image Avail.
03/19/2019	Scheduled Judge: Foster, Hon. Robert B. Event: Telephone Conference Call Date: 04/18/2019 Time: 09:30 AM (Notice sent to Attorneys John Flynn, Kevin Freytag, Timothy Casey, and Andrew Goloboy)		
03/26/2019	Letter to the Court from Attorney Andrew Goloboy, filed.		Image
03/26/2019	Letter to the Court from Attorney Timothy Casey, filed.		Image
04/16/2019	Joint Request for Interdepartmental Judicial Assignment to the Land Court, filed.		Image
04/18/2019	Event Resulted: Telephone Conference Call scheduled on: 04/18/2019 09:30 AM Has been: Telephone Status Conference held. Attorneys John Flynn, Timothy Casey, and Andrew Goloboy appeared. Administrative Record to be filed by May 31, 2019. A telephone status conference is scheduled for June 3, 2019 at 10:30 A.M.		
04/19/2019	Scheduled Judge: Foster, Hon. Robert B. Event: Telephone Conference Call Date: 06/03/2019 Time: 10:30 AM (Notice sent to Attorneys John Flynn, Kevin Freytag, Timothy Casey, and Andrew Goloboy)		
05/01/2019	Chief Justice of the Trial Court Order of Assignment dated May 1, 2019		Image
05/10/2019	Interdepartmentally Assigned Case No. 1982CV00079 received from Norfolk Superior Court.		
05/29/2019	Appearance of Diane C Tillotson, Esq., Michael P Moore, Jr., Esq. for Town of Milton Board of Appeals, filed		Image
05/31/2019	Answer, filed.		Image
05/31/2019	Administrative Record, Volumes I-VII, filed.		
06/03/2019	Event Resulted: Telephone Conference Call scheduled on: 06/03/2019 10:30 AM Has been: Telephone Status Conference held. Attorneys John Flynn, Anthony Riley, Andrew Goloboy, Timothy Casey, and Patrick Moore appeared for the defendants. By June 17, 2019, the parties are to report as to whether they are satisfied with the record, or in the alternative, file a motion to supplement the record. The Carlins and the Town of Milton shall file their motions for judgment on the pleadings by August 19, 2019, Land Court Rule 4 to govern the content and timing of such filings. Oppositions and cross-motions shall be filed by October 21, 2019 and replies shall be submitted by November 4, 2019. A hearing on the motions for judgment on the pleadings is scheduled for November 13, 2019 at 10:00 a.m. (Notice to Attorneys John Flynn, Anthony Riley, Andrew Goloboy, Timothy Casey, and Patrick Moore)		
06/05/2019	Scheduled Judge: Foster, Hon. Robert B. Event: Hearing Date: 11/13/2019 Time: 10:00 AM (Notice sent to Attorneys John Flynn, Anthony Riley, Andrew Goloboy, Timothy Casey, and Patrick Moore)		
06/17/2019	Plaintiff Town of Milton Board of Appeals' Motion for a View or, Alternatively, Leave to Present Additional Evidence, filed.		Image
06/25/2019	Plaintiff Town of Milton Board of Appeals' Motion to Stay Enforcement of the HAC Decision, filed.		Image
07/15/2019	Defendant, HD/MW Randolph Avenue LLC's Opposition to Plaintiff's Motion for a View or, in the alternative, Leave to Present Additional Evidence, filed.		Image
07/16/2019	Scheduled Judge: Foster, Hon. Robert B. Event: Hearing Date: 07/24/2019 Time: 09:15 AM		

Docket Date	Docket Text	Amount Owed	Image Avail.
07/16/2019	Opposition of the Massachusetts Housing Appeals Committee to Plaintiff Town of Milton Board of Appeals' Motion for a View or, alternatively, Leave to Present Additional Evidence, filed.		Image
07/17/2019	Notice of Withdrawal of Plaintiff Town of Milton Board of Appeals' Motion to Stay Enforcement of the HAC Decision, filed.		Image
07/17/2019	Stipulation, filed.		Image
07/24/2019	Event Resulted: Hearing scheduled on: 07/24/2019 09:15 AM Has been: Hearing held. Attorneys Ronald Dunbar, Timothy Casey, Patrick Moore, Donna Mizrahi, Robert Galvin appeared. Plaintiff Town of Milton Board of Appeals' Motion for a View or, Alternatively, Leave to Present Additional Evidence is DENIED. The court finds that a view is not appropriate in light of Young's Court v. Outdoor Advertising Board, 4 Mass. App. Ct. 130, 134 (1976), and that, in any event, a view or additional photographs constitute supplements to the record that are not necessary.		
08/19/2019	Plaintiff Town of Milton Board of Appeals Motion for Judgment on the Pleadings filed.		Image
08/19/2019	Plaintiff Town of Milton Board of Appeals' Memorandum in Support of its Motion for Judgment on the Pleadings, filed.		Image
08/26/2019	Withdrawal of Timothy James Casey, Esq. for The Massachusetts Housing Appeals Committee, filed		Image
08/26/2019	Appearance of Samuel M Furgang, Esq. for The Massachusetts Housing Appeals Committee, filed		Image
10/15/2019	Joint Motion to Extend Time for Filing Cross-Motions for Judgment and Rescheduling Hearing, filed.		
10/15/2019	Joint Motion to Extend Time for Filing Cross-Motions for Judgment and Rescheduling Hearing ALLOWED. Cross motions for judgment on the pleadings to be filed on December 23, 2019 and replies to be filed on January 15, 2020. The hearing currently set down for November 13, 2019 is continued to January 27, 2020 at 10:00 AM. Judge: Foster, Hon. Robert B. (Notice sent to Attorneys Samuel Furgang, M. Patrick Moore, Jr., and Andrew Goloboy)		
10/15/2019	Event Resulted: Hearing scheduled on: 11/13/2019 10:00 AM Has been: Continued Hon. Robert B. Foster, Presiding		
10/15/2019	Scheduled Judge: Foster, Hon. Robert B. Event: Hearing Date: 01/27/2020 Time: 10:00 AM (Notice sent to Attorneys Samuel Furgang, M. Patrick Moore, Jr., and Andrew Goloboy)		Image
10/21/2019	Interdepartmentally Assigned Case No. 1982CV00079 returned to Norfolk Superior Court.		
12/20/2019	Massachusetts Housing Appeal Committee's Assented to Motion to Further Extend Time for Filing its Cross-Motion for Judgment and Rescheduling Hearings ALLOWED. The deadline for filing cross-motions for judgment on the pleadings is extended to January 9, 2020. Replies are to be filed by January 31, 2020. The January 27, 2020 hearing is continued to February 6, 2020 at 10:30 AM. Judge: Foster, Hon. Robert B. (Notice sent to Attorneys Samuel Furgang, Andrew Goloboy and M. Patrick Moore)		
12/20/2019	Event Resulted: Hearing scheduled on: 01/27/2020 10:00 AM Has been: Continued Hon. Robert B. Foster, Presiding		
12/20/2019	Scheduled Judge: Foster, Hon. Robert B. Event: Hearing Date: 02/06/2020 Time: 10:30 AM (Notice sent to Attorneys Samuel Furgang, Andrew Goloboy and M. Patrick Moore)		

Docket Date	Docket Text	Amount Owed	Image Avail.
12/23/2019	Massachusetts Housing Appeals Committee's Assented to Motion to Further Extend Time for Filings its Cross-Motion for Judgment and Rescheduling Hearing, filed.		Image
01/09/2020	Defendant, HD/MW Randolph Avenue, LLC's Cross-Motion for Judgment on the Pleadings to Uphold the December 20, 2018 Decision of the Massachusetts Housing Appeals Committee, filed.		Image
01/09/2020	Defendant, HD/MW Randolph Avenue, LLC's, Memorandum in Opposition to Plaintiff, Town of Milton Board of Appeals', Motion for Judgment on the Pleadings and in Support of its Cross-Motion for Judgment on the Pleadings, filed.		Image
01/09/2020	Massachusetts Housing Appeals Committee's Opposition and Cross-Motion to Town of Milton's Motion for Judgment on the Pleadings, filed.		Image
01/30/2020	Event Resulted: Hearing scheduled on: 02/06/2020 10:30 AM Has been: Continued For the following reason: Request of all Parties Hon. Robert B. Foster, Presiding		
01/30/2020	Joint Motion for Modification of the Scheduling Order, filed.		Image
01/30/2020	Joint Motion for Modification of the Scheduling Order ALLOWED. Replies are due March 9, 2020. The hearing is continued to March 24, 2020 at 10:00 AM. Judge: Foster, Hon. Robert B. (Notice sent to Attorneys Samuel Furgang, Andrew Goloboy and M. Patrick Moore)		
01/30/2020	Scheduled Judge: Foster, Hon. Robert B. Event: Hearing Date: 03/24/2020 Time: 10:00 AM (Notice sent to Attorneys Samuel Furgang, Andrew Goloboy and M. Patrick Moore)		
03/09/2020	Plaintiff Town of Milton Board of Appeals' Reply Memorandum in Support of Its Motion for Judgment on the Pleadings, filed.		Image
03/12/2020	In light of the state of emergency being declared in Massachusetts due to the coronavirus (COVID-19), Judge Foster is converting all non-trial proceedings to telephone conference calls. Please use the call in information below: (866) 653-0770 passcode: 2871652 Please note that these telephone conferences may overlap. If you call in and there is already a conference taking place, please stay on the line and wait until your case is called. (Notice sent to Attorneys Samuel Furgang, Andrew Goloboy and M. Patrick Moore)		
03/19/2020	Court orders rescheduling due to State of Emergency surrounding the Covid-19 virus.: Hearing scheduled on: 03/24/2020 10:00 AM Has been: Rescheduled-Covid-19 emergency Hon. Robert B. Foster, Presiding		
03/19/2020	Scheduled Judge: Foster, Hon. Robert B. Event: Telephone Conference Call Date: 05/14/2020 Time: 10:00 AM (Notice sent to Attorneys Samuel Furgang, Andrew Goloboy and M. Patrick Moore)		
03/19/2020	Pursuant to Land Court Standing Orders 2-20 and 3-20, and in light of the COVID-19 (Coronavirus) pandemic, the Hearing currently set down for March 24, 2020 is continued to May 14, 2020 at 10:00am, and will be conducted by telephone. Any deadlines currently pending in this matter are extended to a date one week before the event. Until further notice, all filings shall be made by email, with a hard copy mailed to the court. In the event any party needs to be heard before the event, counsel shall confer and contact the sessions clerk to request a mutually acceptable date and time for a telephone conference. (Notice sent to Attorneys Samuel Furgang, Andrew Goloboy and M. Patrick Moore)		

Docket Date	Docket Text	Amount Owed	Image Avail.
04/30/2020	Court orders rescheduling due to State of Emergency surrounding the Covid-19 virus.: Telephone Conference Call scheduled on: 05/14/2020 10:00 AM Has been: Rescheduled-Covid-19 emergency Hon. Robert B. Foster, Presiding		
04/30/2020	Scheduled Judge: Foster, Hon. Robert B. Event: Hearing Date: 06/04/2020 Time: 10:00 AM (Notice sent to Attorneys Samuel Furgang, Andrew Goloboy, Diane Tillotson and M. Patrick Moore)		
05/12/2020	Court orders rescheduling due to State of Emergency surrounding the Covid-19 virus.: Hearing scheduled on: 06/04/2020 10:00 AM Has been: Rescheduled-Covid-19 emergency Hon. Robert B. Foster, Presiding		
05/12/2020	Scheduled Judge: Foster, Hon. Robert B. Event: Hearing Date: 06/05/2020 Time: 02:00 PM (Notice sent to Attorneys Samuel Furgang, Andrew Goloboy, Diane Tillotson and M. Patrick Moore)		
06/05/2020	Event Resulted: Hearing scheduled on: 06/05/2020 02:00 PM Has been: Hearing held via video. Attorneys Michael P. Moore, Samuel Furgang and Andrew Goloboy appeared. Plaintiff Town of Milton Board of Appeals Motion for Judgment on the Pleadings heard. Plaintiff Town of Milton Board of Appeals Motion for Judgment on the Pleadings taken under advisement. Hon. Robert B. Foster, Presiding (Notice sent to Attorneys Michael P. Moore, Samuel Furgang and Andrew Goloboy)		
07/30/2021	Memorandum and Order Allowing in Part and Denying in Part Motions for Judgment on the Pleadings, issued. (Copies emailed to Attorneys Samuel Furgang, Patrick Moore, and Andrew Goloboy) Judge: Foster, Hon. Robert B.		Image
07/30/2021	Judgment entered. (Copies emailed to Attorneys Samuel Furgang, Patrick Moore, and Andrew Goloboy) Judge: Foster, Hon. Robert B.		Image
08/20/2021	Notice of Appeal by Town of Milton Board of Appeals to the Appeals Court filed.		Image
08/23/2021	Notice of Service of Notice of Appeal sent to Samuel M Furgang, Esq., Ronald W Dunbar, Jr., Esq., Andrew E Goloboy, Esq. and Ashley Brown Ahearn, Clerk of the Appeals Court.		
09/28/2021	Notice of Assembly of Record on Appeal sent to the Clerk of the Appeals Court.		
09/28/2021	Notice of Assembly of Record on Appeal sent to all counsel of record.		
10/14/2021	Case entered in the Appeals Court as Case No. 2021-P-0908.		

Financial Summary

Cost Type	Amount Owed	Amount Paid	Amount Dismissed	Amount Outstanding
Cost	$265.00	$265.00	$0.00	$0.00
Total Total	$265.00	$265.00	$0.00	$0.00

Receipts

Receipt Number	Receipt Date	Received From	Payment Amount
398568	01/18/2019	Flynn, Esq., John P	$265.00
Total Total Total Total			$265.00

Case Disposition

Disposition	Date	Case Judge
Judgment entered.	07/30/2021	Foster, Hon. Robert B.

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

NORFOLK, ss

MISCELLANEOUS CASE
NO. 19 MISC 000037 (RBF)

TOWN OF MILTON ZONING BOARD OF APPEALS,

Plaintiff,

v.

THE MASSACHUSETTS HOUSING APPEALS COMMITTEE and HD/MW RANDOLPH AVENUE, LLC,

Defendants.

MEMORANDUM AND ORDER ALLOWING IN PART AND DENYING IN PART MOTIONS FOR JUDGMENT ON THE PLEADINGS

Introduction

General Laws c. 40B, §§ 20-23, and the attendant regulations of the Department of Housing and Community Development (DHCD) establish a process by which qualified developers (qualified by the agency MassHousing) can apply for and obtain a comprehensive permit from a town's zoning board of appeals to construct an affordable housing project when the town is below a certain threshold of affordable housing units, all as defined by the statute and regulations. Defendant HD/MW Randolph Avenue, LLC (HD/MW) is such a qualified developer, having obtained a project eligibility letter from MassHousing. It applied to the plaintiff Town of Milton Zoning Board of Appeals (the Board) for a comprehensive permit to

construct a 90-unit project with 23 affordable residential units on a parcel on Randolph Avenue in Milton. The Board granted the comprehensive permit with a series of conditions.

Chapter 40B provides for when a developer can appeal a decision on a comprehensive permit. Of course, the developer can appeal a denial. G.L. c. 40B, § 22. But a developer may also appeal a grant of a comprehensive permit with conditions if the conditions "make the building or operation of such housing uneconomic." *Id.* That is what HD/MW did. It appealed the Board's comprehensive permit to the defendant Massachusetts Housing Appeals Committee (HAC). After evidence and hearing, HAC annulled or revised multiple conditions in the comprehensive permit. The Board has appealed HAC's decision to this court under G.L. c 30A, §14, and G.L. c. 40B, § 22. The parties have filed cross-motions for judgment on the pleadings.

An appeal to HAC on the grounds of uneconomic conditions requires two showings. First, HD/MW was required to establish that the comprehensive permit conditions of which it complained rendered its project uneconomic. G.L. c. 40B, § 23. If HD/MW made that showing, the burden shifted to the Board to show that the conditions "are consistent with local needs." *Id.* HAC found that the HD/MW had made the first showing, and, after consideration, the court finds (a) that the Board waived its argument on this issue as it did not raise it below, and (b) that even if it had not waived its argument, HAC's analysis was correct. With respect to HAC's modification of the conditions, the court finds that all of its modifications are supported by substantial evidence in the record except with respect Conditions 18 and 19, concerning long term affordability. That portion of HAC's decision will be annulled and remanded to HAC for further evidence and hearing and additional subsidiary findings.

Procedural History

The Board filed its complaint on January 18, 2019, naming as defendants HAC and HD/MW. The complaint is an appeal of a decision of HAC under G.L. c. 30A, § 14. The case management conference was held on March 18, 2019, at which answers from the defendants were waived.[1]

The administrative record was filed on May 31, 2019. On June 17, 2019, Plaintiff Town of Milton Board of Appeals' Motion for a View or, Alternatively, Leave to Present Additional Evidence (Motion for View or Additional Evidence) was filed. Defendant, HD/MW Randolph Avenue LLC's Opposition to Plaintiff's Motion for a View or, Alternatively, Leave to Present Additional Evidence was filed on July 15, 2019, and the Opposition of the Massachusetts Housing Appeals Committee to Plaintiff Town of Milton Board of Appeals' Motion for a View or, Alternatively, Leave to Present Additional Evidence was filed on July 16, 2019. The Motion for View or Additional Evidence was heard on July 24, 2019, and denied.

On August 19, 2019, the Board filed Plaintiff Town of Milton Board of Appeals' Motion for Judgment on the Pleadings (Board MJOP) and Plaintiff Town of Milton Board of Appeals' Memorandum in Support of its Motion for Judgment on the Pleadings (Board Memorandum). On January 9, 2020, HD/MW filed Defendant, HD/MW Randolph Avenue, LLC's Cross-Motion for Judgment on the Pleadings to Uphold the December 20, 2018 Decision of the Massachusetts Housing Appeals Committee (HD/MW MJOP) and Defendant, HD/MW Randolph Avenue, LLC's Memorandum in Opposition to Plaintiff, Town of Milton Board of Appeals' Motion for Judgment on the Pleadings and in Support of its Cross-Motion for Judgment on the Pleadings,

[1] The complaint in Superior Court case no. 1982CV00079 was filed January 18, 2019 (the Superior Court case). The Land Court judge (Foster, J.) was interdepartmentally assigned as a judge of the Superior Court to hear the Superior Court case by an Order of Assignment dated May 1, 2019. A Stipulation of Dismissal of the Superior Court case was filed October 19, 2019.

and HAC filed Massachusetts Housing Appeals Committee's Opposition and Cross-Motion to Town of Milton's Motion for Judgment on the Pleadings (HAC MJOP). On March 9, 2020, the Board filed Plaintiff Town of Milton Board of Appeals' Reply Memorandum in Support of its Motion for Judgment on the Pleadings. The Board MJOP, HD/MW MJOP, and HAC MJOP were heard on June 5, 2020, and taken under advisement. This Memorandum and Order follows.

Standard of Review

A decision by HAC is subject to review under the provisions of G.L. c. 30A. G.L. c. 40B § 22. In reviewing a decision under G.L. c 30A, §14, the court is confined to the record, except in limited circumstances not applicable here. G.L. c. 30A, §§ 14(5), (6). A court may set aside or modify a HAC decision if it was made "in excess of the statutory authority or jurisdiction of the agency," "based upon error of law," "unsupported by substantial evidence," "arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law." G.L. c. 30A, §§ 14(7)(b)-(g); *Eisai, Inc. v. Housing Appeals Comm.*, 89 Mass. App. Ct. 604, 610 (2016). "'Substantial evidence' means such evidence as a reasonable mind might accept as adequate to support a conclusion." G.L. c. 30A, § 1 (6). In determining whether an administrative agency's decision is "supported by substantial evidence, one must examine the entire administrative record and take into account whatever detracts from its weight." *Pyfrom v. Commissioner of the Dep't of Pub. Welfare*, 39 Mass. App. Ct. 621, 624-625 (1996), citing *New Boston Garden Corp. v. Board of Assessors of Boston*, 383 Mass. 456, 466 (1981).

The Board has the burden of demonstrating the invalidity of the agency's actions. *Middleborough v. Housing Appeals Comm.*, 449 Mass. 514, 524 (2007). The reviewing court is to afford all rational presumptions in favor of the validity of the agency's actions. *Id.* Additionally, the reviewing court cannot declare an agency's actions void unless "its provisions

cannot by any reasonable construction be interpreted in harmony with the legislative mandate." *Consolidated Cigar Corp. v. Department of Pub. Health,* 372 Mass. 844, 855 (1977), citing *Colella v. State Racing Comm'n*, 360 Mass. 152, 156 (1971); see *Perkins v. Westwood*, 226 Mass. 268, 271 (1917). A reviewing court will give the highest importance to the statutory language in order to determine legislative intent. *Middleborough*, 449 Mass. at 523, citing *Hoffman v. Howmedica, Inc.*, 373 Mass. 32, 37 (1977). If the statutory language is not clear as to the statutory intent, the construction is to be determined by the agency charged with the administration of the statute, and the highest deference is given to agency's interpretation of the governing statute. *Id.*; see *Zoning Bd. of Appeals of Wellesley v. Housing Appeals Comm.*, 385 Mass. 651, 654 (1982) ("*Wellesley I*"); *Board of Appeals of Hanover v. Housing Appeals Comm.*, 363 Mass. 339, 368 n.20 (1973). A reviewing court will give "due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it." G.L. c. 30A § 14 (7); *Esai, Inc.*, 89 Mass. App. Ct. at 617.

Facts

The following facts appear from the administrative record (A.R.). Other relevant facts from the administrative record are reserved to the discussion.

1. On November 3, 2014, MassHousing issued a Project Eligibility Letter under G.L. c. 40B for HD/MW's proposal for a two-building, ninety-unit affordable housing project in Milton, Massachusetts (the Project). A.R. 1726-1727, 4407.
2. On or about November 6, 2014, HD/MW applied to the Board for a comprehensive permit to build the Project on land at 693-711 Randolph Avenue in Milton, Massachusetts (Project site). A.R. 1728-1853, 4406.

3. The Project, as proposed, consists of two buildings, each approximately forty-five feet high. There is proposed a total of ninety residential units, of which twenty-three will be low or moderate income, eighty-three garage parking spaces, seventy-three outdoor spaces, and a fifteen-foot-high retaining wall. A.R. 1734, 1869, 2420-2422, 2600, 2806-2813, 4408-4409.
4. The Project site is approximately 7.81 acres; 1.93 of those acres are wetlands, leaving 5.88 acres of buildable land. A.R. 2418, 4407-4408.
5. The only access point to the Project site would be a to-be-built driveway that would cross over the wetlands on the Project site. A.R. 2418-2421, 4408.
6. The neighborhood of the Project site is predominantly residential. A.R. 4408.
7. Between December 2, 2014, and June 17, 2015, the Board held eleven public hearings concerning HD/MW's application for a comprehensive permit. A.R. 2597.
8. The Board granted the comprehensive permit with conditions on July 30, 2015 (comprehensive permit). A.R. 2595, 4406.
9. On August 18, 2015 HD/MW filed an appeal with HAC, entered as HAC proceeding No. 2015-03, *HD/MW Randolph Avenue, LLC v. Milton Board of Appeals* (appeal), arguing that certain conditions imposed by the Board in the comprehensive permit rendered the Project uneconomic. A.R. 3360-3430, 4406.
10. The relevant conditions to which HD/MW objected were: Condition 2, limiting the Project to 35 units; Condition 5, requiring a 50-foot vegetated buffer area; Condition 6, requiring that the Project be broken up into smaller buildings; Condition 10, limiting construction with regard to the wetland areas; Condition 11, requiring any stormwater facility be located at least 20 feet away from any building; Conditions 18 and 19,

requiring that HD/MW agree to maintain low and moderate income housing in the event the that the agreement with the subsidizing agency is terminated, expires, or is otherwise no longer in effect and not replaced; Condition 22, requiring more elevators; Condition 23, requiring the design to reflect the architectural styles of the surrounding neighborhood; Condition 25 requiring HD/MW to retain mature trees on the property; and Condition 28 requiring a looped driveway. A.R. 2607-2615, 3360-3430; Board Memorandum at 25-27, 29-30, 31, 32, 33-35.

11. Following the submission of pre-filed direct testimony from 20 witnesses, a site visit, and a four-day hearing, HAC issued a decision in the appeal on December 20, 2018, striking or modifying the above conditions (decision). A.R. 4406-4472.

Discussion

An applicant, like HD/MW, who was granted a comprehensive permit with conditions has the right to appeal to HAC if the Project is "granted with such conditions and requirements as to make the building or operation of such housing uneconomic." G.L. c. 40B, § 22. HAC's hearing on such an appeal is "limited to the issue of . . . , in the case of an approval with conditions and requirements imposed, whether such conditions and requirements make the construction or operation of such housing uneconomic and whether they are consistent with local needs." G.L. c. 40B, § 23. The Board first argues that HAC erred in finding that the comprehensive permit's conditions rendered the Project uneconomic. In making this argument, the Board points to DHCD guidelines. These guidelines define the "return on total cost" (ROTC) for any project as the projected net operating income of the project divided by the projected total development cost. A.R. 742. They set a standard for the "minimum return on total cost" of any project. This is measured as an ROTC "that is less than the sum of the ROTC Threshold

Increment [as of December 2014, 450 basis points] and the Applicable Ten-Year U.S. Treasury Rate." A.R. 741, 745. The guidelines then provide that any conditions that cause a project's ROTC to fall below the minimum ROTC are, by definition, uneconomic. A.R. 741. It is undisputed that when the Project was proposed to the Board, the ROTC of the Project was below the minimum ROTC. A.R. 2768. The Board now argues for the first time that because the Project was already below the minimum ROTC, it was uneconomic from the beginning, and, therefore, HD/MW could not demonstrate that any of the Board's conditions rendered the Project uneconomic.

The Board also objects to HAC's finding that the Board's prohibition on three-bedroom units prevented HD/MW from receiving funding from MassHousing and that condition rendered the project uneconomic, regardless of the ROTC analysis. The Board argues that there was no such prohibition on three-bedroom units and that it made this clear to HAC. A.R. at 3758-59; 4418.

These arguments raises four distinct issues. First, is the requirement under §§ 22 and 23 that the conditions render the Project uneconomic a matter of subject matter jurisdiction? Second, if not, did the Board waive its argument regarding the minimum ROTC? Third, did HAC err in finding that the conditions of the comprehensive permit rendered the Project uneconomic? Fourth, did HAC err in finding that the Board prohibited three-bedroom units in the Project? These questions are addressed in turn.

I. Jurisdictional Argument

The Board first argues that the standard in §§ 22 and 23 that a project proponent must demonstrate to HAC that conditions render a project uneconomic is a jurisdictional requirement. Therefore, the Board maintains, its argument that the Project is already uneconomic because it is

below the ROTC is a question of subject matter jurisdiction. The Board is incorrect. The requirement that HD/MW demonstrate that the conditions render the project uneconomic is "a necessary element of the developer's prima facie case for relief." *Board of Appeals of Woburn v. Housing Appeals Comm.*, 451 Mass. 581, 590-591 (2008). It is not a jurisdictional requirement. See *Middleborough*, 449 Mass. at 520-521 (fundability requirement is not jurisdictional but rather part of prima facie case for comprehensive permit). As part of HD/MW's prima facie case before HAC, whether the conditions render the Project uneconomic is one of the issues before HAC on appeal, and one on which HD/MW had the burden of proof. 760 CMR 56.07(1)(c)(1), (2)(a)(3). Only if HD/MW met that burden of proof would the Board then have to show that its conditions are consistent with local needs. *Board of Appeals of Woburn*, 451 Mass. at 591.

II. Waiver

The reason it matters that the uneconomic conditions requirement is not jurisdictional, but is rather a part of HD/MW's prima facie case, is that while subject matter jurisdiction cannot be waived, an argument on the claim can. In other words, a failure to raise an issue concerning uneconomic conditions before HAC would constitute a waiver of that argument before this court. *Albert v. Municipal Court of Boston*, 388 Mass. 491, 493-494 (1983), citing *Shamrock Liquors, Inc. v. Alcoholic Beverages Control Comm'n,* 7 Mass. App. Ct. 333, 335 (1979). Because the issue is nonjurisdictional, a party is not entitled to raise it on appeal if it did not raise the issue previously. *Id.;* see *Hingham v. Department of Telecomm. & Energy*, 433 Mass. 198, 215-216 (2001); *Warren v. Board of Appeals of Amherst*, 383 Mass. 1, 8-9 (1981) (declining to hear nonjurisdictional argument not raised before the zoning board).

HD/MW argues that the Board waived the ROTC argument because it did not make that argument to HAC. In response, the Board points to its Post-Hearing Brief to HAC. A.R. 4191-

4273. In particular, the Board points to the following portion of its Post-Hearing Brief as its argument on the ROTC issue:

> HD/MW's expert, Robert Engler, testified in his Pre-Filed Testimony that the 90-unit project as proposed is economically infeasible and uneconomic, because the minimum threshold of an economic project is a return on total costs of 6.84%. Thus, the 5.93% return is 0.91% below the threshold, but "slightly higher" than the 5.88% when the project was originally submitted for site approval in 2014. Exhibit 85, ¶¶13, 14. Based upon Mr. Engler's calculations, and the Board does not admit that Mr. Engler's calculations are based upon accurate assumptions, the thirty-five unit project the Board permitted will yield a return of 4.13% or 2.71% less than the threshold.[] Id., ¶22. This is a return which is only 1.8% below the 90-unit development's return. It is a stretch to go from calling a 0.91% difference a "slight" change to calling a 1.8% change (ie. another 0.89%) a "significant" one.

A.R. 4271-4272.

While this argument does refer to the "return on total costs," it uses the ROTC only to argue that any reduction in economic return as a result of the Board's conditions is not significant. It is not an argument that because the Project did not meet the minimum ROTC, it was already uneconomic and therefore the conditions could not render the Project uneconomic. This particular argument about the ROTC was never made to HAC, and is therefore waived. *Albert,* 388 Mass. at 493-494.

III. ROTC

Notwithstanding the Board's waiver, the court addresses the ROTC argument in the interest of completeness. As discussed above, DHDC guidelines have defined a minimum ROTC. The minimum ROTC is used as a measure for whether conditions in an approval render a project uneconomic. The guidelines provide that if the conditions cause the ROTC of a project to fall below the minimum ROTC, then by definition the conditions render the project uneconomic. A.R. 741-742.

At the time the Project was initially presented to the Board, its ROTC was below the minimum ROTC. A.R. 2768. This means that HAC could not rely on the minimum ROTC as a

measure of whether the Board's conditions rendered the Project uneconomic: since the Project was already below the minimum ROTC, HD/MW could not demonstrate that the conditions made the ROTC fall below that minimum. A.R. 4410. Instead, HAC applied a different standard for whether the conditions rendered the project uneconomic. HAC applied the standard that HD/MW had to show that the Board's conditions rendered the project "significantly more uneconomic than the project proposed in the developer's application for a comprehensive permit." *Id.*

The Board argues that this "significantly more uneconomic" standard was the creation of HAC and was beyond its statutory authority, because HAC was obligated to follow the DHCD guidelines, and by those guidelines, the Project was already uneconomic. The Board's argument is in error. Under G.L. c. 23B, § 5A, HAC is required to "conduct [...] hearings in accordance with rules and regulations established by [DHCD.]" There are no DHCD rules and regulations defining what constitutes rendering a project "uneconomic" under G.L. c. 40B, § 22. The DHCD guidelines are not "rules and regulations established by" DHCD. They are what they say they are: guidelines, intended to serve as a supplement in interpreting G.L. c. 40B and the applicable regulations. In any conflict between the terms in the DHCD guidelines and either c. 40B or the regulations, the latter control. A.R. 739. Therefore, HAC has discretion not only to follow the guidelines, but also to adopt "policies through adjudication as well as through rulemaking" when those guidelines do not help the agency determine when conditions render a project uneconomic. *Board of Appeals of Woburn*, 451 Mass. at 593. Such discretion includes applying the standard of a project being rendered "significantly more uneconomic" by a board's conditions. *Id.* at 592-593. The application of the ROTC calculation for the percentage at which a project becomes "uneconomic" is not compulsory; rather, the ROTC methodology serves as one way of

calculating whether conditions rendered a project uneconomic. It is not the only way, and it does not supplant the statutory standard.

Even though the Project's ROTC is below the minimum ROTC, it is still profitable; it was determined to be profitable by DHCD when DHCD issued the project eligibility letter. 760 CMR 56.04. That determination was conclusive evidence that the Project satisfied eligibility requirements and was an irrebuttable presumption before the Board and HAC. 760 CMR 56.04(6), 56.07(3)(a). Thus, HAC, when asked to determine if the Project was rendered uneconomic by the Board's conditions, could reasonably look at the Project's ROTC and determine if the reduction in ROTC, if any, made the Project significantly more uneconomic. In reviewing HAC's decision, a reviewing court "must apply all rational presumptions in favor of the validity of the administrative action." *Middleborough*, 449 Mass. at 524, quoting *Wellesley*, 385 Mass. at 654. HAC's use of the "significantly more uneconomic" standard to determine if the conditions of the comprehensive permit rendered the Project uneconomic is within its discretion.

IV. Three Bedroom Units

The Board also challenges HAC's alternative grounds for finding that the Project was rendered uneconomic: that the comprehensive permit's ban on three-bedroom units rendered the Project uneconomic by prohibiting final approval from the subsidizing agency, MassHousing. A.R. 4416-18. The Board argues that it did not, in fact, ban three-bedroom units and that it made this clear to HAC. A.R. 3758-59; 4418. HAC based its conclusion that the Board prohibited the inclusion of three-bedroom units on Condition 2 of the comprehensive permit that explicitly mentions "one-bedroom" and "two-bedroom" units but not three-bedroom units. A.R. 2608.

HAC heard both parties and exercised its proper authority in reaching the conclusion that the Board's exclusion of language on three-bedroom units was effectively a ban on them. Further, HAC was within its authority in finding that this ban would render the Project uneconomic by causing the subsidizing agency to not fund the Project. A.R. 4418. HAC did not overreach its statutory authority and the court must thus "apply all rational presumptions" in favor of the validity of this decision. *Wellesley,* 385 Mass. at 654.

V. Validity of Local Concerns

The court next turns to HAC's striking and modification of various conditions in the comprehensive permit. The court must uphold HAC's decision on the conditions where it is supported by substantial evidence. *Wellesley,* 385 Mass. at 657. In evaluating two fairly conflicting views, "the court may not displace an administrative board's choice [...] even though the court would justifiably have made a different choice had the matter been before it de novo." *Id.*, quoting *Labor Relations Comm'n v. University Hosp., Inc.*, 359 Mass. 516, 521 (1971).

a. Fire and Safety Access Conditions

The Board first pushes back against HAC's modification of the comprehensive permit's conditions related to fire safety and emergency access, namely Conditions 2, 6, and 28. In response to these safety and emergency access concerns, HAC imposed two new conditions:

1) Requiring HD/MW to include a vehicle turnaround location that meets the Town's turning radius specifications for the largest emergency vehicle; and
2) Requiring HD/MW to provide a paved area for the placement of fire vehicles during an emergency approach on the southerly side of Building 2.

A.R. 4428-4430. The Board argues that in imposing these conditions as opposed to the ones initially imposed by the Board, HAC had no evidence before it that these conditions were

practicable. This assertion is contrary to the record as HAC took into account evidence from both parties on this matter. Indeed, the Board, in objecting to the second requirement of a paved area, could not demonstrate a lack of substantial evidence that there is space (outside of wetlands) on the southerly side of Building 2 for the requisite paved area. Board's Memorandum at 27. In light of the substantial evidence presented, the court may not displace HAC's decision on this matter. See A.R. 2802-2811; 2814-2815; 2841-2843; 4424-4430.

The Board next turns to the decision's modifications to Conditions 2, 5, 6, 10, 11, 22, 23, and 25 of the comprehensive permit as they relate to site and building designs. The Board argues that HAC improperly dismissed these conditions as concerns that could not be a basis for comprehensive permit conditions. The Board points to language from 56 CMR § 56.02 that includes "site and building design" in the definition of "Local Concern." In evaluating these conditions, HAC found that the Board failed to meet its burden in establishing its conditions as reflecting valid local concerns or that the concerns presented did not outweigh the need for affordable housing. See A.R. 4432 (striking Condition 22); 4437 (striking Condition 11); 4447 (striking Condition 5 and modifying Condition 25); 4451-52 (striking Condition 6 and modifying Condition 2); 4454-55 (striking Condition 23). HAC cited substantial evidence in reaching these conclusions. See A.R. 4431-32; 4436-37; 4444-47; 4451-52; 4454-55. Given the weight of the evidence HAC considered in making this decision, the court cannot displace this decision.

With respect to Condition 10, the Board argues in its Memorandum that Condition 10 was struck unlawfully. Board Memorandum at 31. While Conditions 10(a) and 10(b) were modified to "allow building construction activity in the wetlands and the non-disturbance zone to the extent necessary to construct and maintain the access driveway and replication area," and waived Chapter 15 and § IV.B of the Milton Wetland Bylaw (A.R. 4439-40), Condition 10(c),

which addresses the stormwater concerns the Board complains of, was left intact, with an added condition: "HD/MW's revised stormwater management plans shall show the means by which the diversion of stormwater away from the Carlin property is managed." A.R. 4443. Since HAC's decision retains the portion of Condition 10 addressing stormwater concerns, the Board's argument with respect to Condition 10 is disregarded, and that portion of the decision is affirmed.

b. Long-Term Affordability Conditions

The Board argues that HAC's striking of Conditions 18 and 19 of the comprehensive permit constitutes a reversible error. Condition 18 required that HD/MW execute a Permanent Restriction/ Regulatory Agreement, prior to issuance of a building permit, that:

(i) Shall only become effective if and when the Regulatory Agreement with the subsidizing agency is terminated, expires or is otherwise no longer in effect and is not replaced with another regulatory agreement with another subsidizing agency;
(ii) Shall require that at least twenty five (25%) percent of the apartments in the project shall be rented in perpetuity to low and moderate income households as that term is defined in M.G.L Chapter 40B, Sections 20-23; and
(iii) Shall in no event contain any provisions restricting or limiting the dividend or profit of the Applicant.

A.R. 2610. Condition 19 provided that the Town would monitor the enforcement of Condition 18 and that HD/MW would provide the Town with a "reasonable monitoring fee." *Id.*

In making the argument that the striking of these conditions constitutes a reversible error, the Board highlights the principle that "a party to a proceeding before a regulatory agency [...] has a right to expect and obtain reasoned consistency in the agency's decisions." *Boston Gas Co. v. Department of Pub. Utils.*, 367 Mass. 92, 104 (1975). While "[t]his does not mean that every decision of the Department in a particular proceeding becomes irreversible in the manner of judicial decisions constituting res judicata, . . . neither does it mean that the same issue arising as to the same party is subject to decision according to the whim or caprice of the Department every

time it is presented." *Id.* at 104. This "reasoned consistency" requires only "that any change from an established pattern of conduct must be explained." *Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd.*, 448 Mass. 45, 56 (2006), quoting *Robinson v. Department of Pub. Utils.*, 416 Mass. 668, 673 (1993).

To buttress its argument, the Board points to past HAC decisions where similar conditions were upheld. In *Archstone Communities Trust v. Woburn Bd. of Appeals*, HAC upheld a condition that required a permanent restriction on affordability. HAC No. 01-07, 2003 WL 25338645, at *37-38 (June 11, 2003). In *Lexington Ridge Assocs. v. Lexington Bd. of Appeals*, HAC No. 90-13, 1992 WL 12562138 (1992), HAC upheld a perpetual affordability condition as being consistent with local needs, after the developer objected that it had been treated differently from other projects in the town. *Id.* at *11-12, 24-25.

The Board also highlights the policy behind the enabling statute as described by the SJC:

> If housing developed under a comprehensive permit is 'affordable' only temporarily [...], a city or town may never achieve the long-term statutory goals: each time an affordable housing project reverts to market rentals, the percentage of low income housing units in a municipality decreases, the percentage of market rate units increases, and access to a new round of comprehensive permits is triggered.

Zoning Bd. of Appeals of Wellesley v. Ardemore Apartments L.P., 436 Mass. 811, 824 (2002) (*"Wellesley II"*). It is important to note the court in that case was not analyzing the validity of a similar condition, but instead highlighting the requirement that a comprehensive permit must maintain an affordability requirement so long as the project does not comply with local zoning. *Id.* at 813, 825.

For its part, HD/MW argues that HAC's decision to strike the conditions was supported by substantial evidence and was consistent with the law. A.R. 4458-59; 4335-36. HAC, in its decision, cited the Board's lack of adequate briefing on the issue of the responsibility of the

subsidizing agency and the role of DHCD in maintaining the affordability obligations. HAC also pointed towards the Board's possible impingement on the regulatory responsibilities of the subsidizing agency and its lack of evidence regarding either MassHousing or DHCD's position on this sort of assertion of local control of the program. *Attitash Views, LLC v. Amesbury Zoning Bd. of Appeals,* HAC No. 06-17, 2007 WL 3102184 at *6-8 (Oct. 15, 2007). Lastly, HAC emphasized its past denial of conditions requiring future review and approval by a board. A.R. 4459.

In challenging HAC's modification or striking of these conditions of the comprehensive permit, the Board first had the burden of proving that the conditions were supported by a valid local concern. The Board then had the burden of proving that this concern outweighed the regional need for low and moderate income housing. 760 CMR 56.07(1)(c), 56.07(2)(b)3. Since the Town of Milton does not meet the statutory minimum regarding affordable housing, a rebuttable presumption is established that a substantial regional housing need outweighs the local concern. 760 CMR 56.07(3)(a); see *Zoning Bd. of Appeals of Lunenburg v. Housing Appeals Comm.*, 464 Mass. 38, 42 (2013).

In reviewing HAC's decision under G.L. c. 30A, § 14(7)(g), the court may set aside or modify the decision if "arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law." As discussed, a party "proceeding before [an administrative agency] … has a right to expect and obtain reasoned consistency in the agency's decisions." *Boston Gas Co.*, 367 Mass. at 104. Reasoned consistency means that any departure from "an established pattern of conduct" requires adequate explanation from the administrative agency. *Alliance to Protect Nantucket Sound, Inc.,* 448 Mass. at 56.

In striking Condition 18 and departing from its past decisions, HAC did not provide the adequate explanation required when an agency departs from "an established pattern of conduct." *Id.* While HAC did raise valid concerns about the Board impinging on the jurisdiction of DHCD, see G.L. c. 184, § 32, and MassHousing, HAC did not explain why those concerns did not cause it to strike similar restrictions in past cases. HAC's striking of Conditions 18 and 19 was arbitrary and capricious. In determining the validity of a local concern, HAC is tasked with weighing whether the Town's concern outweighs the need for low and moderate income housing. 760 CMR 56.07(1)(c), 56.07(2)(b)3. The Board's concern in imposing Conditions 18 and 19 was ensuring the longevity of the affordability of these units. In accordance with the *Wellesley II* decision, the Board sought to ensure that as long as the Project was nonconforming, it would remain affordable. While HAC argues that *Wellesley II*, in its holding, already guarantees that the units must remain affordable so long as the project remains noncompliant with zoning, it is still permissible for the comprehensive permit to guarantee future affordability in the event that *Wellesley II* is overturned. In *Archstone Communities Trust*, HAC cited *Wellesley II* specifically in upholding a perpetual affordability condition. 2003 WL at 38. To strike these conditions on the grounds that the Board didn't seek the input of MassHousing or DHCD rises to the level of an arbitrary and capricious decision and is therefore a reversible error.

The conditions the Board imposed with regard to long-term affordability are only distinguishable from similar conditions upheld by HAC insofar as the Board included a requirement that HD/MW pay the Town of Milton an undetermined fee for the service of monitoring the affordability requirements. HAC struck Conditions 18 and 19 on the grounds that the Board provided no evidence regarding MassHousing's position with regard to this condition

and that the Board was imposing conditions that were instead within the province of the subsidizing agency. Because of this, HAC never reached the issue of the validity of the monitoring fee. Under G. L. c. 30A, § 14(7), a reviewing court may remand the matter to the agency for further proceedings, especially in the absence of "sufficient subsidiary findings to demonstrate that correct legal principles were applied." *Norfolk County Retirement Sys. v. Director of Dep't of Labor and Workforce Dev.*, 66 Mass. App. Ct. 759, 770 (2006) (internal citation omitted). That is the situation here. While the rest of HAC's decision will be affirmed, the portion of the decision relating to Conditions 18 and 19 must be annulled, and the question of the validity of Conditions 18 and 19 remanded to HAC. On remand, the Board and HD/MW may present further evidence and briefing on Conditions 18 and 19, and HAC will then make the necessary subsidiary findings with respect to the validity of the long-term affordability and monitoring fee requirements of those conditions.

Conclusion

For the foregoing reasons, the Board MJOP is DENIED in part and ALLOWED in part, and the HD/MW MJOP and HAC MJOP are ALLOWED in part and DENIED in part. The decision of HAC with respect to Conditions 18 and 19 (A.R. 4458-4459) is ANNULLED and remanded to HAC for further proceedings to reconsider said Conditions, particularly on whether the local concerns of the Board outweigh the regional need for low and moderate income housing, consistent with this Memorandum and Order. The remainder of HAC's decision is AFFIRMED. Judgment shall enter accordingly.

By the Court (Foster, J.) */s/ Robert B. Foster*

Attest: */s/ Deborah J. Patterson*
Deborah J. Patterson, Recorder

Dated: July 30, 2021

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

NORFOLK, ss

MISCELLANEOUS CASE
NO. 19 MISC 000037 (RBF)

TOWN OF MILTON ZONING BOARD OF APPEALS,

Plaintiff,

v.

THE MASSACHUSETTS HOUSING APPEALS COMMITTEE and HD/MW RANDOLPH AVENUE, LLC,

Defendants.

J U D G M E N T

The Town of Milton Board of Appeals (the Board) filed its complaint on January 18, 2019, naming as defendants the Housing Appeals Committee (HAC) and HD/MW Randolph Ave, LLC (HD/MW). The complaint is an appeal of the decision in HAC proceeding No. 2015-03, *HD/MW Randolph Avenue, LLC v. Milton Board of Appeals* dated December 20, 2018 (decision). The administrative record was filed on May 31, 2019. On August 19, 2019, the Board filed Plaintiff Town of Milton Board of Appeals' Motion for Judgment on the Pleadings (Board MJOP) and Plaintiff Town of Milton Board of Appeals' Memorandum in Support of its Motion for Judgment on the Pleadings. On January 9, 2020, HD/MW filed Defendant, HD/MW Randolph Avenue, LLC's Cross-Motion for Judgment on the Pleadings to Uphold the December 20, 2018 Decision of the Massachusetts Housing Appeals Committee (HD/MW MJOP) and Defendant, HD/MW Randolph Avenue, LLC's Memorandum in Opposition to Plaintiff, Town of Milton Board of Appeals' Motion for Judgment on the Pleadings and in Support of its Cross-Motion for Judgment on the Pleadings, and HAC filed Massachusetts Housing Appeals Committee's Opposition and Cross-Motion to Town of Milton's Motion for Judgment on the Pleadings (HAC MJOP). On March 9, 2020, the Board filed Plaintiff Town of Milton Board of Appeals' Reply Memorandum in Support of its Motion for Judgment on the Pleadings. The Board MJOP, HD/MW MJOP, and HAC MJOP were heard on June 5, 2020, and taken under advisement. In a Memorandum and Order of even date, the court has allowed in part and denied in part the Board MJOP, the HD/MW MJOP, and the HAC MJOP.

In accordance with the court's Memorandum and Order issued today, it is

ORDERED, ADJUDGED and DECLARED that HAC's decision striking Conditions 18 and 19 imposed by the Board is REVERSED and REMANDED to HAC for further proceedings consistent with the Memorandum and Order. It is further

ORDERED, ADJUDGED and DECLARED that the remainder of HAC's decision is AFFIRMED.

So Ordered.

By the Court. (Foster, J). */s/ Robert B. Foster*

Attest: */s/ Deborah J. Patterson*
Deborah J. Patterson
Recorder

Dated: July 30, 2021.

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss. LAND COURT DEPARTMENT

TOWN OF MILTON BOARD OF APPEALS Plaintiff, v. THE MASSACHUSETTS HOUSING APPEALS COMMITTEE and HD/MW RANDOLPH AVENUE, LLC Defendants.	**LAND COURT** **Case No. 19 MISC 000037 (RBF)**
JACOB W. CARLIN AND CHRISTINA M. CARLIN Plaintiff, v. THE MASSACHUSETTS HOUSING APPEALS COMMITTEE, HD/MW RANDOLPH AVENUE, LLC, AND TOWN OF MILTON BOARD OF APPEALS Defendants.	**SUPERIOR COURT** **Case No. 1982CV00079** **[Assigned to Land Court]**

PLAINTIFF TOWN OF MILTON BOARD OF APPEALS'
MOTION FOR JUDGMENT ON THE PLEADINGS

Plaintiff Town of Milton ("the Town") hereby moves pursuant to Mass. R. Civ. P. 12(c) for judgment on the pleadings on its Complaint brought pursuant to G.L. c. 30A, § 14, for review of a decision by the Defendant Massachusetts Housing Appeals Committee ("HAC"). Because HAC lacked jurisdiction, improperly dismissed the Town's local concerns without engaging in

the analysis required by law, and struck the Town's efforts to ensure long-term affordability, HAC erred as a matter of law. As described further in the Town's accompanying memorandum of law, each of the foregoing errors provides separate and independent grounds to reverse the HAC's decision and enter judgment in favor of the Town, or alternatively to remand this matter to HAC for further proceedings in accordance with the Court's judgment.

WHEREFORE, the Town respectfully requests that the Court grant its Motion for Judgment on the Pleadings and enter a judgment in favor of the Town, setting aside the HAC's decision, or in the alternative remand this matter to HAC for further proceedings in accordance with the Court's judgment.

Respectfully submitted,

PLAINTIFF TOWN OF MILTON BOARD OF APPEALS

By its Attorneys,

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I hereby certify under pains and penalties of perjury that this document was served upon counsel for all parties in this case on August 19, 2019 ~~by hand~~/by mail
Donna A. Mizrahi

Dated: August 19, 2019

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss. LAND COURT DEPARTMENT

TOWN OF MILTON BOARD OF APPEALS Plaintiff, v. THE MASSACHUSETTS HOUSING APPEALS COMMITTEE and HD/MW RANDOLPH AVENUE, LLC Defendants.	**LAND COURT** **Case No. 19 MISC 000037 (RBF)**
JACOB W. CARLIN AND CHRISTINA M. CARLIN Plaintiff, v. THE MASSACHUSETTS HOUSING APPEALS COMMITTEE, HD/MW RANDOLPH AVENUE, LLC, AND TOWN OF MILTON BOARD OF APPEALS Defendants.	**SUPERIOR COURT** **Case No. 1982CV00079** **[Assigned to Land Court]**

PLAINTIFF TOWN OF MILTON BOARD OF APPEALS' MEMORANDUM IN SUPPORT OF ITS MOTION FOR JUDGMENT ON THE PLEADINGS

1116816

This is a case about a 90-unit Chapter 40B[1] development strikingly ill-suited to the site on Route 28 in Milton for which it is planned. But for several errors of law committed by the Housing Appeals Committee ("HAC"), the proposal would be subject to the conditions placed on it by the Town of Milton's Board of Appeals (the "Board") that address well-founded safety, environmental, and neighborhood concerns.

Lest there be any doubt, the Town of Milton (the "Town") supports the development of affordable housing and acknowledges the need for such housing within its borders, which it is actively working to address. Indeed, members of the Board made that point throughout the proceedings before it. The Town does not, however, support proposals like the one at issue here that are conceived without consideration for the unique characteristics of the property for which they are proposed and raise — and wholly fail to address — considerable local concerns. Nor may the Town countenance the actions here of the HAC, which seized the Town's powers for itself by asserting jurisdiction that it does not have; and then dismissed the Town's local concerns out-of-hand without engaging in the analysis required by law. Each of these errors provides a separate and independently sufficient basis for reversal and remand.

As described in detail below, in November 2014, HD/MW Randolph Avenue, LLC (the "Developer") submitted to the Board a comprehensive permit application for a rental development on a parcel (the "Site") located on Route 28— a major thoroughfare to Interstate 93.[2] The Site's unique features, including significant variations in slope and a profusion of wetlands covering roughly a quarter of its area, render less than half of it developable and require that all proposed development be located on one side of the Site immediately abutting single

[1] G.L. c. 40B, § 20-23.

[2] In Milton, Route 28 is known as Randolph Avenue. The four-lane road is one of the most heavily trafficked roads in Milton.

family homes. In addition, the slope of the Site is such that development requires the installation of a network of retaining walls. On this constrained parcel, the Developer first proposed and received funding for a 72-unit, three-building development. Within months, it expanded its plan to 90 units – condensed, this time, within two buildings, the largest of which is approximately 300 feet long and, if built, will be the longest building of any type in the Town (the "Project").

Over eleven public hearings, the Board heard testimony from Town officials, subject matter experts, and members of the public identifying serious safety, traffic, and environmental concerns with the Project. By the close of the public hearing, there was significant evidence before the Board that the Developer's plans failed to offer adequate fire protection, storm water drainage, and traffic circulation arrangements. In addition, the height, bulk, and placement of the Project were markedly out of step with its surroundings. The Board issued a decision approving the Project, subject to a series of conditions consistent with 760 Code Mass. Regs. § 56.02.

The Developer appealed to the HAC pursuant to G.L. c. 40B, § 22, even though neither statutory condition for HAC review had been met. The Town had neither denied the comprehensive permit nor imposed conditions that would have rendered the development uneconomic. Instead, the project was uneconomic *as proposed*. Increasingly, developers proceeding under Chapter 40B are submitting such proposals to Massachusetts municipalities, suggesting that they are functionally immune from the imposition of local conditions (because such conditions would purportedly render the proposal more uneconomic and trigger exacting HAC review). That is precisely what the Developer did here. In these circumstances, there is no basis for HAC jurisdiction, which is set by statute (*i.e.*, G.L. c. 40, § 22) and carefully policed by the Supreme Judicial Court. Once the HAC did assert jurisdiction, it cursorily rejected the

Town's considerable local concerns without engaging in the analysis required by Chapter 40B and the pertinent regulations.

These errors are independently sufficient grounds for reversal under G.L. c. 30A, § 14(7).

STATUTORY AND REGULATORY BACKGROUND

The structure of Chapter 40B, also known as the Comprehensive Permit Law, is the backdrop for the facts of the Project and a central part of this action for judicial review. Accordingly, the Board will begin with an overview of its pertinent provisions.

Chapter 40B was carefully constructed to "to facilitate the development of low and moderate income housing in communities throughout the Commonwealth." *E.g., Esai, Inc. v. Housing Appeals Comm.*, 89 Mass. App. Ct. 604, 608–609 (2016); *see Zoning Bd. of Appeals of Wellesley v. Ardemore Apartments Ltd. P'ship*, 436 Mass. 811, 822 (2002). When a developer proposes a qualifying project — which, among other things, must reserve 25% of the project's units for low- and moderate-income households and be determined eligible by a federal or state subsidizing agency — Chapter 40B establishes "a streamlined comprehensive permitting procedure." *Standerwick v. Zoning Bd. of Appeals of Andover*, 447 Mass. 20, 29 (2006). The developer may file "a single application to the local zoning board of appeals" rather than "separate applications to any other local boards that would [but for G.L. c. 40B] otherwise have jurisdiction to review the proposal." *Id.*; G.L. c. 40B, § 21; *see* Tyman & Cosco, "Low- & Moderate-Income Housing," *Massachusetts Zoning Manual* § 5.3.2 (MCLE 6th ed. 2017) ("Tyman & Cosco").[3] The Legislature has granted to the Department of Housing and

[3] When considering the application, the local board "shall have the same power to issue permits or approvals as any local board or official who would otherwise act with respect to such application," and may seek the testimony and expertise of any local official who "may be helpful [to] its decision." G.L. c. 40B, § 21.

Community Development ("DHCD" or the "Department") the power to implement regulations, consistent with the text of Chapter 40B, to govern the streamlined process. G.L. c. 23B, § 6.

In reviewing the application, the local board must determine whether the proposal is "consistent with local needs" and may grant waivers from local zoning bylaws or other municipal requirements to the extent local needs so require. G.L. c. 40, § 20 (defining the term "consistent with local needs"); 760 Code Mass. Regs. § 56.05(4)(a) ("Consistency with Local Needs is the central issue in all Comprehensive Permit applications"); *id.*, §56.05(7); *see* Tyman & Cosco, § 5.3.[4] The local board may deny the comprehensive permit application or grant it with conditions, provided that the denial is (or the conditions imposed are) "consistent with Local Needs." 760 Code Mass. Regs. §56.04(c), (d). In this case, the application was granted with conditions. Such conditions are "consistent with local needs,"

> if they are reasonable in view of the regional need for low and moderate income housing considered with the number of low income persons in the city or town affected and the need to protect the health and safety of the occupants of the proposed housing or of the residents of the city or town, to promote better site and building design in relation to the surroundings, or to preserve open spaces, and if such requirements and regulations are applied as equally as possible to both subsided and unsubsidized housing.

G.L. c. 40B, § 20; *see* 760 Code Mass. Regs. §56.02–Local Needs.

In two ways, Chapter 40B "reflects the Legislature's careful balance between leaving to local authorities their well-recognized autonomy generally to establish local zoning requirements, while [also] foreclosing municipalities from obstructing the building of a minimum level of housing affordable to persons of low income." *Zoning Bd. of Appeals of Wellesley*, 436 Mass. at 822-23 (internal citations omitted). First, the developer of a Chapter 40B project may seek an exemption from otherwise applicable local bylaws or land use controls

[4] DHCD's regulations capitalize defined terms, and that capitalization will be retained when quoting the regulations throughout this memorandum.

to the extent the balance of local needs supports such an exemption. G.L. c. 40B, § 20; *see Zoning Bd. of Appeals of Wellesley*, 436 Mass. at 815. Second, the local board's decision may be appealed to the HAC if the application is wholly denied or "is granted with such conditions and requirements as to make the building or operation of such housing uneconomic." G.L. c. 40B, § 22; *see Board of Appeals of Woburn v. Housing Appeals Comm.*, 451 Mass. 581, 590–94 (2008).

In circumstances like those here — where an application is granted with conditions — an appeal to HAC may be taken "*only* if those conditions render the project uneconomic." *Board of Appeals of Woburn*, 451 Mass. at 590 (emphasis in original). "Demonstrating that the conditions render a project uneconomic is, therefore, a necessary element of the developer's prima facie case for relief." *Id.* at 591. Without it, the HAC has no jurisdiction at all. *Id.* ("Absent a showing that conditions placed on an approval render the project uneconomic, the [HAC] is not empowered to review them . . ."). [5]

If the HAC has a basis for jurisdiction, the concept of uneconomic impact is again implicated. State law directs the HAC to follow "rules and regulations established by the director" of DHCD. G.L. c. 23B, § 5A. Pursuant to those regulations (and the overarching structure imposed by Chapter 40B), the HAC must consider the conditions imposed by the local board to determine whether they are supported by "Local Concerns" that outweigh the local "Housing Need," 760 Code Mass. Regs. § 56.07(2)(b)(3); *see* G.L. c. 40B, § 23. [6] If a Board-

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[5] The Supreme Judicial Court also has acknowledged that the HAC may review and strike conditions imposed by a local board that do not relate to issues governed by local zoning authorities. *Zoning Bd. of Appeals of Amesbury v. Housing Appeals Comm.*, 457 Mass. 748, 757 (2010). In other words, ultra vires conditions may trigger HAC review. *Id.* at 763 n. 18. By contrast, "conditions that the local zoning board [is] authorized to impose, however onerous they might be," are not subject to HAC review unless they render the project uneconomic. *Id.* (citing *Board of Appeals of Woburn*, 451 Mass. at 590).

[6] DHCD regulations define "Local Concern" as the "need to protect the health or safety of the occupants of a proposed Project or of the residents of the municipality, to protect the natural environment, to promote better site and building design in relation to the surroundings and municipal and regional planning, or to preserve Open Spaces." 760 Code Mass. Regs. § 56.02–Local Concerns. "Housing Need" is defined as the "regional need for Low

imposed condition is not so supported, the HAC may "order [the Board] to modify or remove any such condition so as to make the proposal no longer uneconomic and to issue any necessary permit or approval." G.L. c. 40B, § 23. That analysis can only be undertaken by understanding whether a condition (or a series of conditions, viewed together) inhibit the development's ability to meet local needs for affordable housing by rendering the project's construction economically infeasible. *See id.*

So, the concept of uneconomic conditions is essential both to the HAC's jurisdiction and the substance of its review. Chapter 40B defines uneconomic conditions to mean those that "make[] it impossible for . . . a [developer] to proceed and still realize a reasonable return in building or operating such housing . . . ." G.L. c. 40B, § 20. DHCD regulations echo that definition, and further define "reasonable rate of return" by reference to the subregulatory guidance that DHCD publishes. 760 Code Mass. Regs. § 56.02–Uneconomic(b), 56.02–Reasonable Rate of Return. The referenced DHCD guidance equates a "reasonable rate of return" to a "minimum return on total cost," which it defines as the applicable 10-year United States Treasury rate plus 450 basis points. *See* DHCD Chapter 40B Comprehensive Permit Projects Guidelines ("DHCD Guidelines"), at I–3 and Appendix I.1. At the time the Developer sought HAC review here, that minimum rate of return on total cost was 6.84%. Record Appendix ("RA") 2768 (¶ 13).

FACTUAL BACKGROUND

A. The Project Proposal.

On May 27, 2014, MassHousing issued a Project Eligibility Letter ("PEL I") under Chapter 40B and DHCD regulations for a three-building, 72-unit project proposed by the

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and Moderate Income Housing considered with the number of Low Income Persons in a municipality affected." *Id.* §56.02–Housing Need.

Developer on the Site. RA 1427–39. PEL I specifically directed the Developer to address during the comprehensive permit process municipal concerns regarding, *inter alia*, the protection of wetlands on the Site; pedestrian access to, from, and within the Site; on-site circulation and the adequacy of emergency access; and appropriate storm water management. RA 1431. Before submitting a comprehensive permit application to the Town, the Developer revised its proposal, increasing the number of units to 90, this time packed within two structures. RA 4408; RA 1726–27. MassHousing reaffirmed its determination of eligibility for the larger project on November 3, 2014, in a second Project Eligibility Letter ("PEL II"). Though PEL I made passing reference to the 72-unit project's "financial[] feasib[ility]," neither eligibility letter addressed the Project's expected rate of return nor conditioned preliminary approval on a particular expected return. RA 1427.

The Developer submitted its comprehensive permit application to the Board on November 6, 2014. Rather than addressing the numerous Town concerns documented in PEL I, the application instead proposed an even larger project wholly unsuited to the Site. The Site is located within a residential neighborhood and abutted by single-family homes on multiple sides; Town-owned land operated by the Department of Public Works lies to the northeast. While the Site totals 7.81 acres, the actual developable area is significantly constrained by existing natural features — and all of that immediately abuts the single-family homes. RA 2418.[7] Approximately 25% of the Site area is wetlands and only 3.4 acres of the Site (43.5% of its total acreage) is developable. RA 2600. Site topography ranges from a high elevation of 160 feet located along the westerly rear property line to an elevation of 108 feet to the south along Route 28. *Id.* Additionally, the Site slopes approximately 50 feet in elevation from west to east. *Id.*

[7] For the Court's convenience, a full-sized color set of project plans (available in the record, in black and white form, at RA 2417-2429) is attached to this Memorandum in a sleeve at **Tab A.**

To account for these substantial slopes, development of the Site requires significant excavation and fill. RA 2419. It likewise requires the installation of high retaining walls to provide level space for buildings. RA 2420.

Within these constraints, the Developer proposed to construct 90 units in two buildings (the "Project"), resulting in a density of 27 units per acre. RA 2601. One building is approximately 45 feet high and 200 feet long; the second is approximately 50 feet high and 300 feet long (which, as proposed, is the longest building in the Town). RA 2600. The topography of the Site necessitates the construction of a 15-foot high, 290-foot long retaining wall to the rear of the smaller building; at least one other retaining wall and two earth berms encircle the Project. RA 2420. The presence of significant wetland areas along the Route 28 frontage requires construction of a bridge over the wetlands in order to provide driveway access to the Site. *Id.* Limitations on developable area also require the extraordinary measure of installing the storm water drainage facility for the project directly beneath the buildings, rather than on land adjacent to the structures. RA 2602; RA 2864 (¶17).

Over eleven public hearings, the Board heard testimony from the Fire Department, the Conservation Commission, the Department of Public Works, and other town officials; expert witnesses; and members of the public. RA 2597-98; 2605-06. The testimony identified a range of serious traffic, environmental, and public safety concerns. *Id.* It also addressed the fundamental inconsistency of the Project with its surrounding residential context. RA 2604-2606. In the face of such testimony, the Developer offered only minimal modifications to the Project, none of which adequately mitigated the health, safety, and environmental issues raised throughout the comprehensive permit process.

B. The Board's Approval With Conditions.

Ultimately, the Board approved the Project, subject to a series of conditions targeted at reducing impacts to environmentally sensitive lands and natural resources, mitigating traffic impacts, addressing public safety issues, and improving the overall functionality of the Site.

Among the conditions of approval was a reduction in the number of units from 90 to 35 and a requirement that the massing of the Project be broken up by creating a series of smaller buildings. RA 2608. The Board noted that reducing the intensity of the development would eliminate key local concerns with the Project. *Id.* Most notably, a development of lesser intensity would alleviate safety concerns raised by the Town Fire Chief that the Project as proposed does not provide sufficient access to one of the buildings nor sufficient area for Town fire apparatus to turn around or to exit the Project access road in a forward direction (rather than driving backward downhill for 350 feet). RA 2979-82 (¶¶ 11, 13, 17, 20); RA 545.

The Board also required modifications to the proposed site layout in order to ensure the safety of Project occupants. RA 2611. For example, it required the widening of sidewalks on the Site to five feet in width, the installation of sidewalks on both sides of the driveway access road, and the construction of a vehicle and pedestrian waiting area on Route 28 or at the Site entrance to facilitate the school bus pickup and drop off of school children. *Id.* Other conditions in the decision preserved wetland areas and other natural resources on the Site, including limitations on construction in wetland, no-disturb areas, and a requirement that existing mature trees be retained. RA 2611-12.

The Developer appealed the Board's decision to the HAC on August 18, 2015. RA 4406.

C. The HAC Decision.

In a decision dated December 20, 2018, the HAC vacated the Board's decision and directed that the Board issue a comprehensive permit in conformance with the HAC's written directives. RA 4470. As it is required to do, the HAC first considered whether the Developer could establish that conditions imposed by the Board rendered the project uneconomic. RA 4410. It noted that the threshold established by the Department for a minimum rate of return is the ten-year Treasury rate plus 450 basis points – in this case, 6.84% return – and the Project, as proposed, fell well below that level. RA 4416. Indeed, the Developer's own financial expert expressly conceded both that the Department's minimum rate of return was the applicable standard, and that the Project was uneconomic as proposed. RA 2768 (¶¶ 13–14) ("Based on these figures, the projected [return] for the 90-unit rental development is economically infeasible . . . . A developer is allowed to submit an application for a project which is technically uneconomic under 40B standards (as many in my experience are) as there are other reasons for any particular developer for wanting to proceed with the project"); RA 3079 (¶ 3).

Without citation to Chapter 40B or DHCD regulations, the HAC determined that where "the development as proposed is below the [return on total cost] economic threshold, as is the case here, the [D]eveloper must . . . show that the Board's conditions render the project significantly more uneconomic than the project proposed in the [D]eveloper's application for a comprehensive permit." RA 4410. Though the HAC did not address what "significantly more uneconomic" means, it concluded that the Developer had demonstrated that the Board's conditions met that threshold. RA 4416.

The HAC then proceeded to review each of the conditions imposed by the Board decision to determine whether they were consistent with "Local Needs," as that term is used in the DHCD

regulations.[8] For the vast majority of the Board's conditions, the HAC determined that the Board had not demonstrated valid local concerns that outweighed the need for affordable housing; it never explained, however, how the Town's local concerns could be weighed against the regional need for affordable housing, where the conditions meant to address those concerns were not the reason why the Project as proposed was economically infeasible. In some instances, the HAC acknowledged the concerns raised by the Board, but modified the conditions imposed by the Board, in most cases without making the requisite findings regarding the feasibility of implementing such modified conditions.

STANDARD OF REVIEW

A decision by the HAC is subject to review "in accordance with the provisions of [G.L. c.] 30A." G.L. c. 40B, § 22. This Court may set aside and remand a HAC decision if, among other things, it is "in excess of the statutory authority or jurisdiction of the agency," "based upon error of law," "unsupported by substantial evidence," or "arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law." G.L. c. 30A, § 14(7)(b)–(g). In the words of the Supreme Judicial Court, the HAC has no authority to "brush[] aside the language of the governing statute and the regulations of [DHCD]," and where it does so its decision will be reversed. *Board of Appeals of Woburn*, 451 Mass. at 590.

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[8] Much was made in the HAC's decision regarding what the HAC believed to be a condition imposed by the Board that, according to HAC (but not the Board), prohibited three-bedroom units in the Project. *See* RA 4416-18. The condition at issue (Condition 2) required that the Developer submit plans indicating the mix of one- and two-bedroom units on its Site Plans. While the condition was not a model of clarity, its meaning and intent were made crystal clear by the Town to the HAC. In submissions to the HAC, the Board emphasized that the condition did not, and was not intended to, prohibit three-bedroom units. RA 4378-79. Given that the HAC may review only those conditions imposed by the Board — and not conditions that theoretically could have been, but in fact were not imposed — there is no dispute, no basis for the HAC to have weighed in, and no ripe or material question before this Court regarding three-bedroom units in the Project. *See* G.L. c. 40B, §§ 22–23; *Boston Herald, Inc. v. Superior Ct. Dep't of the Trial Ct.*, 421 Mass. 502, 504 (1995) ("It is the general rule that courts decide only actual controversies," not abstract or speculative questions).

The HAC's factual findings are reviewed to determine whether they are buttressed by substantial record evidence; its legal determinations are reviewed *de novo*. *See Ten Local Citizen Grp. v. New England Wind, LLC*, 457 Mass. 222, 231 (2010) ("[S]ubstantial evidence is evidence that a reasonable mind might accept as accurate to support a conclusion," provided that the Court must "carefully consider any evidence in the record that detracts from the agency's conclusion") (quoting *DSCI Corp. v. Department of Telecomm. & Energy*, 449 Mass. 597, 606 (2007)) (internal quotation marks omitted); *Bristol County Ret. Bd. v. Contributory Ret. Appeal Bd.*, 65 Mass. App. Ct. 445, 451 (2006) ("Where a question of law is involved, we act de novo, and we are not bound by what we believe is an agency's erroneous interpretation of its statutory authority"). Due weight is given to the HAC's "experience, technical competence, and specialized knowledge," but an "incorrect interpretation of a statute [or regulation] . . . is not entitled to deference." *Craft Beer Guild, LLC v. Alcoholic Beverages Control Comm'n*, 481 Mass. 506, 512 (2019); *see ENGIE Gas & LNG LLC v. Department of Pub. Utils.*, 475 Mass. 191, 198 (2016) ("Statutory interpretation . . . is ultimately the duty of the courts and the principle of according weight to an agency's discretion . . . is one of deference, not abdication, [such that the] court will not hesitate to overrule agency interpretations of statutes or rules when those interpretations are arbitrary or unreasonable") (internal citations omitted).

In conducting G.L. c. 30A review, the Court must "not 'supply a reasoned basis for the agency's action that the agency itself has not given.'" *NSTAR Elec. Co. v. Department of Pub. Utils.*, 462 Mass. 381, 387 (2012) (quoting *Costello v. Department of Pub. Utils.*, 391 Mass. 527, 533 (1984)). *Accord Attorney Gen. v. Comm'r of Ins.*, 442 Mass. 793, 803–04 (2004) ("We have consistently refused to 'supply a reasoned basis for the agency's action that the agency itself has not given'" because the agency "should not leave counsel and the courts without the guidance of

proper findings to determine from a voluminous record whether [its] conclusions can be sustained on the evidence") (quoting *Costello*, 391 Mass. at 536) (internal citations omitted). The HAC — like other state agencies — has a duty to "make subsidiary findings of fact on all issues relevant and material to the ultimate issue to be decided" and a "duty to set forth the manner in which it reasoned from the subsidiary facts so found to the ultimate decision reached." *School Comm. of Chicopee v. Massachusetts Comm'n Against Discrimination*, 361 Mass. 352, 355 (1972).

ARGUMENT

I. THE HAC DECISION SHOULD BE REVERSED BECAUSE IT LACKED JURISDICTION, AND THE CONCEPT OF "SIGNIFICANTLY MORE UNECONOMIC" ON WHICH IT RELIES DEPARTS ENTIRELY FROM THE GOVERNING STATUTE.

The HAC "may review an approval [of a comprehensive permit] with conditions *only* if those conditions render the project uneconomic." *Board of Appeals of Woburn*, 451 Mass. at 590 (citing G.L. c. 40B, § 22) (emphasis in original).[9] Here, the HAC and the Developer concede that the Project was uneconomic *as proposed*. RA 4410–11; RA 2768 (¶¶12-14); RA 3079 (¶ 3). Because the Project was uneconomic at the start, no action of the Board rendered it so. Accordingly, the HAC lacked jurisdiction, and the Board was "not required either under [Chapter 40B] or [DHCD's] regulations to demonstrate that its conditions [were] consistent with local needs." *Board of Appeals of Woburn*, 451 Mass. at 590.

[9] None of the conditions at issue in this G.L. c. 30A action were beyond the scope of the Board's local authority, and the exception recognized in *Zoning Board of Appeals of Amesbury* — which allows for limited HAC review where a local board has acted ultra vires — is therefore not at issue here. 457 Mass. at 762–63. Conditions, like those in dispute here, that "relate to maters of clear local concern, such as building construction, zoning and subdivision control, land use planning, as well as safety and health of residents," are well within the Board's authority. *Id.* at 756; *see id.* (citing G.L. c. 40B, § 21) ("The clear import of this provision, defining as it does the [B]oard's power in terms of that belonging to a 'local board,' is that the [B]oard, when acting on an application for a comprehensive permit under the act, has the same scope of authority as 'any town or city board of survey, board of health, board of subdivision control appeals, planning board, building inspector or the officer or board having supervision of the construction of buildings'").

The concept relied upon by the HAC — that conditions imposed by the Board rendered it "significantly more uneconomic" than the proposal — is an apparition that finds no support at all in Chapter 40B or DHCD's regulations. In addition, according to bedrock principles of administrative law, the HAC has no ability to conjure up now an alternative ground for its jurisdiction that was not articulated in its decision. *See NSTAR Elec. Co.*, 462 Mass. at 387 n. 3 (quoting *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 50 (1983)) ("[A]n agency's ground of decision must be clear from its own order, not from 'appellate counsel's post hoc rationalizations'").

A. Because the Conditions Imposed by the Board Did Not Render the Project Uneconomic, There Was No Basis for HAC Review.

The Developer submitted clear evidence — which was credited and relied upon by the HAC — that the Project was uneconomic as proposed. RA 4110–11; RA 2768 (¶14). The Developer's financial expert "stated that the minimum economic threshold for the project would be 6.84%, based on the [DHCD] Guidelines' requirement to add 450 basis points to the applicable 10-year Treasury rate," and the HAC so found. RA 4411; *see* DHCD Guidelines at Appendix I-1. As proposed, the Project had a return on total capital of 5.88%, nearly 100 basis points less than the minimum threshold established by DHCD. RA 4111; RA 4411. The lynchpin of HAC jurisdiction — that *the Board* impose a condition or multiple conditions that render the Project uneconomic — is therefore missing. G.L. c. 40B, § 22; *Board of Appeals of Woburn*, 451 Mass. at 591.[10] That alone should have been the end of the matter. *Id.* at 591 ("Here, the [HAC] determined that the developer failed to show that the conditions imposed by

[10] Regardless whether the requirement that the local board's conditions rendered the project uneconomic is considered a jurisdictional prerequisite or the central element of the Developer's prima facie showing, *see, e.g., Board of Appeals of Woburn*, 451 Mass. at 590–91, the requirement has not been and cannot be met, and the conditions imposed by the Board were not subject to review.

the [local] board rendered the 'building or operation of [the project] uneconomic,' and its inquiry should have ended there"). This issue alone resolves the case in favor of the Board.

Instead, the HAC asserted jurisdiction by relying upon a concept it created from whole cloth. With no authority but its own, the HAC has declared that it may review conditions imposed by a local board where they "render the project significantly more uneconomic than the project as proposed in the developer's application for a comprehensive permit." RA 4410 (citing and relying upon three recent HAC decisions). The HAC's powers, however, are narrowly defined by statute, and the HAC has no authority to expand them. G.L. c. 40B, § 22–23; *see Telles v. Commissioner of Ins.*, 410 Mass. 560, 564 (1991) ("It is settled that 'an administrative board or officer has no authority to promulgate rules or regulations which are in conflict with the statutes or exceed the authority conferred by the statutes by which such board or office was created") (internal citation and quotation marks omitted).

Neither Chapter 40B nor any regulation promulgated by DHCD under it references the concept of "significantly more uneconomic." *See* G.L. c. 40B, § 20 (defining "uneconomic" as conditions "mak[ing] it impossible for . . . a [developer] to proceed and still realize a reasonable return," but containing no reference to "significantly more uneconomic"); 760 Code Mass. Regs. §§ 56.00, *et seq.* (echoing G.L. c. 40B, § 20's definition of "uneconomic," but saying nothing at all about "significantly more uneconomic"). Instead, the HAC has tried to create the concept in a handful of its decisions. RA 4410 (citing *Cirsan Realty Trust v. Woburn*, No. 2001-22, slip op. at 3 (Mass. Housing Appeals Comm. Apr. 23, 2015); *Haskins Way, LLC v. Middleborough*, No. 2009-08, slip op. at 18 (Mass. Housing Appeals Comm. Mar. 28, 2011); *Avalon Cohasset, Inc. v. Cohasset*, No. 2005-09, slip op. at 13 (Mass. Housing Appeals Comm. Sept. 18, 2007)). But it is black letter law that the HAC is not at liberty to expand its authority via adjudication. *See Board*

of Appeals of Woburn, 451 Mass. at 593; *Globe Newspaper Co. v. Beacon Hill Architectural Comm'n*, 421 Mass. 570, 587 (1996) ("Any judicial review of agency action embodies the principle that an agency has no inherent authority beyond its enabling act and therefore it may do nothing that contradicts such legislation"); *see also Zoning Bd. of Appeals of Groton v. Housing Appeals Comm.*, 451 Mass. 35, 39–41 (2008) (Chapter 40B is the exclusive source of the HAC's authority, which has no power to order municipalities to do anything beyond what Chapter 40B allows). Indeed, as described immediately below in Section I–B, the Supreme Judicial Court rejected the HAC's recent, analogous attempt to do so as unsupported by Chapter 40B.

As an initial matter, though, it is not at all clear that the HAC has any authority to adopt general rules by adjudication. Some agencies no doubt have the discretion to do so in limited circumstances. *E.g.*, *City of Brockton v. Energy Facilities Siting Bd.*, 469 Mass. 196, 200 n. 11 (2014) (recognizing state agency discretion to "establish rules and agency policy through adjudication as well as rulemaking," where the agency has both powers); *Massachusetts Elec. Co. v. Department Pub. Utils.*, 383 Mass. 675, 679 (1981) ("[T]he prudent administrative body, being mindful of the scrutiny given to the rules of general application established in ad hoc adjudication, should proceed by rulemaking where possible and practical"). But the authority to adopt a general rule by adjudication is derivative of rulemaking authority. *See* G.L. c. 30A, § 1(5) ("'Regulation' includes the whole or any part of every rule, regulation, standard or other requirement of general application and future effect"). The HAC has no such authority. G.L. c. 40B, § 23 (setting forth the HAC's limited powers). Instead, rulemaking authority under Chapter 40B rests exclusively with DHCD, of which the HAC is only a component part. *See* G.L. c. 23B, § 5A (appeals to the HAC must be "in accordance with rules and regulations established by the [D]irector" of DHCD); *see, e.g., Board of Appeals of Woburn*, 451 Mass. at 594 n. 24 (noting the

Department's, *i.e.*, DHCD's authority, to promulgate regulations); *id.* at 598 (Marshall, C.J., concurring) (same); 760 Code Mass. Regs. § 56.01 (Chapter 40B regulations were promulgated by DHCD). Though the HAC may adopt a consistent practice in addressing recurring issues where that practice accords with Chapter 40B or DHCD regulations, *e.g.*, *Zoning Bd. of Appeals of Amesbury*, 457 Mass. at 759 n. 17, it may not displace the statutory language of Chapter 40B or DHCD's authority. *See Board of Appeals of Woburn*, 451 Mass. at 590–94.

For its part, DHCD has neither adopted nor publicly proposed any regulation regarding local board conditions that render a project "significantly more uneconomic" than proposed. *See* 760 Code Mass. Regs. § 56.02. Nor may the HAC now seek to explain its decision by *post hoc* reliance on some other concept, regulation, or law. *See NSTAR Elec. Co.*, 462 Mass. at 387 n. 3; *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 50.[11]

B. The Supreme Judicial Court Has Rejected Attempts By the HAC to Expand Its Jurisdiction Beyond the Scope of Chapter 40B, and Its Analysis Controls This Case.

This is not the first time the HAC has strayed from Chapter 40B and DHCD regulations to claim a power that, in its view, "'would be helpful in effectuating the legislative purpose underlying [Chapter 40B].'" *Board of Appeals of Woburn*, 451 Mass. at 595 (quoting *Board of Appeals of N. Andover v. Housing Appeals Comm.*, 4 Mass. App. Ct. 676, 680 (1976)). Of course, it is neither the role of the HAC, nor the role of this Court, to "invest the [HAC] with powers beyond those given it by the legislature." *Id.*; *cf. Zoning Bd. of Appeals of Groton*, 451 Mass. at 41 ("To be sure, in enacting G.L. c. 40B, the Legislature indicated that, in some

[11] Because the keystone of the HAC's decision is its wholly unsupported "significantly more uneconomic" analysis, the Board fears the HAC — now subject to the watchful eye of judicial review — will attempt to anchor its decision in some other basis of support that was neither cited nor substantively discussed in its decision below. "The short — and sufficient — answer to [such an attempt] is that the courts may not accept . . . counsel's post hoc rationalizations for agency action. It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 50.

circumstances, compliance with locally imposed barriers may need to yield to the regional need for affordable housing, but this legislative judgment cannot be stretched to empower the committee to act as the legislative body of a municipality for purposes of land transfers").

In the 1990s and early 2000s, the HAC began asserting jurisdiction over conditional grants of comprehensive permits that it believed operated as "'functional' or 'de facto' denials" because they curtailed the size of a proposed project, even though the project as limited was still economic to build. *Board of Appeals of Woburn*, 451 Mass. at 591. When that practice was challenged, the HAC attempted to justify it just as it has done here, *i.e.*, by "point[ing] to several of its former decisions to . . . conten[d] that it has an established method of determining when the imposition of [such] conditions should properly be considered to be a denial." *Id.* The Supreme Judicial Court was unmoved and promptly put an end to the HAC's attempt to seize for itself powers the Legislature had not granted it. *Id.* "The [HAC]'s authority to alter or set aside conditions imposed by a local board is . . . expressly delineated by the act, and it may not be expanded by recasting an approval with conditions as a ['functional' or 'de facto'] denial." *Id.* at 594; *see Zoning Bd. of Appeals of Groton*, 451 Mass. at 41 (the HAC may not order municipalities to take any action for which there is a "lack of authority" in Chapter 40B).

The same analysis controls here. Unless the conditions imposed by the local board are responsible for rendering the project uneconomic, *see* G.L. c. 40B, § 22, the HAC has no basis to review them. The HAC may not avoid that result by creating an entirely new category of local board decisions that trigger its oversight, *i.e.*, those that impose conditions rendering a project "significantly more uneconomic." *See Board of Appeals of Woburn*, 451 Mass. at 594 ("Absent a showing that conditions placed on an approval render the project uneconomic, the committee is not empowered to review them under the denial standard").

C. The HAC is Afforded No Deference Where it Strays From the Governing Statute and Its Self-Created Concept of "Significantly More Uneconomic" Does Nothing More than Illustrate the Arbitrariness of Existing DHCD Regulations.

The facts of this case are a fitting demonstration of why Chapter 40B does not grant to a developer the leverage to propose an uneconomic project secure in the knowledge that just about any condition placed on it by the Board will be subject to demanding HAC review. Here, the Developer initially proposed a 72–unit, three-building project. RA 1426. That project, which was determined eligible by MassHousing, presumptively[12] had a lower rate of return than the revised Project proposed just several months later, this time for 90 units in two buildings. RA 1732. But, under the HAC's proposed analysis, the rate of return of the revised, 90-unit project became the baseline from which to measure whether a Board-imposed condition rendered the Project "significantly more uneconomic." *See* RA 4411. Rather than an objective, measurable minimum rate of return known to all interested parties — *i.e.*, the minimum rate of return set forth in DHCD Guidelines — the baseline instead becomes a moving target, wholly within the developer's control. The HAC also has not provided any detail at all regarding what is "significantly more" uneconomic than the baseline — suggesting it may be somewhere between 11 basis points and 162 basis points (presumably to be determined on an *ad hoc* basis). RA 4412, 4416. Such opacity is strongly disfavored, as the Supreme Judicial Court has emphasized in the very context of Chapter 40B. *See Board of Appeals of Woburn*, 451 Mass. at 598 (Marshall, C.J., concurring) (encouraging DHCD to "provide much-needed guidance for the HAC, as well as for developers and municipalities").

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[12] Neither PEL I nor PEL II identified a specific rate of return, nor did the Developer specifically identify a rate of return in seeking either PEL. *See* RA 1426-1439; RA 1726-27; RA 1821-1829.

Nor is granting a developer such considerable leverage consistent with Chapter 40B's carefully calibrated structure. As described by the legislative committee that drafted it, Chapter 40B struck a balance between encouraging the development of affordable housing and preserving local control by "encourag[ing] communities to establish conditions on such housing which will be consistent with local needs." *Zoning Bd. of Appeals of Wellesley*, 436 Mass. at 823 (quoting 1969 House Doc. No. 5429). The law "provides the *least interference* with the power of a community to plan for its own future" while accounting for the need for affordable housing. *Id.* (emphasis added). But the HAC's approach here cedes municipal power almost entirely to the developer, well beyond what Chapter 40B intends.

The solution, if any, is the same suggested to DHCD by the Supreme Judicial Court a decade ago: DHCD might consider "promulgating regulations that would more fully address the meaning of the term 'uneconomic' in the context of the construction of affordable housing." *Board of Appeals of Woburn*, 451 Mass. at 594 n. 24; *see id.* at 598 (Marshall, C.J., concurring). It is, of course, no secret why DHCD has failed to promulgate such regulations. If DHCD defined an uneconomic rate of return to be *lower* than DHCD has currently set it, then fewer comprehensive permit conditions would trigger HAC review under G.L. c. 40B, § 22 — thereby granting municipalities more discretion and the HAC less.

Instead, DHCD chooses to have it both ways by continuing to define the minimum rate of return as the ten-year Treasury rate plus 450 basis points, while the HAC nevertheless asserts jurisdiction to review conditions on projects that are (by DHCD's own telling) uneconomic from the get-go. *See* RA 4410 (and cases cited therein). What a remarkable display of administrative mischief. Perhaps the recent proliferation of Chapter 40B projects that are uneconomic as proposed demonstrates that the minimum rate of return set by DHCD is too high. The solution,

then, would be to initiate the regulatory process to *lower the rate*, rather than merely looking on as the HAC ignores the existing regulations. Fortunately, G.L. c. 30A does not countenance such caprice. *See Ruzicka v. Commissioner of the Dep't of Employment and Training*, 36 Mass. App. Ct. 215, 219 n. 8 (1994) (rejecting state agency's "effort to have it both ways [which] brought to mind the old saying — 'Heads I win, tails you lose.' Fortunately, the law is otherwise, *i.e.*, based upon concepts of mutuality, fairness, and consistency."). The HAC decision should be reversed. This matter should be remanded to it with instructions to reinstate the conditions imposed by the Board.

II. THE HAC IMPROPERLY DISMISSED THE TOWN'S LOCAL CONCERNS AND FAILED TO ENGAGE IN THE ANALYSIS MANDATED BY DHCD REGULATIONS.

Under G.L. c. 40B, § 23 and 760 Code Mass. Regs. §§ 56.07(1) and (2), if a developer is able to sustain its burden of showing that conditions of approval render the project uneconomic, the burden shifts to the board to prove, first, "that there is a valid health, safety, environmental, design, open space or other Local Concern which supports such conditions," and, second, that the Local Concerns outweigh the local affordable "Housing Need."[13] A necessary component of that balancing test, however, is that the Board's conditions render the project economically infeasible; otherwise they would have no effect at all on the need for affordable housing. Here, the HAC avoided altogether the balancing required by Chapter 40B and DHCD regulations by summarily rejecting the myriad local concerns of the Board. That approach was error and is alone a basis for reversal under G.L. c. 30A, § 14(7).

Where, as here, the HAC declines to undertake the analysis required by G.L. c. 40B, § 23 and DHCD regulations, it has erred as a matter of law. *See, e.g., Craft Beer Guild*, 481 Mass. at

[13] The regulatory definitions of the terms "Local Concern" and "Housing Need" are set forth in note 6, *supra*.

527 (failure to follow governing statute and regulations is an error of law); *Tabroff v. Contributory Retirement Appeal Bd.*, 69 Mass. App. Ct. 131, 134 (2007) (any deference that might otherwise be afforded an agency is "no longer appropriate" when it fails to follow the controlling statute). The summary rejection of the Town's local concerns — where those concerns are cognizable under Chapter 40B and the plain language of DHCD regulations — likewise is an error of law. G.L. c. 40B, § 20 (Town Board may consider "the need to protect the health or safety of the occupants of the proposed housing . . . to promote better site and building design in relation to the surroundings . . . or to preserve open spaces"); 760 Code Mass. Regs. §56.02–Local Concerns (echoing Chapter 40B language); *see Maryland Cas. Co. v. Commissioner of Ins.*, 372 Mass. 554, 559 (1977) (while findings of fact are given deferential review, "questions of law involved in [an agency's] determination are subject to de novo judicial review"); *Smith v. Commissioner of Transitional Assistance*, 431 Mass. 638, 646 (2000) (an administrative agency may not bypass express statutory factors). To the extent the HAC argues that its disregard of the Town's local concerns is subject to substantial evidence review, a complete review of the record likewise demonstrates the HAC's error. *See Reavey v. Director of the Div. of Employment Sec.*, 377 Mass. 913, 914 ("An administrative agency must make findings on each factual issue essential to its decision"); *see also NSTAR Elec. Co.*, 462 Mass. at 390 ("An adequate statement of reasons must contain not only the department's factual conclusions, but also supporting subsidiary findings of fact").

A. The Board Properly Imposed Comprehensive Permit Conditions on the Basis of Serious Emergency Access Concerns Which the HAC Improperly Struck or Substantially Rewrote.

The administrative record documents a number of serious Local Concerns with the Project as proposed, most notably relating to fire safety and emergency access.[14]

Testimony offered by the Board established that the proposed Project created fire safety and emergency access hazards. Fire Chief Grant, who has been a firefighter since 1986 and has served as Milton's chief for ten years, RA 2978 (¶¶1-2), testified unequivocally that the project did not provide adequate space for emergency vehicles. Chief Grant explained that for any smoke, gas, or fire box alarm, the Milton Fire Department would respond with four vehicles: two engines; one ladder truck; and one command vehicle. RA 2979 (¶7). According to Chief Grant, the design of the larger building "does not provide adequate room for fire apparatus to fight a fire" in that building. *Id.* at ¶8. This testimony was corroborated by Maurice Pilette, PE, FSPE, CFPS, CET, a fire protection engineer with more than 40 years of experience. RA 2961 (¶1); RA 2963 (¶12). As Chief Grant noted, "the distance around the larger building is approximately 505 feet", RA 2979 (¶11), well in excess of the 250 feet permitted for sprinklered buildings under the Massachusetts Comprehensive Fire Safety Code. *Id.* at ¶¶9-11; *see also* RA 2963 (¶¶11; 12). He explained that because the Project did not provide any road, driveway or other means of passage of fire apparatus on the rear side of the larger building, "Fire Department personnel would have great difficulty in conducting fire ground operations in the rear of the building."[15] RA 2980 (¶11). These are very significant concerns. Tim Logan, et al., "Did

[14] As set forth in 760 CMR 56.07(3)(d), factual areas of Local Concern include, *inter alia*, the adequacy of fire protection and the adequacy of the proposed arrangements for dealing with the traffic circulation within the site.

[15] Chief Grant fully rebutted the applicant's suggestion that this hazard could be remedied by the addition of stairs to a portion of the rear of the large building, noting that a fixed installation which would, effectively, predetermine firefighting apparatus placement, would be "poor firefighting strategy." RA 2980 (¶13). He further observed that one of the stairway locations proposed by the Developer would require apparatus to park on an uphill slope of the Project access road, which could restrict access of later arriving emergency vehicles. *Id.*; *see also* RA 2963-64 (¶¶ 13-14).

Wooden Construction Feed Dorchester Fire," *Boston Globe* (Jun. 28, 2017) (describing total loss to fire of affordable housing development in Boston).

Chief Grant further testified that the proposed site design left insufficient area for fire trucks to execute back up and turnaround maneuvers during a response to a fire emergency at the Project. RA 2981 (¶¶17, 20). In particular, Chief Grant stated that a ladder truck would have to back down the access road – a distance of 350 feet[16] -- and back into Randolph Avenue/Route 28 before it could make a turning movement. *Id.* at ¶20. Ultimately, Chief Grant opined that the Town's firefighting equipment could not maneuver out of the Site without the possibility of damaging the apparatus or vehicles parked in the Project parking areas, thereby affecting the quality of a Town fire response to the Project and the ability of the Fire Department to leave the Project to respond to an emergency elsewhere. *Id.* at ¶17. Similarly, Milton Police Chief King testified that "[t]he proposed development is tight with the (*sic*) little open space. The layout of the parking areas means that if parking areas are full or heavily occupied, it would be very difficult for emergency vehicles to access the buildings. Backing and turnaround movements are a particular concern."[17] RA 2998 (¶11).

Chief Grant, Chief King, and Mr. Pilette testified that the Board's conditions requiring a reduction in the number of units to 35 (Condition 2) and the requirement that the massing of the project be broken into smaller buildings (Condition 6) would fully address the concerns raised in their testimony. RA 2981-82 (¶20); RA 2999 (¶16); RA 2965 (¶21). According to these witnesses, a 35-unit development would allow all Town of Milton fire apparatus to execute a

[16] RA 543-44.

[17] Chief King further testified that the Project's density "raises significant safety concerns regarding the ability of first responders and emergency personnel to quickly and expediently address issues concerning the health and safety of the residents and guests of the proposed development." RA 2997 at ¶7.

turnaround maneuver on the Site and proceed back down the access road in a forward direction, resulting in a far safer method of fire apparatus egress from the Site. *Id.*

Other witnesses presented by the Board testified that proposed vehicular circulation through the Site created unacceptable safety hazards. Traffic Engineer Jeffrey Dirk explained that, because the Developer's traffic study documented delays for vehicles exiting the Site and associated vehicle queuing along the Project Site driveway, both the ITE[18] and the most recent edition of the Fire Code recommend that two means of access be provided for safety reasons. RA 2850-51 (¶13). Mr. Dirk further opined that

> [i]n addition to the problems emergency vehicles will face because of the Project's layout and the site's topography, the single access to this multi-unit development means that a temporary road blockage, which could occur as a result of an accident, utility break, fallen tree or pole, or pavement repairs, creates a potential safety hazard. Any road blockage affects access and egress by police, fire, and ambulance equipment. The hazard increases with the number of people served by the single access.

RA 2851 (¶14). Fire Chief Grant echoed this concern, noting in his testimony that if the Milton Fire Department were to "come in there on an incident, nobody's leaving...we're clogging that point up and virtually while we are there on scene, nobody's getting out of there." RA 2542.

To mitigate this condition, Mr. Dirk recommended that the project provide a looped roadway, which would facilitate emergency vehicle movement within the project, particularly in instances of temporary blockage of the driveway access. RA 2851-52 (¶15). Mr. Dirk further testified that a looped roadway would eliminate the need for back-up movements in parking areas and in the driveway where parked or queued vehicles would impede or add to the difficulty of safely maneuvering emergency equipment. RA 2850 (¶13). Chief King concurred with this recommendation, RA 2999 (¶16), and both witnesses opined that Condition 28 of the Board's Decision requiring a looped roadway was necessary to facilitate emergency vehicle movement

[18] Institute of Transportation Engineers.

and reduce the potential risk to public safety created by a single means of access to the Site. RA 2851-52 (¶15); RA 2999 (¶16).

The HAC responded to these concerns by adding two new conditions which (a) require the Developer to include in the Project a vehicle turnaround location that meets the turning radius specifications for the Town's largest emergency vehicle when exterior parking spaces are completely occupied, RA 4428-29; and (b) require the Developer to provide a paved area for the placement of fire vehicles during an emergency approach on the southerly side of Building 2, as either a parking area or access driveway sufficiently wider than 24 feet to accommodate the largest of Fire Department vehicles. RA 4430. While these new conditions nominally address the very real concerns articulated by the Board's witnesses, the HAC had before it no evidence that such conditions were practicable given Site constraints, including significant wetland areas on the southerly side of the larger Project building.[19] Thus, rather than crediting the Board's conditions specifically aimed at resolving these concerns (*i.e.*, reduction in project size and inclusion of a looped roadway), the HAC instead proposed new and potentially unworkable conditions in their place, without any subsidiary fact findings to support them. That is reversible error. *NSTAR Elec. Co.*, 462 Mass. at 390 ("An adequate statement of reasons must contain not only the [agency's] factual conclusions, but also supporting subsidiary findings of fact" sufficient to "allow meaningful review of [the agency's] apparent conclusion").

We invite the Court's review of the plans attached at Tab A; nothing but unbridled speculation supports a suggestion that a paved area could be constructed on the south side of the second (larger) building, in the midst of wetlands, to facilitate emergency response access. But

[19] Indeed, a review of the Project plans at Tab A attached hereto suggests that owing to insufficient developable area around Building 2, the HAC's suggested remedy is wholly infeasible. As the HAC made no subsidiary findings relating to the feasibility of its substitute conditions, such conditions constitute legal error.

that is how the HAC proposes to address the Town's significant fire safety concern. Chapter 30A requires far more. *Cf. New Boston Garden Corp. v. Board of Assessors of Boston*, 383 Mass. 456, 473 (1981) (the state agency must have a "rational articulable basis in the evidence" to support its action).

B. The HAC Erred by Rejecting the Town's Design Concerns by Suggesting, Despite Clear Statutory Language, That Such Concerns Could Not Properly Be a Basis for Comprehensive Permit Conditions.

Under Chapter 40B and the DHCD regulations, the local board is expressly empowered to consider — and impose conditions based upon — "site and building design in relation to the surroundings." G.L. c. 40B, § 20; 56 Code Mass. Regs. § 56.02–Local Concern. In recent years, however, the HAC has begun reading that local authority out of the statute, which it has no authority to do.[20] But that is just what the HAC did here, despite the fact that site and building design concerns with this Project are particularly acute.

Within an established residential neighborhood, the Developer proposes to squeeze into a severely constrained site two massive buildings of considerable length, which will tower over neighboring single-family homes (and require the installation of Maginot line of retaining walls and earth berms). As Cheryl Tougias, Registered Professional Architect, Planner, and Member of the Milton Planning Board, testified, the height and length of the proposed buildings are significantly greater than almost every residential structure in the Town of Milton. RA 2953

[20] It is settled administrative law that agencies may not ignore portions of the statute that create and enable them, no matter how inconvenient the agency may find those provisions. *See, e.g., Smith*, 431 Mass. 638, 646-47 (2000) (where the Welfare Reform Act lists three factors for the commissioner of transitional assistance to consider in determining whether a recipient's benefits can be extended, the commissioner is empowered pursuant to that Act to add additional criteria "but not to bypass these three factors"); *Tartarini v. Dep't of Mental Retardation*, 82 Mass. App. Ct. 217, 220 (2012) (holding a Department of Developmental Services regulation was invalid because it was inconsistent with the legislation that authorized it where the promulgated regulations failed to describe "clinical authorities" for purposes of defining mental retardation and sub-average intellectual functioning, as required by the department's enabling statute).

(¶17). Indeed, the larger of the two buildings in the project as proposed is 300 feet long, with a scale equivalent to six stories along Randolph Avenue. RA 505 (ln. 5) – RA 510 (ln. 3). The design of these monolithic buildings is wholly incompatible with any residential architectural style found within the Town, let alone in the neighborhood of the Site. RA 2953 (¶17); RA 510 (ln. 12-16). The HAC dismissed these concerns as improper, without considering whether they supported the conditions imposed by the Board (and likewise avoided entirely its obligation to weigh any supported conditions against the need for affordable housing that the statute and regulations assume would be adversely affected by such conditions). RA 4451-52 (striking Conditions 2 and 6); RA 4454-55 (striking Condition 23).

The HAC likewise dispensed with other, specific Local Concerns that adequately supported the imposition of comprehensive permit conditions by the Board.

1. The Board Could, and Properly Did, Impose Conditions Based on Insufficient Elevators.

The Board's witnesses emphasized that the Project's failure to provide sufficient elevators relative to the length of the proposed buildings would endanger Project residents. As proposed, the Project would provide only one elevator for each building, notwithstanding the buildings' respective lengths of 200 and 300 feet. RA 2600. According to Cheryl Tougias, who has served on the Milton Planning Board for a number of years,[21] no other building in Milton of this scale and style has a single elevator, let alone one located at the very end of a 300-foot hallway. RA 2953 (¶16). Police Chief King testified that with only one elevator in each building, emergency medical transport would require use of stairs in the event that the single elevator was out of service, creating a potentially life or death situation. RA 2999 (¶17); RA

[21] RA 465 (ln. 10-22).

3000 (¶19); RA 124-126. The Board's Decision in Condition 22 sought to address this safety risk. *See* RA 2611. The HAC summarily dismissed this specific, detailed testimony as vague and struck Condition 22 from the Decision. RA 4431-32.

2. Infeasible and Extraordinary Stormwater Management Plans Likewise Supported Conditions Imposed by the Board that Were Improperly Stricken by the HAC.

Numerous witnesses before the HAC testified about the negative environmental impacts of the inappropriate Site design. For example, site design engineer Janet Carter Bernardo testified that the proposed construction of a 2-foot wide, 1-foot high elevated berm along the rear property line would result in the harmful diversion of stormwater runoff toward the closest abutting property. RA 3048 (¶19). This concern was reinforced by the testimony of the Developer's own site engineer, James Burke, who confirmed that two proposed earthen berms located along the western property boundary line were designed to intercept stormwater from upgradient properties to prevent it from flowing into the development and its parking areas and instead divert it in the direction of abutting residential properties. RA 610-11.

Witnesses also described how site constraints drove the Project to include an unworkable stormwater retention facility to serve the development. Lacking sufficient level space on the Site on which to locate a conventional stormwater infiltration system, the Developer proposed to locate the facility beneath one of the Project buildings. RA 2445-46. As Scott Turner, Professional Engineer, testified before the HAC, this is inconsistent with the Massachusetts Stormwater Management Guidelines in the Massachusetts Stormwater Handbook, whose site design criteria require that stormwater infiltration trenches must be a minimum of 20 feet from any building foundation, including slab foundations without basements. RA 2864 (¶¶17-18). According to Mr. Turner, this setback is required to prevent stormwater from undermining

nearby building foundations or causing leaking into a building.[22] *Id.* Mr. Turner and Ms. Tougias testified that placing stormwater infiltration systems beneath buildings makes system cleaning, inspection, maintenance, and repairs unnecessarily challenging and creates health and safety risk for building residents. RA 2951 (¶10); RA 2864 (¶18); *see also* RA 3071 (¶10).

These concerns were addressed in a number of conditions in the Board's Decision, including Conditions 10 and 11. RA 2609 (¶¶ 10-11). Notwithstanding the testimony of multiple credible witnesses, the HAC struck these conditions as unsupported by a valid local concern, which cannot be squared with the evidence. RA 4437. Instead, the HAC *de facto* weighed the conditions against the local need for affordable housing, but failed to — and, indeed, could not — articulate that it was doing so because the weighing required by G.L. c. 40B, § 23 and 760 Code Mass. Regs. § 56.07(2)(b)(3) is unworkable where the Project is uneconomic as proposed. The HAC has no authority to simply strike conditions that it finds "helpful in effectuating" the construction of more affordable housing, without identifying a legal basis for doing so. *Cf. Board of Appeals of Woburn*, 451 Mass. at 594.

3. The HAC's Conclusory Rejection of the Town's Interest in Adequate Buffering Likewise Was Error.

Witness testimony also highlighted the Developer's failure to provide adequate landscaped area on the Site. Janet Carter Bernardo testified that "in order to effectuate the proposed site grading, the construction of berms, and the construction of retaining walls, a contractor must necessarily utilize heavy equipment and that this equipment will deforest the site[,] substantially altering the existing landscape[,] destroying most if not all of the natural buffer and vegetation which slowed surface water runoff." RA 3048 (¶18).

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[22] Underscoring the extraordinary nature of this proposal, Mr. Turner also testified that in his over 24 years as a Professional Engineer, he had never designed or endorsed a stormwater infiltration facility beneath a building in a suburban development. RA 2864 (¶17); RA 2870.

According to Ms. Carter Bernardo, a forested buffer is critical to mitigating against noise and light impacts, providing a continuous upland corridor for wildlife habitat and minimizing the heat impact of new impervious surfaces on the closest abutting neighbor. RA 3048-49 (¶20). Cheryl Tougias highlighted how the minimal rear yard setback offered by the Developer would result in the intrusion of the taller project buildings on abutting properties and deprive abutters use of their backyards. RA 2954 (¶19); RA 484-85; RA 510-12.

While the Developer sought to counter these concerns by pointing out that the proposal includes 257,347 square feet of open space, RA 2417[23], a review of the Site plan reveals that such "open space" is the result of Site conditions, including wetlands and slope, which render more than half the Site unbuildable. *Id.* Moreover, the vast majority of such "open space" is located between the Site and the Town's public works yard, rather than as a buffer between the proposed buildings and its single family residential abutters. *Id.*

The project's deficiencies with respect to landscaping and buffer areas were addressed in Conditions 5 and 25 of the Board's decision. Notwithstanding a plethora of testimony regarding the consequences of insufficient landscaping and buffering, the HAC struck Condition 5, which required maintenance of a 50-foot vegetated buffer long the southerly and westerly limits of the Site. RA 4446. The HAC similarly disregarded the Board's witnesses' testimony regarding the importance of maintaining trees on the Site, modifying a condition requiring that mature trees along the property lines be retained "to the maximum extent possible" to a watered down "to the maximum extent reasonably practicable." RA 4447. There can be no serious suggestion that the Town's concern for abutting residents is an improper local concern. Here, again, the HAC conclusorily rejected that concern, rather than engaging in the weighing required by G.L. c. 40B,

[23] *See also* Tab A (sheet 4).

§ 23 and 760 Code Mass. Regs. § 56.07(2)(b)(3). Of course, striking the buffering conditions did not "make the proposal no longer uneconomic" — *i.e.*, the sole basis for the HAC's authority to strike any such condition — because the Project was uneconomic from the get-go. So, the HAC, applying an unclear analysis — consonant with neither standards imposed by the Legislature or DHCD — became the sole arbiter of the interests of the neighbors to the Project. Quite simply, that is not how Chapter 40B works. *See Zoning Bd. of Appeals of Wellesley*, 436 Mass. at 823 (quoting 1969 House Doc. No. 5429 at 2) (Chapter 40B "*encourages* . . . communities to establish conditions on [affordable] housing which will be consistent with local needs") (emphasis added).

III. THE HAC ERRED BY STRIKING THE TOWN'S EFFORTS TO ENSURE LONG-TERM AFFORDABILITY.

Finally, the HAC inexplicably struck a Board-imposed condition that ensured the long-term affordability of the Project. In so doing, the HAC undercut the purpose of Chapter 40B while purporting to enforce it.

Condition 18 of the Board's decision provides that the Developer shall execute an agreement with the Town (the "Town Regulatory Agreement") to require that at least 25% percent of the apartments in the Project shall be rented in perpetuity to low- and moderate-income households as that term is defined by Chapter 40B. That provision will take effect only if the agreement with the "subsidizing agency is terminated, expires or is otherwise no longer in effect," at which point the Town will assume responsibility for monitoring and enforcing the affordability restrictions on the project.

This condition is consistent with the text and purpose of Chapter 40B. As the Supreme Judicial Court observed in *Zoning Board of Appeals of Wellesley*,

> if housing developed under a comprehensive permit is 'affordable' only temporarily [...], a city or town may never achieve the long-term statutory goals: each time an affordable housing project reverts to market rentals, the percentage of low income housing units in a municipality decreases, the percentage of market rate units increases, and access to a new round of comprehensive permits is triggered.

436 Mass. at 824. Based on the foregoing, the Court concluded that "unless otherwise expressly agreed to by a town, so long as the project is not in compliance with local zoning ordinances, it must continue to serve the public interest for which it was authorized." *Id.* at 825. The Town Regulatory Agreement memorializes that settled law.

It is no surprise, then, that the HAC itself has previously upheld Town-imposed affordability agreements as consistent with Chapter 40B and DHCD regulations. For example, in *Archstone Communities Trust v. Woburn Board of Appeals*, 2003 WL 25338645, at *20 (June 11, 2003), the HAC upheld a condition requiring a permanent restriction on affordability, noting that the HAC "has recognized the policy considerations supporting perpetual affordability, and has approved such conditions in the past." Numerous other HAC decisions are in accord. *E.g.*, *Lexington Ridge Assocs. v. Lexington Bd. of Appeals*, 1992 WL 12562138, at *9 (June 25, 1992) (upholding condition as consistent with municipal policy "to carry out the twin objectives of providing affordable housing and at the same time providing against the effects of 'expiring use'"); *see also Lever Dev., LLC and Village at Oakdale Assocs., LLC*, HAC No. 2004-10 (October 27, 2008) (approving condition requiring developer to execute an affordability restriction in favor of the town to take effect only in the event that the subsidizing agency regulatory agreement terminates for any reason). As the Supreme Judicial Court has held, as a party "proceeding before an [administrative] agency . . . [the Board] has a right to expect and obtain reasoned consistency in the agency's decisions." *Massachusetts Auto Rating & Accident*

Prevention Bureau v. Comm'r of Ins., 401 Mass. 282, 289 (1987) (internal citation and quotation marks omitted).

Conditions 18 and 19 of the Board's decision ensure the long-term affordability of units within the Project in the event that, due to unforeseen circumstances, the MassHousing regulatory agreement is terminated. These conditions serve the purpose of Chapter 40B and are consistent with the local need to maintain affordability for so long as the Project is not in compliance with local zoning ordinances. There is no basis under G.L. c. 40B or DHCD regulations to strike them, and the HAC's attempt to do so should be reversed.

CONCLUSION

For the foregoing reasons, this Court should enter judgment in favor of the Town of Milton Zoning Board of Appeals, thereby reversing the Housing Appeals Committee and instructing it to dismiss the Developer's petition for review under G.L. c. 40B, § 22, because the Developer cannot establish that any action of the Board rendered the proposed development uneconomic. Alternatively, the Court should remand this matter to the Housing Appeals Committee with instructions to follow the express terms of G.L. c. 40B, §§ 22–23 and regulations promulgated by the Department of Housing and Community Development in conducting any review of the Board's decision.

Respectfully submitted,

TOWN OF MILTON BOARD OF APPEALS

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Dated: August 19, 2019

I hereby certify under pains and penalties of perjury that this document was served upon counsel for all parties in this case on August 19, 2019 *by hand/by mail*

Donna A. Mizrahi

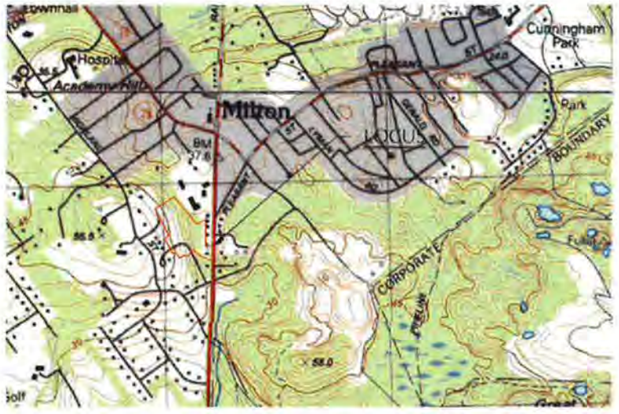
TAB A

H & W APARTMENTS

A PROPOSED MIXED INCOME APARTMENT COMMUNITY
711 RANDOLPH AVENUE
MILTON, MASSACHUSETTS

OCTOBER 1, 2014

SHEETS



LOCUS MAP
1" = 1,000'±

REVISIONS:

No.	DATE	
1.	11-26-14	DRAFTING EDITS
2.	04-15-15	PEER REVIEW EDITS
3.	05-29-15	PEER REVIEW EDITS

H & W APARTMENTS
MILTON, MASSACHUSETTS
DEVELOPMENT TEAM

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ULRICH BACHAND LANDSCAPE ARCHITECTURE
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CIVIL/SURVEY
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QUINCY, MA 02169

DeCELLE BURKE & Associates, Inc.
JOB NUMBER: 185.013

BK 448 PG. 446

LOCUS MAP
1" = 1,000'±

N/F ELLEN M SHEA
MAP J BLOCK 14 PLOT 15

N/F ELLEN M SHEA
MAP J BLOCK 14 PLOT 15

N/F CLAIRE A KINGSTON
MAP J BLOCK 14 PLOT 9

N/F JOSEPH LOMBARDI
MAP J BLOCK 14 PLOT 5A

DEED RESTRICTION LINE
(BOOK 23180 PAGE 181)

LOT J-14-6
1.94± ACRES

100' BUFFER LINE

N/F JOSEPH R MULLINS
MAP J BLOCK 14 PLOT 5B

N/F CHARLENE A MULLINS
MAP J BLOCK 14 PLOT 4A

LOT J-14-5C
1.85± ACRES

LOT J-14-16
2.78± ACRES

25' "NO DISTURBANCE ZONE"

N/F TOWN OF MILTON - HIGHWAY DEPARTMENT
MAP J BLOCK 14 PLOT 7

#11

"MEG LANE"
26,743 ± S.F.

N/F JACOB & CHRISTINA CARLIN
MAP J BLOCK 14 PLOT 4B

25' "NO DISTURBANCE ZONE"

EDGE OF BORDERING VEGETATED WETLAND

100' WETLAND BUFFER

20' WIDE SEWER EASEMENT

WETLANDS

N/F CLODOMIRO BAUTISTA
MAP J BLOCK 14 PLOT 1

MAP J BLOCK 14 PLOT 15
LOT J-14-15
0.95± ACRES

20' WIDE SEWER & DRAIN EASEMENT

12" SEWER MAIN

RESIDENCE A
RESIDENCE C

N/F
HD/MW RANDOLPH
AVENUE, LLC
LOT J-14-14

POOL

#721
#711
#693
#687
#681
#675
#669

N/F MICHAEL S WALSH
MAP J BLOCK 14 PLOT 11

N/F KEVIN ZHANG
MAP J BLOCK 14 PLOT 12

N/F MICHAEL S WALSH
MAP J BLOCK 14 PLOT 11

N/F MICHAEL S WALSH
MAP J BLOCK 14 PLOT 10

EDGE OF BORDERING VEGETATED WETLAND

25' "NO DISTURBANCE"

100' WETLAND BUFFER

CONCRETE SIDEWALK
VERTICAL GRANITE CURB

RANDOLPH AVENUE (ROUTE 28)
(STATE HIGHWAY - 74 FT WIDE)

PLEASANT STREET

GAS MAIN
VERTICAL GRANITE CURB
CONCRETE SIDEWALK

LEGEND:

EXISTING:		PROPOSED:
	- LOCUS PROPERTY LINE	
	- DRAIN MANHOLE	
	- SEWER MANHOLE	
	- CATCH BASIN	
	- GAS VALVE	
	- WATER VALVE	
	- UTILITY POLE	
N/F	- NOW OR FORMERLY	
	- IRON PIPE	
	- DRAIN PIPE	
	- WATER MAIN	
	- FIRE HYDRANT	
G	- GAS MAIN	G
E	- UNDERGROUND POWER	E
OHW	- OVERHEAD WIRES	
S	- SEWER PIPE	S
100	- CONTOUR	100
	- SPOT GRADE	
	- CHAIN LINK FENCE	
	- TO BE REMOVED	TBR
	- HANDICAP SPACE	HP
	- WETLAND FLAG	
	- WETLAND LINE	

NOTE:
D1 XX MEANS DECIDUOUS TREE OF DIAMETER XX".

DeCELLE
BURKE
& Associates, Inc.
1266 Furnace Brook Parkway, Suite 401 Quincy, MA 02169
(617) 405-5100 (O) (617) 405-5101 (F)

COMMONWEALTH OF MASSACHUSETTS
LAWRENCE W. DECELLE, JR.
No. 9156
REGISTERED PROFESSIONAL LAND SURVEYOR

LAWRENCE W. DECELLE, JR. PLS DATE

GENERAL NOTES:
1. LOCUS: ASSESSORS MAP J BLOCK 14 LOT 5C, 6, 15, 16

DEED REFERENCE:
Book 20853 Page 125 Book 20756 Page 187
Book 23180 Page 181
PLAN REFERENCE:
Book 2917 Page 517
Book 2966 Page 351
Book 448 Plan 446 OF 1997 Book 531 Plan 88 OF 2004
Book 547 Plan 29 OF 2005

2. THE LOT SHOWN DOES NOT LIE WITHIN A SPECIAL FLOOD HAZARD ZONE AS DELINEATED ON FIRM 250245 0001B, DATED APRIL 03, 1978.

3. THIS PLAN IS THE RESULT OF AN ON-THE-GROUND SURVEY PERFORMED BY DECELLE-BURKE & ASSOCIATES. WETLANDS DELINEATED BY ECOTEC, INC. AND FIELD LOCATED BY THIS OFFICE.

4. ALL CONSTRUCTION TO CONFORM TO MILTON PUBLIC WORKS AND MASS HIGHWAY STANDARDS.

5. EXISTING UTILITIES WHERE SHOWN IN THE DRAWINGS ARE APPROXIMATE. THE CONTRACTOR SHALL BE RESPONSIBLE FOR PROPERLY LOCATING AND COORDINATING THE PROPOSED CONSTRUCTION ACTIVITY WITH DIG-SAFE AND THE APPLICABLE UTILITY COMPANIES AND MAINTAINING THE EXISTING UTILITY SYSTEM IN SERVICE.

6. DIG-SAFE SHALL BE NOTIFIED PER THE STATE OF MASSACHUSETTS STATUTE CHAPTER 82, SECTION 40B AT TEL 1-888-344-7233. THE ENGINEER DOES NOT GUARANTEE THEIR ACCURACY OR THAT ALL UTILITIES AND SUBSURFACE STRUCTURES ARE SHOWN. LOCATIONS AND ELEVATIONS OF UNDERGROUND UTILITIES WERE TAKEN FROM RECORD PLANS. THE CONTRACTOR SHALL VERIFY SIZE, LOCATION, AND INVERTS OF UTILITIES AND STRUCTURES AS REQUIRED PRIOR TO THE START OF CONSTRUCTION.

7. ALL DISTURBED AREAS TO BE LOAMED AND SEEDED.

8. ELEVATIONS WHERE SHOWN ARE ON TOWN OF MILTON DATUM.

PRESENT OWNERS:

HD/MW Randolph Ave LLC	Map J Block 14 Plot 6
Randolph Avenue Realty Trust	Map J Block 14 Plots 5C & 16
HD/MW Randolph Ave LLC	Map J Block 14 Plots 15

TOTAL AREA OF ALL EXISTING PARCELS - 354,505± S.F.
- 8.14± ACRES

PROJECT TITLE & LOCATION:

H&W APARTMENTS
IN
MILTON, MA

711 RANDOLPH AVENUE

PLAN TITLE:
EXISTING CONDITIONS

PREPARED FOR:

HD/MW RANDOLPH AVENUE,LLC
519 ALBANY STREET SUITE 200
BOSTON, MA 02118

DATE: OCTOBER 1, 2014
REVISED: NOVEMBER 26, 2014 - DRAFTING EDITS
REVISED: APRIL 4, 2015 - PEER REVIEW EDITS
REVISED: MAY 29, 2015 - PEER REVIEW EDITS
JOB NUMBER: 185.013 | SHEET 2 OF 13

40 20 0 40 80
SCALE: 1"=40'

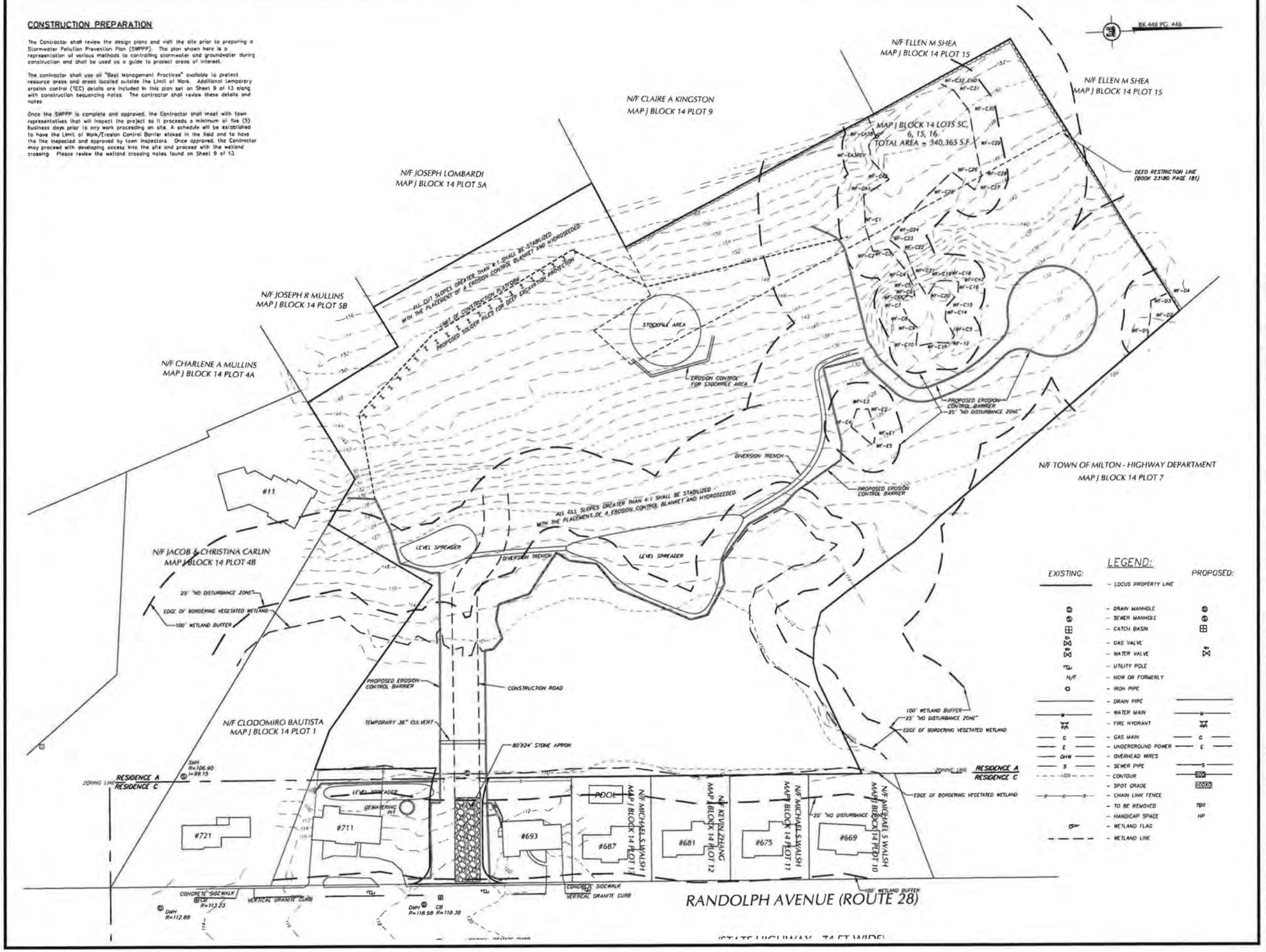
ADD104

CONSTRUCTION PREPARATION

The Contractor shall review the design plans and visit the site prior to preparing a Stormwater Pollution Prevention Plan (SWPPP). The plan shown here is a representation of various methods to controlling stormwater and groundwater during construction and shall be used as a guide to protect areas of interest.

The contractor shall use all "Best Management Practices" available to protect resource areas and areas located outside the Limit of Work. Additional temporary erosion control (TEC) details are included in this plan set on Sheet 9 of 13 along with construction sequencing notes. The contractor shall review these details and notes.

Once the SWPPP is complete and approved, the Contractor shall meet with town representatives that will inspect the project as it proceeds a minimum of five (5) business days prior to any work proceeding on site. A schedule will be established to have the Limit of Work/Erosion Control Barrier staked in the field and to have the line inspected and approved by town inspectors. Once approved, the Contractor may proceed with developing access into the site and proceed with the wetland crossing. Please review the wetland crossing notes found on Sheet 9 of 13.



LEGEND:

EXISTING:		PROPOSED:
	LOCUS PROPERTY LINE	
	DRAIN MANHOLE	
	SEWER MANHOLE	
	CATCH BASIN	
	GAS VALVE	
	WATER VALVE	
	UTILITY POLE	
N/F	NOW OR FORMERLY	
	IRON PIPE	
	DRAIN PIPE	
W	WATER MAIN	W
	FIRE HYDRANT	
G	GAS MAIN	G
E	UNDERGROUND POWER	E
OHW	OVERHEAD WIRES	
S	SEWER PIPE	S
100	CONTOUR	100
	SPOT GRADE	100X0
X X X	CHAIN LINK FENCE	
	TO BE REMOVED	TBR
	HANDICAP SPACE	HP
	WETLAND FLAG	
	WETLAND LINE	

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& Associates, Inc.
1266 Furnace Brook Parkway, Suite 401 Quincy, MA 02169
(617) 405-5100 (O) (617) 405-5101 (F)

JAMES W BURKE, PE — DATE

GENERAL NOTES:

1. LOCUS: ASSESSORS MAP J BLOCK 14 LOT 5C, 6, 15, 16

DEED REFERENCE:
Book 20853 Page 125 Book 20756 Page 187
Book 23180 Page 181
PLAN REFERENCE:
Book 2017 Page 517
Book 2966 Page 351
Book 448 Plan 446 OF 1897 Book 531 Plan 88 OF 2004
Book 547 Plan 29 OF 2005

2. THE LOT SHOWN DOES NOT LIE WITHIN A SPECIAL FLOOD HAZARD ZONE AS DELINEATED ON FIRM 250245 0001B, DATED APRIL 03, 1978.

3. THIS PLAN IS THE RESULT OF AN ON-THE-GROUND SURVEY PERFORMED BY DECELLE-BURKE & ASSOCIATES. WETLANDS DELINEATED BY ECOTEC, INC. AND FIELD LOCATED BY THIS OFFICE.

4. ALL CONSTRUCTION TO CONFORM TO MILTON PUBLIC WORKS AND MASS HIGHWAY STANDARDS.

5. EXISTING UTILITIES WHERE SHOWN IN THE DRAWINGS ARE APPROXIMATE. THE CONTRACTOR SHALL BE RESPONSIBLE FOR PROPERLY LOCATING AND COORDINATING THE PROPOSED CONSTRUCTION ACTIVITY WITH DIG-SAFE AND THE APPLICABLE UTILITY COMPANIES AND MAINTAINING THE EXISTING UTILITY SYSTEM IN SERVICE.

6. DIG-SAFE SHALL BE NOTIFIED PER THE STATE OF MASSACHUSETTS STATUTE CHAPTER 82, SECTION 40B AT TEL 1-888-344-7233. THE ENGINEER DOES NOT GUARANTEE THEIR ACCURACY OR THAT ALL UTILITIES AND SUBSURFACE STRUCTURES ARE SHOWN. LOCATIONS AND ELEVATIONS OF UNDERGROUND UTILITIES WERE TAKEN FROM RECORD PLANS. THE CONTRACTOR SHALL VERIFY SIZE, LOCATION, AND INVERTS OF UTILITIES AND STRUCTURES AS REQUIRED PRIOR TO THE START OF CONSTRUCTION.

7. ALL DISTURBED AREAS TO BE LOAMED AND SEEDED.

8. ELEVATIONS WHERE SHOWN ARE ON TOWN OF MILTON DATUM.

ZONING: RESIDENCE A / C

MINIMUM REQUIREMENTS:
AREA: 40,000 S.F. / 7,500 S.F.
FRONT SETBACK: 30' / 20'
SIDE SETBACK: 15' / 10'
REAR SETBACK: 30' / 30'
LOT FRONTAGE/WIDTH: 150' / 75'

PRESENT OWNERS:

HD/MW Randolph Ave LLC	Map J Block 14 Plot 6
Randolph Avenue Realty Trust	Map J Block 14 Plots 5C &16
HD/MW Randolph Ave LLC	Map J Block 14 Plots 15

PROJECT TITLE & LOCATION:

H&W APARTMENTS
IN
MILTON, MA

711 RANDOLPH AVENUE

PLAN TITLE:
EROSION & SEDIMENTATION CONTROL

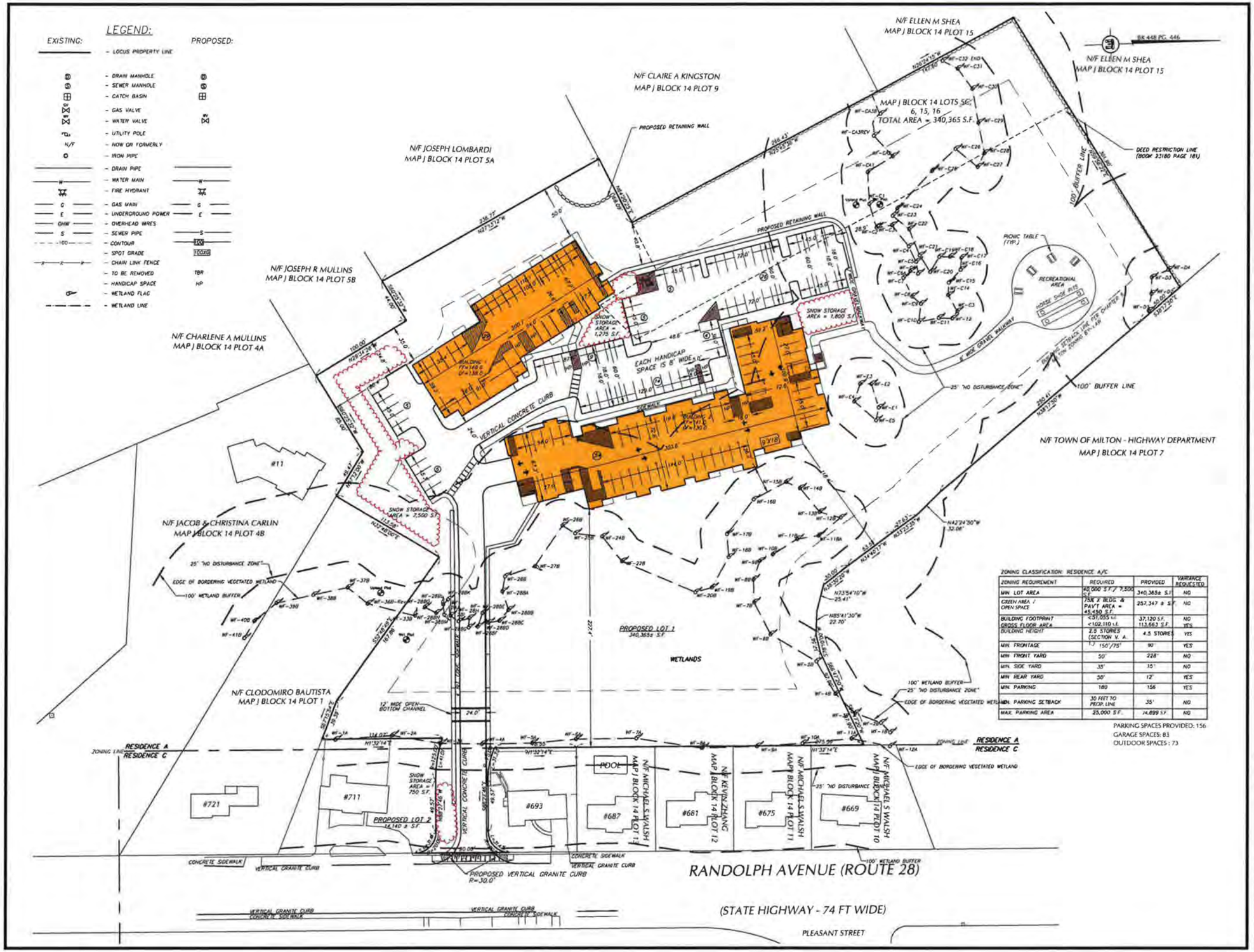
PREPARED FOR:

HD/MW RANDOLPH AVENUE,LLC
519 ALBANY STREET SUITE 200
BOSTON, MA 02118

DATE: OCTOBER 1, 2014
REVISED: NOVEMBER 26, 2014 - DRAFTING EDITS
REVISED: APRIL 4, 2015 - PEER REVIEW EDITS
REVISED: MAY 29, 2015 - PEER REVIEW EDITS
JOB NUMBER: 185.013 — SHEET 3 OF 13

SCALE: 1" = 40'

ADD105



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(617) 405-5100 (O) (617) 405-5101 (F)

COMMONWEALTH OF MASSACHUSETTS
LAWRENCE W. DECELLE, JR.
No. 8158
REGISTERED PROFESSIONAL LAND SURVEYOR

LAWRENCE W. DECELLE, JR. PLS — DATE

GENERAL NOTES:

1. LOCUS: ASSESSORS MAP J BLOCK 14 LOT 5C, 6, 15, 16

DEED REFERENCE:
Book 20653 Page 125 Book 20756 Page 187
Book 23180 Page 181
PLAN REFERENCE:
Book 2917 Page 317
Book 2968 Page 251
Book 448 Plan 446 OF 1997 Book 531 Plan 88 OF 2004
Book 547 Plan 29 OF 2005

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4. ALL CONSTRUCTION TO CONFORM TO MILTON PUBLIC WORKS AND MASS HIGHWAY STANDARDS.

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7. ALL DISTURBED AREAS TO BE LOAMED AND SEEDED.

8. ELEVATIONS WHERE SHOWN ARE ON TOWN OF MILTON DATUM

PRESENT OWNERS:

HD/MW Randolph Ave LLC	Map J Block 14 Plot 6
Randolph Avenue Realty Trust	Map J Block 14 Plots 5C &16
HD/MW Randolph Ave LLC	Map J Block 14 Plots 15

PROJECT TITLE & LOCATION:

H&W APARTMENTS
IN
MILTON, MA

711 RANDOLPH AVENUE

PLAN TITLE:

PROPOSED LAYOUT

PREPARED FOR:

HD/MW RANDOLPH AVENUE,LLC
519 ALBANY STREET SUITE 200
BOSTON, MA 02118

DATE: OCTOBER 1, 2014	
REVISED: NOVEMBER 26, 2014 - DRAFTING EDITS	
REVISED: APRIL 4, 2015 - PEER REVIEW EDITS	
REVISED: MAY 29, 2015 - PEER REVIEW EDITS	
JOB NUMBER: 165.013	SHEET 4 OF 13

40 20 0 40 80
SCALE: 1" = 40'

ADD106

EARTHWORK CALCULATIONS:
14,252 CUBIC YARDS CUT
9,532 CUBIC YARDS FILL
4,720 CUBIC YARDS CUT NET

BK 448 PG. 446

N/F ELLEN M SHEA
MAP J BLOCK 14 PLOT 15

N/F ELLEN M SHEA
MAP J BLOCK 14 PLOT 15

N/F CLAIRE A KINGSTON
MAP J BLOCK 14 PLOT 9

MAP J BLOCK 14 LOTS 5C, 6, 15, 16
TOTAL AREA = 340,365 S.F.

DEED RESTRICTION LINE (BOOK 23180 PAGE 181)

PROPOSED RETAINING WALL

RETAINING WALL TO BE A MINIMUM 6" ABOVE THE EXISTING GRADE

N/F JOSEPH LOMBARDI
MAP J BLOCK 14 PLOT 5A

PROPOSED 2' WIDE 1' HIGH EARTH BERM

PROPOSED RETAINING WALL

N/F JOSEPH R MULLINS
MAP J BLOCK 14 PLOT 5B

PROPOSED 2' WIDE 1' HIGH EARTH BERM

N/F CHARLENE A MULLINS
MAP J BLOCK 14 PLOT 4A

RECREATIONAL AREA

6' WIDE GRAVEL WALKWAY

PROPOSED EROSION CONTROL BARRIER
25' "NO DISTURBANCE ZONE"

PROPOSED EROSION CONTROL BARRIER

N/F TOWN OF MILTON - HIGHWAY DEPARTMENT
MAP J BLOCK 14 PLOT 7

N/F JACOB & CHRISTINA CARLIN
MAP J BLOCK 14 PLOT 4B

25' "NO DISTURBANCE ZONE"

EDGE OF BORDERING VEGETATED WETLAND

100' WETLAND BUFFER

PROPOSED LEVEL SPREADER
24" HEADER
PIPE W/ 4" ORIFICES 4' O.C.

PROPOSED OUTLET CONTROL STRUCTURE

PROPOSED EROSION CONTROL BARRIER

N/F CLODOMIRO BAUTISTA
MAP J BLOCK 14 PLOT 1

12" WIDE OPEN BOTTOM CHANNEL

100' WETLAND BUFFER
25' "NO DISTURBANCE ZONE"
EDGE OF BORDERING VEGETATED WETLAND

ZONING LINE RESIDENCE A / RESIDENCE C

12" SEWER MAIN

#721 #711 #693 #687 #681 #675 #669

POOL

N/F MICHAEL S WALSH MAP J BLOCK 14 PLOT 11

N/F KEVIN ZHANG MAP J BLOCK 14 PLOT 12

N/F MICHAEL S WALSH MAP J BLOCK 14 PLOT 11

N/F MICHAEL S WALSH MAP J BLOCK 14 PLOT 10

25' "NO DISTURBANCE"

100' WETLAND BUFFER

CONCRETE SIDEWALK
VERTICAL GRANITE CURB

TO BE RE-LOCATED

MEET EXISTING GRADE

RANDOLPH AVENUE (ROUTE 28)

(STATE HIGHWAY - 74 FT WIDE)

LEGEND:

EXISTING:		PROPOSED:
	LOCUS PROPERTY LINE	
	DRAIN MANHOLE	
	SEWER MANHOLE	
	CATCH BASIN	
	GAS VALVE	
	WATER VALVE	
	UTILITY POLE	
N/F	NOW OR FORMERLY	
	IRON PIPE	
	DRAIN PIPE	
W	WATER MAIN	W
	FIRE HYDRANT	
G	GAS MAIN	G
E	UNDERGROUND POWER	E
OHW	OVERHEAD WIRES	
S	SEWER PIPE	S
100	CONTOUR	100
	SPOT GRADE	TOC/BC
X X X	CHAIN LINK FENCE	
	TO BE REMOVED	TBR
	HANDICAP SPACE	HP
	WETLAND FLAG	
	WETLAND LINE	
	INSPECTION/MAINTENANCE MANHOLE	

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& Associates, Inc.
1286 Furnace Brook Parkway, Suite 401 Quincy, MA 02169
(617) 405-5100 (O) (617) 405-5101 (F)

JAMES W BURKE, PE — DATE

GENERAL NOTES:
1. LOCUS: ASSESSORS MAP J BLOCK 14 LOT 5C, 6, 15, 16

DEED REFERENCE:
Book 20553 Page 125 Book 20756 Page 187
Book 23180 Page 181
PLAN REFERENCE:
Book 2817 Page 517
Book 2966 Page 351
Book 448 Plan #46 OF 1997 Book 531 Plan 88 OF 2004
Book 547 Plan 29 OF 2005

2. THE LOT SHOWN DOES NOT LIE WITHIN A SPECIAL FLOOD HAZARD ZONE AS DELINEATED ON FIRM 250245 0001B, DATED APRIL 03, 1978.

3. THIS PLAN IS THE RESULT OF AN ON-THE-GROUND SURVEY PERFORMED BY DECELLE-BURKE & ASSOCIATES WETLANDS DELINEATED BY ECOTEC, INC AND FIELD LOCATED BY THIS OFFICE.

4. ALL CONSTRUCTION TO CONFORM TO MILTON PUBLIC WORKS AND MASS HIGHWAY STANDARDS.

5. EXISTING UTILITIES WHERE SHOWN IN THE DRAWINGS ARE APPROXIMATE. THE CONTRACTOR SHALL BE RESPONSIBLE FOR PROPERLY LOCATING AND COORDINATING THE PROPOSED CONSTRUCTION ACTIVITY WITH DIG-SAFE AND THE APPLICABLE UTILITY COMPANIES AND MAINTAINING THE EXISTING UTILITY SYSTEM IN SERVICE.

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7. ALL DISTURBED AREAS TO BE LOAMED AND SEEDED

8. ELEVATIONS WHERE SHOWN ARE ON TOWN OF MILTON DATUM.

ZONING: RESIDENCE A / C

MINIMUM REQUIREMENTS:
AREA: 40,000 S.F. / 7,500 S.F.
FRONT SETBACK: 30' / 20'
SIDE SETBACK: 15' / 10'
REAR SETBACK: 30' / 30'
LOT FRONTAGE/WIDTH: 150' / 75'

PRESENT OWNERS:

HD/MW Randolph Ave LLC	Map J Block 14 Plot 6
Randolph Avenue Realty Trust	Map J Block 14 Plots 5C &16
HD/MW Randolph Ave LLC	Map J Block 14 Plots 15

PROJECT TITLE & LOCATION:

H&W APARTMENTS
IN
MILTON, MA

711 RANDOLPH AVENUE

PLAN TITLE:
GRADING & DRAINAGE

PREPARED FOR:

HD/MW RANDOLPH AVENUE,LLC
519 ALBANY STREET SUITE 200
BOSTON, MA 02118

DATE: OCTOBER 1, 2014
REVISED: NOVEMBER 26, 2014 - DRAFTING EDITS
REVISED: APRIL 4, 2015 - PEER REVIEW EDITS
REVISED: MAY 29, 2015 - PEER REVIEW EDITS
JOB NUMBER: 185.013 — SHEET 5 OF 13

SCALE: 1" = 40'

UTILITY NOTES:
1. THE PROPOSED WATER SYSTEM SHALL BE INSTALLED IN ACCORDANCE WITH THE AMERICAN WATER WORKS ASSOCIATION (AWWA) REQUIREMENTS, MILTON WATER REGULATIONS AND WITH THE MILTON DEPARTMENT OF PUBLIC WORKS STANDARDS AND SPECIFICATIONS

2. THE PROPOSED SEWAGE COLLECTION SYSTEM SHALL BE INSTALLED IN ACCORDANCE WITH THE AMERICAN WATER WORKS ASSOCIATION (AWWA) REQUIREMENTS, MILTON SEWER REGULATIONS AND WITH THE MILTON DEPARTMENT OF PUBLIC WORKS STANDARDS AND SPECIFICATIONS

N/F ELLEN M SHEA
MAP J BLOCK 14 PLOT 15

BK 448 PG. 446

N/F CLAIRE A KINGSTON
MAP J BLOCK 14 PLOT 9

MAP J BLOCK 14 LOTS 5C, 6, 15, 16
TOTAL AREA = 340,365 S.F.

PROPOSED RETAINING WALL

DEED RESTRICTION LINE (BOOK 23180 PAGE 181)

N/F JOSEPH LOMBARDI
MAP J BLOCK 14 PLOT 5A

INSPECTION/MAINTENANCE MANHOLE RIM TO BE BROUGHT TO GRADE (TYP.)

N/F JOSEPH R MULLINS
MAP J BLOCK 14 PLOT 5B

N/F CHARLENE A MULLINS
MAP J BLOCK 14 PLOT 4A

BUILDING 1
FF=149.0
GF=138.0

HANCOR 30"ø CHAMBERS BOT. OF STONE = 133.0

HANCOR 30"ø CHAMBERS BOT. OF STONE = 135.0

HANCOR 30"ø CHAMBERS BOT. OF STONE = 124.0

HANCOR 30"ø CHAMBERS BOT. OF STONE = 125.0

BUILDING 2
FF=141.0
GF=130.0

25' "NO DISTURBANCE ZONE"

N/F TOWN OF MILTON - HIGHWAY DEPARTMENT
MAP J BLOCK 14 PLOT 7

CONNECT NEW 8" WATER MAIN TO EXISTING 6" WATER MAIN LOCATED WITHIN THE MILTON DPW YARD

PROP. TRANSFORMER

#11

N/F JACOB & CHRISTINA CARLIN
MAP J BLOCK 14 PLOT 4B

EDGE OF BORDERING VEGETATED WETLAND

100' WETLAND BUFFER

PROPOSED LEVEL SPREADER 24" HEADER PIPE W/ 4" ORIFICES 4' O.C. I=115.0

PROPOSED OUTLET CONTROL STRUCTURE R=127.5 I(in)=124.0 I(out)=113.5

N/F CLODOMIRO BAUTISTA
MAP J BLOCK 14 PLOT 1

12" WIDE OPEN BOTTOM CHANNEL

8" PVC SEWER

RIP-RAP APRON

ZONING LINE RESIDENCE A / RESIDENCE C

12" SEWER MAIN

10" MIN.

#721

#711

#693

#687

#681

#675

#669

POOL

N/F MICHAEL S WALSH MAP J BLOCK 14 PLOT 13

N/F KEVIN ZHANG MAP J BLOCK 14 PLOT 12

N/F MICHAEL S WALSH MAP J BLOCK 14 PLOT 11

N/F MICHAEL S WALSH MAP J BLOCK 14 PLOT 10

HANCOR 30"ø CHAMBERS BOT. OF STONE = 111.0

CONCRETE SIDEWALK
VERTICAL GRANITE CURB

TO BE RE-LOCATED

RANDOLPH AVENUE (ROUTE 28)

(STATE HIGHWAY - 74 FT WIDE)

PLEASANT STREET

LEGEND:

EXISTING:		PROPOSED:
	LOCUS PROPERTY LINE	
	DRAIN MANHOLE	
	SEWER MANHOLE	
	CATCH BASIN	
	GAS VALVE	
	WATER VALVE	
	UTILITY POLE	
N/F	NOW OR FORMERLY	
	IRON PIPE	
	DRAIN PIPE	
	WATER MAIN	W
	FIRE HYDRANT	
G	GAS MAIN	G
E	UNDERGROUND POWER	E
OHW	OVERHEAD WIRES	
S	SEWER PIPE	S
-100-	CONTOUR	100
	SPOT GRADE	100.00
	CHAIN LINK FENCE	
	TO BE REMOVED	TBR
	HANDICAP SPACE	HP
	WETLAND FLAG	
	WETLAND LINE	
	INSPECTION/MAINTENANCE MANHOLE	

DeCELLE
BURKE
& Associates, Inc.
1266 Furnace Brook Parkway, Suite 401 Quincy, MA 02169
(617) 405-5100 (O) (617) 405-5101 (F)

JAMES W BURKE, PE — DATE

GENERAL NOTES:
1. LOCUS: ASSESSORS MAP J BLOCK 14 LOT 5C, 6, 15, 16

DEED REFERENCE:
Book 20853 Page 125 Book 20756 Page 187
Book 23180 Page 181
PLAN REFERENCE:
Book 2917 Page 317
Book 2966 Page 351
Book 448 Plan 446 OF 1997 Book 531 Plan 88 OF 2004
Book 547 Plan 29 OF 2005

2. THE LOT SHOWN DOES NOT LIE WITHIN A SPECIAL FLOOD HAZARD ZONE AS DELINEATED ON FIRM 250245 0001B, DATED APRIL 03, 1978.

3. THIS PLAN IS THE RESULT OF AN ON-THE-GROUND SURVEY PERFORMED BY DECELLE-BURKE & ASSOCIATES WETLANDS DELINEATED BY ECOTEC, INC. AND FIELD LOCATED BY THIS OFFICE.

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ZONING: RESIDENCE A / C
MINIMUM REQUIREMENTS:
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FRONT SETBACK: 30' / 20'
SIDE SETBACK: 15' / 10'
REAR SETBACK: 30' / 30'
LOT FRONTAGE/WIDTH: 150' / 75'

PRESENT OWNERS:

HD/MW Randolph Ave LLC	Map J Block 14 Plot 6
Randolph Avenue Realty Trust	Map J Block 14 Plots 5C &16
HD/MW Randolph Ave LLC	Map J Block 14 Plots 15

PROJECT TITLE & LOCATION:

H&W APARTMENTS
IN
MILTON, MA

711 RANDOLPH AVENUE

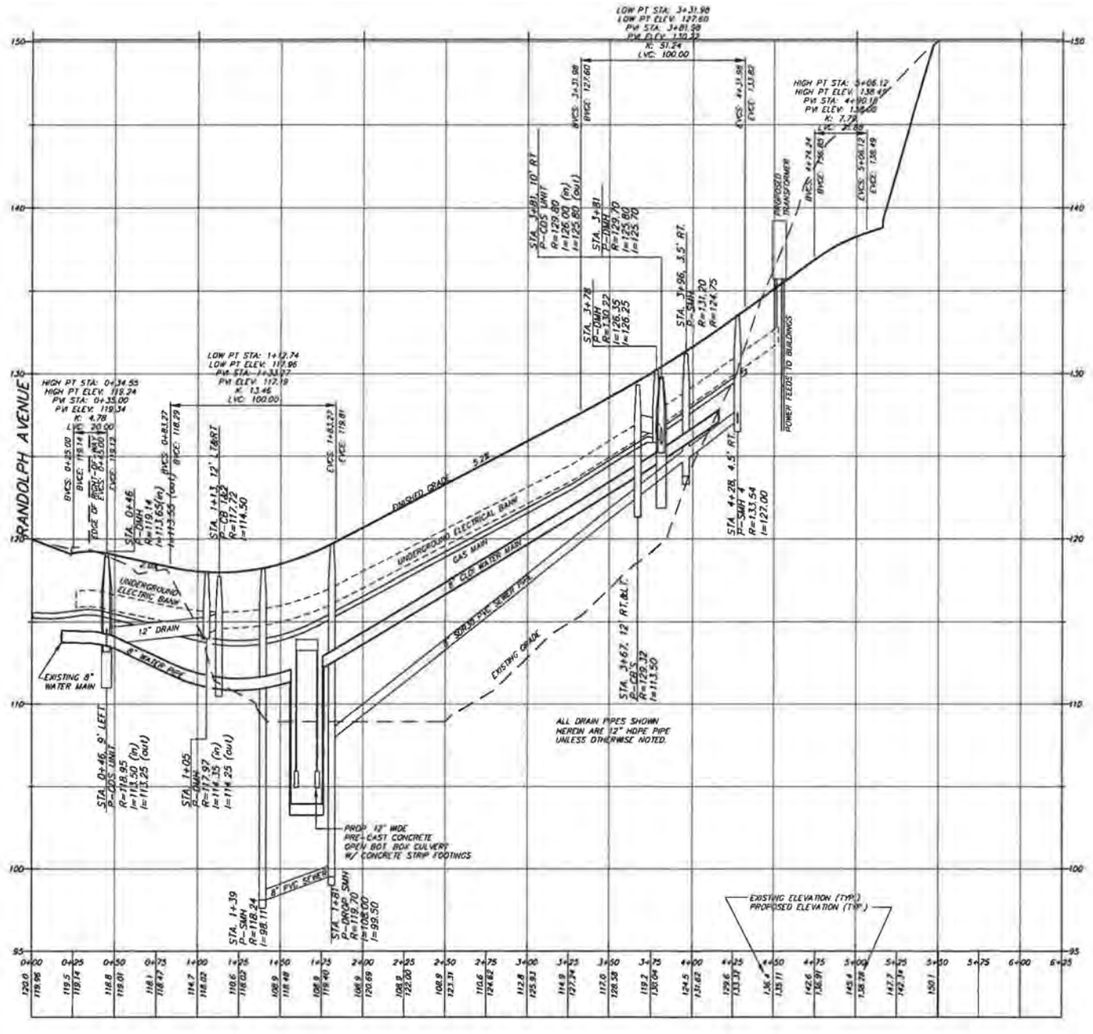
PLAN TITLE:
UTILITIES

PREPARED FOR:
HD/MW RANDOLPH AVENUE,LLC
519 ALBANY STREET SUITE 200
BOSTON, MA 02118

DATE: OCTOBER 1, 2014
REVISED: NOVEMBER 26, 2014 - DRAFTING EDITS
REVISED: APRIL 4, 2015 - PEER REVIEW EDITS
REVISED: MAY 29, 2015 - PEER REVIEW EDITS
JOB NUMBER: 185.013 — SHEET 6 OF 13

SCALE: 1" = 40'

ADD108



DeCELLE
BURKE
& Associates, Inc.
1266 Furnace Brook Parkway, Suite 401 Quincy, MA 02169
(617) 405-5100 (O) (617) 405-5101 (F)

JAMES W BURKE, PE DATE

GENERAL NOTES:

1. LOCUS: ASSESSORS MAP J BLOCK 14 LOT 5C, 6, 15, 16

DEED REFERENCE:
Book 20853 Page 125 Book 20756 Page 187
Book 23180 Page 181
PLAN REFERENCE:
Book 2917 Page 317
Book 2966 Page 351
Book 448 Plan 446 OF 1897 Book 531 Plan 86 OF 2004
Book 547 Plan 29 OF 2005

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Randolph Avenue Realty Trust	Map J Block 14 Plots 5C & 16
HD/MW Randolph Ave LLC	Map J Block 14 Plots 15

PROJECT TITLE & LOCATION:

H&W APARTMENTS
IN
MILTON, MA

711 RANDOLPH AVENUE

PLAN TITLE:

DRIVEWAY PROFILE

PREPARED FOR:

HD/MW RANDOLPH AVENUE,LLC
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BOSTON, MA 02118

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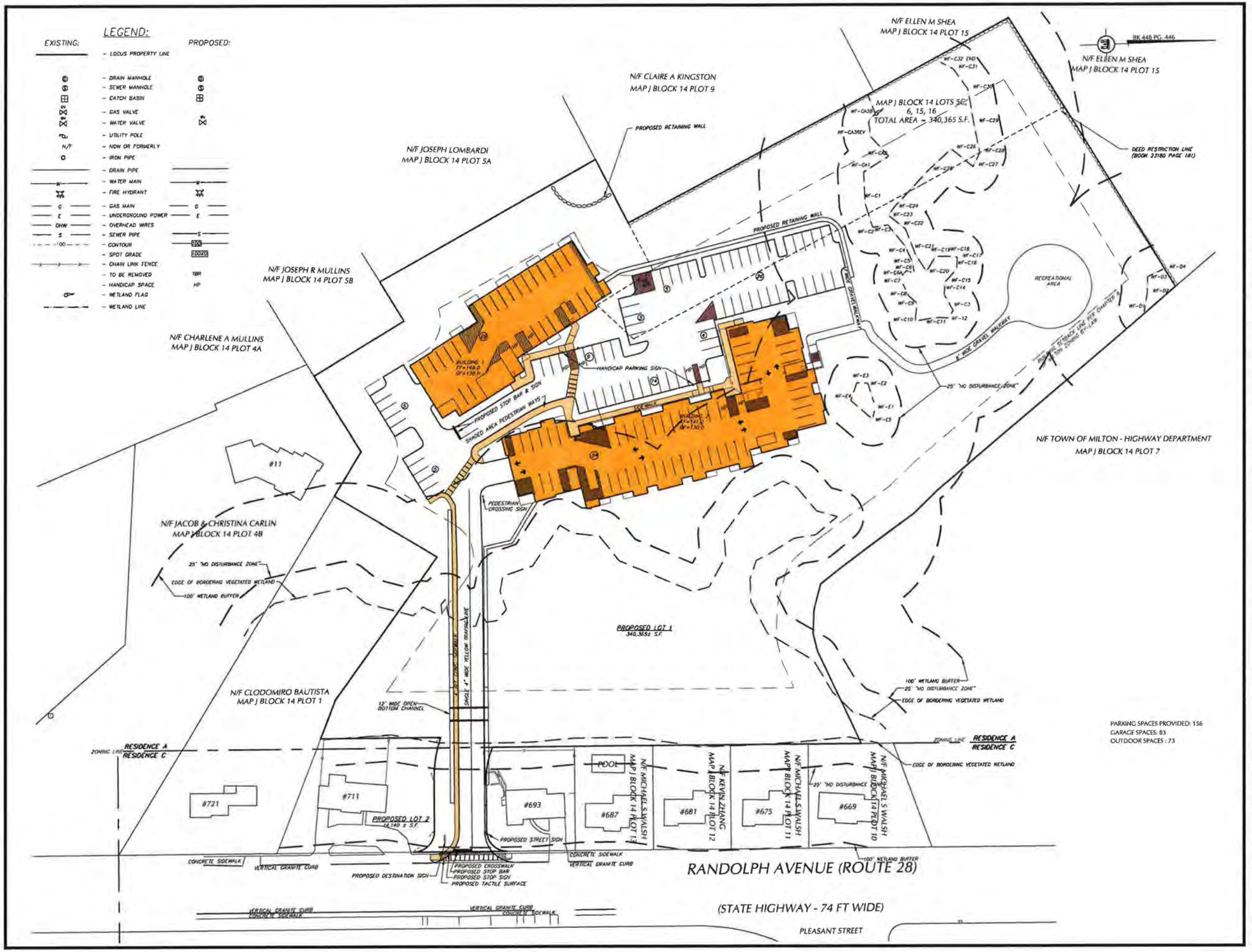
JOB NUMBER: 185.013 SHEET 7 OF 13

40 20 0 40 80
SCALE: 1" = 40'



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1266 Furnace Brook Parkway, Suite 401 Quincy, MA 02169
(617) 405-5100 (O) (617) 405-5101 (F)

LAWRENCE W. DECELLE, JR. PLS — DATE

GENERAL NOTES:

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Randolph Avenue Really Trust	Map J Block 14 Plots 5C & 16
HD/MW Randolph Ave LLC	Map J Block 14 Plots 15

PROJECT TITLE & LOCATION:

H&W APARTMENTS IN MILTON, MA

711 RANDOLPH AVENUE

PLAN TITLE:

PROPOSED SIGNAGE

PREPARED FOR:

HD/MW RANDOLPH AVENUE,LLC
519 ALBANY STREET SUITE 200
BOSTON, MA 02118

DATE: OCTOBER 1, 2014
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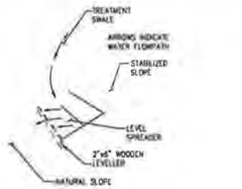
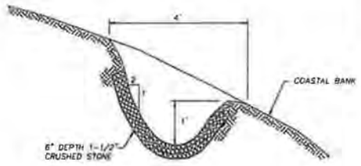
SCALE: 1" = 40'

ADD110

CONSTRUCTION SPECIFICATIONS

1. Construct the level spreader lip on a zero percent grade to ensure uniform spreading of runoff.
2. Level spreader shall be constructed on undisturbed soil and not fill.
3. An erosion stop shall be placed vertically a minimum of 6" inches deep in a slit trench one foot back of the level lip and parallel to the lip. The erosion stop shall extend the entire length of the lip.
4. The entire level lip area shall be protected by placing two strips of jute or excelsior matting along the lip. Each strip shall overlap the erosion stop by at least 6" inches.
5. The entrance channel to the level spreader shall not exceed a 1 percent grade for at least 50 feet before entering the spreader.
6. The flow from the level spreader shall outlet onto stabilized areas. Water should not reconcentrate immediately below the spreader.
7. Periodic inspection and maintenance shall be performed if required.





TEMPORARY DIVERSION SWALE
NOT TO SCALE

TEMPORARY LEVEL SPREADER
NOT TO SCALE

CONSTRUCTION SEQUENCE / METHODOLOGY

Erosion and Sedimentation Control

– Contractor to prepare a Stormwater Pollution Prevention Plan (SWPPP) to comply with the EPA's National Pollution Discharge Elimination Systems (NPDES) General Permit Conditions for a Construction Project prior to any ground disturbance associated with the proposed construction. The SWPPP will include a Soil and Erosion Control Plan that conforms to all locally issued permits as well as the NPDES requirements.
– Contractor shall prevent any illicit discharge to occur on site. Per Standard No 10 of the MassDEP Stormwater Management Standards, there shall be no illicit discharges to the stormwater management system. The Contractor during construction is responsible for implementing the Erosion and Sedimentation Control Plan and the Operation and Maintenance Plan and overseeing activities at the facility to prevent illicit discharges to the drainage system from occurring. It is strictly prohibited to discharge any products or substances onto the ground surface or into any drainage structures, such as catch basin inlets, manholes, water quality units, forebays, basin or drainage outlets that would be a detriment to the environment.
– Contractor to stake limit of work in the field by instrument survey. The erosion control barrier shall be installed at this demarcation. This includes the stream crossing area.
– Prior to any construction activities, install temporary erosion controls (TEC) as shown on the site plans. Additional erosion control fencing may be in the form of wattles, haybales, siltation fencing or a combination of both. (Hand clearing of limited vegetation may be required in order to install the erosion control barriers.
– Construct the stone construction drive at the construction vehicle egress point.

Culvert Installation / Stream Crossing

– Contractor to work from the upland area toward the wetland crossing to maintain the existing hydraulic connection. The road construction moving from upland areas to wet areas will allow the contractor to use the compacted sub-grade surface as a work platform to minimize rutting. Contractor to use no more than 250 horsepower, 40 ton excavator.
– Contractor to install dewatering devices and additional TEC devices as required by individual construction area constraints to protect the downgradient wetland and direct water and potential runoff toward the dewatering pit.
– Contractor to work quickly to minimize dewatering impacts generated from excavation work for the wall construction and culvert installation.
– As the Contractor moves toward soils that have potential value for future replication use, the Environmental Monitor and a wetland soil scientist hired by the owner will determine if the organic soil material is to be stockpiled outside of the jurisdictional wetland areas.
– Contractor to schedule wetland crossing and culvert installation for summer months during low flow conditions. The Contractor shall monitor weather reports and schedule excavation a minimum of 48 hours prior to any predicted precipitation event for the wetland and stream crossing wall construction.
– Contractor to place TEC devices such as a wattles or staked haybales up stream and downstream of the wetland crossing. Installed Limit of Work / Erosion Control Barriers to be inspected and repaired as necessary.
– Contractor to excavate organic material and other deleterious material at new roadway location and retaining wall base. A crushed stone base is to be placed and the proposed pre-cast concrete wall is to be installed at the elevation shown on the plan.
– Contractor to install water and sewer utilities and cap ends for future connection
– Contractor to prepare subgrade as required for wall installation adjacent to the culvert. This includes removing organic soil replacing the soil with a structural 1-1/2" crushed stone and compacting the wall base level and to a compaction of 95%. Dewatering may be necessary for this work. Dewatering devices shall be ready for service prior to this excavation work beginning.
– Contractor to place pre-cast block wall courses moving from the upland area to the culvert location.
– Contractor to place clean, compact fill in 18" lifts within the driveway limits
– Contractor to install temporary culvert for use during construction of proposed culvert.
– Contractor to install culvert PIP strip footing with crushed stone base.
– Contractor to place open bottom box culvert once footing is ready for installation.
– Contractor to carefully backfill the culvert and install the pre-cast block retaining wall around the culvert as specified by the wall construction plans. Contractor to purge culvert and wall joints to form a uniform wall surface.
–Contractor to repeat process and continue to place retaining wall blocks to construct construction road to cross wetland area.

Once culvert is installed and a construction road provides access to the westerly side of the project site, the Contractor shall proceed with the placement of TEC devices at the limit of work. Contractor shall proceed with the clearing the site and preparing the site for construction.

Cutting, Grubbing and Stripping

– Trees should be felled, if possible, in a direction to prevent the diversion and concentration of stormwater runoff around the trunks.
– Erosion control devices should be in place as shown on the design plans before clearing commences.
– Establish stockpile area for additional TEC devices, mulch, construction soils, etc...
– Clear only trees that are within the limits of the construction and other site improvements or work as shown on site plans.
– Brush and branches should be mulched and stockpiled on-site for use as temporary erosion control.
– Stripping should be done in manner that will not concentrate runoff. If precipitation is expected, earthen berms, should be constructed around the area being stripped with a silt fence or haybale dike located in an arc at the low point of the berm.
– If intense precipitation is expected, haybales and silt fence should be stockpiled and used to prevent erosion and sediment transport.
– Dust should be held at a minimum by sprinkling exposed soil with the appropriate amount of water at the appropriate time. A water truck shall be on call during this stage of work.
– Stabilize all exposed surfaces that will not be under immediate construction.
– Install additional TEC devices as required to prevent sediment transport into resource areas.
– Place a ring of hay bales around stockpiles.

Roadway Subbase, Utility and Building Construction

– Install temporary culverts and diversion ditches and additional TEC devices as required by individual construction area constraints to direct potential runoff toward the replication area for short term stormwater control.
– Wetland replication areas are to be excavated and stabilized once the construction road is constructed prior to any excavation work proceeding upgradient of the area. This area shall be used for temporary stormwater control during construction.
– Excavate loam, subsoil and other deleterious material undesirable for building and wall support.
– Prepare wall subgrade for wall installation. Install first pre-cast block wall and backfill in 18" lifts.
– Rough grade site to establish building platform to construct building foundations and install utilities.
– Apply water to control air suspension of dust. Avoid creating an erosive condition due to over-watering.
– Contractor to excavate for building foundation at the location and elevations specified in the plans. A crushed stone base is to be placed and the proposed concrete footing and wall is to be poured into forms, allowed to cure and backfilled once the forms are stripped.
– Install utilities separately. Excavate and backfill as required.
– Contractor to install sewer first and the drainage second. Other utilities such as water and electric may proceed after the sewer and drain is installed.
– Contractor to install sewer at location and elevation specified in the plans. Contractor to trench, place a crushed stone bed install pipe and backfill in compacted 12" lifts.
– Final connection to the public sewer will be made once buildings are completed.
– Contractor to install catch basins, drain manholes and water quality structures at location and elevations specified on the plan.
– Contractor to excavate for the underground detention basins at the locations and elevations specified on the plans. Crushed stone bed shall be placed in the excavation limits and the perforated pipe installed.
– Excavations for the drainage systems should not be left open when rainfall is expected overnight.
– All catch basin openings should be covered by plywood placed between the grate and the frame or projected from sediment by a TEC device surrounding the catch basin grate. In some situations it may be necessary to keep catch basins open. Appropriate arrangements should be made downstream to remove all sediment deposition prior to the release into the underground detention basins.
– Contractor to trench and install drainage pipe to connect the stormwater management system components.
– Contractor to finish utility installation once sewer and drainage systems are installed.
– Contractor to fine grade site for the installation of curbing and final surface construction.

– Place and compact gravel as work progresses to control erosion potential. If water is required for soil compaction, it should be added in a uniform manner that does not allow excess water to flow off the area being compacted.
– During the placement of sub-base and pavement, the entrances to the stormwater drainage systems should be sealed if rain is expected. When these entrances are closed, consideration must be given to the direction of run-off and measures should be undertaken to minimize erosion and provide for the collection of sediment.

Wetland Replication

– Wetland replication area shall be excavated out of deleterious material accrued during the use of this area for short term stormwater management. This material shall be disposed of in a legal manner.
Loam stockpiled from the wetland and crossing excavation shall be placed in accordance with the approved wetland replication protocol. Native wetland plantings approved for installations shall be installed and the site stabilized with a wetland seed mix.

Remaining Site Construction

– Place gravel base for parking lots, drives and sidewalks. Fine grade gravel to grades specified in the plan.
– Contractor to install curbing and bring utility castings to final grade.
– Compact pavement base as work progresses.
– Install pavement binder coat.

Finished Landscaping

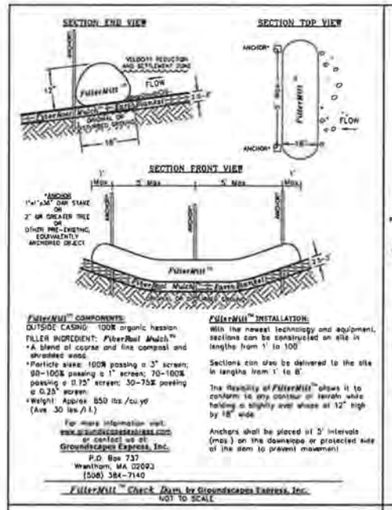
– Install native trees and shrubs along drive and adjacent to homes for aesthetic and habitat purposes.
– Hydro-seed all disturbed areas after loam is placed and fine graded.

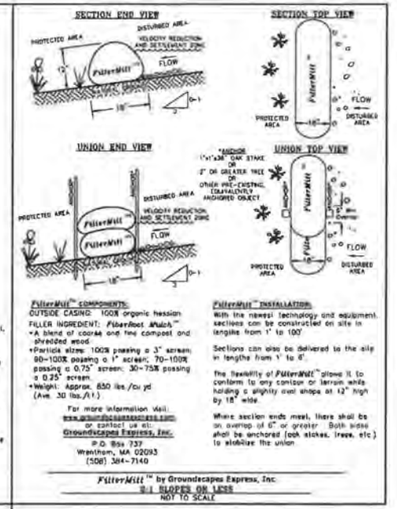
Finish Paving

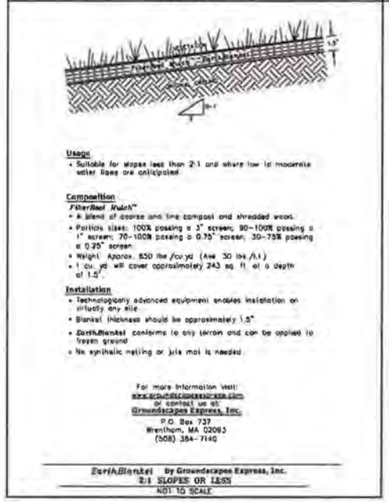
– Repair and stabilize damaged side slopes.
– Clean inverts of drainage structures.
– Install final top coat of pavement.

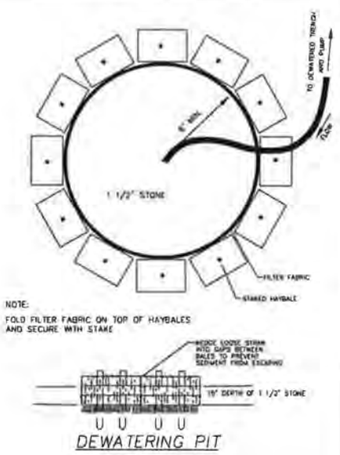
Final Clean-up

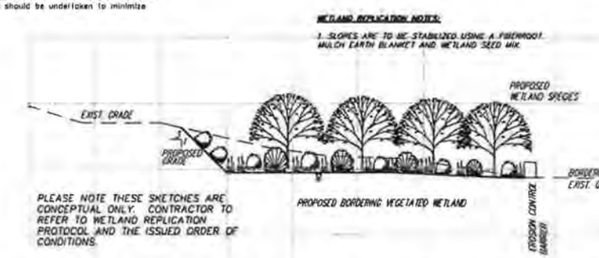
– Clean inverts of culverts and catch basins.
– Remove sediment and debris from rip-rap outlet areas.
– Remove TEC devices only after permanent vegetation has been fully established.



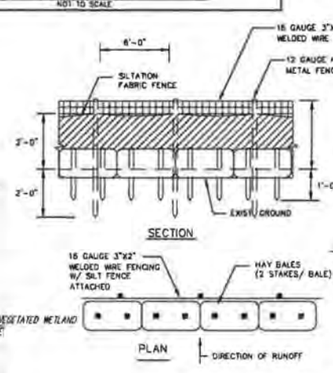








CONCEPTUAL WETLAND & VERNAL POOL REPLICATION DETAIL



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IN
MILTON, MA

711 RANDOLPH AVENUE

PLAN TITLE:

DETAILS

PREPARED FOR:

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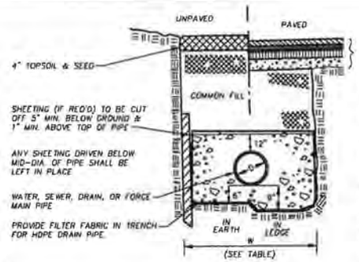
ADD111



PAVE AS SPECIFIED

NOTES:

1. COMMON FILL MATERIAL TO CONSIST OF GRANULAR MATERIAL CONTAINING NO STONES LARGER THAN 6" IN GREATEST DIMENSION.
2. BACKFILL WITH CLEAN SAND TO 12" OVER PIPE FOR WATERMAINS.
3. BACKFILL WITH SELECT MATERIAL CONTAINING NO STONES LARGER THAN 3" IN GREATEST DIMENSION TO 12" OVER PIPE FOR SEWER AND DRAIN PIPES.
4. PROVIDE SCREENED GRAVEL BEDDING TO MID PIPE DIAMETER FOR SANITARY SEWERS AND WHERE GROUNDWATER IS ENCOUNTERED AS DIRECTED BY THE ENGINEER.
5. REMOVE UNSUITABLE MATERIAL BELOW GRADE IF ENCOUNTERED, TO SUITABLE DEPTHS AS DIRECTED BY ENGINEER AND REPLACE WITH CLEAN GRANULAR FILL.
6. PROVIDE FILTER FABRIC IN TRENCHES FOR HDPE DRAIN PIPE.

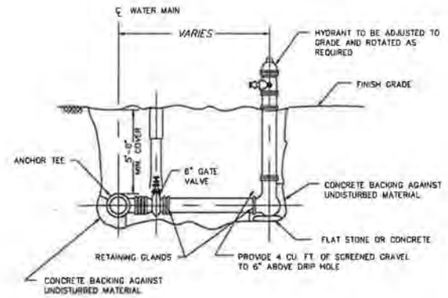
TRENCH WIDTH			
D DIAMETER OF PIPE	W UNSHEETED	W SHEETED	
TO 12"	3'	4'	
14" TO 24"	4'	5'	
30" TO 36"	5'	6'	

NOTES:

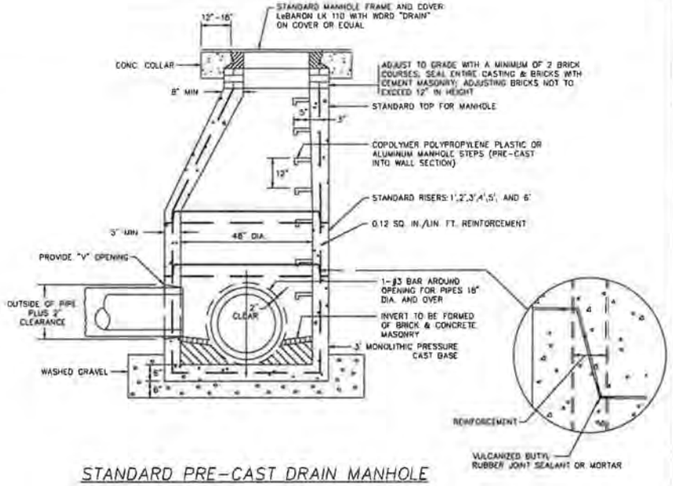
1. ALL TRENCH CONSTRUCTION TO CONFORM TO APPLICABLE FEDERAL, STATE AND LOCAL REGULATIONS.
2. COMPACT FILL AND TAMP PIPE TO 93% MAX. DENSITY UNLESS OTHERWISE SPECIFIED.

TYPICAL TRENCH SECTIONS

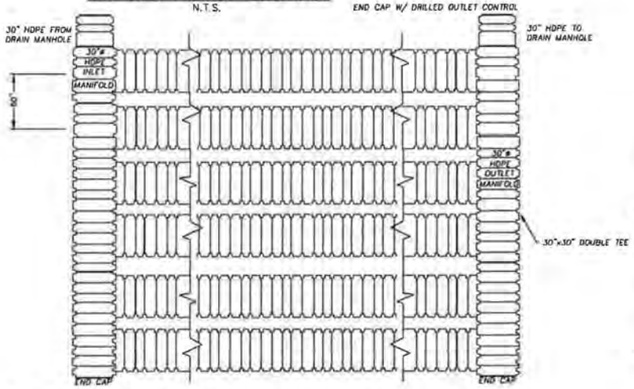
N.T.S.



TYPICAL HYDRANT AND VALVE DETAIL



STANDARD PRE-CAST DRAIN MANHOLE



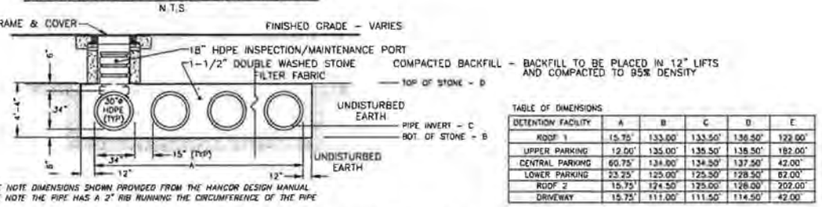
THE UNDERGROUND DETENTION FACILITY IS A SERIES OF CONNECTED PIPES: LATERALS AND MANIFOLDS. 3-30" MANIFOLDS, ONE DISTRIBUTION, ONE COLLECTION AND 30" LATERALS.

- THE SYSTEM SHOWN HEREIN IS THE FACILITY FOR THE UPPER AND CENTRAL PARKING LOTS W/ 36-1 FOOT LONG LATERALS AND 180 FOOT LONG MANIFOLDS
- THE ROOF 1 HAS 60-1 FOOT LONG LATERALS AND 4-120 FOOT FOOT LONG MANIFOLDS
- THE LOWER PARKING LOT HAS 12-1 FOOT LONG LATERALS AND 6-60 FOOT LONG MANIFOLDS
- ROOF 2 HAS 40-1 FOOT LONG LATERALS AND 2-200 FOOT LONG MANIFOLDS.
- SYSTEMS ARE FED FROM ONE END AND FLOW CONTROLLED USING AN DRILLED END CAP.

THIS OFFICE DESIGNED THE SYSTEM USING HANCOR PRODUCTS, SPECIFICALLY THE HI-Q SYSTEM WITH SOLID PIPE WALLS, HOWEVER THE CONTRACTOR CAN PROVIDE AN EQUAL STORMWATER MANAGEMENT SYSTEM IF APPROVED BY THIS OFFICE AND THE MILTON PLANNING BOARD. THE INSTALLATION SHALL BE IN ACCORDANCE WITH THE MANUFACTURERS INSTRUCTIONS.

SUBSURFACE DETENTION FACILITY

N.T.S.



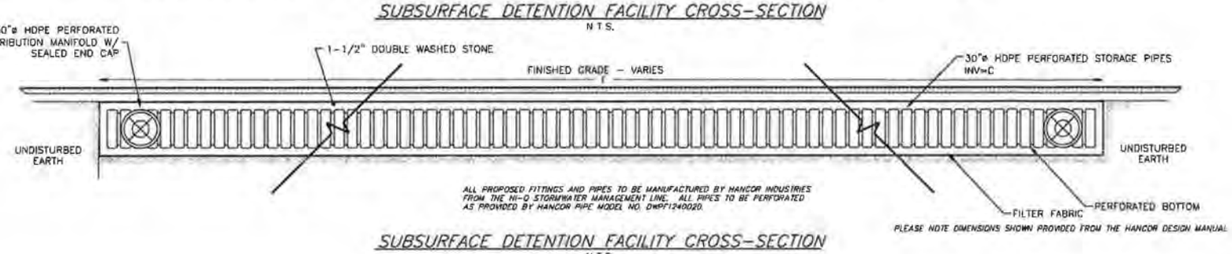
PLEASE NOTE DIMENSIONS SHOWN PROVIDED FROM THE HANCOR DESIGN MANUAL
PLEASE NOTE THE PIPE HAS A 2" RIB RUNNING THE CIRCUMFERENCE OF THE PIPE

TABLE OF DIMENSIONS

DETENTION FACILITY	A	B	C	D	E
ROOF 1	15.75'	133.00'	133.50'	136.50'	122.00'
UPPER PARKING	12.00'	135.00'	135.50'	138.50'	182.00'
CENTRAL PARKING	60.75'	134.00'	134.50'	137.50'	42.00'
LOWER PARKING	23.25'	125.00'	125.50'	128.50'	82.00'
ROOF 2	15.75'	124.50'	125.00'	128.00'	202.00'
DRIVEWAY	15.75'	111.00'	111.50'	114.50'	42.00'

SUBSURFACE DETENTION FACILITY CROSS-SECTION

N.T.S.

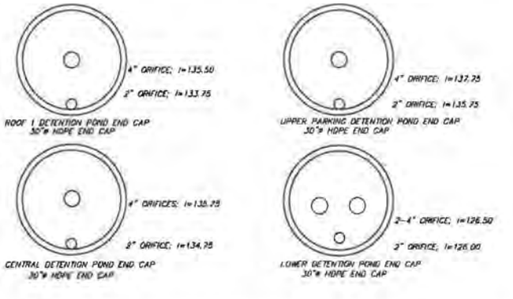


ALL PROPOSED FITTINGS AND PIPES TO BE MANUFACTURED BY HANCOR INDUSTRIES FROM THE HI-Q STORMWATER MANAGEMENT LINE. ALL PIPES TO BE PERFORATED AS PROVIDED BY HANCOR PIPE MODEL NO. 0MPF1240020.

PLEASE NOTE DIMENSIONS SHOWN PROVIDED FROM THE HANCOR DESIGN MANUAL

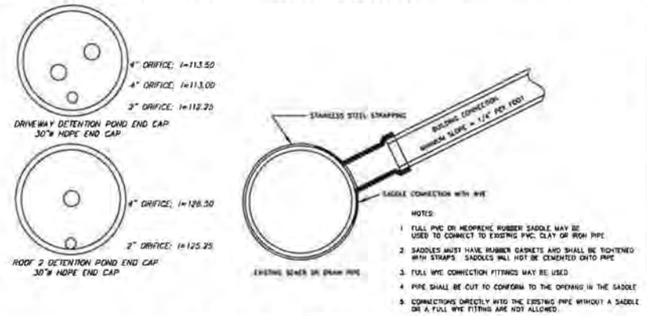
SUBSURFACE DETENTION FACILITY CROSS-SECTION

N.T.S.



OUTLET CONTROL 30" HDPE END CAP

N.T.S.

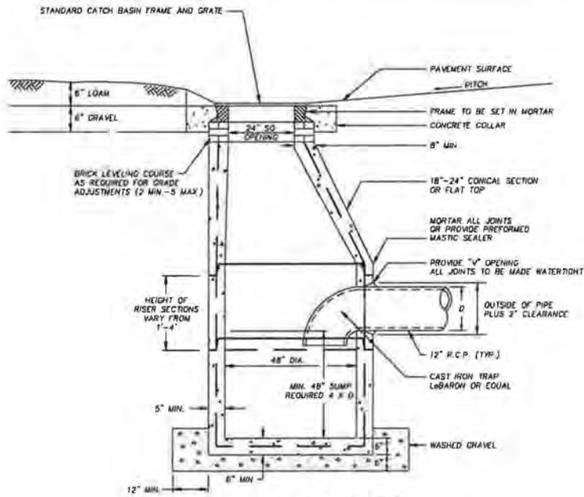


NOTES:

1. FULL PVC OR NEOPRENE RUBBER SADDLE MAY BE USED TO CONNECT TO EXISTING PVC, CLAY OR IRON PIPE
2. SADDLES MUST HAVE RUBBER GASKETS AND SHALL BE TIGHTENED WITH STRAPS. SADDLES WILL NOT BE CEMENTED ONTO PIPE
3. FULL WYE CONNECTION FITTINGS MAY BE USED
4. PIPE SHALL BE CUT TO CONFORM TO THE OPENING IN THE SADDLE
5. CONNECTIONS DIRECTLY INTO THE EXISTING PIPE WITHOUT A SADDLE OR A FULL WYE FITTING ARE NOT ALLOWED.

DRAIN AND SEWER SADDLE CONNECTION

N.T.S



NOTE: REFER TO DROP INLET THROAT DETAIL

PRECAST CONCRETE CATCH BASIN

N.T.S.

DeCELLE
BURKE
& Associates, Inc.
1266 Furnace Brook Parkway, Suite 401 Quincy, MA 02169
(617) 405-5100 (O) (617) 405-5101 (F)

JAMES W BURKE, PE — DATE

GENERAL NOTES:

1. LOCUS: ASSESSORS MAP J BLOCK 14 LOT 5C, 6, 15, 16

DEED REFERENCE:
Book 20653 Page 125 Book 20756 Page 187
Book 23180 Page 181
PLAN REFERENCE:
Book 2917 Page 517
Book 2966 Page 351
Book 448 Plan 446 OF 1917 Book 531 Plan 88 OF 2004
Book 547 Plan 29 OF 2005

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AREA: 40,000 S.F. / 7,500 S.F.
FRONT SETBACK: 30' / 20'
SIDE SETBACK: 15' / 10'
REAR SETBACK: 30' / 30'
LOT FRONTAGE/WIDTH: 150' / 75'

PRESENT OWNERS:

HD/MW Randolph Ave LLC	Map J Block 14 Plot 6
Randolph Avenue Realty Trust	Map J Block 14 Plots 5C &16
HD/MW Randolph Ave LLC	Map J Block 14 Plots 15

PROJECT TITLE & LOCATION:

H&W APARTMENTS
IN
MILTON, MA

711 RANDOLPH AVENUE

PLAN TITLE:

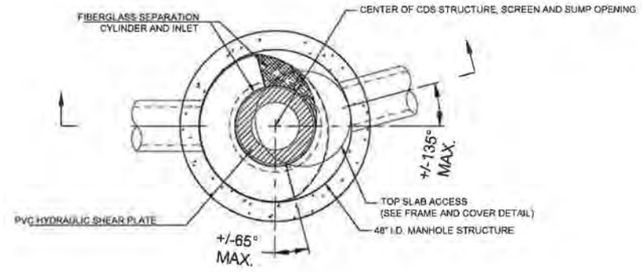
DETAILS

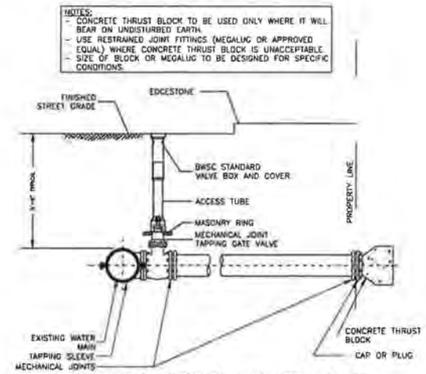
PREPARED FOR:

HD/MW RANDOLPH AVENUE,LLC
519 ALBANY STREET SUITE 200
BOSTON, MA 02118

DATE: OCTOBER 1, 2014
REVISED: NOVEMBER 26, 2014 - DRAFTING EDITS
REVISED: APRIL 4, 2015 - PEER REVIEW EDITS
REVISED: MAY 29, 2015 - PEER REVIEW EDITS
JOB NUMBER: 185.013 — SHEET 10 OF 13

ADD112

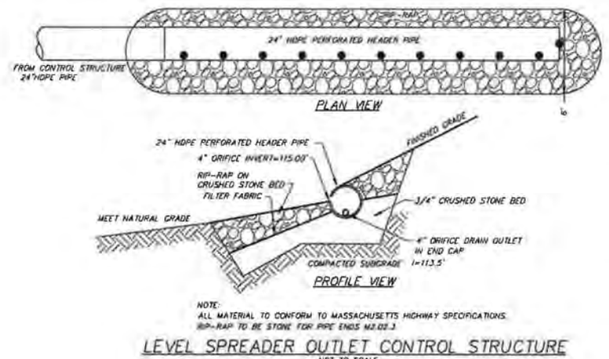




TAPPING SLEEVE & GATE VALVE

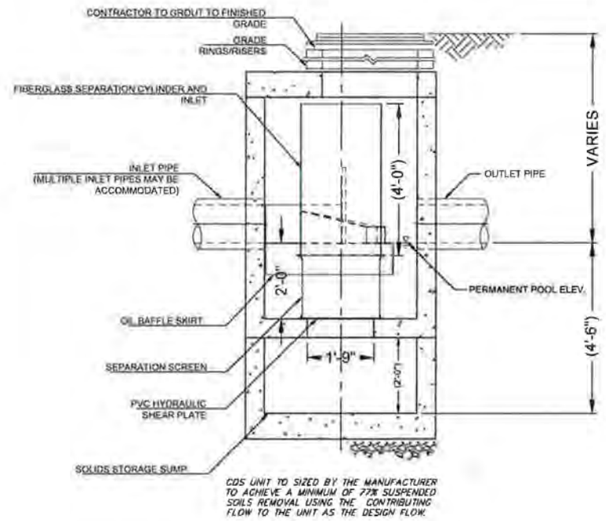
FOR 8" WATER SERVICE

N.T.S



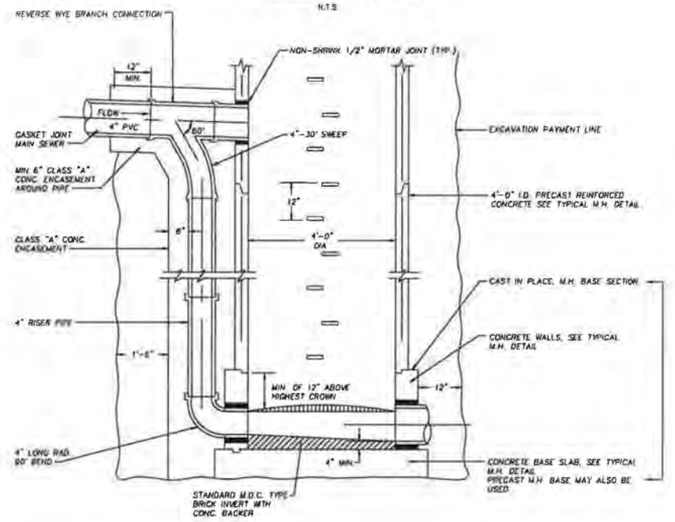
LEVEL SPREADER OUTLET CONTROL STRUCTURE

NOT TO SCALE



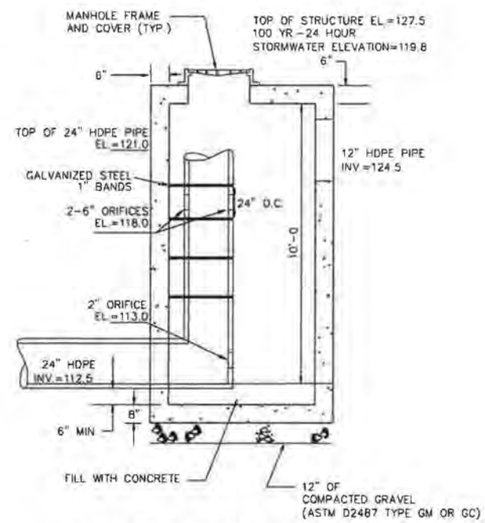
CDS UNIT

NOT TO SCALE



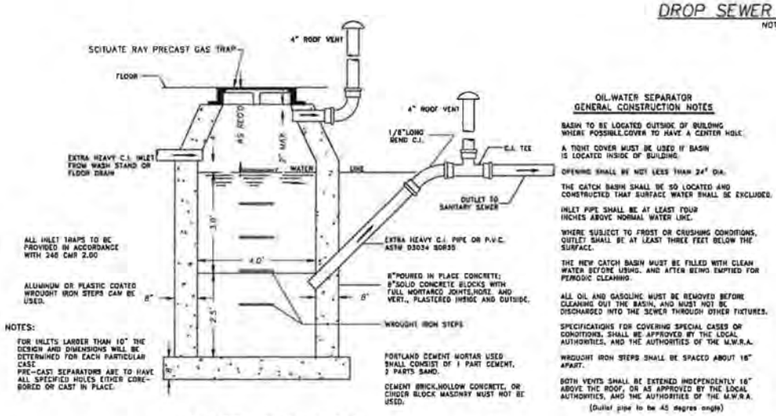
DROP SEWER MANHOLE DETAIL

NOT TO SCALE



OUTLET CONTROL STRUCTURE

NOT TO SCALE



OIL-WATER SEPARATOR
GENERAL CONSTRUCTION NOTES

BASIN TO BE LOCATED OUTSIDE OF BUILDING WHERE POSSIBLE,COVER TO HAVE A CENTER HOLE.

A TIGHT COVER MUST BE USED IF BASIN IS LOCATED INSIDE OF BUILDING.

OPENING SHALL BE NOT LESS THAN 24" DIA.

THE CATCH BASIN SHALL BE SO LOCATED AND CONSTRUCTED THAT SURFACE WATER SHALL BE EXCLUDED.

INLET PIPE SHALL BE AT LEAST FOUR INCHES ABOVE NORMAL WATER LINE.

WHERE SUBJECT TO FROST OR CRUSHING CONDITIONS, OUTLET SHALL BE AT LEAST THREE FEET BELOW THE SURFACE.

THE NEW CATCH BASIN MUST BE FILLED WITH CLEAN WATER BEFORE USING, AND AFTER BEING EMPTIED FOR PERIODIC CLEANING.

ALL OIL AND GASOLINE MUST BE REMOVED BEFORE CLEANING OUT THE BASIN, AND MUST NOT BE DISCHARGED INTO THE SEWER THROUGH OTHER FIXTURES.

SPECIFICATIONS FOR COVERING SPECIAL CASES OR CONDITIONS, SHALL BE APPROVED BY THE LOCAL AUTHORITIES, AND THE AUTHORITIES OF THE M.W.R.A.

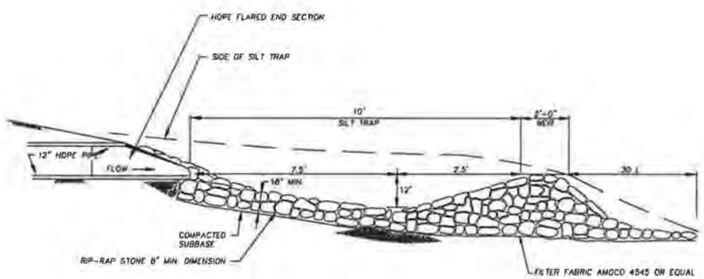
WROUGHT IRON STEPS SHALL BE SPACED ABOUT 16" APART.

BOTH VENTS SHALL BE EXTENED INDEPENDENTLY 16" ABOVE THE ROOF, OR AS APPROVED BY THE LOCAL AUTHORITIES, AND THE AUTHORITIES OF THE M.W.R.A.

(Outlet pipe to be 45 degree angle)

OIL/WATER SEPARATOR

N.T.S.



RIP-RAP APRON OUTLET CONTROL SECTION

NOT TO SCALE

DeCELLE
BURKE
& Associates, Inc.
1266 Furnace Brook Parkway, Suite 401 Quincy, MA 02169
(617) 405-5100 (O) (617) 405-5101 (F)

JAMES W BURKE, PE — DATE

GENERAL NOTES:

1. LOCUS: ASSESSORS MAP J BLOCK 14 LOT 5C, 8, 13, 16

DEED REFERENCE:
Book 20653 Page 125 Book 20756 Page 187
Book 23180 Page 181
PLAN REFERENCE:
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Book 2966 Page 351
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SIDE SETBACK: 15' / 10'
REAR SETBACK: 30' / 30'
LOT FRONTAGE/WIDTH: 150' / 75'

PRESENT OWNERS:

HD/MW Randolph Ave LLC	Map J Block 14 Plot 8
Randolph Avenue Realty Trust	Map J Block 14 Plots 5C &16
HD/MW Randolph Ave LLC	Map J Block 14 Plots 15

PROJECT TITLE & LOCATION:

H&W APARTMENTS
IN
MILTON, MA

711 RANDOLPH AVENUE

PLAN TITLE:

DETAILS

PREPARED FOR:

HD/MW RANDOLPH AVENUE,LLC
519 ALBANY STREET SUITE 200
BOSTON, MA 02118

DATE: OCTOBER 1, 2014
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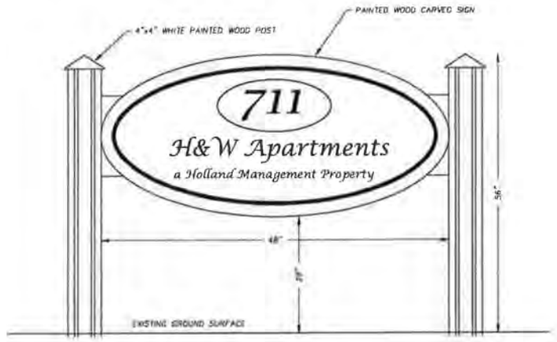

PROPOSED LOCATION SIGN
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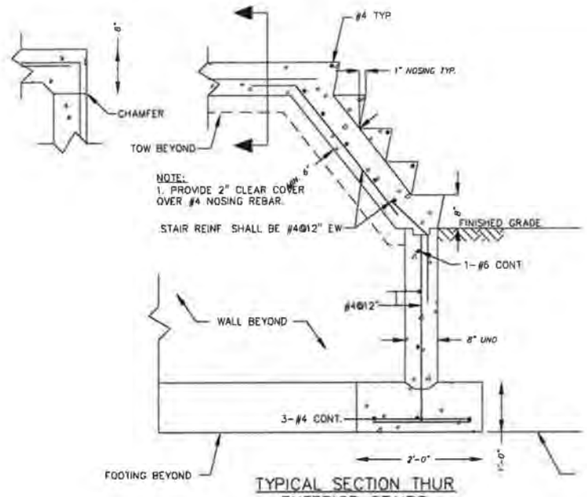

TYPICAL SECTION THUR EXTERIOR STAIRS
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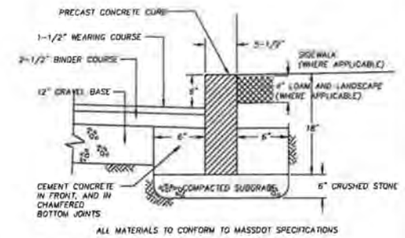

PAVEMENT SECTION & CONCRETE CURB DETAIL
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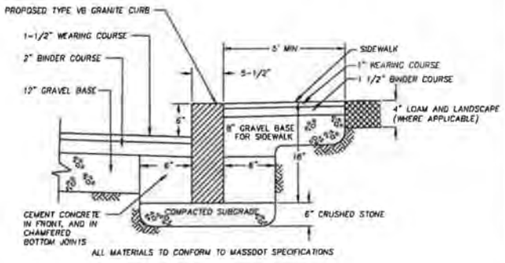
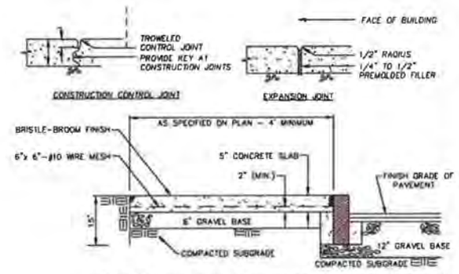


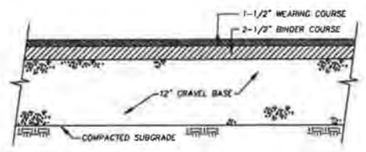
SIDEWALK SECTION & GRANITE CURB DETAIL
N.T.S.



ALL MATERIALS AND WORKMANSHIP TO CONFORM MASSDOT HIGHWAY SPECIFICATIONS

NOTES:
1. PROVIDE CONSTRUCTION CONTROL JOINT EVERY 5'.
2. PROVIDE EXPANSION JOINT EVERY 20' OF 400 SQUARE FEET.
3. PITCH WALK TO DOWN GRADE SIDE AT 3/16" PER 1 FOOT (MAX.)
4. REFER TO ARCHITECTURAL PLANS FOR JOINT PATTERN AND FINISH SURFACE IN ENTRANCE AREA WALK

CEMENT CONCRETE SIDEWALK
NOT TO SCALE



PAVEMENT SECTION
NOT TO SCALE

DeCELLE
BURKE
& Associates, Inc.
1266 Furnace Brook Parkway, Suite 401 Quincy, MA 02169
(617) 405-5100 (O) (617) 405-5101 (F)

JAMES W BURKE, PE DATE

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H&W APARTMENTS
IN
MILTON, MA

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PLAN TITLE:
DETAILS

PREPARED FOR:

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519 ALBANY STREET SUITE 200
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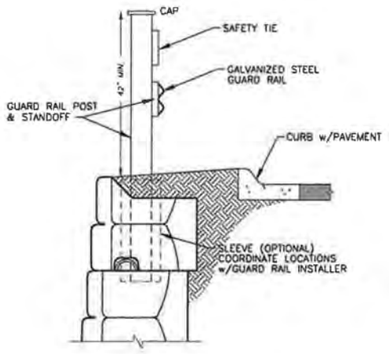
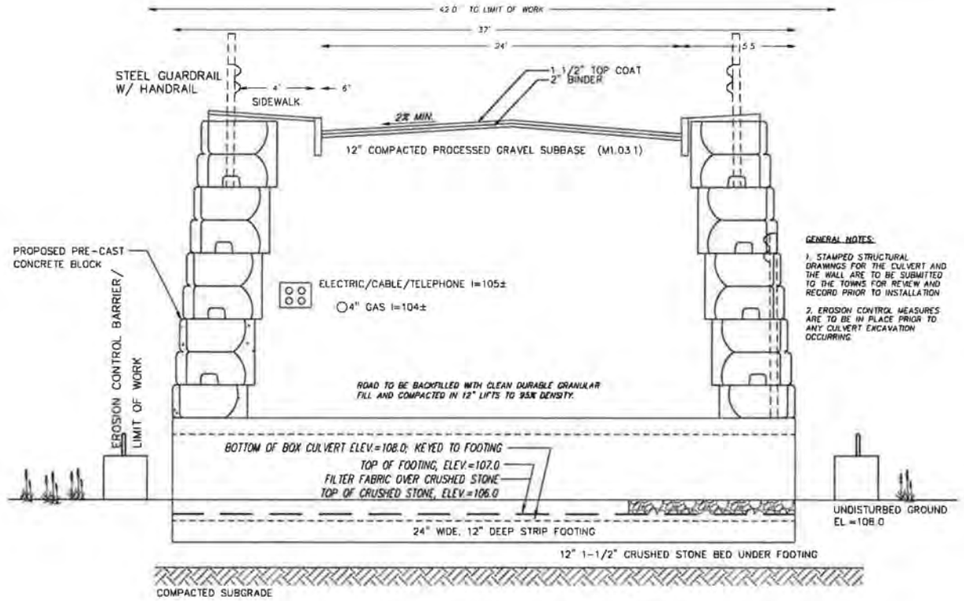


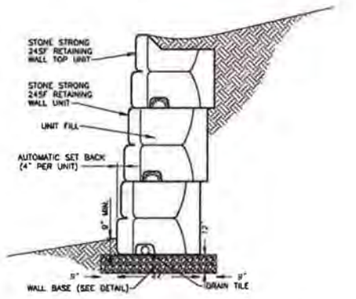
WALL w/GUARD RAIL
NOT TO SCALE



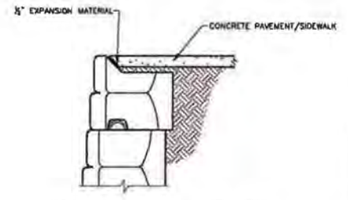
GENERAL NOTES:

1. STAMPED STRUCTURAL DRAWINGS FOR THE CULVERT AND THE WALL ARE TO BE SUBMITTED TO THE TOWNS FOR REVIEW AND RECORD PRIOR TO INSTALLATION
2. EROSION CONTROL MEASURES ARE TO BE IN PLACE PRIOR TO ANY CULVERT EXCAVATION OCCURRING

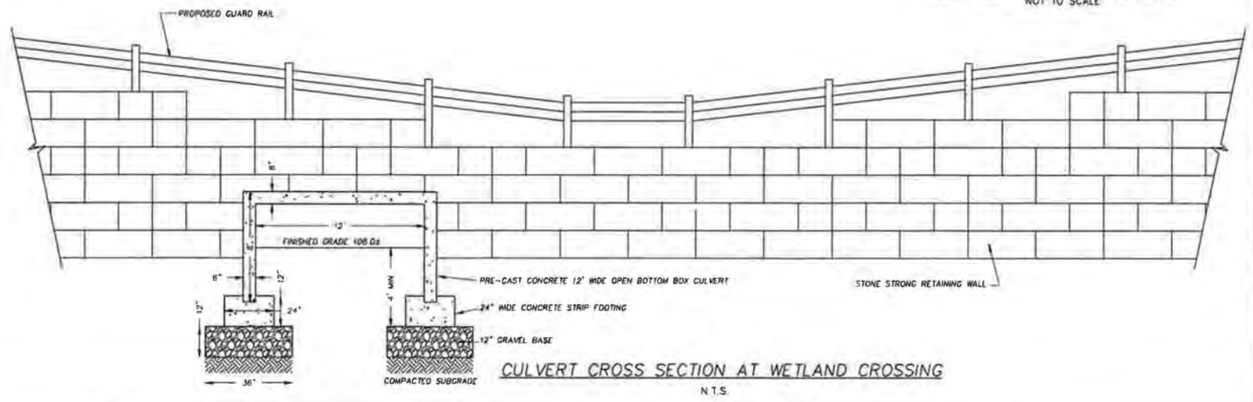
CULVERT SECTION AT WETLAND CROSSING
N.T.S.



24SF GRAVITY WALL CROSS SECTION
N.T.S.



TOP OF WALL w/SIDEWALK
NOT TO SCALE



CULVERT CROSS SECTION AT WETLAND CROSSING
N.T.S.

DeCELLE
BURKE
& Associates, Inc.
1266 Furnace Brook Parkway, Suite 401 Quincy, MA 02169
(617) 405-5100 (O) (617) 405-5101 (F)

JAMES W BURKE, PE — DATE

GENERAL NOTES:
1. LOCUS: ASSESSORS MAP J BLOCK 14 LOT 5C, 6, 15, 16

DEED REFERENCE:
Book 20653 Page 125 Book 20756 Page 187
Book 23180 Page 181
PLAN REFERENCE:
Book 2917 Page 517
Book 2966 Page 351
Book 448 Plan 44E OF 1997 Book 531 Plan 88 OF 2004
Book 547 Plan 29 OF 2005

2. THE LOT SHOWN DOES NOT LIE WITHIN A SPECIAL FLOOD HAZARD ZONE AS DELINEATED ON FIRM 250245 0001B, DATED APRIL 03, 1978

3. THIS PLAN IS THE RESULT OF AN ON-THE-GROUND SURVEY PERFORMED BY DECELLE-BURKE & ASSOCIATES. WETLANDS DELINEATED BY ECOTEC, INC. AND FIELD LOCATED BY THIS OFFICE.

4. ALL CONSTRUCTION TO CONFORM TO MILTON PUBLIC WORKS AND MASS HIGHWAY STANDARDS.

5. EXISTING UTILITIES WHERE SHOWN IN THE DRAWINGS ARE APPROXIMATE. THE CONTRACTOR SHALL BE RESPONSIBLE FOR PROPERLY LOCATING AND COORDINATING THE PROPOSED CONSTRUCTION ACTIVITY WITH DIG-SAFE AND THE APPLICABLE UTILITY COMPANIES AND MAINTAINING THE EXISTING UTILITY SYSTEM IN SERVICE.

6. DIG-SAFE SHALL BE NOTIFIED PER THE STATE OF MASSACHUSETTS STATUTE CHAPTER 82, SECTION 40B AT TEL. 1-888-344-7233. THE ENGINEER DOES NOT GUARANTEE THEIR ACCURACY OR THAT ALL UTILITIES AND SUBSURFACE STRUCTURES ARE SHOWN. LOCATIONS AND ELEVATIONS OF UNDERGROUND UTILITIES WERE TAKEN FROM RECORD PLANS. THE CONTRACTOR SHALL VERIFY SIZE, LOCATION, AND INVERTS OF UTILITIES AND STRUCTURES AS REQUIRED PRIOR TO THE START OF CONSTRUCTION

7. ALL DISTURBED AREAS TO BE LOAMED AND SEEDED.

8. ELEVATIONS WHERE SHOWN ARE ON TOWN OF MILTON DATUM

ZONING: RESIDENCE A / C
MINIMUM REQUIREMENTS:
AREA: 40,000 S.F. / 7,500 S.F.
FRONT SETBACK: 30' / 20'
SIDE SETBACK: 15' / 10'
REAR SETBACK: 30' / 30'
LOT FRONTAGE/WIDTH: 150' / 75'

PRESENT OWNERS:

HD/MW Randolph Ave LLC	Map J Block 14 Plot 6
Randolph Avenue Realty Trust	Map J Block 14 Plots 5C &16
HD/MW Randolph Ave LLC	Map J Block 14 Plots 15

PROJECT TITLE & LOCATION:

H&W APARTMENTS
IN
MILTON, MA

711 RANDOLPH AVENUE

PLAN TITLE:
DETAILS

PREPARED FOR:
HD/MW RANDOLPH AVENUE,LLC
519 ALBANY STREET SUITE 200
BOSTON, MA 02118

DATE: OCTOBER 1, 2014
REVISED: NOVEMBER 26, 2014 - DRAFTING EDITS
REVISED: APRIL 4, 2015 - PEER REVIEW EDITS
REVISED: MAY 29, 2015 - PEER REVIEW EDITS
JOB NUMBER: 185.013 | SHEET 13 OF 13

ADD115

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss

LAND COURT DEPARTMENT
Case No.19 MISC 000037 (RBF)

TOWN OF MILTON BOARD OF APPEALS

Plaintiff,

v.

THE MASSACHUSETTS HOUSING APPEALS COMMITTEE and HD/MW RANDOLPH AVENUE, LLC

Defendants.

DEFENDANT, HD/MW RANDOLPH AVENUE, LLC'S, CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS TO UPHOLD THE DECEMBER 20, 2018 DECISION OF THE MASSACHUSETTS HOUSING APPEALS COMMITTEE

Pursuant to Mass. R. Civ. P. 12(c) and Massachusetts Land Court Standing Order 2-06, Defendant, HD/MW Randolph Avenue, LLC ("HD/MW"), hereby opposes the Town of Milton Board of Appeal's (the "Board") Motion for Judgment on the Pleadings and cross moves for Judgment on Pleadings as the Massachusetts Housing Appeals Committee's December 20, 2018 Decision which the Board is challenging should be upheld. In support of its cross-motion, HD/MW incorporates its Memorandum of Law in Opposition to the Board's Motion for Judgment on the Pleadings and in support of its Cross-Motion for Judgment on the Pleadings and the administrative record.

WHEREFORE, HD/MW prays that this Honorable Court:

(1) grants HD/MW's Motion for Judgment on the Pleadings upholding the Massachusetts Housing Appeals Committee's December 20, 2018 Decision;

(2) denies the Board's Motion for Judgment on the Pleadings;

(3) enters Judgment in favor of HD/MW dismissing the Board's G.L. c 30A appeal; and

(4) grants any and all other relief that the Court deems just and fair.

Respectfully Submitted,

HD/MW Randolph Avenue, LLC

By its attorney,

Andrew E. Goloboy, BBO#663514
goloboy@dunbarlawpc.com
Dunbar Goloboy LLP
197 Portland Street, 5th Floor
Boston, MA 02114
(617)244-3550

Dated: January 9, 2020

CERTIFICATE OF SERVICE
I hereby certify that on this day a true copy of the above document was served upon the attorney of record for each party by mail/by email/by hand
Dated: 1/9/20
Andrew E. Goloboy

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss

LAND COURT DEPARTMENT
Case No.19 MISC000037 (RBF)

TOWN OF MILTON BOARD OF APPEALS

Plaintiff,

v.

THE MASSACHUSETTS HOUSING APPEALS COMMITTEE and HD/MW RANDOLPH AVENUE, LLC

Defendants.

DEFENDANT, HD/MW RANDOLPH AVENUE, LLC'S, MEMORANDUM IN OPPOSITION TO PLAINTIFF, TOWN OF MILTON BOARD OF APPEALS', MOTION FOR JUDGMENT ON THE PLEADINGS AND IN SUPPORT OF ITS CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS

Respectfully Submitted,

HD/MW Randolph Avenue, LLC

By its attorney,

Andrew E. Goloboy, BBO#663514
goloboy@dunbarlawpc.com
Dunbar Goloboy LLP
197 Portland Street, 5th Floor
Boston, MA 02114
(617)244-3550

Dated: January 9, 2020

TABLE OF CONTENTS

Defendant, HD/MW Randolph Avenue, LLC ("HD/MW"), hereby opposes the Town of Milton Board of Appeal (the "Board") Motion for Judgment on the Pleadings. HD/MW further cross-moves and seeks a judgment upholding the December 20, 2018 decision (the "Decision") of the Housing Appeals Committee (the "HAC").

Introduction

The Board's Motion for Judgment on the Pleadings should be denied and the Court should uphold the HAC's Decision. Pursuant to the legal standard set forth in G.L. c. 30A, §14 ("30A"), the HAC's 67 page decision is based on substantial evidence, contains no errors of law and is consistent with the statutory authority afforded to the HAC. In the Decision, the HAC properly concluded that HD/MW met its burden of demonstrating that the conditions imposed by the Board, in the aggregate, render the building--or operation of HD/MW's project--uneconomic. Next, the HAC found that the Board failed to meet its burden of demonstrating that each of the conditions challenged by HD/MW were consistent with local concerns and outweighed the regional need for affordable housing. The HAC's Decision is based on 121 Exhibits, comprised of more than 2,500 pages, the testimony of numerous witnesses, and credibility determinations of the HAC. Accordingly, the HAC's decision should be upheld and the Board's case dismissed.

In recognition of the high standard imposed by 30A, and the deference accorded to the HAC, the Board desperately (and inappropriately) asks this Court to conduct a *de novo* review of the proceedings before the HAC through dressing up its argument as a challenge to the HAC's statutory authority and compliance with the established law. In reality, the HAC's decision is entirely consistent with G.L. c. 40B, its regulations (760 CMR 56), and even the guidelines promulgated by DHCD (that do not have the force of law) and the Board's challenges to the

Decision are nothing more than attacks on the factual findings by the HAC that are supported by substantial evidence in the record.

First, the HAC always had jurisdiction to hear HD/MW's appeal. Notwithstanding, the Board devotes a significant portion of its brief arguing to the contrary. The Board's argument, however, is without merit as the conditions imposed by the Board rendered the project uneconomic. Indeed, the Court need not delve into the Board's argument on this issue at all, because the HAC made a factual finding that the condition imposed by the Board prohibiting three bedroom units made it impossible for HD/MW to obtain final approval from its subsidizing agency, the Massachusetts Housing Finance Agency ("MassHousing"), which rendered the project uneconomic. This should be the beginning, and the end, of the review of whether the HAC had jurisdiction to hear HD/MW's appeal.

Notwithstanding, if the Court considers the Board's argument, it is fatally flawed because it was not raised in front of the HAC and, therefore, was waived. In fact, the Board's challenge to the HAC's jurisdiction is not properly identified as a jurisdictional challenge, because it is a procedural challenge based on the burdens of proof, which had to be raised in front of the HAC or forever waived. Moreover, even if the Court addresses the substance of the Board's argument, it fails because it ignores the definition of "uneconomic" as set forth in G.L. c. 40B, §20 and the definition of "reasonable return" contained in the regulations, 760 CMR 56.02, which establish that it is impossible for a developer who obtains a project eligibility letter from a subsidizing agency or an approval with conditions from a board that decreases the number of units to propose a project that is "uneconomic" as defined by the statute and regulations. Accordingly, the Board's argument that the HAC lacked jurisdiction is without any merit – either procedurally or substantively.

Second, the Board asks this Court to reinstate several conditions, or remand to the HAC, based on its purported error of law by not considering or accepting as credible or true evidence submitted by the Board and argue for a *de novo* review. This argument is without merit. The HAC thoroughly summarized the evidence and arguments submitted by the Board in the Board's attempt to meet its significant burden in upholding the conditions it imposed in its approval with conditions. As such, the evaluation as to whether the HAC's decision to strike or modify conditions should only be subject to a substantial evidence review, which overwhelmingly supports upholding the Decision. This is especially true where, as here, the HAC made credibility determinations with respect to several of the Board's witnesses whose testimony before the HAC differed drastically from their statements to the Board during the public process. Thus, the Court should uphold the HAC's Decision with respect to the Board's failure to meet its burden and the HAC's decision to strike and/or modify conditions.

Background Facts

HD/MW received a determination of Project Eligibility under the New England Fund Program of the Federal Home Loan Bank of Boston ("NEF") dated May 27, 2014 from MassHousing that was re-affirmed on November 3, 2014 pursuant to 760 CMR 56.04 after the design of the project was altered. A.R. 4407; A.R. 4031 at Stipulation No. 5; A.R. 1426-39, 1726-7.[1] On or about November 6, 2014, HD/MW submitted an application for a Comprehensive Permit, under G.L. Chapter 40B, §§20-23, to the Board for a project consisting of 90 rental units with twenty-three (23) units to be low or moderate income units. A.R. 4405, A.R. 4031-2 at No. 6, A.R. 1728-1853.

[1] All Citations are to the Administrative Record ("A.R.").

The address of the project site is 693-711 Randolph Ave., Milton, Massachusetts (the "Subject Property"). A.R. 4405, A.R. 4031 at No. 2. The Subject Property is a 7.81 parcel of land and, pursuant to a binding SORAD issued by the Massachusetts Department of Environmental Protection, wetlands comprise 1.93 acres of the Subject Property leaving 5.88 acres of buildable land on the Subject Property. A.R. 4408; A.R. 2389, A.R. 2804. HD/MW's proposed project consists of two buildings: Building 1 (13,600 square feet, 200 feet long and 62 feet wide) will contain 30 units and 30 garage parking spaces. Building 2 (23,500 square feet, 300 feet long, and 70 feet wide), will contain 60 units and 54 garage parking spaces. A.R. 4408; A.R. 2813. Total parking for the proposed project includes 156 spaces, or 1.7 spaces per unit, and contains a mix of one, two, and three bedroom units. A.R. 4409, A.R. 2806.

The Board held public hearings between December 2, 2014 and June 17 2015. A.R. 4405, A.R. 4031 at No. 9. The public hearing was closed on June 17, 2015. A.R. 4032 at Nos. 8-9. The Board deliberated at public meetings on July 13 and July 16 of 2015. *Id.* at No. 11. As part of the public hearing process, HD/MW's proposed project was extensively peer reviewed by Scott Turner of Nitsch Engineering and Jeffrey Dirk of Vanasse & Associates. A.R. 2569-94, A.R. 2396-2411. Neither of the peer reviewers identified any safety issues nor did they recommend a reduction in the number of units. *Id.* The same is true with respect to Fire Chief John Grant, who addressed the Board during the public hearing process and did not express any safety or firefighting concerns. A.R. 4429-30; A.R. 57-8-62-3.

The Board issued a written, signed, decision dated July 30, 2015, which granted a Comprehensive Permit for the construction of 35 units subject to 64 Conditions.[2] A.R. 4032 at No. 12. Indeed, the Decision specifically states that the Board "unanimously voted *not to*

[2] The Decision identifies 65 conditions, but the list of conditions does not contain a number 57. As a result, there are 64 conditions.

approve the proposed 90-unit development for the Site." A.R. 2605-06. (emphasis added). The Decision not only included a drastic unit reduction from 90 to 35, but also included dozens of other conditions purporting to dictate a design for a completely different project than what HD/MW had proposed. A.R. 4405; A.R. 2595-2623.

Moreover, during the public hearing process, the Board did not comply with any portion of 760 CMR 56.05(6) which provides a procedure for a Board to review financial statements before the close of the public hearing and prior to a decision granting an approval with conditions that includes a reduction of the number of dwelling units. A.R. 2719. Indeed, the Board did not even inform HD/MW that it was considering granting an approval with a significant reduction in the number of dwelling units until after the public hearings concluded. A.R. 2719. The Board first raised the concept of an approval with conditions that included a drastic reduction in dwelling units during its deliberations after the public hearings concluded. A.R. 2719. The first time that the Board provided HD/MW with draft conditions was when its counsel, Kathleen O'Donnell, provided HD/MW with a draft decision on July 16, 2015 ("Board's Draft Decision") on the second night of the Board's deliberations. A.R. 2719, A.R. 3187-3200.

The Board's Decision was filed with the Milton Town Clerk on July 30, 2015. A.R. 4032 at No. 13. On August 18, 2015, HD/MW filed this appeal to the HAC. A.R. 4405, A.R. 3360-3431. On December 6, 2016, a Pre-Hearing Order was entered by the HAC. A.R. 4030-65. The hearing occurred on April 10-13 with closing arguments on April 20, 2017. A.R. 4406. Prior to the hearing, HD/MW submitted pre-filed testimony, and pre-filed rebuttal testimony, from the following:

- Paul Holland of HD/MW (A.R. 2718-2735; A.R. 3074-3077)

- Lynne Sweet of LDS Consulting, a housing consultant who performed a rental market study (A.R. 2736-65);
- Robert Engler of SEB LLC, a housing economics expert who created various *pro formas* and conducted an economic analysis including, but not limited to, a Return on Total Cost ("ROTC") analysis (A.R. 2766-2801, A.R. 3078-90);
- James Burke, PE of DeCelle-Burke, the civil engineer responsible for designing the engineering of HD/MW's proposed project (A.R. 2801-13, A.R. 3091-3105);
- Daniel Dulaski, PE of DeCelle-Burke, and a transportation engineering professor at Northeastern University, who provided expert traffic and transportation studies and analysis (A.R. 2814-37, A.R. 3147-54);
- Scott Morrison of Ecotec, Inc., a wetland's scientist who designed the wetland's replication protocol for the project and opined on the effects of HD/MW's proposed project on the wetlands located on the Subject Property (A.R. 2838-40, A.R. 3155-57); and
- Kevin Hastings of Hastings Consulting, Inc., a fire safety expert that opined on HD/MW's compliance with the Fire Safety Code and the overall fire safety of the proposed 90 unit development (A.R. 2841-45 89, A.R. 3158-62).

At the hearing, each of HD/MW's witnesses were cross-examined except for Daniel Dulaski.

The Board submitted pre-filed testimony from the following: Jeffrey Dirk, a transportation engineer who provided peer reviews during the public hearing process (A.R. 2846-57); Scott Turner, a professional engineer who provided peer reviews during the public hearing process (A.R. 2858-2947); Cheryl Tougias, a member of the Town of Milton's Planning Board and an architect (A.R. 2948-60); Maurice Pilette, a fire safety expert (A.R. 2961-2977); Fire

Chief John Grant (A.R. 2978-2984); Joseph Prondak, the Building Commissioner for the Town of Milton (A.R. 2985-95); Police Chief John King (A.R. 2996-3000); Joseph Lynch, the head of Milton's Department of Public Works (A.R. 3001-3004); John Kiernan, an attorney who is the chairman of the Milton Conservation Commission (A.R. 3005-3009); Glenn Pavlicek, the assistant superintendent of Milton Public Schools (A.R. 3010-13); and Joseph Mullins, an abutter and real estate developer (A.R. 3014-39).

HD/MW cross-examined each of these witnesses except for Joseph Prondak, Joseph Lynch, Glenn Pavlicek, and Joseph Mullins. The Board did not submit any testimony from the three members of the Board or Milton's Planning Director and 121 exhibits were admitted into evidence during the April 2017 Hearing. Following, the hearing the parties submitted Post-Hearing Briefs and Reply Briefs. A.R. 4274-4360, A.R. 4361-74.

On December 20, 2018, the HAC issued its 67 page Decision. A.R. 4402-73. The Decision contains seven (7) sections: Introduction (A.R. 4406-7), Factual Background (A.R. 4407-4409), Economic Effect of the Board's Decision (A.R. 4409-4420), Local Concerns (A.R. 4420-4456), Lawfulness of the Board's Conditions (A.R. 4456-67), Massachusetts Environmental Protection Act (MEPA) Requirements (A.R. 4467-69), Conclusion and Order (A.R. 4470-71). A.R. 4403. The Decision methodically follows the burden shifting analysis required by the regulations to evaluate an approval with conditions. A.R. 4409-4467. Further, the Decision is replete with factual findings that are supported by substantial evidence and are consistent with the HAC's authority. A.R. 4406-4471.

Standard of Review

The Board challenges the HAC's Decision pursuant to 30A. The Board must carry the burden of demonstrating invalidity of the agency's action. *Town of Middleborough v. Housing*

Appeals Committee, 449 Mass. 514, 524 (2007)(*"Middleborough"*). The Court is not to hear the matter *de novo* but, instead, will determine the appeal based on its review of the Administrative Record. *Zoning Bd. of Appeals of Holliston v. Hous. Appeals Comm.*, 80 Mass.App.Ct. 406, 414 (2011). "[T]he scope of review of an administrative decision pursuant to G.L. c. 30A, § 14, leaves little room for appellate discretion ... the agency's decision must be upheld if supported by such evidence as a reasonable mind might accept as adequate to support a conclusion." *Middleborough,* 449 Mass. at 524 (internal quotation omitted).

In a 30A review of an HAC decision, the Supreme Judicial Court has been clear on the hefty burden the Board faces:

> The decision of HAC must be upheld if it is supported by substantial evidence. Substantial evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion. G.L. c. 30A, s 1(6). This does not permit a court to treat the proceeding as a trial de novo on the record which was before the administrative board. A court may not displace an administrative board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.

Zoning Board of Appeals of Wellesley v. Housing Appeals Committee, 385 Mass. 651, 657 (1982)(internal quotations omitted)*; see also Middleborough,* 449 Mass. at 524.

Also, the agency is the sole judge of the credibility and weight of evidence before it during the administrative proceeding. *Maddocks v. Contributory Retirement Appeal Bd.*, 369 Mass. 488, 495 (1976); *see also Zoning Board of Appeals of Sunderland v. Sugarbush Meadow, LLC,* 464 Mass. 166, 184 (2013). Within judicial review of an agency's decision under Chapter 30A, the reviewing court is to afford the agency all rational presumptions in favor of the validity of its actions. *Middleborough,* 449 Mass. at 524.

Finally, "[i]n considering regulations promulgated under [the] act, [courts give] great

weight to a reasonable construction of a regulatory statute adopted by the agency charged with its enforcement...." *Id.* at 523. Further, "where the focus of a statutory enactment is reform, as is true of the act [G.L. c. 40B]... the administrative agency charged with its implementation should construe it broadly so as to further the goals of such reform...agency action will not be overturned unless it be proven arbitrary, unreasonable, or inconsistent with the agency's own rules." *Id.* at 524 (internal quotations omitted); *see also Zoning Board of Appeals of Sunderland* 464 Mass. at 191. A court "must apply all rational presumptions in favor of the validity of the administrative action and not declare it void unless its provisions cannot by any reasonable construction be interpreted in harmony with the legislative mandate." *Zoning Bd. of Appeals of Wellesley,* 385 Mass. at 654.

Argument

I. THE HAC HAD JURISDICTION TO HEAR HD/MW'S APPEAL OF THE BOARD'S DECISION.

The primary argument advanced by the Board in its opening brief is that the "HAC lacked jurisdiction" to hear HD/MW's appeal because the project as proposed by HD/MW was "uneconomic;" therefore, the conditions imposed by the Board did not render it "uneconomic." This argument is without merit and is premised on an inaccurate recitation of the HAC's decision, the evidence presented at the HAC, and the language and relationship among the statute, G.L. c. 40B, §§20-23, the regulations, 760 CMR 56, and guidelines issued by the DHCD. The Board argues that, based on a Return on Total Cost ("ROTC") analysis employed by the HAC to evaluate the economics of rental projects, that the HAC only has jurisdiction to hear appeals of approvals with conditions that render the project "uneconomic" and the use of the "significantly more uneconomic" analysis was improper and exceeds the HAC's authority. *See* Opening Brief at pp. 14-22. While this argument was waived because it was not raised below (as

set forth in Section I.B) and is substantively without merit (as set forth is Section I.C), the Court need not consider this argument, or the whole concept of ROTC whatsoever, because the HAC determined that the Board's condition--precluding three bedroom units preventing HD/MW from obtaining final approval from its subsidizing agency--rendered the project "uneconomic," which the Board does not dispute is the correct standard and within the HAC's jurisdiction.

A. The HAC had jurisdiction over HD/MW's appeal because the condition imposed by the Board prohibiting three bedroom units rendered the project "uneconomic" regardless of the ROTC analysis.

The HAC's jurisdiction is established by G.L. c. 40B, §§20-23. Specifically, G.L. c. 40B, §22 states that "[w]henever an application filed under the provisions of section twenty-one is denied, or is granted with such conditions and requirements as to make the building or operation of such housing uneconomic, the applicant shall have the right to appeal to the housing appeals committee in the department of housing and community development for a review of the same." Further, G.L. c. 40B, §20 defines the term "uneconomic" as:

> any condition brought about by any single factor or combination of factors to the extent that it makes it impossible for a public agency or nonprofit organization to proceed in building or operating low or moderate income housing without financial loss, or for a limited dividend organization to proceed and still realize a reasonable return in building or operating such housing within the limitations set by the subsidizing agency of government on the size or character of the development 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 units sizes proposed by the public, nonprofit or limited dividend organizations.

Here, the HAC found that Condition No. 2, imposed by the Board prohibiting three bedroom units in HD/MW's development, "renders the project uneconomic as it prohibits final approval from the subsidizing agency [MassHousing]." A.R. 4416-4418. Accordingly, the imposition of a condition that precludes HD/MW from obtaining final approval from its

subsidizing agency indisputably renders the project "uneconomic" as defined by G.L. c. 40B because it precludes HD/MW from building its project within the limitations set by the subsidizing agency – let alone construct or achieve a reasonable return.[3] *See* G.L. c. 40B, §20, *Delphic Associates Inc. v. Hudson Board of Appeals*, HAC No. 2-11, 2002 WL 34082292 *7 (Dec. 23, 2002)(Determination by the Committee, that the inclusion of a condition that precludes Final Approval from MassHousing, renders the project Uneconomic.); *see also Atwater Investors, Inc. v. Ludlow Board of Appeals,* HAC No. 01-09, 2004 WL 5052503 at *10-11 (Jan. 26, 2004)(Decision)(Determination that the Developer met his burden of demonstrating that the Board's conditions rendered the project uneconomic based on a letter from the Developer's bank stating that the Board's conditions precluded financing under the NEF program.). As such, pursuant to 40B, §22, HD/MW had the right to appeal the Board's decision to the HAC and the HAC had jurisdiction over the appeal and did not exceed its authority.

Not surprisingly, the Board completely ignores this issue, including the HAC's finding that "the condition prohibiting three-bedroom units in the project renders the project uneconomic as it prohibits final approval from the subsidizing agency" in its argument that the HAC lacked jurisdiction and the Board does not challenge the HAC's factual finding that the Board's decision prohibits three bedroom units prohibiting approval from MassHousing rendering the project uneconomic.[4] A.R. 4416-4418.

This glaring omission should be construed as an admission by the Board that the HAC had jurisdiction to hear the appeal and that the HAC's factual finding that HD/MW sustained its

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[3] The term "reasonable return" is not defined in the G.L. c. 40B, but is defined in the 760 CMR 56.02 and the relevant portion is found in Section I.C on page 17 herein.

[4] Section I.B explains in greater detail why the Board's challenge is not jurisdictional whatsoever and is really a procedural challenge that was waived.

burden of proof that the conditions imposed by the Board rendered the project uneconomic and should not be overturned pursuant to 30A's hefty burdens.[5] Thus, the HAC clearly had jurisdiction to hear HD/MW's appeal, did not exceed its authority, and this Court need not consider any of the arguments advanced by the Board with respect to the argument that the "HAC lacked jurisdiction" and/or exceeded its legal authority by allegedly applying an allegedly improper standard during its ROTC analysis to determine that the conditions imposed by the Board rendered the project "uneconomic."[6] Thus, the Board's argument that the "HAC lacked jurisdiction" is nothing more than a smoke screen that has no applicability to this 30A appeal.

B. The Board's new assertion that the "HAC lacked jurisdiction" to decide HD/MW's appeal has been waived.

While this Court need not address the Board's argument that "HAC lacked jurisdiction" or exceeded its statutory authority by using the phrase "significantly more uneconomic" as part of its ROTC analysis for the reasons stated above, the Board waived the argument in any event. It is well established that "a party is not entitled to raise arguments on appeal that he could have raised, but did not raise, before the administrative agency." *Albert v. Municipal Court of Boston,* 388 Mass. 491, 493–494, (1983). Indeed, issues and arguments that are not raised before an administrative agency are waived. *City of Springfield v. Department of Telecommunications and Cable*, 457 Mass. 562, 573 (2010)("Because the city did not raise these arguments before the

[5] The evidence on this issue was overwhelming as set forth in the Decision. A.R. 4416-19; *see also* 2720-2724 (Holland Pre-Filed Testimony, ¶¶9-27 and referenced Exhibits), 2730-31 (Letter from Gregory P. Watson, Manager of Comprehensive Permit Programs at MassHousing stating "MassHousing will not grant a waiver of the three bedroom requirement" and "In order for HD/MW to gain final approval from MassHousing, the Project must comply with the January 17, 2014 Interagency Agreement, which requires at least 10% of the units in its Project to have three bedrooms."); A.R. 1428 at No. 8 (Project Eligibility Letter requiring compliance with Interagency Agreement); A.R. 1726 (Re-Affirmation of Project Eligibility Letter).

[6] The ROTC analysis is derived from the HAC's decisions regarding rental projects and DHCD's guidelines. A.R. 742.

department, we do not consider them on appeal."); *see also City of Springfield v. Civil Service Com'n*, 469 Mass. 370, 382 (2014)("Failure to raise an issue before an appointing authority, an administrative agency, and a reviewing court precludes a party from raising it on appeal"), *see also Shamrock Liquors, Inc., v. Alcoholic Beverages Control Comm'n*, 7 Mass. App. Ct. 333, 335 (1979)("a party cannot prevail here on an argument not made before an administrative agency"). As a result, since the Board failed to raise this issue in front of the HAC, it is waived.

i. The Board did not raise this purported "jurisdictional" challenge at the HAC.

For the first time, in this 30A appeal of the HAC's Decision, the Board argues that the "HAC lacked jurisdiction" to hear HD/MW's appeal of the Board's decision. *See* Board Br. at p. 14. Consistent with *Albert*, however, the Board's failure to raise this issue before the HAC constituted a waiver and cannot be raised for the first time in this appeal. In the two years from the time HD/MW initiated its appeal to the HAC, in August 2015 through the post-hearing briefing that concluded in August 2017, the Board never raised the issue that the "HAC lacked jurisdiction" to hear HD/MW's appeal. Specifically, the Board did not (1) move to dismiss HD/MW's appeal to the HAC for lack of jurisdiction at any time; (2) seek summary disposition from the HAC on this issue (A.R. 3633-61); or (3) raise it at the hearing or in the two rounds of post-hearing briefing (A.R. 4191-4273, A.R. 4375-86). Accordingly, the Board waived any argument that the "HAC lacked jurisdiction" to hear HD/MW's appeal of the Board's decision.

Indeed, not only did the Board not assert that the "HAC lacked jurisdiction" to hear the appeal, in its post-hearing brief to the HAC, the Board acknowledged that the HAC's "significantly more uneconomic" standard was an appropriate standard for the HAC to employ. A.R. 4201. Specifically, the Board's Post-Hearing Brief states:

> Finally, Mr. Engler testified that the 90-unit project proposed by

> the Applicant [HD/MW] is already uneconomic. Under the circumstances, 'to sustain its burden the developer must establish also that its profit (return on total costs) is such that the project [as permitted or conditioned by the Board of Appeals] is significantly more uneconomic than the development it proposes to building.'

A.R. 4201 (internal citation omitted).[7] Further, the Board's Post-Hearing Brief acknowledged the "significantly more uneconomic" terminology by saying "[a]ccordingly, HD/MW has not met its burden of proving that the Board's conditions make the 35-unit development permitted significantly more uneconomic than HD/MW's proposed 90-unit development." *Id.* As such, the Board not only waived the argument that the "HAC lacked jurisdiction" to hear HD/MW's appeal or that it could not apply a "significantly more uneconomic" analysis, but it agreed that was the appropriate standard for the HAC to employ.

ii. The Board's challenge is not "jurisdictional"

Despite the Board's efforts to frame its argument as a "jurisdictional" argument (a transparent attempt to avoid its waiver of the issue), the Board's argument is not a jurisdictional argument at all but is, instead, a procedural--burden of proof--issue that needed to be raised before the HAC in order for it not to be waived. *See* 760 CMR 56.07(1)(c)(1)("Scope of Hearing") and 56.07(2)(a)(3)("Burdens of Proof"). This type of manufactured "jurisdictional" argument has previously been rejected by the SJC in the context of G.L. c. 40B. *Middleborough*, 449 Mass. at 520-21. In *Middleborough*, the SJC confirmed that the HAC's jurisdiction is derived from G.L. c. 40B. *Id.* at 520-21 ("Subject matter jurisdiction is "jurisdiction over the nature of the case and the type of relief sought," Black's Law Dictionary 870 (8th ed.2004),

[7] The actual context of Mr. Engler's testimony, which the Board ignores in its opening brief, was that the project was "uneconomic" pursuant to the formula in the guidelines, but that the correct economic threshold to measure the economic effect of the conditions was the ROTC of HD/MW's proposed project. A.R. 2768 at ¶¶13-14, A.R. 2769 at ¶22.

which among the various trial courts and administrative agencies "is both conferred and limited by statute.").

Moreover, in *Middleborough,* the SJC held that fundability is a "substantive aspect" of a developer's prima facie case and "is not one of subject matter jurisdiction that can never be waived. It is an evidentiary issue that the party opposing the comprehensive permit must rebut." *Id.* The same is true when a developer challenges that the conditions imposed by a board render a project uneconomic and it is a question of proof not jurisdiction. Accordingly, the Board's failure to raise the issue before the HAC is a waiver. Moreover, the Board obscures, in its opening brief, that its argument that the "HAC lacked jurisdiction" is solely premised on a formula and calculation of an "economic threshold" that is not contained in either the statute or regulation, but is only found in the guidelines issued by DHCD (which do not have the force of law).[8] *See* A.R. 739 (definition of "Applicable 10-Year U.S. Treasury Rate"), A.R. 741 (guideline definition of "Minimum Return on Total Cost"). As explained above in Section I.A, the HAC's jurisdiction is established through the statute not the guidelines issued by DHCD.

Further, the minimum ROTC set forth in the guidelines is determined as of the date of the Pre-Hearing Order issued by the HAC during the appellate process. *See* A.R. 739 (definition of "Applicable 10-Year U.S. Treasury Rate"), A.R. 741 (guideline definition of "Minimum Return on Total Cost"). Consequently, pursuant to the guidelines, the "economic threshold" is not calculated until well after an appeal is filed and at a date unknown to the developer until a Pre-Hearing Order is issued. Specifically, in this case, the "economic threshold," based on the formula in the guidelines, was determined on December 6, 2016 - more than thirty (30) months

[8] Indeed, the Guidelines explicitly state that "[i]n the event of a conflict between the meaning given to any term in these Guidelines and the meaning given to the same term in the Act or the Regulations thereunder, the meaning given in the Act or Regulations shall control." A.R. 739.

after HD/MW applied to MassHousing for Project Eligibility, twenty-five (25) months after MassHousing re-affirmed the PEL and HD/MW applied to the Board for a Comprehensive Permit, and sixteen (16) months after HD/MW filed its appeal to the HAC. *See* A.R. 1426 (Date of Project Eligibility Letter), A.R. 1726 (Re-Affirmation of Project Eligibility Letter), A.R. 1728 (Date of Application to the Board), A.R. 4065 (date of Pre-Hearing Order). As such, any challenge to whether the HAC appropriately determined whether a developer has met its burden of proof is a procedural challenge that must be presented to the HAC or is waived. Accordingly, since the Board's current argument that the "HAC lacked jurisdiction" was not raised at any point between the filing of HD/MW's appeal in August 2015 through post-hearing briefing in April 2017, it has been waived.

C. The Board's argument that the HAC lacked jurisdiction is substantively incorrect.

If the Court reaches the substance of the Board's argument (which it should not), the Board is substantively incorrect that the HAC lacked jurisdiction or exceeded its statutory authority in determining that HD/MW satisfied its burden of proof.[9] The HAC appropriately concluded that HD/MW carried its burden of demonstrating that the condition imposed by the Board rendered its proposed project "uneconomic" and also "significantly more uneconomic" because the conditions imposed by the Board reduced HD/MW's ROTC by 27.5% from 5.88% to 4.26%. A.R. 4416. The HAC's finding is wholly consistent with G.L. c. 40B, the regulations 760 CMR 56, and the guidelines issued by DHCD, and is a factual finding based on substantial evidence.

As set forth above, the HAC's jurisdiction is established by the G.L. c. 40B which contains a specific definition of the term "uneconomic," which delegates to the subsidizing

[9] The Board does not challenge any of the HAC's factual findings with respect to the ROTC analysis as not based on substantial evidence.

agency to determine the reasonable return that makes a project economic. In practice, this is determined by the subsidizing agency issuing a Project Eligibility Letter determining that a project is financially feasible. Next, the regulations, which were promulgated to assist in the implementation of the statutory scheme, provide a definition of "reasonable return" which is undefined in the statute, but is found in the statutory definition of "uneconomic." 760 CM 56.02 ("Reasonable Return"). The regulations define "reasonable return", in relevant part, for a rental project as follows:

> (c) for the purpose of determining whether the Project is Uneconomic, that profit to the Developer or payment of development fees from the initial construction of the Project, if an amount lower than the minimum set forth 760 CMR 56.02: Reasonable Return(a) or (b), as applicable, has been determined to be feasible as set forth In the Project Eligibility Letter, then such lower amount shall be the minimum: or
>
> (d) for the purpose of determining whether the Project is Uneconomic, when one or more conditions imposed by the Board decrease the total number of units in a Project, if those conditions do not address a valid health, safety, environmental, design, open space or other Local Concern, then the amount as calculated prior to the imposition of such conditions shall be the minimum, provided that such amount does not exceed the maximum return set forth in 760 CMR 56.02: Reasonable Return(a), or fall below the minimum set forth in 760 CMR 56.02:

Id. (emphasis in original). Thus, for a rental project like HD/MW's the baseline "reasonable return" is calculated either at the time of the issuance of a Project Eligibility Letter from a subsidizing agency or when an approval is issued with conditions that decreases the number of units.[10] As such, it is impossible for any developer, including HD/MW, to propose a project that

[10] On May 27, 2014, HD/MW was issued a Project Eligibility Letter by MassHousing that determined its proposed project was "financially feasible" and, on November 3, 2014, MassHousing re-affirmed this finding when is issued a supplemental Project Eligibility Letter after reviewing HD/MW revised proposal and *pro forma* to construct 90 units as opposed to the original 72 units. A.R. 1426, 1438, 1726. The *pro forma* for the 90 unit development was

is "uneconomic" as defined by the statute and regulations if they have received a Project Eligibility Letter and/or an approval with conditions that includes a decrease in units. Consequently, the HAC did not, nor can it ever, lack jurisdiction based on the proposed return for a rental project that has received a Project Eligibility Letter and/or an approval with conditions that includes a decrease in units. This indisputable fact is fatal to the Board's position.

In practice, the HAC measures "reasonable return" when evaluating rental projects by conducting an ROTC analysis. A.R. 4410. ROTC is a term that does not exist in the statute and regulations, but is found and defined in the guidelines. *Id.* Pursuant to the guidelines, ROTC "means, in calculating Reasonable Return, projected NOI of a Project, divided by the projected total development cost (including development fees and overhead)." A.R. 742 ("Return on Total Cost (ROTC) emphasis added). As such, the guidelines have created the formula of measuring a minimum ROTC based on the 10 year treasury rate on the date of the Pre-Hearing Order plus 450 basis points. The purpose of the formula established in the guidelines is to create an objective standard when the economic thresholds set forth in 760 CMR 56.02(c) & (d) are not applicable. For example, if HD/MW's 90 unit project had a proposed return of 9%, the conditions imposed by the Board (if the conditions did not include a unit reduction) would have had to decrease the ROTC to less than 6.84% for HD/MW to meet its burden. As such, when applicable, the minimum ROTC formula as set forth in the guidelines is consistent with the statute and guidelines.

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submitted as part of HD/MW's application for a comprehensive permit to the Board three days later on November 6, 2014. A.R. 1728, 1821-1829.

However, in this case, since the subsidizing agency, MassHousing, determined that HD/MW's proposal was "financially feasible" and the Board imposed a condition decreasing the number of units, the formula set forth in guidelines was not the baseline utilized by the HAC to determine whether the project had been rendered "uneconomic." A.R. 4416, A.R. 1438, 1726. Pursuant to the regulations, the HAC found that the economic baseline for "reasonable return" in this case was 5.88% even though the formula in the guidelines calculates a minimum ROTC as 6.84%. *See* A.R. 4416 (Decision); A.R. 2708, ¶14 (Engler Pre-Filed Testimony). Based on the evidence submitted by both HD/MW and the Board, the HAC found that as a result of the conditions imposed by the Board, the ROTC for the 35 unit project was 4.26% which was 1.62% lower than the ROTC for HD/MW's proposed 90 unit project. A.R. 4416. In other words, the conditions imposed by the Board reduced HD/MW's "reasonable return" by 27.5%, which led the HAC to "find the ROTC for the approved project is both uneconomic and significantly more uneconomic than the ROTC for the developer's proposal." (emphasis added). A.R. 4416.

Consequently, the HAC's decision is in accord with the statute, regulations, and guidelines. The HAC and HD/MW recognized the minimum ROTC set forth in the formula established in its guidelines (6.84%) because it is the methodology that HAC typically uses to assess rental projects, but properly found that the 5.88% ROTC of the proposed 90 unit project as its baseline to determine whether the conditions rendered the project "uneconomic" and also "significantly more uneconomic." A.R. 4416. Indeed, in practice, the concept of "significantly more uneconomic" is actually beneficial to the Board as it seemingly required HD/MW to demonstrate the conditions imposed by the Board significantly decreased the ROTC as opposed

to just demonstrating that the conditions imposed merely dropped the ROTC below the objective 5.88% baseline.[11] As such, the HAC did not exceed its statutory authority or lack jurisdiction.

Furthermore, the Board's heavy reliance on *Board of Appeals of Woburn v. Massachusetts Housing Appeals Committee* 451 Mass. 581 (2008)("*Woburn*") is misplaced. In *Woburn*, the SJC held that the HAC exceeded its statutory authority by ignoring the burdens of proof enumerated in the regulations by disregarding the developer's initial burden of proof in cases of approvals with conditions to demonstrate that the conditions render the project uneconomic and treating approvals with conditions as *de facto* denials. *Id.* at 590 ("Consistent with this statutory requirement, the department's regulations provide that the developer must demonstrate that the conditions are uneconomic before the committee considers whether they are 'consistent with local needs.'"). In this case, the HAC did not exceed its statutory authority. Indeed, it expressly complied with the statute and regulations and the Board has attempted to bootstrap an argument based on the formula contained in the guidelines (not the statute or the regulations) without any regard for the statute, regulations, and the relationship between the three and cherry pick's without any context quotations from the testimony and HAC's Decision.

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[11] Additionally, as the Board concedes in its brief, the HAC has been applying the "significantly more uneconomic" concept since at least 2007. *See* Board Opening Br. at p. 16 *citing See Cir San Realty Trust v. Woburn Board of Appeals,* HAC No. 01-22 at p. 15 (April 23, 2015) *Haskins Way, LLC v. Middleborough Zoning Board of Appeals,* HAC No. 09-8 at pp. 17-18 (March 28, 2011); *Cohasset, Inc. v. Cohasset Zoning Board of Appeals,* HAC No. 05-09 (September 18, 2007). Further, as the SJC noted in *Woburn* "[i]t is a recognized principle of administrative law that an agency may adopt policies through adjudication as well as through rulemaking,... and 'the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." (internal citations and quotation omitted) *Woburn,* 451 Mass. at 593. Also, recently in *Woburn Zoning Board of Appeals v. Housing Appeals Committee*, 2016 WL 3129642, *4, *11 (Mass. Land Ct. June 3, 2016), Judge Speicher upheld an HAC decision stating that the HAC's finding that a project was "significantly more uneconomic"... "was supported by substantial evidence, was not arbitrary or capricious, was legally tenable and was otherwise within the proper exercise of the HAC's authority."

Finally, the Board's position is contrary to the purpose of the statute. At bottom, the Board's argument is that a developer must propose an affordable housing development at the time it applies for Project Eligibility from a subsidizing agency that exceeds an unknowable return that is impossible to calculate until years in the future, in order to have the ability to appeal an approval with conditions and for the HAC to have jurisdiction. In other words, a Board is entitled to impose any conditions it desires and, if the 10-year treasury rate goes up enough by the time a Pre-Hearing Order is issued, then the HAC has no jurisdiction of the appeal and the developer is without recourse regardless of the conditions imposed by the Board and the economic effect of those conditions. This is both nonsensical and inconsistent with the statutory language of G.L. c. 40B, its regulations, and the legislature's intent in passing G.L. c. 40B, which is to "streamline and accelerate the permitting process for developers of low or moderate income housing in order to meet the pressing need for affordable housing and streamlining application procedures and overriding local zoning restrictions." *See Taylor v. Board of Appeals of Lexington,* 451 Mass. 270, 277-278 (2008) *citing Middleborough*, 449 Mass. at 521. Thus, the Board's argument is completely inconsistent with this enumerated legislative intent.

Thus, for the reasons set forth herein, the Court should reject the Board's argument that the "HAC lacked jurisdiction" to hear HD/MW's appeal or that the HAC exceeded its statutory authority in determining that HD/MW met its burden of proof.

II. THE HAC'S FINDINGS THAT THE BOARD FAILED TO SUSTAIN ITS BURDEN OF PROOF OF DEMONSTRATING THAT EACH OF ITS CONDITIONS WERE SUPPORTED BY A VALID LOCAL CONCERN AND THAT THE LOCAL CONCERN OUTWEIGHED THE REGIONAL NEED FOR AFFORDABLE HOUSING SHOULD BE UPHELD.

In its Decision, the HAC devotes thirty-six (36) pages to addressing the Board's burden with respect to Local Concern and laid out in detail the evidence presented by both the Board

and HD/MW and the HAC's findings with respect to whether the Board met its burden for each of the conditions. A.R. 4420-56. Notwithstanding, because the Board disagrees with the HAC's factual findings, it once again attempts to bootstrap an argument that the HAC failed to consider the evidence presented by the Board or adequately explain its findings and simply summarizes the evidence presented by the Board at the hearing. *See* Board Opening Brief at pp. 22-23. Indeed, the Board's argument is without merit, is easily dispensed with upon a review of the HAC decision, and is merely another attempt by this Board to induce the Court into abandoning the standard of review set forth in 30A and conduct a *de novo* review with the hope that the Court will substitute its judgment for the HAC's. The Court should reject this tactic. *See e.g. Board of Appeals of Hanover v. Housing Appeals Committee*, 2009 WL 867124, *9 (Mass. Land Court April 2, 2009)("[a]ll [the Boards'] challenges to [the agency's] decision are, in fact, arguments to the effect that we 'should make independent findings on our own initiative from the record more in accordance with the Plaintiff[s'] theory of the case in place of making a determination as to whether substantial evidence exists to support [HAC's] findings.") *see also Zoning Board of Appeals of Wellesley,* 385 Mass. at 657("A court may not displace an administrative board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.").

The HAC did not commit any errors of law and the Decision is supported by substantial evidence. Accordingly, the HAC's decision that the Board failed to meet its burden with respect to many of the conditions its imposed should not be disturbed in this 30A appeal.

A. The Board's Burden of Proof before the HAC

Once the HAC determined that HD/MW satisfied its burden that the conditions imposed by the Board rendered the project "uneconomic," the burden shifted to the Board to demonstrate

that each of the conditions imposed by the Board, and the denials of certain requested waivers, were supported by valid health, safety, environmental or other local concern that supports each condition imposed, and that such concern outweighs the regional need for low or moderate income housing.[12] A.R. 4420, 760 CMR 56.07(a)(c), 56.07(2)(b)(3); see also *Cozy Hearth Community Corp. v. Edgartown Zoning Board of Appeals*, 2008 MA. HAC. 06-09 (MA.HOUS.APP.COM.), 2008 WL 1847284, *11 (April 14, 2008)(Decision); *see also Paragon Residential Properties, LLC v. Brookline Zoning Board of Appeals*, 2007 MA HAC 04-16, 2007 WL 956644 at *50 (March 26, 2007)(Decision)(rejecting board's argument that each individual condition must render a project uneconomic for the condition to be stricken and, instead, holding that once a developer demonstrates that the conditions (in the aggregate) render the project uneconomic then "each condition contested by the developer is to be reviewed to determine if it is consistent with local needs."). Also, as part of its burden, the Board was required to prove that the conditions are applied as equally as possible to both subsidized and unsubsidized housing. A.R. 740, definition of "Consistent with Local Needs."

As the HAC's Decision states, "The Board's burden was significant: the fact that Milton does not meet the statutory minima regarding affordable housing establishes a rebuttable presumption that a substantial regional housing need outweighs local concerns in this instance."[13] A.R. 4420 *citing* 760 CMR 56.07(3)(a); A.R. 4033(Pre-Hearing Order, § II, ¶19),

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[12] Indeed, throughout its argument with respect to "Local Concern" the Board simply argues that the HAC did not have the power to strike or modify conditions because the conditions did not render the project uneconomic. This argument should be disregarded because the HAC's finding that the conditions imposed by the Board rendered the project uneconomic should be affirmed for the reasons set forth above in Section I.

[13] At the time HD/MW submitted its application to the Board, Milton had achieved a subsidized housing inventory of merely 4.4% – less than half of the 10% threshold. A.R. 1845. Also, in the Pre-Hearing Order, the Board stipulated that the Town of Milton has not (1) satisfied any of the

G.L. c. 40B, §§2, 23; *Zoning Board of Appeals of Lunenberg v. Housing Appeals Comm.*, 464 Mass. 38, 42 (2013)("there is a rebuttable presumption that there is a substantial Housing Need which outweighs Local Concern: if the statutory minima are not met), *quoting Boothroyd v. Zoning Bd. of Appeals of Amherst*, 449 Mass. 333, 340 (2007), *quoting Board of Appeals of Hanover v. Housing Appeals Comm.*, 363 Mass. 339, 346, 365, 367 (1973) ("municipality's failure to meet its minimum [affordable] housing obligations defined in § 20 will provide compelling evidence that the regional need for housing does in fact outweigh the objections to the proposal").

Despite the "significant" burden of proof imposed on Board, the Board did not submit any studies, or analysis, performed by any of its witnesses to rebut the studies and analysis of HD/MW's experts. Instead, the Board's witnesses primarily relied on the phrase that various Board conditions were "reasonable." *See e.g.* A.R. 2858, (Turner Pre-Filed generally) and A.R. 2948,(Tougias Pre-Filed generally) *see also* A.R. 293-295; A.R. 344-6. "Reasonable", however, is certainly not the lofty burden of proof that the Board is required to meet to justify each and every condition and denial of requested waivers. *Adams Road Trust v. Grafton Board of Appeals,* HAC No. 02-38, 2004 WL 5052500 at n. 13 (Dec. 10, 2004)(Decision)(rejecting the board's and intervenors' argument that conditions and denials of waiver had either a "rational basis" or were "feasible" as irrelevant to the board's and intervenors' burden of proof).

Conversely, at the hearing before the HAC, HD/MW submitted substantial evidence – which the HAC credited in its decision that the conditions imposed by the Board were not based on a Local Concern that outweighed the regional need for affordable housing. This evidence

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statutory minima defined in sentence two of the definition of "consistent with local needs" in G.L. c. 40B, § 20; and (2) met any of the "Safe Harbor" requirements as set forth in 760 CMR 56.03. A.R. 4033 at Nos. 19-20.

included the testimony of Paul Holland, the developer and a civil engineer (A.R. 2718-35, A.R. 3074-77), James Burke, PE, the Project Engineer (A.R. 2814-37, A.R. 3091-3105), Kevin Hastings, PE, a fire safety expert (A.R. 2841-45, A.R. 3158-62), Daniel Dulaski, Phd, a transportation engineer (A.R. 2814-37, A.R. 3147-54), and Scott Morrison, and environmental scientist (A.R. 2838-40, A.R. 3155-57) along with numerous studies supporting the design, safety, and environmental impact of the proposed 90-unit Project (e.g. A.R. 2802-04 at ¶2, A.R. 2814 at ¶3, A.R. 2838-9 at ¶4, (listing studies contained in the record) and post-hearing briefing summarizing the evidence A.R. 4274-4360, A.R. 4361-74. Additionally, HD/MW's position was buttressed by the peer reviews for its proposed 90 unit development completed by the Board's two engineering experts, Scott Turner and Jeffrey Dirk, that were submitted during the Board's public hearing phase and the public statements of Fire Chief Grant to the Board that significantly contradicted the testimony of all three witnesses presented at the Hearing, which certainly affected how the HAC viewed their credibility.[14] A.R. 2396-2411, A.R. 2569-94, A.R. 57-8-62-3.

Further, HD/MW submitted substantial evidence that the conditions imposed on HD/MW's project were not equally applied to unsubsidized housing, including, that other unsubsidized developments in Milton were taller, denser, did not have looped roadways, lacked multiple access points, did not have 50-ft vegetated buffers, and in one case was specifically re-

[14] Both Mr. Dirk and Mr. Turner acknowledged at the Hearing that their peer reviews provided an "honest" assessment of HD/MW's plans and supporting studies and if either had identified a portion of HD/MW's plans or explanations that was unsafe they would have identified it for the Board in their peer reviews. A.R. 297:17-298:1; A.R. 347:19-348:1. Neither Mr. Turner nor Mr. Dirk identified any safety issues with respect to HD/MW's proposed 90 unit development during their peer review nor did they recommend the imposition of the conditions imposed by the Board. A.R. 2396-2411, A.R. 2569-94. The same is true with Milton Fire Chief Grant, who spoke publicly during the Board's hearing process and did not express any concern about the size or layout of HD/MW's proposed 90 unit development. A.R. 57-8-62-3.

zoned to permit greater height and density. A.R. 2805-6 at ¶¶8, 11, 14, A.R. 3161 at ¶10, Exhibit A; A.R. 2634-2717 *See* A.R. 652:6-16; A.R. 660:22-661:20; *see also* A.R. 3255-6.

As such, the HAC's findings that the Board did not carry its burden to demonstrate that each of the conditions it imposed were supported by a valid Local Concern that outweighed the regional need for affordable housing was supported by substantial evidence and should not be disturbed in this 30A appeal.

B. The HAC's decision to strike and/or modify the conditions that the Board challenges in this 30A appeal should be upheld because the HAC's decision is supported by substantial evidence.

In its opening brief, the Board limits its arguments to the HAC's findings with respect to conditions relating to: (1) "Emergency Access" including "fire safety" and (2) "Design Concerns" including, "elevators", "stormwater management" and "buffering." *See* Board Opening Brief at pp. 23-33. The HAC's Decision specifically addresses each of these categories of conditions and made findings of fact with respect to each of these issues. The HAC's analysis and findings with respect to these issues are located in the record at "Emergency Access and Fire Safety" at A.R. 4420-31; Design at A.R. 4451-4456; Elevators at A.R. 4431-32; Stormwater at A.R. 4436-44, and Buffering at A.R. 4444-47. Accordingly, the HAC's findings should not be disturbed merely because the Board disagrees with the HAC's findings.

i. The HAC appropriately considered the evidence and arguments submitted by the Board and HD/MW with respect to the conditions imposed by the Board relating to Emergency Access and Fire Safety and its finding that the Board did not carry its burden of proof was supported by substantial evidence.

Despite the Board's protestations, the HAC considered the evidence and arguments submitted by the Board with respect to emergency access and fire safety and appropriately found that the Board did not meet its burden of proof. A.R. 4420-4431. In rejecting Conditions 7 and 28 requiring that the proposed development be re-designed to include a looped roadway and,

after identifying evidence and arguments advanced by both the Board and HD/MW (all of which the Board ignores in its brief), the HAC found:

> the Board has not satisfied its burden that a requirement of a looped roadway for this development is supported by a valid local concern, as long as the project provides a sufficient turn radius for large emergency vehicles to turn around within the development, as required by the fire code. Its requirement for a looped roadway constitutes an improper redesign of the project. Condition 28 is struck and requirements for a looped roadway in other conditions are also struck.

A.R. 4428. The HAC's findings with respect to this issue is supported by substantial evidence set forth in both the record and reiterated in the HAC's decision, including the HAC's summary of the evidence and arguments advanced by the Board. A.R. 4424-29. As such, the HAC's findings, to credit HD/MW's testimony, including the testimony of James Burke, Kevin Hastings, Daniel Dulaski, and arguments as opposed to the Board's, and determination to strike the conditions requiring a looped roadway should not be disturbed. A.R. 4424-29, A.R. 2801-13, A.R. 3097-99, ¶¶16-22, A.R. 3152-3, ¶¶16-17, A.R. 2430-37, A.R. 4309-17, 4320-22, 4367-8.

With respect to "Emergency Access to Buildings," once again, the HAC's decision outlines the evidence and arguments submitted by the Board and HD/MW, including, recounting the numerous inconsistent statements made by Fire Chief Grant at a March 31, 2015 hearing of the Board prior to its Decision and his testimony at the Hearing. A.R. 4429-30. After considering the evidence, the HAC decided to add a condition requiring HD/MW "to provide a paved area for placement of fire vehicles during the emergency approach on the southerly side of Building 2, as either a parking area or access driveway sufficiently wider than 24 feet to accommodate the largest of the department vehicles" and to include a set of stairs that HD/MW proposed to add. A.R. 4424-4430. These conditions are reasonable and within the power of the HAC. Moreover, these conditions were supported by substantial evidence presented at the

hearing by James Burke, PE and Kevin Hastings with respect to the stairs and site plans show plenty of space to pave an additional area that the fire department can use to park vehicles if it so chooses. A.R. 3097 at ¶¶17-18, A.R. 3105, A.R. 3158-59. ¶¶3-5, A.R. 4430.

Moreover, to the extent the Board refers to Conditions 2 and 6 within its emergency access and fire safety section, which include the unit reduction from 90 to 35 and a condition to break up the massing of the buildings in several smaller buildings, the HAC's decision thoroughly lays out the arguments and evidence submitted by the Board and HD/MW and sets forth its findings as to why it struck these Condition 6 (breaking up the buildings) and modified Condition 2 to cap the number of units at 90 and to require it to contain a mix of 1, 2, and 3 bedroom units in accordance with the Interagency Agreement.[15] A.R. 4420-24, 4451-4452, A.R. 4310-17, A.R. 4366-7. The Decision states:

> the Board has not drawn any logical connection between its concerns about density, open space, and the environment and the limitation of the development specifically to 35 units. The Board's reduction in project size to a maximum limit of 35 units without support for that specific figure is not consistent with local needs. Therefore, consistent with our rulings above, Condition 2 is modified to provide that the project shall include no more than 90 units and the applicable mix of units shall include three bedroom units in accordance with the Interagency Agreement.

A.R. 4451 (internal citations omitted).

In striking Condition 6, the HAC stated "making a better development is not the standard for whether the Board has shown a valid local concern that outweighs the need for affordable

[15] During the public hearing, the Board did not engage in the process set forth in 760 CMR 56.05(6) regarding reviewing financial statements in anticipation of conditioning an approval on a unit reduction. *See* A.R. 2719 at ¶¶5-6. Additionally, the Board's decision specifically states that the Board "unanimously voted *not to approve* the proposed 90-unit development for the Site." A.R. 2605-06. (emphasis added).

housing and it does not support the breakup of the two residential buildings into multiple buildings. As the condition is not credibly supported, it constitutes an improper redesign of the project." A.R. 4452. Accordingly, the HAC's decision striking Condition 6 and modifying Condition 2 is supported by substantial evidence and based on credibility determinations.

ii. The HAC appropriately considered the evidence and arguments submitted by the Board and HD/MW with respect to the conditions imposed by the Board relating to "Design Conditions" and its finding that the Board did not carry its burden of proof was supported by substantial evidence.

Despite the Board's protestations, the HAC considered the evidence and arguments submitted by the Board with respect to the "Design Conditions" that the Board identifies in its opening brief and appropriately found that the Board did not maintain its burden of proof. A.R. 4431-32, 4436-44, A.R. 4444-47, 4451-4456. As set forth above, the HAC considered and then modified Condition 2 and struck Condition 6 finding that the HAC failed to meet its burden. With respect to Condition 23, which required "the design [of the buildings] shall reflect the architectural styles of the surrounding neighborhood which is a mix of single family colonials, Victorians, and mid-century split levels" would have resulted in a complete architectural re-design of HD/MW's proposed project. A.R. 4338-39. Once again, the HAC summarized the evidence submitted by both the Board and HD/MW (A.R. 4454-55) and then found that:

> [w]hile the intent of the condition appears to address a local concern for the advancement of design consistency in the neighborhood, we note that the neighborhood includes the abutting DPW property. The condition itself is not supported by an identified local regulation or bylaw, and is improperly vague and ambiguous, since it identifies three distinct historical styles, spanning different time periods of residential design. The Board has not shown a valid local concern that outweighs the need for affordable housing to support this condition. It is therefore struck.

A.R. 4455.

Moreover, the HAC appropriately considered and struck Condition 22, which required that all dwelling units must be located no more than one hundred feet from an elevator. A.R. 4431-32. In its Decision, the HAC summarized the evidence submitted by both the Board and HD/MW and then issued a finding striking the condition. *Id.* In striking Condition 22, the HAC stated:

> The developer argues that the Board has only raised vague statements that do not support a valid safety concern for this requirement. Mr. Hastings, its fire safety expert, testified that this condition is not supported by any provisions of the state building code, fire code, Massachusetts Architectural Access Board regulations or ADA standards regulating maximum travel distance allowed from a dwelling unit to an elevator, and the Board has offered no information to the contrary and no citation to any local requirement support this condition. Exh 108, ¶9; Tr I, 113-114. We agree with the developer that the Board has not demonstrated a valid local concern, for this condition that outweighs the need for affordable housing. It is therefore struck."

A.R. 4431-32. Accordingly, the Board's finding striking Condition 22 was correct and supported by substantial evidence. A.R. 3160 at ¶9; A.R. 4337-38; A.R. 4367.

The same is true with respect to the Board's argument regarding stormwater. The HAC appropriately considered the evidence presented with respect to Stormwater Management and its decision to strike and modify certain conditions is supported by substantial evidence. A.R. 4436-7, 4442-3; A.R. 4323-25; A.R. 3094-7, ¶¶8-15. Indeed, the HAC noted that the Board's engineering expert witness, Mr. Turner, who also conducted the peer review during the Board's public process, found that HD/MW proposed 90 unit project complied with the 10 standards in the Massachusetts Stormwater Handbook. A.R. 4437. A.R. 2590-94. As such, even without considering the substantial evidence provided by HD/MW, the Board's own witness

acknowledged that the design of HD/MW's proposed project complied with the standards set forth by the Commonwealth.[16] *Id.*

The Board focuses much of its argument on the HAC's decision to strike Condition 11, which states that required compliance with Milton's Rules for Comprehensive Permits, including the Massachusetts Stormwater Handbook, including the requirement any proposed stormwater facility not be located beneath any site building and is at least 20 feet away from any building slab or footing. As it did throughout its Decision, the HAC summarized the evidence and arguments submitted by the Board and the evidence and arguments submitted by HD/MW, including that under building infiltration systems are common to collect roof runoff and do not pose any risk to the living space of the residents or the abutters' property, and then rendered its finding. A.R. 4436-7.

With respect to Condition 11, the HAC found:

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

A.R. 4437.

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[16] Notwithstanding, the Board asks this Court to set aside various findings made by the HAC regarding the conditions related to Stormwater because its witnesses were "credible." *See* Board Br. at p. 31. The HAC disagreed and its credibility determinations are virtually unassailable in this 30A appeal.

Also, for some unknown reason, the Board refers to Condition 10, which the HAC modified subsection (a) in conformity with the request by the Board to allow for the construction of the access drive and the HAC retained subsection (c) that requires HD/MW to submit documentation to the town that the project site has been designed to handle runoff from upgradient properties and that it would not be directed onto the Carlins property. A.R. 4439-40, 4442-3. As such, the modification of Conditions 10(a) and the retention of 10(c) irrefutably demonstrate that the Court considered the evidence submitted by the Board and made appropriate findings supported by substantial evidence.

Finally, the HAC's decision to strike Condition No. 5 imposing a 50-foot vegetated buffer and to modify Condition 25 regarding retaining mature trees along the property lines were supported by substantial evidence. In the decision, the HAC summarized the evidence and arguments of the Board (and abutter) and the evidence and arguments submitted by HD/MW, including that the by-laws only require a 35-foot setback, and issued a finding supported by substantial evidence. A.R. 4444-7, A.R. 4318-20, A.R. 4367. The HAC found that: "the Board has not demonstrated credibly that the project must be shielded from abutters with a 50-foot buffer, as opposed to the setbacks proposed. Not only have the Board and Carlins not shown a local requirement for a 50-foot buffer, they have not demonstrated why such a large buffer is necessary in the context of this project. Accordingly, Condition 5 is struck." A.R. 4447.

Moreover, with respect to Condition 25, the HAC also summarized the evidence and arguments of the Board and HD/MW and made a reasonable modification requiring HD/MW to retain mature trees to "the extent reasonably practable." A.R. 4447 This provides HD/MW with the freedom to conduct its site work – without arbitrary limitations on the trees that it can remove from its own property. The HAC was well within its authority in finding that the Board did not

meet its substantial burden that requiring HD/MW to " retain mature trees particularly along the property lines to the north, west, and south" was supported by a local concern that outweighed the regional need for affordable housing.

Accordingly, the HAC's decision to strike and/or modify conditions imposed by the Board should be upheld because the HAC's findings and determinations are supported by substantial evidence.

III. THE HAC'S DECISION TO STRIKE CONDITIONS 18 AND 19 REGARDING THE BOARD'S ATTEMPT TO IMPINGE ON THE AUTHORITY OF MASSHOUSING AND DHCD SHOULD BE UPHELD.

Despite the Board's characterization, Condition 18 required HD/MW to enter into a wholly unnecessary regulatory agreement "acceptable to the Board and Town Counsel...prior to the issuance of a building permit for the Project." A.R. 4458. Condition 19 authorized Milton to become or select the monitoring agent and charge an undetermined fee for that service. *Id.* Consequently, the HAC appropriately struck Conditions 18 and 19 and its decision to strike these conditions was supported by both substantial evidence and is consistent with the law. A.R. 4458-4459; A.R. 43354-6.

In evaluating Conditions 18 and 19, the HAC summarized the evidence and arguments submitted by both the Board and HD/MW. A.R. 4458-4459. The HAC noted that the Board did not provide any testimony in support of these conditions nor did it supply any evidence from DHCD or MassHousing with respect to their positions on an ancillary regulatory agreement, including, but not limited to, the need, the language, or requirement that it be executed prior to the issuance of a building permit. A.R. 4458-4459.

In striking the conditions, the HAC concluded:

> The Board has also inadequately briefed the issue of the responsibility of the subsidizing agency and the role of

> DHCD with regard to maintaining the affordability obligations under the regulatory agreement. According to the *Guidelines*, the purpose of the regulatory agreement 'is to memorialize the rights and responsibilities of the parties' and provide 'for monitoring of the project throughout the term of affordability. Therefore, if it would be appropriate continued monitoring of affordability after the termination of a subsidizing agency's role, it would be important to consider DHCD's role with respect to approving and executing agreements and maintaining oversight of them.
>
> Finally, under *Attitash*, as confirmed by *Amesbury*, two considerations are in play: First, as we noted, it is important that the Board not 'impinge on the regulatory responsibilities of the subsidizing agency,' Additionally, a requirement to execute an additional regulatory agreement subject to the review and approval of the Board and Town counsel represent 'the sort of condition subsequent requiring future review and approval [by the Board] of which we have frequently disapproved' Therefore, on the record before us, the Board has not demonstrated that requiring HD/MW to execute and record an additional regulatory agreement with the Town in the fashion it has set out is within the authority of the Board. Accordingly, this condition is struck.

(internal citations omitted). A.R. 4459.[17]

The Board's purported reliance *Zoning Bd. of Appeals of Wellesley v. Ardemore Apartments Ltd. Partnership*, 436 Mass. 811 (2002)("*Wellesley*") misses the mark. The SJC's decision in *Wellesley* merely stands for the proposition that a project that is developed subject to a comprehensive permit must maintain an affordability requirement as long as the project does not comply with local zoning. *Id.* at 813, 825. *Wellesley,* and none of the HAC decisions cited by the Board, authorize a Board to condition the issuance of building permit for a 40B project on the approval of an ancillary regulatory agreement subject to the approval of the Board and town counsel without any regard for DHCD or the subsidizing agency. Indeed, *Wellesley* was brought

[17] The Decision also notes in Footnote 31 additional failures by the Board to justify the imposition of Conditions 18 and 19. A.R. 4459

nearly 20 years after the issuance of the comprehensive permit, long after the project was constructed, and after the affordability covenant in the subsidizing agencies loan agreements expired. *Id.* 812-813. Accordingly, the HAC's decision to strike Conditions 18 and 19 is consistent with the SJC's decision in *Wellesley* and G.L. c 40B and the decision to strike these conditions should be upheld. *Whitcomb Ridge, LLC, v. Boxborough Board Of Appeals*, 2008 MA. HAC. 06-11 (MA.HOUS.APP.COM.), 2008 WL 268334 * 6 (Jan. 22, 2008)(Summary Decision) (recognizing DHCD's 2006 memorandum stating that "Zoning boards of appeals may not under any circumstances impose conditions in a comprehensive permit that impinge on the regulatory responsibilities of the subsidizing agency" including project monitoring.); *Attitash Views, LLC. v. Amesbury Board of Appeals,* HAC No. 06-17, 2007 WL 3102184 at *6 (Oct. 15, 2007)(Summary Decision) (the final terms of the regulatory documents are within the regulatory discretion of MassHousing).

IV. HD/MW IS ENTITLED TO JUDGMENT ON THE PLEADINGS AND THE BOARD'S 30A APPEAL SHOULD BE DISMISSED.

As set forth above, the Board has failed to demonstrate any basis for the HAC's decision to be reversed or remanded and the Decision is properly based on substantial evidence. Accordingly, the HAC's decision should be upheld, judgment should enter in favor of HD/MW, and the case should be dismissed. *See Middleborough,* 449 Mass. at 523-24, 528-29 (The HAC's decision must be upheld if supported by substantial evidence.).

Conclusion

For the foregoing reasons, the Court should deny the Board's Motion for Judgment on the Pleadings, grant judgment in favor of HD/MW Randolph Avenue, LLC, uphold the HAC's December 20, 2018 Decision, and dismiss the Board's appeal pursuant to G.L. c. 30A.

Respectfully Submitted,

HD/MW Randolph Avenue, LLC

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Dated: January 9, 2020

CERTIFICATE OF SERVICE
I hereby certify that on this day a true copy of the above document was served upon the attorney of record for each party by mail/by email/~~by hand~~
Dated: 1/9/20
Andrew E. Goloboy

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

LAND COURT
No. 19 MISC 000037 (RBF)

TOWN OF MILTON BOARD OF APPEALS,
Plaintiff,

v.

THE MASSACHUSETTS HOUSING APPEALS COMMITTEE and HD/MW RANDOLPH AVENUE, LLC,
Defendants.

MASSACHUSETTS HOUSING APPEALS COMMITTEE'S OPPOSITION AND CROSS-MOTION TO TOWN OF MILTON'S MOTION FOR JUDGMENT ON THE PLEADINGS

The defendant Housing Appeals Committee ("Committee") opposes the Motion of Plaintiff Milton Board of Appeals For Judgment On The Pleadings ("Motion"). In responding to the Motion, the Committee generally defers to and relies upon the codefendant HD/MW Randolph Avenue, LLC ("HD/MW") to rebut the substantial evidence and other record-specific arguments made in that challenge of the Committee's decision. This Opposition addresses several broader legal issues raised by the Motion.

STATUTORY AND REGULATORY BACKGROUND: CHAPTER 40B AND THE REGULATIONS IMPLEMENTING IT.

The Legislature enacted the Comprehensive Permit Act, G.L. c. 40B, §§ 20-23 ("Chapter 40B"), "to provide relief from exclusionary zoning practices which prevented the construction of badly needed low and moderate income housing." *Hanover v. Hous. App.. Comm.*, 363 Mass. 339, 354 (1973). It accordingly has a "core purpose" of "streamlin[ing] the process for obtaining the necessary authorization to build [such] housing." *Amesbury v. Hous. App. Comm.*, 457 Mass. 748, 759 (2010). An even more central legislative concern was to create a vehicle for

"overriding local zoning restrictions," so as to prevent "cities' and towns' . . . use of their [locally controlled] zoning powers to exclude" affordable housing. *Taylor v. Lexington*, 451 Mass. 270, 278 (2008) (citing *Hanover*, 363 Mass. at 347, 355).

Under Chapter 40B, a developer who wishes to build affordable housing may apply for a "comprehensive permit" with a municipality's Zoning Board of Appeal ("Board"), rather than have to "seek separate approval from each local board having jurisdiction over the project." *Wellesley v. Ardemore Apartments Ltd. P'ship*, 436 Mass. 811, 815 (2002). The Board is empowered to grant the application, grant it with conditions, or deny it. G.L. c. 40B, § 21. If the Board grants the application (with or without conditions), its resulting comprehensive permit may override local requirements or restrictions that would normally be imposed by other local boards. *Id.*

The Legislature also recognized that in some instances a Zoning Board itself might act to prevent a project from proceeding, either by denying a comprehensive-permit application outright or, as in this case, by allowing it but saddling it with conditions that would make it financially infeasible or "uneconomic" for the developer to proceed. Section 22 of Chapter 40B accordingly allows the developer to appeal in either of those two situations to the Committee, a State-level tribunal within the Department that has the power to override the ZBA and issue a comprehensive permit itself. G.L. c. 40B, §§ 22-23; *Hanover*, 363 Mass. at 354-55, 372-74. While the hearing before the Committee is de novo, *Hanover*, 363 Mass. at 371, Section 23 of Chapter 40B carefully circumscribes its scope:

> The hearing by [C]ommittee . . . shall be limited to the issue of whether, in the case of the denial of an application, the decision of the board of appeals was reasonable and consistent with local needs and, in the case of an approval of an application with conditions and requirements imposed, whether such conditions and requirements make the construction or operation of such housing uneconomic and whether they are consistent with local needs.

G.L. c. 40B, § 23. The Legislature also provided definitions of "uneconomic" (in pertinent part "any condition brought about by any single factor or combination of factors to the extent that it makes it impossible for a . . . limited dividend organization to proceed and still realize a reasonable return in building or operating such housing") and "consistent with local needs." G.L. c. 40B, § 20.[1]

As expressly authorized by the Legislature, see G.L. c. 23B, § 6, the Department has promulgated extensive regulations implementing Chapter 40B's more general provisions. 760 C.M.R. §§ 56.01-56.08.

ARGUMENT

I. STANDARD OF REVIEW

Judicial review of the Committee's interpretation and application of the Act and its implementing regulations is narrow and deferential. *Town of Middleborough v. Housing App. Comm.*, 449 Mass. 514, 523 (2007). Courts give "due weight to the experience, technical competence, and specialized knowledge of the [Committee] as well as to the discretionary authority conferred upon it," and they apply all rational presumptions in favor of the validity of the Committee's action. *Amesbury v. Hous. App. Comm.*, 457 Mass. 748, 759 (2010). Because of this deference to the Committee's interpretation of the governing statutory scheme, its legal determinations are *not* reviewed *de novo*. *Bd. of Appeals of Town Hanover v. Housing Appeals*

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1 As regards "consistent with local needs," Section 20 provides in pertinent part that "requirements and regulations shall be considered consistent with local needs if they are reasonable in view of the regional need for low and moderate income housing considered with the number of low income persons in the city or town affected and the need to protect the health or safety of the occupants of the proposed housing or of the residents of the city or town, to promote better site and building design in relation to the surroundings, or to preserve open spaces." *Id.*

Committee, 2009 WL 867124, *5 (Land Ct. No. 381349, April 2, 2009), citing *Middleborough*, 429 Mass. at 524. Courts also recognize that, because the Act focuses on reform, both the Committee and the Courts should construe it broadly to further the goals of such reform. *Middleborough*, 449 Mass. at 524. Thus, courts do not overturn the Committee's action unless it is proven arbitrary, unreasonable, or inconsistent with its own rules. *Id.* (citations omitted). Finally, the burden on proving that the Committee's action is invalid rests with the parties challenging that action. *Id.* (citation omitted).

II. THE COMMITTEE PROPERLY FOUND THAT THE CONDITIONS IMPOSED BY THE TOWN RENDERED THE PROJECT UNECONOMIC.

The Board attempts to delegitimize the Committee's decision by claiming, for the first time before this Court, that it had no jurisdiction over the appeal because the project was uneconomic even without the conditions that it imposed. As developed below, this argument fails for three reasons. First, the Committee had jurisdiction over the claim because the issue of whether the project was uneconomic was a matter of proof, not a jurisdictional requirement. Second, the Board waived the issue by not raising it before the Committee. Third, the Committee properly applied its longstanding policy of imposing a higher burden of proof upon the developer where the original proposal was uneconomic and found that the Board's conditions made the project significantly more uneconomic.

a. The Committee Properly Exercised Its Jurisdiction In Hearing The Appeal.

The grounds for an appeal of the Board's decision are set out in G.L. c. 40B, § 22: "[w]henever an application … is denied or is granted with such conditions and requirements as to make the building or operation of such housing uneconomic, the applicant shall have the right to appeal." The Supreme Judicial Court has held that while this provision establishes a "necessary element of the developer's prima facie case for relief," it is *not* a jurisdictional

requirement for the Committee to hear the appeal. *Bd. of Appeals of Woburn v. Housing Appeals Committee,* 451 Mass. 581, 590-591 (2008); *Taylor v. Bd. of Appeals of Lexington*, 451 Mass. 270, 273 (2008) (rejecting jurisdictional challenges of appeal to the Committee); *Town of Middleborough v. Hous. Appeals Comm.*, 449 Mass. 514, 520–21 (2007) ("viewed within the context and purposes of the act, it is clear that what the department denominates as a "jurisdictional requirement" is more properly viewed as a substantive aspect of the successful applicant's prima facie case for entitlement to a particular government benefit, in this case, a comprehensive permit"). The Board's attempt to create a jurisdictional barrier would defeat the purpose of the Committee and is contrary to ruling precedent.

b. The Board Waived The Argument That The "Significantly More Uneconomic" Test Should Not Apply.

In its decision, the Committee found that the Return on Total Cost ("ROTC") of the project as proposed by the developer was below the economic threshold set out in the DHCD Guidelines. AR8 at 4410. For this reason, the Committee held that, under one standard, the developer, to satisfy the "uneconomic" requirement, had to show that the conditions imposed by the Board rendered the project "significantly *more* uneconomic than the project proposed in the developer's application for a comprehensive permit." *Id.* (emphasis added).[2] Now, for the first time, the Board claims that the Committee's test was incorrect and that if the project was uneconomic according to the Guidelines, then any conditions imposed by the Board were not subject to appeal. This argument should not be considered, because it was waived by the Board at the Committee level.

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2 The Committee also separately found that the project was rendered uneconomic because the Board effectively cut off approval of the project from the subsidizing agency by not permitting the construction of 3-bedroom units. AR8 at 4416-4419. This alternative finding is briefed extensively in HD/MW's memorandum, which is incorporated herein.

The Committee had no reason to address the argument now being raised on this issue by the Board, because it was not raised below. *See City of Springfield v. Civil Serv. Comm'n,* 469 Mass. 370, 382 (2014) (failure to raise issue before administrative agency precludes a party from raising it on appeal), citing *Albert v. Municipal Court of Boston,* 388 Mass. 491, 493–494 (1983). *Cf. Kilnapp Enters., Inc. v. Massachusetts State Auto. Dealers Ass'n*, 89 Mass. App. Ct. 212, 222 n.4 (2016) ("An argument that is not raised in a party's principal brief may be deemed waived." (internal citation and quotation omitted)); *Okoli v. Okoli*, 81 Mass. App. Ct. 371, 378 (2010) (declining "to address [an] ...argument ...because it has not been properly briefed."). The Board failed "to satisfy the duty ... to assist the [Committee] with argument and appropriate citation of authority." *Okoli*, 81 Mass. App. Ct. at 378. (internal citations and quotations omitted). Furthermore, the Committee acted consistently with its past decisions and did not act arbitrarily or capriciously. *See* AR8 at 4410 (citing precedent).

Not only was the argument waived, but in its post-hearing memorandum before the Committee, the Board explicitly adopted the Committee's own "significantly more uneconomic" test for determining whether the conditions could be challenged. AR8 at 4200-4201. Indeed, the Board relied upon the same precedent cited by the Committee. AR8 at 4201. Thus, the Board has waived the argument that the Committee used the wrong standard to determine whether the conditions made the project uneconomic.

c. The Committee's Standard For Determining Whether The Project Was Uneconomic Should Be Upheld Because It Reflects Longstanding Policy And Furthers The Purposes of c. 40B.

Quite apart from the Board's failure to challenge the Committee's legal test below, the "significantly more uneconomic" approach that the Committee used for the "uneconomic" issue was in fact fully consistent with both the Committee's prior decisional precedent and G.L.

c. 40B, §§ 22-23. Contrary to the Board's new argument, this is precisely the type of legal policy that the Committee "may adopt . . . through adjudication as well as through rule making... Policies announced in adjudicatory proceedings may serve as precedents for future cases." *Amesbury*, 457 Mass. at 760 n. 17 (quoting *Arthurs v. Bd. of Regis. in Med.*, 383 Mass. 299, 312-13 (1981))[3]. Here, the Committee had already established in prior decisions that in a case where the ROTC on the developer's proposal was itself already below the DHCD guidelines, the developer must establish that the ROTC following the conditions imposed by the Board is significantly more uneconomic than the developer's proposal. *Haskins Way, LLC v. Middleborough,* No. 2009-08 slip op. at 18 (Mass. Housing Appeals Comm. Mar. 28, 2011).

In *Haskins Way,* the Committee recognized that under some circumstances, a developer may choose to proceed with a development that would be considered uneconomic under the Guidelines for a variety of reasons. However, rather than allowing this situation to satisfy the developer's burden of showing that the Board's conditions made the project uneconomic, the Committee required the developer to show not only that the project was uneconomic, but also that the conditions imposed by the Board made the project significantly *more* uneconomic. *Id.* This test is consistent with c. 40B's overall goal of encouraging the construction of low-income housing by lessening the regulatory burden on developers while balancing that need against local concerns. Adopting the Board's argument would frustrate the purpose of c. 40B by allowing the Board to impose punitive conditions on a project that was already subject to financial difficulties.

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3 In *Amesbury*, the Supreme Judicial Court recognized that the Department was the agency statutorily authorized to issue regulations implementing Chapter 40B, but declined to limit its judicial deference to administrative constructions of the statute to those adopted in the Department's regulations. *Id.* The Supreme Judicial Court instead specifically extended its interpretive deference to statutory constructions adopted in Committee adjudications as well. *Id.* at 759-60 & n. 17 (citing *Middleborough v. Hous. App. Comm.*, 449 Mass. 514, 523 (2007)).

The Committee's rule acknowledges the right of the Board to seek appropriate conditions, as long as they do not significantly increase the financial obstacles facing the developer.

d. The Operative Regulations Did Not Require A Finding That The Board's Conditions Made The Proposal Significantly More Uneconomic.

Because the Committee found that the Board's conditions rendered the project "significantly more uneconomic" using the baseline established under the DHCD Guidelines, there was no need for the Committee to engage in further analysis of the issue. However, quite apart from the fact that the Board waived any challenge to the appropriateness of the "significantly more uneconomic" test, the Committee could also have found, under an alternative test, that the proposal had a reasonable rate of return prior to the conditions imposed by the Board.

As more fully argued in the developer's memo, DHCD's regulations establish that one way to determine a reasonable return on the project is the rate of return determined to be feasible in the Project Eligibility Letter provided by the subsidizing agency. See, 760 CMR 56.02(c). Because HD/MW received such an eligibility letter in response to its revised 90-apartment proposal, which included a pro forma financial statement, the rate of return disclosed by the developer was deemed reasonable, and any reduction in the rate of return caused by the Board's conditions would render the project uneconomic. See, 760 CMR 56.04(4)(e) (subsidizing agency reviews pro forma statement and determines financial feasibility of project for determination of project eligibility). AR3 1726.

III. THE COMMITTEE PROPERLY STRUCK CONDITIONS 18 AND 19.

Among the numerous conditions imposed by the Board were Conditions 18 and 19, requiring that the developer execute a "Permanent Restriction/Regulatory Agreement" that 25% of the apartments be rented in perpetuity to low- and moderate-income households, and that the

developer provide the town with a monitoring fee when the town becomes responsible for monitoring the affordability requirements of the project.

The Committee properly struck these conditions because the Board failed to present any evidence regarding either MassHousing or DHCD's position on this assertion of local control over a statewide statutory program. See G.L. c. 184, §32 (affordable housing restrictions must be approved by director of housing and community development).

Moreover, the Board misapplied the holding of *Zoning Bd. of Appeals of Wellesley v. Ardemore Apartments Ltd. Partnership,* 436 Mass. 811 (2002). In that case, the Court concluded that under c. 40B, §§20-23, "where a comprehensive permit itself does not specify for how long housing units must remain below market, the Act requires an owner to maintain the unit as affordable for as long as the housing is not in compliance with zoning requirements, regardless of the terms of any attendant construction subsidy agreements." *Id.* at 813-814. In other words, the statutory scheme requires that units remain affordable for as long as the developer's property is subject to preferential zoning treatment. The Court did not give municipalities the power to unilaterally force the developer to maintain low income units in perpetuity.

CONCLUSION

For the foregoing reasons, the Court should deny the Motion of Plaintiff Town of Milton Board Of Appeals For Judgment On The Pleadings and enter judgment for the Committee on all claims in the Board's Complaint.

Respectfully submitted,

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Dated: January 9, 2020

CERTIFICATE OF SERVICE

I, Samuel S. Furgang, Assistant Attorney General, hereby certify that I have on this day served the within Massachusetts Housing Appeals Committee's Assented to Motion for Filing its Cross-Motion for Judgment and Rescheduling Hearing on all parties by mailing a copy first class, postage prepaid and/or emailing a copy to:

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Dated: January 9, 2020

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss. LAND COURT DEPARTMENT

TOWN OF MILTON BOARD OF APPEALS Plaintiff, v. THE MASSACHUSETTS HOUSING APPEALS COMMITTEE and HD/MW RANDOLPH AVENUE, LLC Defendants.	**LAND COURT** **Case No. 19 MISC 000037 (RBF)**
JACOB W. CARLIN AND CHRISTINA M. CARLIN Plaintiff, v. THE MASSACHUSETTS HOUSING APPEALS COMMITTEE, HD/MW RANDOLPH AVENUE, LLC, AND TOWN OF MILTON BOARD OF APPEALS Defendants.	**SUPERIOR COURT** **Case No. 1982CV00079** **[Assigned to Land Court]**

PLAINTIFF TOWN OF MILTON BOARD OF APPEALS' REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR JUDGMENT ON THE PLEADINGS

1138986

The 90-unit Project proposed by the Developer on Route 28 in Milton, on a parcel comprised of wetlands and considerable elevation changes, was uneconomic as proposed under the plain and clear language of DHCD's own regulations, *see* 760 Code Mass. Regs. §§ 56.02, 56.07; and according to the Developer's submissions to the HAC, which conceded the point. Consequently, the HAC had no authority whatsoever to review or strike any conditions placed on it by the Board. Under G.L. c. 40B, the Developer's very "*right to appeal* to the Housing Appeals Committee," arises only where a comprehensive permit "is denied or is granted with such conditions and requirements as to make the operation of such housing uneconomic." G.L. c. 40B, § 22 (emphasis added). The substance of the HAC's authority underscores that requirement. It may strike a condition imposed by the Board only "so as to make the proposal no longer uneconomic." G.L. c. 40B, § 23. Of course, that was impossible to do in this case. These are quintessential errors of law and bases for reversal pursuant to the Commonwealth's Administrative Procedure Act. *See* G.L. c. 30A, § 14(7)(b), (c), (d), (g) ("the court may set aside or modify the decision . . because the agency decision is . . . in excess of the statutory authority or jurisdiction of the agency . . . or [b]ased upon an error of law; or [m]ade upon unlawful procedure . . . or . . . otherwise not in accordance with the law").[1]

The Developer and the HAC offer four primary arguments in support of the HAC's decision which cannot be squared with settled administrative law or the record below. First, the Developer asserts that the Board imposed a condition eliminating three-bedroom units, thereby compromising its funding, and that this alone triggered the HAC's jurisdiction. But the Board has been crystal clear that no such condition was imposed. Moreover, a full articulation of the

[1] The Developer repeatedly attempts to characterize this G.L. c. 30A action as limited to a review of the record for substantial evidence. Developer Opposition ("Developer Opp.") at 8, 22, 35. That is not the law. *See* G.L. 30A, §14(7) (listing seven bases for reversal of improper agency action).

Developer's argument highlights its circularity and demonstrates why it is no justification for the HAC's actions here. If the Project were rendered uneconomic by a prohibition on three-bedroom units alone, then the HAC's authority was limited to striking that condition. G.L. c. 40B, §§ 22–23. Given that no such condition was imposed in the first place, that would have been a short and sweet proceeding. It is not what happened here. Second, both the Developer and the HAC assert that the Board waived any argument that the Project was uneconomic as proposed by failing to raise it in the administrative proceeding. The record, however, is clear that the Board *did* raise the issue. Nor is the absence of a central component of the HAC's authority subject to waiver. Third, the Developer and the HAC suggest that, despite the plain statutory language of G.L. c. 40B, §§ 22–23 and the DHCD regulations, the HAC is at liberty to create a new basis for its jurisdiction by adjudication. That argument turns administrative law on its head and has already failed, badly, before the Supreme Judicial Court the last time the HAC attempted it. *See Board of Appeals of Woburn v. HAC*, 451 Mass. 581 (2008) (rejecting attempt by the HAC to create a new basis for jurisdiction unmoored from G.L. c. 40B, i.e., "de facto denials" of projects). Last, for the first time in their opposition briefs, the HAC and the Developer offer a new basis to conclude that the Project *was* economic but was rendered uneconomic by the Board, relying on a regulation neither cited to by the Developer nor by the Board. It is, however, a core principle of administrative law that an agency decision must stand or fall on the reasoning articulated by the agency; it is not subject to affirmance on some other ground wholly unaddressed below.

There is a broader point, as well. For too long — and despite clear direction from the Supreme Judicial Court to remedy the issue, *see Board of Appeals of Woburn*, 451 Mass. at 596–98 (Marshall, C.J., concurring) — the HAC's conception of its jurisdiction has been expansive

and amorphous, as though G.L. c. 40B were advisory rather than its binding enabling legislation. The result is uncertainty for municipalities and developers; the only beneficiary is the HAC. The laudatory goal of G.L. c. 40B is the efficient construction of affordable housing. *See* HAC Opp. at 4. That goal is inhibited by continued uncertainty concerning whether the HAC will apply DHCD regulations or whether, instead, it will engage in adjudicatory freelancing, as it has here.

For these reasons, set out in greater detail below, the decision of the HAC must be reversed and set aside as beyond the authority of the HAC; and irreconcilable with the text of G.L. c. 40B, §§ 22 and 23 and the DHCD regulations promulgated thereunder, *see* 760 Code Mass. Regs. §§ 56.02, 56.07.

ARGUMENT

I. A NON-EXISTENT CONDITION IS NO BASIS FOR HAC JURISDICTION AND, IF IT WERE, THE SOLUTION WOULD BE TO STRIKE IT.

The lead argument in the Developer's brief (which the HAC adopts by reference, as well) is that the uneconomic nature of the Project as proposed is irrelevant, because the Board imposed a condition that compromised its funding from MassHousing. Developer Opp. at 10–12. That condition, according to the Developer, is that the Project could have only one- or two-bedroom units; but MassHousing requires as a condition of funding that the Project have three-bedroom units, as well. *Id.* The Board imposed no such condition, as its submissions to the HAC made pellucidly clear. RA 3758–59; RA 4418. The Developer's argument to the contrary extrapolates from Condition 2 of the Board, which requests the Developer identify on its Site Plans its proposed "mix of one and two bedroom units." RA 2608. From this, the Developer suggests that the Board meant to prohibit three-bedroom units — apparently by negative implication, even though such a prohibition was never articulated anywhere else in its twenty-three-page decision. It is said that government actors do not "hide elephants in mouseholes." *Cf. Entergy Nuclear*

Generation Co. v. Dep't of Envtl. Protection, 459 Mass. 319, 333 (2011) (*quoting Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001)). Nor do zoning boards hide unit size prohibitions in plan requests. The Board made that plain to the HAC. The Board further stated that it would be willing to take any step required to remedy any perceived ambiguity.[2]

Accordingly, from the outset of the state administrative process, there was no dispute that the Board would (and continues to) allow three-bedroom units. *Id.* The HAC is simply not empowered to conjure adversity on an issue on which the parties agree, and this Court is not either. *See Boston Herald, Inc. v. Superior Ct. Dep't of the Trial Ct.*, 421 Mass. 502, 504 (1995) ("It is the general rule that courts decide only actual controversies"). *Accord Branch v. Commonwealth Employment Relations Bd.*, 481 Mass. 810 (2019). To illustrate the point, imagine if the HAC *had* asserted jurisdiction on the basis that the Board improperly prohibited three-bedroom units. The matter would have been resolved — easily. Rather than four days of hearings and twenty witnesses, the Board and the Developer would have agreed, and the matter would have been resolved. If the HAC had decided to weigh in despite that agreement, the sole solution within its authority would have been simple: striking the alleged three-bedroom prohibition which compromised the project's funding. *See* G.L. c. 40B, § 23 ("If in the case of an approval with conditions . . . [the HAC] shall order [the] [B]oard to remove or modify any such condition or requirement so as to make the proposal no longer uneconomic"). Needless to say, that is not what occurred here. *See* HAC Decision at *e.g.*, RA 4432, 4437 (evaluating and striking numerous conditions imposed by the Board unrelated to bedroom unit limitations).

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[2] The HAC's attempt to brush aside these representations on the basis of credibility determinations are flatly wrong and evince a wholesale misunderstanding of the HAC's role. *See Covell v. Dep't of Soc. Servs.*, 439 Mass. 766, 783 (2003) (an agency's findings must "take[] into account the entire record, both the evidence supporting the agency's conclusion and whatever in the record fairly detracts from the weight of that evidence").

II. THE BOARD'S CHALLENGE TO AN ESSENTIAL COMPONENT OF THE HAC'S JURISDICTION IS NEITHER WAIVED NOR WAIVABLE.

The primary argument asserted by the HAC, and echoed by the Developer, is that the Board has waived any contention that the HAC lacked the ability to review or strike conditions because the Project was uneconomic from the start. That argument is not supported by the record. In its post-hearing brief, the Board argued, expressly: the HAC must "find that the Board's conditions make the building or operation of the project uneconomic to permit it to alter or set aside any conditions," but that the Developer's expert testified that the Project "as proposed is economically infeasible and uneconomic, because the minimum threshold of an economic project is a return on total costs of 6.84%" whereas the Project's return was "5.93%, [or] 0.91% below the threshold." RA 4271–72. That is the very same argument that the Board has made here. Moreover, the Board emphasized before the HAC that the "significant[ly]" more uneconomic benchmark is arbitrary, undefined, and "a stretch." RA 4272.

Moreover, neither the HAC nor the Developer has identified a single case from any Massachusetts court holding that the absence of a statutory pre-requisite for agency action is a waivable issue. Instead, unless the Developer demonstrates the imposition of conditions that render its Project uneconomic, the Board need not do *anything*. *Board of Appeals of Woburn*, 451 Mass. at 591 ("Absent such a showing, the board is not required under the act or the department's regulations to demonstrate that its conditions are consistent with local needs"). The structure of the law so demands. The Board cannot be asked to establish that its conditions are consistent with local needs because the very concept of "local" needs encompasses whether the conditions improperly elevate local concerns over the need for affordable housing by making the construction of that housing uneconomic. *See Zoning Bd. of Appeals of Amesbury v. HAC*, 457

Mass. 748, 762 (2010) ("[T]he provisions of § 23 require the HAC to subject conditions imposed by the [B]oard to an 'uneconomic' analysis before balancing the conditions against local needs").

Moreover, even if this Court were to ignore that a central focus of the HAC proceeding was whether the Board's conditions rendered the project uneconomic; that both parties briefed the issue before the HAC; and that it was addressed in multiple pages in the HAC's decision, review still would be warranted. The HAC's creation from whole cloth of the concept of "significantly more uneconomic" is a matter of "public interest" bearing on the enforcement of housing law "in over 100 municipalities in the Commonwealth" that is "likely to arise again." *Town of Norfolk v. Dep't of Envtl. Quality Engineering*, 407 Mass. 233, 238 n. 9 (1990).

It is no answer to say, as the Developer does, that the HAC's determination that the Board's conditions rendered the project "significantly more economic" is a determination of fact. Developer Opp. at 12–16. First of all, the benchmark against which "significantly more" is measured is a legal question (and one on which the HAC has entirely refused to take a position). *See* HAC Opp. at 6–8; *Corsetti v. Stone Co.*, 396 Mass. 1, 12 (1985) ("[T]he interpretation of an administrative regulation is a question of law which must be decided by the court."). But far more importantly, the broader question — i.e., whether a determination of "significantly more uneconomic" has any relevance to G.L. c. 40B, §§ 22 and 23 and 760 Code Mass. Regs. § 56.01, et seq. — is a pure question of law. *Id.*; *see Bristol County Retirement Bd. v. Contributory Retirement Appeal Bd.*, 65 Mass. App. Ct. 443, 451 (2006) (an agency's interpretation of its enabling act is "de novo and [the court] is not bound by what [it] believes is an agency's erroneous interpretation of its statutory authority"). The answer is no. *See* Board Mem. at 15–22.

III. THE HAC HAS NO AUTHORITY AT ALL TO ADJUDICATE CONTRARY TO ITS ENABLING ACT AND DHCD REGULATIONS.

In their respective submissions, the Developer and the HAC argue that the HAC's creation from whole cloth of concept of "significantly more uneconomic" should be afforded deference. Developer Opp. at 16-19; HAC Opp. at 6-8. But no agency has the authority to depart from its enabling statute or its regulations *via* adjudication. The HAC only has the authority to apply the statute or DHCD regulations or to fill in ambiguities those authorities have left unaddressed; it may not depart from a conclusion required by the law or the regulations based on some free floating adjudicatory power. *See Royce v. Comm'r of Correction*, 390 Mass. 425, 428 (1983) ("Once an agency has seen fit to promulgate regulations, it must comply with those regulations"); *see Restaurant Consultants, Inc. v. ABCC*, 401 Mass. 167, 170 (1987) ("The regulation promulgated has the force of law, and the [agency] is bound by it"). In other words, adjudication may "supplement . . . regulations when they are silent on a given matter," but the HAC has no authority to "contradict an existing regulation." *Independence Park v. Bd. of Health of Barnstable*, 403 Mass. 477, 481 (1988).

The DHCD regulations define "uneconomic" as "any condition imposed by a Board . . . to the extent that it . . . makes it impossible [for the Developer] to proceed and still realize a reasonable return." 760 Code Mass. Regs. § 56.02 – Uneconomic. A reasonable rate of return is defined by reference to DHCD Guidelines, 760 Code Mass. Regs. § 56.02 – Reasonable Rate of Return, which established that rate as 450 basis points higher than the 10-year treasury yield. The Developer conceded before the HAC, as it does here, that the Project as proposed fell below DHCD's definition of a reasonable rate of return. RA 2768 (¶¶ 13–14). No "condition imposed by [the] Board" made it so. 760 Code Mass. Regs. § 56.02 – Uneconomic. Accordingly, under DHCD's own regulations, which have the force of law, no action of the Board rendered the

Project uneconomic. *Id.*[3] The HAC had no jurisdiction and no authority to conclude otherwise. *See Salaam v. Comm'r of Dep't of Transitional Assistance*, 43 Mass. App. Ct. 38, 42 (1997) ("[A] government agency is bound to respect its own regulations, as long as they exist on the books"). This is all the more true in the context of the HAC, which holds no regulatory authority itself, and instead is bound by the regulations adopted by its parent agency. *See Mass. Teachers' Retirement Sys. v. CRAB*, 466 Mass. 292, 297 (2013) ("Where a regulation has been duly promulgated, we do not give deference to a different administrative agency's contrary conclusion . . . . A properly promulgated regulation has the force of law and must be accorded all the deference due a statute").

IV. THE DEVELOPER'S *POST HOC* RELIANCE ON ITS PROJECT ELIGIBILITY LETTER IS BARRED AS A MATTER OF LAW AND WHOLLY UNAVAILING.

In a final attempt to salvage the HAC's decision, the Developer offers an alternate basis for a determination that the Project was economic as proposed, but uneconomic as conditioned by the Board — by relying on regulatory language never cited nor mentioned before the HAC. Developer Opp. at 16–21. But an agency must articulate the basis for its decision at the time it is made; *post hoc* rationalizations are afforded no weight. *NSTAR Elec. Co. v. Dep't of Public Utils.*, 462 Mass. 381, 387 n. 3 (2012) (*quoting Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 50 (1983)) ("[A]n agency's ground of decision must be clear from its own order, not from 'appellate counsel's *post hoc* rationalizations"); *see Motor Vehicle Mfrs.*, 463 U.S. at 50 ("It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself").

[3] Though this Court need not afford deference to DHCD's Guidelines, the HAC itself is bound by them lest it venture into impermissible caprice. *See Biogen IDEC MA, Inc. v. Treasurer & Receiver Gen.*, 454 Mass. 174, 187 (2009) ("Although courts give the force of law only to formal agency regulations, administrative agencies must abide by their own internally promulgated policies").

Moreover, the alternate basis the Developer chose is revealing. A DHCD regulatory provision states that, in certain circumstances, a project determined eligible for funding — by a so-called "project eligibility letter" or "PEL" — may adopt as its baseline rate of return the rate set forth in the PEL. 760 Code Mass. Regs. § 56.02 — Reasonable Return(c) (noting that a possible definition is one that has "been determined to be feasible as set forth in the Project Eligibility Letter"). Here, however, no rate of return is set forth on the face of *either* PEL; nor does either PEL make a feasibility determination. RA 1427–39. Before the HAC, the developer did not prove what the rate of return involved in either PEL application had been; nor did the HAC make a finding of fact on the issue. *See* RA 4406-4473.

As the Court will recall from the Board's initial brief, the Project as initially conceived had 72 units, and MassHousing first issued a PEL for that proposal. RA 1427–39. Then, the Developer proposed a larger, more profitable project of 90 units; MassHousing issued a second PEL. RA 1726–27, 4408. It is no accident that the Developer chose not to introduce the issue of its PELs to the HAC. After all, there were two. The second one — which the Developer argues is controlling here, on a theory it has never before articulated — included a higher, if undefined, rate of return. RA 1726-27. The reality that the Developer was prepared to proceed with a smaller, less profitable project would have undercut its already paper thin argument that the Board's conditions rendered the Project "significantly more uneconomic."

In addition, the HAC's relative silence on this issue is remarkable. HAC Opp. at 8. The HAC well knows that it cannot defend its decisions on bases it did not articulate below. *See NSTAR*, 462 Mass. at 387; *see also ENGIE Gas & LNG LLC v. Dep't of Pub. Utilities*, 475 Mass. 191, 198 (2016) ("We do not specifically consider these statutory bases, as they were not relied on in the department's order, and the court will not otherwise supply a reasoned basis for the

department's action that the agency itself has not given) (internal quotation marks omitted) (*quoting NSTAR Elec. Co. v. Department of Pub. Utils.*, 462 Mass. at 387). Nor has the HAC identified a *single* prior decision that found a Project uneconomic based on the imposition of conditions that rendered the project less profitable than the PEL had envisioned. *See* HAC Opp. at 8. In our search, the Board has not located any such decision, either. The absence is telling. If the HAC began adopting an approach that the rate of return set forth in the PEL was a baseline and that the imposition of any local condition that lessened it rendered the project "uneconomic," that position would deprive all local zoning boards of any control over G.L. c. 40B projects.[4] That is not what the statute says. *See* G.L. c. 40B, §§ 20–22 (empowering the Board to impose conditions consistent with local concerns). Nor the regulations. 760 Code Mass. Regs. § 56.02 – Local Concern (permitting the Board to impose conditions to "protect the health or safety of the occupants of the Project . . . to protect the natural environment, to promote better site and building design in relation to the surroundings and municipal and regional planning . . . ."). Briefing in the Land Court is no place for the HAC to first adopt a position that so drastically shifts power from municipalities to the state. The HAC's power derives exclusively from statute and DHCD regulation; its attempt to depart from those sources in search of a free-floating authority to strike down local conditions has failed on judicial review in the past and, faithful to G.L. c. 40B, must fail again here. *See Board of Appeals of Woburn*, 451 Mass. at 593 ("Such exceptionally broad discretion is inconsistent with both the language of the act and the Legislature's careful balance between leaving to local authorities their well-recognized autonomy generally to establish local zoning requirements . . . while foreclosing municipal[]

[4] It is no surprise that the Developer gleefully endorses this atextual consequence. If a project has received a PEL, the Developer contends that the HAC *always* will have jurisdiction to strike any attempted reduction in unit numbers. Developer Opp. at 18.

[obstruction of] the building of a minimum level of housing affordable to persons of low income").

CONCLUSION

For the foregoing reasons, the decision of the HAC should be reversed. An order should enter remanding this matter to the HAC, with instructions that it be dismissed, thereby reinstating the Board's decision.

Respectfully submitted,

PLAINTIFF TOWN OF MILTON BOARD OF APPEALS

By its Attorneys,

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Dated: March 9, 2020

CERTIFICATION OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party by mail ~~(by hand)~~ on March 9, 2020

Donna A. Mizrahi

MASSACHUSETTS APPEALS COURT
CIVIL DOCKETING STATEMENT

Appeals Court Docket Number 2021-P-0908

Caption used in the lower court

Plaintiff(s): Town of Milton Board of Appeals

v.

Defendant(s): Massachusetts Housing Appeals Committee, et al.

1. Party Information

Name of the appellant(s) or cross-appellant(s) on whose behalf this statement is being filed:

Town of Milton Board of Appeals

2. Attorney Information

Name M. Patrick Moore BBO# 670323

☐ Or, check this box if you are self-represented and provide your name

3. Lower Court, Board or Agency Information

a. Court Department Land Court

b. Lower Court Docket Number(s) 19 MISC 000037

c. Specify the name and the role of each judge whose orders are at issue on appeal [not applicable for appeals directly from a board or agency]:

Judge, first and last name Robert B. Foster Role Entered Judgment

Judge, first and last name Role

Judge, first and last name Role

d. Was the case or any information in the record designated as impounded in the lower court? (see Section 3) ☐ Yes ☑ No

In addition to providing the information below, parties filing a brief or record appendix that contains impounded materials must comply with Uniform Rule on Impoundment Procedure Rule 12(c), Supreme Judicial Court Rule 1:15 s. 2(c), and M.R.A.P. 16(d), 16(m), 18(a), and 18(g). If this case or any material therein is impounded, specify which documents are impounded and the authority for impoundment, e.g. court order, statute:

4. Nature of the Case

Select the most appropriate description, or enter description: Administrative Law

5. Perfection of Appeal

a. Is the appeal from a final judgment, i.e., judgment disposing of all parties and claims? (•) Yes ( ) No

b. If no, identify the basis on which the interlocutory order is immediately appealable.

c. Docketing Date of Judgment or Interlocutory Order Appealed July 30, 2021

d. Date Notice of Appeal Filed August 20, 2021

Please provide information regarding the following post-judgment motions that may affect the timeliness of the notice of the appeal.

Type of Motion	Check if filed		Date Served (not date filed)
Motion for Judgment (Rule 50(b)) Notwithstanding the Verdict	( ) Yes	(•) No	
Motion to Amend or Make Additional Findings (Rule 52(b))	( ) Yes	(•) No	
Motion to Alter or Amend Judgment (Rule 59)	( ) Yes	(•) No	
Motion for Relief from Judgment (Rule 60)	( ) Yes	(•) No	
Other (specify) _____	( ) Yes	(•) No	

6. Appellate Issues

In cases other than child welfare appeals, please provide a short statement of the anticipated issues on appeal. If the appellate issue involves the interpretation of a particular statute or regulation, please provide a citation to that statute or regulation. (Note: This statement is for informational purposes only and failure to raise an issue here will not preclude an appellant from raising the issue in its brief.):

The issues on appeal include: (1) Whether the developer, HD/MW Randolph Avenue LLC, established the requisite basis to trigger the jurisdiction of the Housing Appeals Committee, specifically whether it established that conditions imposed by the Town of Milton Zoning Board of Appeals rendered the product uneconomic, given that the development was uneconomic as proposed under Department of Housing and Community Development regulations; (2) Whether the Town of Milton Zoning Board of Appeals properly preserved its argument that the Housing Appeals Committee lacked jurisdiction over the proposed development; (3) Whether, if the Housing Appeals Committee had jurisdiction, it properly struck several conditions imposed on the development by the Town of Milton Zoning Board of Appeals.

7. Related Appeals

Are there any pending, past, or anticipated future appeals or original appellate proceedings that involve these parties or this case which have been entered in the Appeals Court or Supreme Judicial Court? ( ) Yes (•) No

Do you know of any pending or anticipated appeals raising related issues? ( ) Yes (•) No

If you answered yes to either question, provide the case name and docket number and describe below the related matter or issue:

Respectfully Submitted,

M. Patrick Moore

Signature

/s/ M. Patrick Moore

Address
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BBO Number

670323

CERTIFICATE OF SERVICE

Pursuant to Mass.R.A.P. 13(d), I hereby certify, under the penalties of perjury, that on this date of October 25, 2021 I have made service of a copy of the Massachusetts Appeals Court Docketing Statement filed on behalf of

Town of Milton Board of Appeals , upon the attorney of record for each party, or if the party has no attorney then I made service directly to the self-represented party, by ○ hand delivery ○ first class mail ◉ e-mail to the following person(s) and at the following address(es). Note: Service may be made by e-mail only with the consent of each party or opposing counsel:

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COMMONWEALTH OF MASSACHUSETTS

HOUSING APPEALS COMMITTEE

HD/MW RANDOLPH AVENUE, LLC

v.

MILTON BOARD OF APPEALS

No. 2015-03

DECISION

December 20, 2018

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COMMONWEALTH OF MASSACHUSETTS

HOUSING APPEALS COMMITTEE

HD/MW RANDOLPH AVENUE, LLC, Appellant, v. MILTON BOARD OF APPEALS, Appellee.	)	No. 2015-03

DECISION

I. INTRODUCTION AND PROCEDURAL BACKGROUND

This is an appeal pursuant to G.L. c. 40B, § 22 of a decision by the Milton Board of Appeals granting a comprehensive permit with conditions to the Appellant HD/MW Randolph Avenue, LLC (HD/MW). On or about November 6, 2014, HD/MW applied to the Board for a comprehensive permit to build a development consisting of 90 residential rental units in two buildings on land at 693-711 Randolph Avenue in Milton. The Board held hearings on 11 days between December 2, 2014 and June 17, 2015. By decision filed with the town clerk on July 30, 2015, the Board granted a comprehensive permit for the construction of 35 units subject to numerous conditions. Exh. 76.

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

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

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

II. FACTUAL BACKGROUND

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

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

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

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

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

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

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

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

III. ECONOMIC EFFECT OF THE BOARD'S DECISION

When a developer appeals a board's grant of a comprehensive permit with conditions, the ultimate question before the Committee is whether the decision of the Board is consistent with local needs. Pursuant to the Committee's procedures, however, there is a shifting burden of proof. The appellant must first prove that the conditions in the aggregate make construction of the housing uneconomic. *See* 760 CMR 56.07(2)(a)3.; *Board of Appeals of Woburn v. Housing Appeals Comm.*, 451 Mass. 581, 594 (2008); *Haskins Way, LLC v. Middleborough,* No. 2009-08, slip op. at 13 (Mass. Housing Appeals Comm. Mar. 28, 2011). HD/MW argues, relying on testimony of its experts and documentary evidence, that it has provided sufficient evidence that the Board's conditions and denials of waivers in the decision render the project uneconomic. The Board contends that the developer has failed to make its *prima facie* showing.

A. Return on Total Cost Analysis

1. The Developer's Presentation

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

> any condition imposed by [the] Board in its approval of a Comprehensive Permit, brought about by a single factor or a combination of factors, … makes it

> impossible ... for [HD/MW] to proceed and still realize a reasonable return in building or operating such Project within the limitations set by the Subsidizing Agency on the size or character of the Project, or on the amount or nature of the Subsidy or on the tenants, rentals, and income permissible, and without substantially changing the rent levels and unit sizes proposed by the Applicant.

760 CMR 56.02: *Uneconomic;* Exh. 1 (*Guidelines*), p. I-5. *See* G. L. c. 40B, § 20. We apply the *Guidelines'* methodology for analyzing "reasonable return" for a rental housing project, a Return on Total Cost (ROTC) analysis.[2] Exh. 1, pp. I-5, 7. The ultimate question is whether the projected ROTC for the project as conditioned by the Board's decision fall shorts of the minimum reasonable return in the *Guidelines* (the economic threshold). *See Autumnwood, LLC v. Sandwich*, No. 2005-06, slip op. at 3 (Mass Housing Appeals Comm. Decision on Remand Mar. 8, 2010); *511 Washington Street, LLC v. Hanover*, No. 2006-05, slip op. at 9, 12-14 (Mass. Housing Appeals Comm. Jan. 22, 2008).

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

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

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

development. The *pro forma* for the 35-unit development took into account the design changes required by the Board's decision, including, most significantly, reduction in the number of units, reduction in buildable area, change in number and design of buildings, looped roadway, sidewalk and parking requirements, and requirement to contribute additional land and tear down a single family house to achieve adequate frontage on Randolph Avenue, but did not include costs associated with MEPA review, if that is required by the Board's conditions. Exhs. 83, ¶¶ 8; 42-47; 83-2; 83-3.

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

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

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

HD/MW argues that finding the approved project uneconomic with these ROTC results is consistent with *Cirsan Realty Trust, supra,* No. 2001-22, slip op. at 15 (ROTC of 1.66% lower is significantly more uneconomic); *Haskins Way, supra,* No. 2009-08, slip op. at 17-18 (reduction of profits by 275 basis points (2.75%) renders the project significantly more uneconomic). By contrast, in *Avalon Cohasset, supra,* No. 2005-09, slip op. at 22, the Committee found a reduction of profits by only .11% (11 basis points) did not render the proposed project "significantly more uneconomic."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. The Committee's Findings

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

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

35-Unit Project

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

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

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

B. Three-Bedroom Requirement

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Nonwaiver of Wetlands Bylaw

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

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

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

IV. LOCAL CONCERNS

Since the developer has sustained its initial burden to demonstrate that conditions and denials of waivers in the Board's decision would, in the aggregate, render the project uneconomic, the burden then shifts to the Board to prove, with respect to those conditions and requirements challenged on economic grounds, first, that there is a valid health, safety, environmental, design, open space or other local concern that supports each of the conditions and requirements imposed, and then, that such concern outweighs the regional need for low and moderate income housing. 760 CMR 56.07(1)(c), 56.07(2)(b)3. *See also* Pre-Hearing Order, § IV, ¶¶ 3, 5. The burden on the Board is significant: the fact that Milton does not meet the statutory minima regarding affordable housing establishes a rebuttable presumption that a substantial regional housing need outweighs the local concerns in this instance. 760 CMR 56.07(3)(a); Pre-Hearing Order, § II, ¶ 19; G.L. c. 40B, §§ 20, 23. *See Zoning Bd. of Appeals of Lunenburg v. Housing Appeals Comm.*, 464 Mass. 38, 42 (2013) ("there is a rebuttable presumption that there is a substantial Housing Need which outweighs Local Concerns" if statutory minima are not met), quoting *Boothroyd v. Zoning Bd. of Appeals of Amherst,* 449 Mass. 333, 340 (2007), quoting *Board of Appeals of Hanover v. Housing Appeals Comm.*, 363 Mass. 339, 346, 365, 367 (1973) ("municipality's failure to meet its minimum [affordable] housing obligations defined in § 20 will provide compelling evidence that the regional need for housing does in fact outweigh the objections to the proposal").

A. Overview – Density, Intensity and Project Redesign

HD/MW argues that the Board has improperly redesigned the project, and that its changes are not supported by valid local concerns. Most significantly, it argues that the Board requires the developer to redesign the entire project including requirements to 1) reduce the number of units to no more than 35 (Condition 2); break two residential buildings into several smaller buildings (Condition 6); construct the internal driveway as a looped roadway (Conditions 7, 28); locate all dwelling units within 100 feet of an elevator (Condition 22); redesign the architectural style of buildings (Condition 23); add an additional right hand turning lane to the access driveway (Condition 29); add additional and wider sidewalks to the access driveway (Condition 30); and requirements regarding parking (Conditions 13, 14). The Board also denied waivers from the zoning bylaw with regard to the following matters: disturbance of wetlands

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

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

We have previously emphasized that a "board must review the proposal submitted to it, and may not redesign the project from scratch." *Pyburn Realty Trust v. Lynnfield*, No. 2002-23, slip op. at 14 (Mass. Housing Appeals Comm. Mar. 22, 2004), quoting from *CMA, Inc. v. Westborough*, No. 1989-25, slip op. at 24 (Mass. Housing Appeals Comm. June 25, 1992). *See* also *Peppercorn Village Realty Trust v. Hopkinton*, No. 2002-02, slip op. at 6 n.4 (Mass. Housing Appeals Comm. Jan. 26, 2004). However, a board is permitted to deny requests for waivers and to impose conditions even if such action would require a developer to modify its project, if the action is supported by valid local concerns that outweigh the need for affordable housing. *See Hanover, supra,* 363 Mass. 339, 346; *CMA, supra,* at 24 n.13; *See also* 760 CMR 56.05(8)(d).[7] One of the important distinctions is that the Board may not itself order a specific design. For example, in *Pyburn*, the board's condition requiring "flipping of the buildings to the opposite side of the property" in addition to requiring a reduction in the number of buildings, was struck by the Committee. *Id.*

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

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

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

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

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

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

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

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

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

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

By contrast, intensity focuses within the site:

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

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

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

B. Emergency Access and Fire Safety

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

1. Looped Roadway

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

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

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

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

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

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

Tr. I, 67-68.

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Emergency Access to Buildings

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

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

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

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

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

3. Fire Hydrants

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

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

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

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

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

4. Elevators

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

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

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

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

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

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

C. Traffic Safety for Vehicles and Pedestrians

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

1. Right Hand Turning Lane

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

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

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

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

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

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

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

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

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

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

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

2. Sidewalk on Access Drive and Parking Areas

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

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

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

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

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

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

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

3. Pick-up and Drop-Off Area

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

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

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

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

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

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

D. Stormwater Management and Wetlands Protection

1. Under Building Stormwater System

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

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

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

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

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

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

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

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

2. Snow Storage

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

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

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

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

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

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

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

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

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

3. Activity in Wetland or Non-Disturbance Zone

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Stormwater from Upgradient Properties toward Carlin Property

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

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

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

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

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

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

E. Potential Impacts on Abutters

1. Setbacks and Buffer for Abutters

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Exterior Lighting

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

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

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

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

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

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

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

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

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

3. Ban on Parking Lot in Deed Restricted Area

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

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

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

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

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

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

4. Mechanicals on Roof

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

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

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

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

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

F. Project Design

1. Number and Configuration of Buildings and Units

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

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

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

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

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

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

2. Number and Configuration of Parking Spaces

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

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

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

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

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

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

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

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

3. Building Height

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

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

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

4. Architectural Style

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

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

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

5. Lot Frontage

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

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

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

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

V. LAWFULNESS OF THE BOARD'S CONDITIONS

In *Zoning Board of Appeals of Amesbury v. Housing Appeals Comm.*, 457 Mass. 748 (2010) *(Amesbury)*, the Supreme Judicial Court made clear that "the local zoning board's power to impose conditions is not all encompassing but is limited to the types of conditions that the various local boards in whose stead the local zoning board acts might impose, such as those concerning matters of building construction and design, siting, zoning, health, safety, environment, and the like." *Id.* at 749. The *Amesbury* court also stated, "...insofar as the board's ... conditions included requirements that went to matters such as, inter alia, project funding, regulatory documents, financial documents, and the timing of sale of affordable units in relation to market rate units, they were subject to challenge as ultra vires of the board's authority under § 21." *Id.* at 758. HD/MW challenges a number of conditions as exceeding the authority of the Board and requests that these conditions be struck from the comprehensive permit.

A. Conditions Imposing Fees

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

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

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

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

We have typically prohibited boards from imposing fees that are not already established by regulation in a municipal fee schedule. Therefore, Conditions 41 and 55 are modified to provide that such other fees are imposed only if in compliance with municipal bylaws or regulations. In order to charge a particular fee, the Board is required to produce to HD/MW the local bylaw or regulation that authorizes charging such a fee in this context. *See LeBlanc II, supra,* No. 2006-08, slip op. at 10.

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

B. Conditions Within the Province of the Subsidizing Agency

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

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

The Board argues that in the event the subsidizing agency's regulatory agreement ceases to be in effect, unless a town regulatory agreement is in place, Milton will be unable to enforce the affordability requirements for maintenance of the units on the Subsidized Housing Inventory (SHI) thereafter. Citing *Zoning Bd. of Appeals of Wellesley v. Ardemore Apartments Ltd. Partnership*, 436 Mass. 811, 825 (2002), it notes that developments are required to remain affordable as long as they benefit from the waivers from local requirements obtained in the comprehensive permit. *Ardemore* stated, "[u]nless otherwise expressly agreed to by a town, so long as the project is not in compliance with local zoning ordinances, it must continue to serve the public interest for which it was authorized." *Id.* at 825.

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

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

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

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

C. Conditions Subsequent Requiring Inappropriate Post-Permit Review

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

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

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

In *LeBlanc II, supra*, No. 2006-08, slip op. at 7, we noted that inappropriate conditions subsequent "undermining the purpose of a single, expeditious comprehensive permit" shall be struck or modified, and that "[t]he Board is permitted to designate individuals or municipal departments with expertise to review various aspects of the plans for consistency with the final comprehensive permit. The Board may even conduct that review itself, if it has the necessary expertise, as long as the review is for consistency with the permit." We stated that improper conditions subsequent are "conditions that reserve for subsequent review matters that should have been resolved by the Board during the comprehensive permit proceeding. Such conditions include, for example, those requiring new test results or submissions for peer review, and those which may lead to disapproval of an aspect of a development project." *Id.* at 7-8 and cases cited. "Our precedents, as well as 760 CMR 56.05(10)(b), 'permit technical review of plans before construction, and routine inspection during construction, by all local boards or, more commonly, by their staff, e.g., the building inspector, the conservation administrator, the town engineer, or a consulting engineer hired for the purpose. Such review ensures compliance with the comprehensive permit, state codes, and undisputed local restrictions, as well as any conditions included in the final written approval issued by the subsidizing agency." *Id.* at 8, *quoting Attitash, supra,* No. 2006-17 at 12.

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

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

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

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

Condition 1 is modified to state:

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

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

For this condition, as with all conditions and provisions in the final comprehensive permit, any specific reference made to the "Board's Decision," "this Decision" or "this comprehensive permit" shall mean the comprehensive permit as modified by the Committee's decision. Any references to the submission of materials to the Board, the building commissioner, or other municipal officials or offices for their review or approval shall mean submission to the appropriate municipal official with relevant expertise to determine whether the submission is consistent with the final comprehensive permit, such determination not to be unreasonably withheld. In addition such review shall be made in a reasonably expeditious manner, consistent with the timing for review of comparable submissions for unsubsidized projects. *See* 760 CMR 56.07(6).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. Other Conditions Challenged as Unlawful

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

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

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

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

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

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

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

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

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

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

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

VI. Massachusetts Environmental Protection Act (MEPA) Requirements

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

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

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

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

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

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

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

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

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

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

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

VII. CONCLUSION AND ORDER

Based upon review of the entire record and upon the findings of fact and discussion above, the Housing Appeals Committee concludes that the decision of the Board is not consistent with local needs. The decision of the Board is vacated and the Board is directed to issue a comprehensive permit that conforms to this decision as provided in the text of this decision and also subject to the following conditions.

1. Any specific reference made to the "Board's Decision," "this Decision" or "this comprehensive permit" shall mean the comprehensive permit as modified by the Committee's decision. Any references to the submission of materials to the Board, the building commissioner, or other municipal officials or offices for their review or approval shall mean submission to the appropriate municipal official with relevant expertise to determine whether the submission is consistent with the final comprehensive permit, such determination not to be unreasonably withheld. In addition such review shall be made in a reasonably expeditious manner, consistent with the timing for review of comparable submissions for unsubsidized projects. *See* 760 CMR 56.07(6).
2. Should the Board fail to carry out this order within thirty days, then, pursuant to G.L. c. 40B, § 23 and 760 CMR 56.07(6)(a), this decision shall for all purposes be deemed the action of the Board.
3. Because the Housing Appeals Committee has resolved only those issues placed before it by the parties, the comprehensive permit shall be subject to the following further conditions:

    (a) Construction in all particulars shall be in accordance with all presently applicable local zoning and other bylaws except those waived by this decision or in prior proceedings in this case.

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

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

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

(e) The Board shall take whatever steps are necessary to ensure that a building permit is issued to the applicant, without undue delay, upon presentation of construction plans, which conform to the comprehensive permit and the Massachusetts Uniform Building Code.

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

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

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

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

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

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

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

HOUSING APPEALS COMMITTEE

December 20, 2018

Shelagh A. Ellman-Pearl, Chair

Joseph P. Henefield

Marc Laplante

Rosemary Connelly Smedile

James G. Stockard, Jr.

Certificate of Service

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

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Dated: 12/20/2018

Tanya J. Reynolds, Clerk
Housing Appeals Committee