COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

AVALON COHASSET, INC.

v.

COHASSET ZONING BOARD OF APPEALS

No. 05-09

DECISION

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HOUSING APPEALS COMMITTEE

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DECISION

I. PROCEDURAL HISTORY

On August 8, 2002 Avalon Cohasset, Inc., LLC filed an application for a comprehensive permit with the Cohasset Zoning Board of Appeals to build a two-hundred-unit rental apartment complex on a 61-acre site at 155 King Street in Cohasset. Pre-Hearing Order, § II-1 (Sep. 18, 2006). After public hearings, the Board filed with the Cohasset Town Clerk, on November 10, 2003, a decision granting the comprehensive permit subject to 31 conditions. Pre-Hearing Order, § II-4; Exh. 1.

One of the conditions imposed by the Board formalized the developer's agreement to provide an on-site wastewater system. The developer did not appeal the decision or the conditions. On January 16, 2004, however, it submitted a request to the Board pursuant to 760 CMR 31.03(3) for a change in the permit to allow the development to connect to the municipal sewer.[1]

1. The Board contends that the developer was required to file an application with the Cohasset Sewer Commission. Board's Brief, p. 19. No such application was required. The purpose of the Comprehensive Permit Law is to allow a "single application" to be filed with the Board. G.L. c.

Initially, the Board approved the change as insubstantial, and granted the developer's request, but made the grant conditional upon a future determination that adequate capacity existed in the town's sewer system or that the necessary arrangements could be made for connection to the sewer of another municipality—presumably the town of Hull.

In November 2004, the developer filed a second request for modification, asking that the Board determine definitively that there was adequate capacity in the Cohasset sewer system to accommodate the flows from the development. After a public hearing at which the Board heard testimony from the chairman of the Cohasset Sewer Commission (CSC), it denied the request, and on March 14, 2005, the developer appealed to this Committee.

The Committee opened its hearing, and the Board filed a motion to dismiss, which was denied by the presiding officer on January 9, 2006. That ruling has been reviewed by the Committee, and is incorporated into this decision as a ruling of the full Committee.

Pursuant to the Committee's regulations, the parties then negotiated a Pre-Hearing Order, which was issued by the presiding officer; prefiled testimony was submitted; a site visit and three days of hearings to permit cross-examination of witnesses were conducted; and post-hearing briefs were filed.[2]

II. FACTS

Like many towns near the coast south of Boston, Cohasset has had a history of difficulties in disposing of sewage because of unusual soil conditions. Exh. 44, p. 2. In 1979, the Massachusetts Division of Water Pollution Control (DWPC) brought suit against the town alleging that discharges from the town sewage treatment plant were in violation of the Clean Waters Act., G.L. c. 21, §§ 26-53. Exh. 4, p. 3, ¶ 1. At that time, the town had a small sewer district in the historic center of the town. Exh. 5, p. 19; see

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40B, § 21. This provision applies to requests for changes in permits as well as to initial applications.

2. The parties stipulated that the developer has satisfied the three requirements contained in 760 CMR 31.01(1)(limited dividend status, fundability, and site control), and that the town of Cohasset has not satisfied any of the statutory minima set forth in the second sentence of the definition of "consistent with local needs" in G.L. c. 40B, § 20.

Exh. 58, p. vi. Agreements for judgment were entered by the Superior Court first in 1980 (Agreement for Judgment) and then in 1994 (Amended Final Judgment). Exh. 4, p. 3, ¶ 1. A later consent decree, the Second Amended Final Judgment, finalized on April 17, 1997, required construction of "greatly expanded wastewater facilities," which were to be fully operational by June 30, 2000. Exh. 9, ¶¶ 16-25; Exh. 58, p. vi. It also required the town to address inflow and infiltration (I/I) problems (that is, groundwater and stormwater infiltration through defects in pipes, illegal connections, and other unintended sources of flow, all of which needlessly strain the total capacity of the treatment system). Exh. 9, ¶¶ 26-31. The Second Amended Final Judgment also established a framework for the town to designate critical areas for connections to the town's sewer system, including not only the Central Sewer District, but also the Little Harbor area to the north of the town center. See Exh. 4, p. 3, ¶ 2; 9, ¶¶ 8-15; 70, ¶¶ 13, 40; 73, ¶15. And it provided for quarterly reporting to DEP, an obligation that terminated on the first anniversary of the date on which the new facilities became fully operational. Exh. 9, ¶ 34. Finally, it provided, "Beginning upon entry of this Final Judgment and continuing until the System is fully operational, the Town shall not authorize or allow any new connections... or extensions of its sewer system," except in cases of imminent hazard to public health or the environment.[3] Exh. 9, ¶ 46.

As a result of the Second Amended Final Judgment, a Wastewater Facility Plan and Environmental Impact Report was prepared in May 1997. See Exh. 57. Based on its recommendations, significant expansion of the sewer system did in fact take place. Exh. 5, p. 19.[4] The original Central Sewer District, with its three miles of municipal sewer, was expanded to almost fourteen and one half miles of piping, and the North Sewer District, in the northeast corner of the town near the towns of Hull and Hingham, was built, adding almost eleven miles of piping conveying flow to the Hull wastewater treatment facility. Exh. 5, p. 19; Exh. 58, pp. vi, 20. The system expanded to nine times its original size, adding force mains and pressure sewer pipes and nine pumping stations.

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3. This may formalize what is referred to in the town's 1997 Wastewater Facility Plan as a DEP sewer connection moratorium. See Exh 57, pp. I-3 to I-4. The parties have not referred to any such moratorium, and there does not appear to be any in effect now.

4. N.b:, pp. 13-19 of Exhibit 5 appear between pp. 53 and 54.

Exh. 5, pp. 19, 20, 21. The system grew from 200 connections to over 1,100 connections. Exh. 58, p. vi. The wastewater treatment facility was dramatically upgraded, using an innovative, "Zenon" membrane, technology. See Exh. 5, p. 23. The capacity of the wastewater treatment facility serving the Central Sewer District was expanded from 72,000 gpd (gallons per day) to 300,000 gpd. Exh. 58, p. vi. It became fully operational in 2000. Exh. 73, ¶ 18.

Documentation of the conditions in the Little Harbor area had been limited in 1997, and at that time, extension of the sewer to that area could not be economically justified. Exh. 5, p. 47. But further study in 2000 and 2001 resulted in a February 2002 supplement to the town's wastewater facility plan, which recommended construction of two new districts, which would result in sewering "almost the entire coastline of Cohasset." Exh. 5, p. 57. The two districts were the Little Harbor Sewer District, comprising 380 EDU (Equivalent Dwelling Units[5]), and the smaller Atlantic Avenue Sewer District, comprising 80 EDU. Exh. 5, p. 57. It also recommended that the town continue to pursue additional capacity by municipal agreement with the town of Hull, and that capacity allocation for new development "not be entertained..." until the North Sewer District expansion had been completed. Exh. 5, p. 58.

On October 12, 2006, a further modification of the Second Amended Final Judgment was allowed by the Superior Court. Exh. 54. The town and DEP agreed that significant progress had been made and that the expansion had been completed in early 2001 with only a few service connections yet to be made. Exh. 54, p. 1; 58, .p. 8. "The new/upgraded treatment plant... [had] been performing exceptionally, and as a result of that performance, it [was] believed that the system [could] be expanded to allow it to accept additional flow." Exh. 58, p. 8. They agreed, therefore, to expand the system to the Little Harbor area. To do so, the main wastewater treatment facility would be expanded from 300,000 gpd to 450,000 gpd, with the intention of dedicating the increased capacity only to serving existing homes, and not to "promote ancillary growth, which may impact adjacent coastal resources." Exh. 58, p. vii. Both the upgrading of the waste water treatment facility and construction of the Little Harbor Sewer System were to

5. An Equivalent Dwelling Unit is a measure of wastewater flow. Exh. 70, ¶ 17; Tr. I, 136.

begin by July 1, 2007 and are to be completed by July 1, 2010. Exh. 54, p. 4 (¶ 51(b)). Connection of certain properties in the Little Harbor Sewer District ("proposed connections") need not be substantially complete until July 1, 2012. Exh. 54, p. 4 (¶ 51(b)(viii)). It was also agreed that portions of Atlantic Avenue and Jerusalem Road that are not within the Little Harbor Sewer District would be connected to the sewer system, because "[e]xcess capacity was found to exist in that system within the limitations of the existing Intermunicipal Agreements with Hingham and Hull....". Exh. 54, p. 2; Exh. 58, p. vii. The town and DEP also agreed that once these steps have been taken, the town "will have substantially performed all of its obligations pursuant to the Second Amended Final Judgment, and may seek an order terminating the judgment, which [DEP] will not unreasonably oppose." Exh. 54, p. 2.

The critical issue in this case is whether waste water from the proposed development should be disposed of on site or in the upgraded municipal sewer system. In its original 2002 application for a comprehensive permit, the developer proposed an on-site wastewater treatment facility with discharge of effluent to the surface. Pre-Hearing Order, § II-2. During the hearing before the Board, the developer amended its proposal to replace the surface discharge system with a system that would discharge to groundwater, and in granting the comprehensive permit in 2003, the Board included a condition formalizing this as a requirement. Pre-Hearing Order, § II-2, II-3; Exh. 1, p. 12, ¶ 16. The design of the system would be subject to approval by the Department of Environmental Protection (DEP). Exh. 1, p. 12, ¶ 16.

The developer did not appeal any conditions in the permit, but in January 2004, although the development is about a half mile from the boundary of the Central Sewer District, it submitted a request, pursuant to 760 CMR 31.03(3), to change the permit to allow wastewater to be disposed of in the municipal sewer system. Exh. 2, Pre-Hearing Order, § II-5. At a public meeting on February 5, 2005, the Board found the requested change to be insubstantial and indicated that it was granting the request—allowing the developer to connect the proposed development into the sewer system of Cohasset or another municipality—subject, however, to a determination that adequate capacity existed in the town's sewer system or that the necessary agreements could be executed for the

connection to another municipality's sewer system. Pre-Hearing Order, § II-6. Specifically, in responding to the request for the change, the Board voted to add the following language to the original, 2003 comprehensive permit:

> As an alternative to the on-site wastewater treatment facility and ground water discharge system referenced in Conditions No. 6, 10, 11, 16 or otherwise in the Comprehensive Permit, the Applicant shall be permitted to tie into a municipal sewer system (1) to the extent it is determined (whether by a final decision of a court of competent jurisdiction or the Cohasset Sewer Commission) that there exists adequate capacity in the Cohasset municipal sewer system to accommodate the sewer flows from the Development, or (2) in the case of a tie-in to another municipal sewer system, to the extent provided in the permit, license or agreement with respect thereto executed by the Cohasset Sewer Commission and other appropriate Cohasset authorities. Such sewer connection shall be made pursuant to a final sewer plan to be submitted to the Board in accordance with Condition No. 10 of this Comprehensive Permit.

Exh. 4, p. 2, ¶ 7.

On November 18, 2004, the developer filed a second request for modification, also pursuant to 760 CMR 31.03(3), requesting "that the Board make a... determination that there exists adequate capacity in the [Cohasset] system to accommodate the flows from the development... [and to permit the development] to connect to the Cohasset municipal sewer system." Exh.. 3, p. 5; Pre-Hearing Order, § II-11. After a public hearing, the Board denied this second requested modification. Pre-Hearing Order, § II-11; Exh. 4. In its March 10, 2005 decision, the Board made a finding that the Chairman of the Cohasset Sewer Commission had testified that:

> 6.A. The recently expanded municipal sewerage treatment plant is still in a "shake-down" mode, meaning that its actual capacity (relative to the design standard) has yet to be definitively established.
>
> 6.B. The Town, the DWPC, and the Office of the Attorney General are in the process of crafting a Third Amended Final Judgment. The Third Amended Final Judgment will address the timetable and specifications for the sewering of the Little Harbor area....
>
> 6.C. Until such time as the capacity to accommodate the sewering of the Little Harbor area is designed and constructed, and homes in the Little Harbor area are connected to the municipal sewerage system, the Sewer Commission cannot safely conclude that capacity exists in the system to handle the wastewater generated by the Applicant.

Exh. 4, p. 4, ¶ 6. The Board went on to state that:

> Without making any finding as to available plant capacity for the connection of Avalon's proposed Development to the Town's municipal sewer treatment plant, the Board finds the testimony of the Sewer Commission credible to the effect that the lack of sewerage plant capacity to achieve compliance with the Second Amended Judgment precludes the connection of the proposed development to the wastewater treatment plant.

Exh. 4, p. 4, ¶ 7.

III. BURDEN OF PROOF

This is the appeal of the denial of a request, pursuant to 760 CMR 31.03(3), to change the housing development from one using an on-site package treatment facility to one connected to municipal sewer by means of the extension of a town sewer main into a previously unserved area.[6]

A. State Law

The Comprehensive Permit Law was enacted to provide a mechanism for overriding local requirements and regulations which restrict the development of affordable housing. It does not supersede other provisions of state law. Typically, we do not address questions arising under other state laws or regulations, instead, simply leaving their enforcement to the appropriate state agencies or the courts. This case, however, is somewhat more complex than usual, and since the Board has pressed its claim that the town cannot permit a sewer connection without violating state law, it may be helpful to address the question briefly. In doing so, we are not asserting any claim to supersede the jurisdiction of state environmental agencies or the courts.

To the extent that the town's claim that a connection to the municipal sewer would violate state law involves proof of facts, the burden of proof is upon the Board.

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6. At times, both the developer and the Board have made technical arguments based on the premise that the initial change was granted, and only the second ruling of the Board should be in issue. Specifically, the developer argued that because the change was granted initially, subject only to verification that there was sufficient sewer capacity available, this Committee need only make a simple factual determination concerning capacity. Review of the developer's two requests and the Board's actions indicates, however, that the requests and responses were integrally related, and should be considered a single denial of the requested change. See Exh. 2, 3, 4. Also see Ruling on the Board's Motion in Limine (Aug. 1, 2006).

B. The Appeal Standard for Changes in a Proposal after Issuance of a Permit

Under our precedents and regulations, and as established by the ruling of the presiding officer in this case, when a change in a permit has been denied, the burden is initially upon the developer to prove that the denial makes the proposal uneconomic. *Avalon Cohasset, Inc. v. Cohasset*, No. 05-09, slip op. at 7-8 (Mass. Housing Appeals Committee Ruling on Board's Motion to Dismiss Jan. 9, 2006), citing *Drumlin Development, LLC v. Sudbury*, No. 01-03, slip op. at 3 (Mass. Housing Appeals Committee Sep. 27 2001); *Shamrock Construction and Dev. Corp. v. Whitman*, No. 96-02, slip op. at 2 (Mass. Housing Appeals Committee Sep. 26, 1996); *Cooperative Alliance of Massachusetts v. Taunton*, No. 90-05, slip op. at 7 and n.11 (Mass Housing Appeals Committee Apr. 2, 1993); also see *Maritime Housing Fund, LLC v. Medway*, No. 06-14, slip op at 8 (Mass. Housing Appeals Committee Apr. 25, 2007); also see 760 CMR 31.06(3); also see Pre-Hearing Order, § IV-2.[7] If the developer sustains its burden, the burden shifts to the Board to prove that there is a valid local concern that supports the denial of the change, and that this concern outweighs the regional need for affordable housing. 760 CMR 31.06(7); also see Pre-Hearing Order, § IV-2. If, and only if, the Board sustains its burden, will its denial of the change be upheld.[8]

C. Unequal Application

The developer may also prevail on appeal by showing that local requirements or regulations have not been applied as equally as possible to subsidized and unsubsidized housing. 760 CMR 31.06(4); G.L. c. 40B, § 20. Also see Pre-Hearing Order, § IV-3. There is no shifting burden of proof on this issue. The developer simply has the burden of proof, and the Board may attempt to rebut the developer's proof. 760 CMR 31.06(4).

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7. Section IV-4 of the Pre-Hearing Order is somewhat ambiguous, appearing to create an alternate avenue of proof for the developer. It cannot, however, under our precedents and the ruling of the presiding officer, create a second, more easily satisfied means for the developer to prove its case, but rather only indicates that the developer has the opportunity to rebut the local concerns put forth by the Board to justify its denial of the change.

8. In a case such as this, in which the Board's action is based upon the inadequacy of municipal services or infrastructure, the Board has the additional burden of proving that there are "unusual topographical, environmental, or other physical circumstances" which make installation of adequate services prohibitively costly. 760 CMR 31.06(8).

If the developer meets its burden, we will rule that the town violated Chapter 40B, § 20, the denial will be vacated, and the sewer connection will be permitted.

IV. DISCUSSION

A. State Law

Interspersed among the Board's arguments that there are local concerns to support its denial of the proposed change, is the claim that "granting Avalon's request amounts to a violation of various Orders and Judgments previously issued by the Superior Court," namely the Second Amended Final Judgment and the further modification of the Second Amended Final Judgment.[9] Board's Brief, pp. 10-11; Exh. 9, 54. We accept at face value the Board's argument that the Cohasset Sewer Commission, its employees, and consultants have worked diligently to comply with the requirements of these judgments and to remedy longstanding problems with failing septic systems in town, and that they have done so under the supervision of DEP and the courts. See Board's Brief, pp. 17-18; also see, e.g., Exh.70, ¶ 7. And, as noted above, we understand fully that the Comprehensive Permit Law cannot supersede state law, and if connection of the proposed housing to Cohasset sewer system violated state law or an order of the Court, it would not be permitted.

But nowhere does the Board point to a specific provision of state law or of the judgments of the Court that would be violated by permitting the proposed housing to connect to the town sewer. It argues only that "the sewer commission has never allowed any applicant to connect... whose property lies outside of a designated critical area of

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9. The Board also points out that lawsuits brought in Superior Court attempting to force the Cohasset Sewer Commission to provide sewer connections to market-rate developments have failed. See Board's Brief, p. 16; also see, e.g., Exh. 11 (*Jerusalem Road Estates, LP v. Town of Cohasset, et al.*, C.A. No. 03-00103 (Norfolk Super. Ct. Memorandum of Decision and Order on Plaintiff's Motion for Judgment on the Pleadings Dec. 9, 2004); Exh. 46 (*Cedarmere Ventures, LLC v. Cohasset Sewer Commission, et al.*, C.A. No. 03-5614 (Suffolk Super. Ct. Memorandum of Decision and Order on Plaintiff's Motions for Judgment on the Pleadings... Aug. 16, 2006)). Though the actions of the sewer commission are relevant in this matter (see section IV-C, below), the court cases themselves and the fact that the developer moved to intervene in one of the lawsuits and that its motion was denied have little or no relevance to the case at hand. See Exh. 6; (*King Taylor Cohasset, LLC v. Cohasset Sewer Commission, et al.*, C.A. No. 03-05614-A (Suffolk Super. Ct. ruling Jun. 14, 2004)).

concern and is not a present, already existing source of pollution...." Board's Brief, p. 21. This is not proof that the proposed change in the permit would violate state law.

Our own review of the judgments reveals no provision that connection of the proposed housing would violate. We described the judgments in detail above. In particular, we note that the Second Amended Final Judgment prohibited new connections or extensions only "until the [new facility was] fully operational...." Exh. 9, ¶ 46. The facility became fully operational in 2000. Exh. 73, ¶ 18. Similarly, there are no provisions in the October 12, 2006 modification of the Second Amended Final Judgment that prohibit connections or extensions.[10] See Exh. 54. Rather, the judgment envisions further upgrading of the wastewater treatment facility to accommodate flows from Little Harbor and calls for termination of state oversight once that area is connected to the town system. Exh. 54, p. 2.

The Board has not sustained its burden of proving a violation of state law. This, however, is merely the beginning of our inquiry.

B. Normal Appeal Standard

1. Economics

a. The Economics of the Development Approved by the Board – the Developer's Presentation

As noted above, the burden is initially upon the developer to prove that the denial of the requested change makes the proposal uneconomic.[11] Since neither the Comprehensive Permit Law nor our regulations definitively prescribe how the economics of a rental housing proposal are to be analyzed, several methodologies are available to the

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10. We can imagine a situation in which a municipality itself has prepared a clear, written, permanent policy that prohibits connections outside of planned districts and in which that policy is incorporated by reference into a judgment of the Court. Though Cohasset appears to have been quite consistent as a matter of *practice* in prohibiting such connections, the Board has drawn our attention to no such formal policy incorporated into the Court's judgment so has to give it the force of state law. Further, it is not clear whether, as a matter of state policy, DEP would approve such a strict provision in the consent decree.

11. The Board argues that this matter should have been remanded so that it could take evidence with regard to the economics of the requested change. Board's Brief, p. 2. This argument is without merit since the question of economics is part of the standard for review on appeal to this Committee, but nothing in the regulation requires that the developer prove, when requesting a change before the local Board, that without the change the development proposal is uneconomic.

developer. We have indicated in previous cases that the preferred methodology is the Return on Total Cost (ROTC) approach. *Paragon Residential Properties v. Brookline*, No. 04-16, slip op. at 24-27, (Mass. Housing Appeals Committee Mar. 26, 2007), *appeal docketed* No. 07-00697 (Norfolk Super. Ct.); *8 Grant Street, LLC v. Natick*, No. 05-13, slip op. at 5 (Mass. Housing Appeals Committee Mar. 5, 2007); *Bay Watch Realty Trust v. Marion*, No. 02-28, slip op. at 13-14 (Mass. Housing Appeals Committee Dec. 5, 2005), *aff'd* No. 06-00007-B (Plymouth Super. Ct.. Jun. 19, 2007), *appeal docketed* No. 07-P-1372 (Mass. App. Ct.). This is consistent with guidelines endorsed by the four Massachusetts state agencies that subsidize affordable housing. "Local 40B Review and Decision Guidelines: A Practical Guide for Zoning Boards of Appeal Reviewing Applications for Comprehensive Permits Pursuant to M.G.L. Chapter 40B" (Massachusetts Housing Partnership and Netter, Edith M., November 2005), p. 19 (Exhibit 27)(hereafter, the "MPH Guidelines"). In this case, the developer's financial expert testified that in his professional opinion the ROTC approach and the Internal Rate of Return (IRR) methodology "provide the best quantitative measures for evaluating the economics of the project." Exh. 65, ¶ 38. Therefore, as we have done in the past, we will rely on the ROTC approach.

To prove that the Board's denial of the change from on-site waste water disposal to municipal sewer made the development uneconomic, the developer introduced into evidence a *pro forma* financial statement for the 200-unit development as approved by the Board, that is, with an on-site waste water treatment facility. See Exh. 50. That *pro forma* and the analysis that it represents, which the developer's financial expert explained in detail, show that the ROTC for the development is 5.47%. Exh. 50, p. 3; 65, ¶ 39. "A projected ROTC of at least 2½... percent above the current yield on 10-year [U.S.] Treasury notes is generally required to fairly compensate capital investors...." MHP Guidelines, p. 19; Exh. 65, ¶ 40. The developer's expert testified that the current yield on such Treasury notes is 4.79%, indicating that a minimum reasonable rate of return would be 7.29%. Exh. 65, ¶ 41. He concluded that the development as approved is uneconomic. Exh. 65, ¶ 42.

b. The Board's Response

The Board does not challenge the developer's analysis of the ROTC for the approved development (with on-site waste water disposal). The analysis provided by its financial expert is nearly the same as that of the developer's expert. His figure for the current yield on Treasury notes is slightly different—4.66%—generating a minimum reasonable rate of return of 7.16%, but he accepts the 5.47% ROTC figure offered by the developer's expert. Exh. 74, ¶17; Exh. 74-B. Thus, the Board concedes that the approved development with on-site waste water disposal is uneconomic.

The Board goes on to argue, however, that because there are equally great expenses associated with the sewered development, the developer must go beyond satisfying its burden in the usual manner, that is, by simply proving that the approved project is uneconomic. It argues that in addition, the developer must show that it is the Board's refusal to permit the change that *makes* the development uneconomic. See Board's Brief, pp. 3-4. We agree with the main thrust of this argument.[12]

The Comprehensive Permit Law and our regulations state that what is at issue in our hearings is whether "conditions and requirements *make* the construction or operation of... housing uneconomic...." G.L. c. 40B, § 23; 760 CMR 31.06(3) (emphasis added). To meet this standard, typically the developer need only show in a hearing before this Committee that the development as approved by the Board is uneconomic. That is, in most cases it is logical to assume that the developer would not propose an uneconomic development. As we have noted previously, however, that under some circumstances, a developer may choose to go forward with an uneconomic development. *Rising Tide Development, LLC v. Sherborn*, No. 03-24, slip op. at 16, n.16 (Mass. Housing Appeals Committee Mar. 27, 2006)("...developers are frequently forced to accept lowered profits for developments that are subject to protracted litigation").[13] But we have seen few such cases, and therefore have not explicitly considered how the statutory standard should be

12. We are not convinced by nor find any authority, however, for the Board's novel argument that § 31.03(3) requires the developer to conduct an economic analysis of all "the various alternatives available." See Board's Brief, p. 7.

13. This may in some cases be unavoidable since, as the Board noted in its opening statement, delays frequently result in increased costs. See Tr. I, 81.

applied in them.

The Board appears to argue that in such cases, where the developer's proposal is uneconomic, any condition may be imposed and any change denied since logically nothing can *make* a development uneconomic if it already *is* uneconomic. Such an interpretation of the statutory standard goes too far however. The intent of the statute is not to give the Board free rein, but only to prevent undue burdens from being placed upon the developer. Under the facts presented here, where the denial of a change is at issue, we rule that to sustain its burden the developer is required to establish not only the ROTC for the development as approved is uneconomic, but also that the ROTC for that development is significantly *more* uneconomic than the development it proposes to build.[14]

c. The Economics of the Development Proposed by the Developer

There are a number of points of disagreement between the parties with regard to the cost of the development proposed by the developer, that is, the 200-unit development using the municipal sewer system for waste water disposal.

(i) Fee for Connection to the Municipal Sewer – The developer's position is that it should pay only the basic fee described on the town's sewer application form that was in effect when it applied for a comprehensive permit in August 2002, that is, $50 for the first three units and $25 for each additional unit, for a total of $5,075. Tr. III, 25-26, 55. The developer notes that it consulted with town officials prior to August 2002, and was not informed of any additional fees. Exh. 64, ¶ 12; Tr. II, 8, 52.

The Board, though it opposes any sewer connection, maintains that if such a connection is permitted, then the developer, like any other user, should contribute to the cost of the system expansion by paying a betterment assessment or connection fee. Specifically, it argues that like other users in the Central Sewer District (which is the

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14. The Board has argued that the developer may take unfair advantage of this rule. That is, it suggests that when a permit is issued by a board, the developer might pretend to accept an objectionable condition in order to avoid appealing the permit, and then later attempt to remove the condition by requesting a project change with regard to the same issue. This is highly unlikely. First, there is little incentive to engage in such tactics since in either case the developer faces the same initial burden of proving that its proposal is uneconomic. Second, the developer is unlikely to use such tactics since they would typically result in additional delays.

district to which the proposed development would connect), the development should pay a connection fee of $15,000 per EDU. Since the flow from the proposed development is 162.5 EDU, this would result in a total fee of $2,437,500. Exh. 76, ¶ 10; also see Exh. 74-B. Not surprisingly, however, the history of these fees is complicated, and the most appropriate solution is one not offered by either of the parties.

When the significantly expanded municipal sewer system first became operational in 2000 as a result of the 1997 Second Amended Final Judgment, residences in the Central District that were permitted or required to connect to the system were assessed for the betterment. Exh. 70, ¶ 16. The total cost was $12,000 per EDU, and half of that was borne by the town, and half assessed to each resident.[15] Tr. III, 16. Residents were permitted to amortize the payment over a twenty-year period at a 1% interest rate. Tr. III, 17. If paid in monthly installments, this is a cost of $332 per EDU per year. In 2004, after the time to assess a betterment had expired, the sewer commission voted to establish a connection fee of $15,000 per EDU to be paid by any additional residents of the district for whom sewer connections were approved.. Exh. 70, ¶¶ 17-18; Tr. III, 23-24. This fee was also charged to two residences that directly abutted the new sewer district and were permitted to connect due to failing septic systems. Tr. II, 110; III, 11.

Determining whether and how much developer's should pay for municipal services under the Comprehensive Permit Law is frequently difficult. We have noted in the past that under traditional land-use law a town is generally obligated to provide services on an equal basis to all residents. *Rounds v. Board of Water & Sewer Commissioners of Wilmington*, 347 Mass. 40, 44, 196 NE.2d 209, 212 (1964). And where this requires extension of a sewer main, since its inception, the Comprehensive Permit Law has authorized a developer to do so at its own expense. See *Maynard v. Housing Appeals Committee*, 370 Mass. 64 at 68-69, 345 N.E.2d 382, 385-386 (1976). This is in spite of strong arguments under both our early precedents and § 31.06(8) of our regulations that the costs of improving town infrastructure should not be borne by the

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15. The cost of later expansions was greater. Residents of the Northern Sewer District paid an assessment based upon a total cost of $26,000 per EDU. Tr. III, 6-7, 17. Residents of the Little Harbor District, to the most recent expansion, will pay a betterment assessment of $31,500 per EDU. Tr. II, 111.

developer. And, in *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 36 (Mass. Housing Appeals Committee Jun. 25, 1992), we went further, and held that a fair contribution to the cost of infrastructure may be required in most cases. Also see *Hilltop Preserve Ltd. Partnership v. Walpole*, No. 00-11, slip op. at 15, 26-29 (Mass. Housing Appeals Committee, Apr. 10, 2002). Most recently, in *Oceanside Village, LLC v. Scituate*, No. 05-03, slip op. at 31-32 (Mass. Housing Appeals Committee Jul. 17, 2007), *appeal docketed* No. 07-01016A (Plymouth Super. Ct.), we upheld a sewer connection fee of $6,500 on the basis that the developer had not made a sufficient factual showing that such a fee was excessive.[16]

We find that under the facts presented in the case before us, where an extensive sewer expansion was made pursuant to a court order, and the residents of the sewer district were assessed the cost of the betterment, it is proper that the proposed development contribute to the costs of the Central District improvements on the same terms as other residents. We rule that it should contribute the amount it would have been assessed when it filed its application in 2002, before the $15,000 connection fee went into effect. See *Paragon Residential Properties v. Brookline*, No. 04-16, slip op. at 45, (Mass. Housing Appeals Committee Mar. 26, 2007), *appeal docketed* No. 07-00697 (Norfolk Super. Ct.); *Weston Development Group v. Hopkinton*, No. 00-05, slip op. at 11 (Mass. Housing Appeals Committee May 26, 2004). That is, it should pay a fee of $6,000 per EDU for a total of $975,000. This, when added to the application fee results in a total sewer connection fee of $980,075.[17]

(ii) Cost to Construct a Sewer Main Extension

To connect to the municipal sewer, the developer must construct a sewer extension main and also a private sewage pumping station at the front of the site.

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16. The amount of fees in other Massachusetts town was raised briefly on cross-examination of the developer's representative. The evidence was somewhat inconclusive, and its relevance to the issues before us was not clearly articulated, but it tended to show that in some towns the sewer connection fee is nominal, but that in others, fees of "several thousand dollars per unit" are not unusual. Tr. II, 27, 30, 32.

17. Arguably, this cost could be amortized and carried on the *pro forma* as an operating expense, but such a change would have little effect on the bottom line. In any case, the developer has not addressed this in detail in its brief, and the record is insufficient to support a finding that this amortization is the better approach.

The developer did not present detailed evidence with regard to the pumping station, and we accept the estimate provided by the Board's expert that this will cost $310,000. Exh. 76, ¶ 9.

For the sewer main itself, there are two alternate routes by which the development may be connected to the municipal sewer. The developer has proposed an extension that would be constructed entirely under Route 3-A to the south to Ridge Top Road, where it would connect to the existing municipal sewer system at a town pumping station. Exh. 34, Tr. II, 18-19. The length of this extension is about 4,000 feet. Exh. 34.[18] The developer's estimated cost is $125 per linear foot, which includes costs associated with repaving the state highway. Tr. II, p. 57-58, 21.[19] Thus, the cost of the extension would be $125 per foot times 4,000 feet or $500,000.

The Board would prefer that the main be placed under Route 3-A for only 900 feet and then proceed an additional 4,600 east under Sohier Road to connect to the system at Ripley Road—a total of 5,500 feet. Exh. 76, ¶ 8; Tr. II, 126; also see Exh. 34. Its construction cost estimate was also higher—$1,264,149. Exh. 76, ¶ 9. This included $310,000 for the pumping station and $164,889 for contingencies. Exh. 76, ¶ 9. By calculation, even if the cost of the pumping station and the contingency allowance are removed from the estimate, the cost is still $789,260 or $144 per foot. The record does not account for the discrepancy between this estimate and the developer's estimate of $125 per foot.

The Board has not presented a convincing justification for requiring the developer to connect to the sewer using the longer, more expensive alternative, and we find that the

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18. In its brief, the developer suggests that "Exhibit 34 (and the graphic scale included on it) reveals... a shorter route of around 2,000 linear feet." Developer's Brief, p. 40. The scale, though nearly illegible, in fact reveals a distance of about 4,000 feet.

19. The Board has suggested that the town might charge the developer for access to that station or for an easement. Board's Brief, p. 8. This is mere speculation, however, since the Board introduced no detailed evidence as to what fee might be charged or whether other users have been charged such a fee, and in any case, we agree with the developer that such costs could properly be waived by the Board or this Committee to permit the construction of affordable housing. See Tr. II, 18-21. The Board also alleges that there may be unaccounted-for "premium" costs associated with repaving the highway. The developer's representative testified, however, that "all elements of that construction" were included in its estimates. Tr. II, 21. We find that testimony credible.

developer's estimate for the cost to connect at Ridge Top Road is credible. Thus, the total cost to construct the sewer extension is $500,00 plus the $310,000 cost of the pumping station or a total of $810,000.

(iii) Cost of On-Site Waste Water Collection System

The Board argues that the developer has failed to take into account that the originally proposed on-site waste water collection system needs to be modified to direct waste water to the front of the site, and that this will result in an additional cost of $266,000. Exh. 75, ¶¶ 13-17; also see Exh. 74-B. The developer's representative testified, however, that "the cost of [the collection system] will be relatively the same under either scenario." Tr. II, 68. We find this testimony more credible, and therefore will not include the additional cost of $266,000.[20]

(iv) Interest

Computation of interest to be carried in the *pro forma* is complex. See Exh. 64, ¶ 74(h); also see Exh. 78, ¶ 11. Since total development costs are not dramatically different under either scenario, and, more important, since neither party offered evidence or argument as to how to recalculate interest, we find that it is acceptable to carry the same figure, $2,784,037, on the *pro forma* for both the approved development and the proposed development.

(v) Delay

Finally, the developer points out that costs associated with delay should be accounted for in its financial projections. We agree. Typically, in preparing *pro formas* and other evidence for the hearing before this Committee, financial figures reflect the best

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20. The Board has suggested that the town might charge the developer for access to the municipal pumping station or for an easement. Board's Brief, p. 8. This is mere speculation, however, since the Board introduced no detailed evidence as to what fee might be charged or whether other users have been charged such a fee, and in any case, we agree with the developer that such costs could properly be waived by the Board or this Committee to permit the construction of affordable housing. See Tr. II, 18-21. The Board also alleges that there may be unaccounted-for "premium" costs associated with repaving the highway. The developer's representative testified, however, that "all elements of that construction" were included in its estimates. Tr. II, 21. We find that testimony credible.

estimates as of the time of that hearing.[21] See *Bay Watch Realty Trust v. Marion*, No. 02-28, slip op. at 16 (Mass. Housing Appeals Committee Dec. 5, 2005)("Generally, the testimony we receive during our hearing attempts to establish land value, costs, rents, and other values as of the time of the hearing."), *aff'd* No. 2006-0007-B (Plymouth Super. Ct. Jun. 19, 2007), *appeal docketed* No. 2007-P-1372 (Mass. App. Ct.). Costs of delay, therefore, are usually not highlighted, but simply included in the time-of-hearing estimates. In this case, however, the developer did include one such item, that is, the "interest-related expense for holding the land." See Developer's Brief, p. 41. According to the rebuttal testimony of the developer's agent, delays in construction of "approximately 18 to 36 months" had not been accounted for. Exh. 77, ¶ 13; also see Exh. 64, ¶ 64(a). The cost of this to the developer is $519,750 per year. Exh. 78, ¶ 15; also see Tr. I, 115-116.[22] We find that there is an additional cost related to delay of at least 18 months of $779,625. Though the developer speculates that delays will be greater if on-site sewage disposal is pursued, it has proven only that delays have already been encountered that will be associated with the development regardless of whether waste water is treated on site or disposed of by sewer. These proven delays should be carried on the *pro formas* for both the approved and proposed developments.

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21. The "time of hearing" means the date on which the Pre-Hearing Order is signed, in this case, September 18, 2006. Under our regulations, the hearing begins with a conference of counsel held within twenty days after filing of the appeal and ends with the filing of briefs, typically many months later. 760 CMR 30.09(4)(a), 30.09(5)(h). Since submission of prefiled testimony and oral cross-examination of witnessed normally takes place over the course of several months, it is important to establish a single date as a reference point. It is on the date that the the Pre-Hearing Order signed that the issues in dispute are finalized and all existing documentary evidence is admitted into evidence. All prefiled testimony and cross-examination that refer to the economics of the proposed housing should use that date as a their point of reference.

22. This testimony also referred to other legitimate costs—engineering, architectural, and legal expenses—which may or may not have been included in the development cost estimates. Since no concrete information was presented with regard to them, we do not consider them. Similarly, the developer presented a brief argument that on-site waste water disposal will result in a reduced resale value if or when the entire development is sold. Board's Brief, p. 43; also see Exh. 78, ¶¶ 20-23. The evidence presented on this issue was limited, and in any case it does not apply to an ROTC analysis (which, as we noted at the outset, is the standard approach and the one we use here), but rather only to an IRR (internal rate of return) analysis.

(vi) Operating Costs

The parties agree that overall operating expenses for the approved development will be $1,443,419. Exh. 50, p. 1; 74-B. And it is undisputed that over a million dollars of these expenses are routine and can be appropriately carried in the *pro forma* for the *proposed* development. But two items—operating costs relating to waste water disposal and funding of a capital reserve account—would vary depending on whether an on-site waste water treatment facility is built or the municipal sewer system is used.

Only the Board's expert prepared detailed estimates of these expenses. For the approved development he estimated $96,300 per year in operating costs and a $50,000 annual contribution to a capital reserve account for a total of $146,300. Exh. 76, ¶ 7. For the proposed development, he estimated $25,000 per year in operating costs, and, in addition, $144,864 for the annual municipal sewer system user fee, for a total of $169,864. Exh. 76, ¶¶ 13, 11-12. The only argument that the Board makes in response is that on cross-examination it adduced testimony that the expert based his estimate on information with which he was familiar in another eastern Massachusetts town. See Board's Brief, pp. 43-44; Tr. II 124-126. The developer has not offered an alternative figure. Board's Brief, pp. 43-44. We find that the expert's credibility was not undercut on cross-examination, we accept his testimony, and we find that the figures above are accurate.

(vii) Changes in Revenues and Costs Related to DEP Action

The developer has continued to pursue a groundwater discharge permit from the state Department of Environmental Protection (DEP).[23] See, e.g., Exh. 43; 77, ¶ 11, 13. Such a permit has recently been issued, and it has been appealed by the Cohasset Water

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23. On May 30, 2007, the developer moved to supplement the record by admission into evidence of the DEP Draft Groundwater Discharge Permit. See Exh. 81. On August 31, 2007, the developer moved to supplement the record by admission into evidence of the final Groundwater Discharge Permit and the Notice of Claim for Adjudicatory Appeal filed by the Cohasset Water Commission. See Exh. 82, 83. For the reasons discussed in the text, above, these documents add little to the record in terms of specific facts relevant to the issues that we must decide, and for that reason might properly be excluded. But even if they were excluded, they would remain part of the administrative record as filings in this appeal. For convenience, and because of their nature as undisputed public records of a collateral proceeding, they are hereby admitted into the evidentiary record as Exhibits 81, 82, and 83.

Commission. Exh. 82, 83. It requires a reduction in the number of bedrooms in the development from 325 to 300. Exh. 1, p. 4, ¶ 2; 82, p. 1. This will undoubtedly affect the economics of the development. But the developer has explicitly indicated that it does not wish to reopen the hearing or have the Committee "reopen the entire question of the calculation of the economics of the project." Motion to Supplement..., p. 2 (filed Aug. 31, 2007). And in the absence of further expert testimony or other evidence, it is entirely speculative as to exactly what the economic effect will be.[24] Therefore we are not in a position to make an adjustment in our financial analysis to account for the reduction.

d. Synthesized *Pro Forma* Analysis

As indicated above, there was little, if any, disagreement between the opposing parties' experts with regard to the methodology to be used in arriving at a final, estimated ROTC. Using the pro formas prepared by both experts (Exhibits 50 and 74-B), we have aggregated the undisputed figures and prepared our own, synthesized analysis based upon the findings in sections IV-B(1)(c), above. We find that the following are the best estimates of development costs and net operating income for the two development proposals under consideration:

24. The situation is further complicated because the permit will not become effective if a stay, as requested by the Cohasset Water Commission, is granted. See Exh. 83, p. 5, § V-C; 314 C.M.R. 2.08. Presumably the most likely outcome of the appeal is either that the permit would be upheld or revised to permit even fewer bedrooms, though we cannot dismiss the possibility that the developer would take advantage of the appeal to request that the project could be restored to its original size.

	Approved Development (On-Site Treatment)	Proposed Development (Sewer)	
Site Acquisition	**7,000,000**	**7,000,000**	
Hard Costs			
Undisputed Costs	23,895,695	23,895,695	
WWTF[25]	3,192,000	n/a	
Sewer Connection Fee	n/a	980,075	(see § IV-B(1)(c)(i))
Sewer Ext. & Pump Station	n/a	810,000	(see § IV-B(1)(c)(ii))
On-Site Collection System	n/a	-0-	(see § IV-B(1)(c)(iii))
Sub-Total (Hard Costs)	27,087,695	25,685,770	
Hard-Cost Contingency (5%)	1,354,385	1,284,289	
Total Hard Costs	**28,442,080**	**26,970,059**	
Soft Costs			
Undisputed Costs	4,087,543	4,087,543	
Interest Charges	2,784,037	2,784,037	(see § IV-B(1)(c)(iv))
Interest Costs (of Delay)	779,625	779,625	(see § IV-B(1)(c)(v))
Sub-Total (Soft Costs)	7,651,205	7,651,205	
Soft-Cost Contingency (5%)	382,560	382,560	
Total Soft Costs	**8,033,765**	**8,033,765**	
Developer Overhead and Fee (8%)	**3,478,067**	**3,360,306**	
Total Development Costs	**46,953,912**	**45,364,130**	
Effective Rental Income	**3,962,933**	**3,962,933**	
Undisputed Operating Exp.	1,297,119	1,297,119	
Operating Costs	146,300	169,864	(see § IV-B(1)(c)(vi))
Operating Exp.	**1,443,419**	**1,466,983**	
Net Operating Income	**2,529,514**	**2,495,950**	
ROTC	**5.39%**	**5.50%**	

25. Waste Water Treatment Facility.

c. Reasonable Return – ROTC is calculated by dividing net operating income (NOI) in the first year of stabilized occupancy by the developments estimated total development costs (TDC). See Exh. 65, p. 39. As noted in the synthesized pro forma analysis, above, for the approved development (on-site treatment) the NOI of $2,529,514, divided by TDC of $46,953,912 yields an ROTC of 5.39%. For the proposed development (sewer) the NOI of $2,495,950, divided by TDC of $45,364,130 yields an ROTC of 5.50%. Thus, in practical terms, changing from one means of waste water disposal to another—or the Board's denial of such a change—changes the ROTC for this development by only about one tenth of one percent.

In legal terms, under the standards provided in the Comprehensive Permit Law, the threshold for a reasonable return is an ROTC of slightly over 7%, that is, between 7.16% and 7.29%. See §§ IV-B(1)(a) and IV-B(1)(b), above. Based upon the facts proven, the development as approved with on-site waste water disposal is uneconomic. But, for the reasons described above in section IV-B(1)(b), since the estimated ROTC for the development serviced by municipal sewer is 5.50%, and the estimated ROTC for the approved development with on-site disposal is only about one tenth of one percent lower, that is 5.39%, we conclude that the developer has not sustained its burden of proving that the approved development is significantly more uneconomic than the development it proposes to build.

2. Local Concerns

Although the Board has raised significant local concerns with regard to sewer capacity, because the developer has not sustained its burden of proof with regard to the economics of the development, we need not consider whether those concerns are sufficient to outweigh the regional need for affordable housing.

C. Unequal Application

The developer also argues that local requirements were not applied as equally as possible to both subsidized and unsubsidized housing. In its brief, it notes that the Board acted in a principled manner in granting the comprehensive permit in this case, and points to evidence to show that in fact it is less the Board than other town agencies "which have engaged in numerous efforts to undermine the project." Developer's brief, p. 17. It notes further that even before applying for its permit, it "was told by town officials that municipal sewer would not be available...." *Id.*; also see Exh. 16; 64 ¶13. It also points out that about one hundred properties have been granted sewer connections since the beginning of 2003, while no affordable housing units have received such permission. Exh. 60. Finally, it points to the history and plans (described above, in section II) to provide sewer service to many private residences in the town's three sewer districts.

There can be no doubt that there have been significant differences of opinion and a great deal of animosity between the developer and local officials concerning whether or not the development should be permitted to use the town sewer system. But the facts to which the developer points—the connection of a large number of private residences in the designated sewer districts and the town's animated opposition to providing sewer service to the developer—are consistent with a townwide policy of limiting connections to areas of town where the need for environmental protection is greatest. See, e.g., Exh. 44; 15; 16; 53; 73, ¶¶ 58, 77. And with regard to the narrow question of whether local requirements have been applied equally, the most convincing evidence was presented by the Board. Specifically, in the case of two other proposed developments of unsubsidized housing, the sewer commission also denied connections. In December 2002, a twenty-five-unit residential subdivision called Jerusalem Estates was denied a connection for reasons similar to those on which the Avalon Cohasset denial was based. Exh. 10; also see Exh. 70, ¶¶ 25-29. And, in 2003, a 105-unit multi-family proposal for senior housing called the King Taylor Apartments was denied a connection. Exh. 8; also see Exh. 70, ¶¶ 32-34. This evidence was reinforced by the testimony of the Board's engineering expert, a professional civil engineer who has worked with the town of Cohasset since 1994. Exh. 73, ¶¶ 10, 55-76, 77.

We conclude that the developer has not sustained its burden of proving unequal application of local sewer connection restrictions.

V. CONCLUSION

Based upon review of the entire record and upon the findings of fact and discussion above, the Housing Appeals Committee affirms the March 10, 2005 decision of the Cohasset Zoning Board of Appeals denying a change in the means of waste water disposal approved in the comprehensive permit filed with the Cohasset Town Clerk on November 10, 2003.

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

Housing Appeals Committee

Date: September 18, 2007

Werner Lohe, Chairman

Joseph P. Henefield

Marion V. McEttrick

Christine Snow Samuelson

James G. Stockard, Jr.