

**COMMONWEALTH OF MASSACHUSETTS  
HOUSING APPEALS COMMITTEE**

**SURFSIDE CROSSING, LLC**

v.

**NANTUCKET ZONING BOARD OF APPEALS**

No. 2019-07

**DECISION**

September 16, 2022

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

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SURFSIDE CROSSING, LLC,	)	
Appellant	)	
	)	
v.	)	
	)	
NANTUCKET ZONING BOARD	)	
OF APPEALS,	)	
Appellee	)	
_____	)	

No. 2019-07

**DECISION**

**I. INTRODUCTION AND PROCEDURAL HISTORY**

This appeal involves the conditional grant of a comprehensive permit pursuant to G.L. c. 40B, §§ 20-23 for an affordable housing proposal for a substantial condominium development on an undeveloped suburban site in Nantucket. Although it has engendered quite extensive and wide-ranging litigation in opposition, the proposal itself is not particularly unusual. There are understandable concerns about the housing’s impact on traffic, fire safety, adequacy of public sewers, and open space and wildlife—concerns that are often addressed and resolved in the comprehensive permit process. As discussed below, after concluding that the development is uneconomic at the much-reduced size approved by the Board, we have reviewed the local concerns raised concerning the developer’s proposal, and conclude that they all have been or will be resolved in a manner that protects the health, safety, and other interests of the occupants of the housing and of nearby residents of the town.

In April 2018, Surfside Crossing, LLC applied to the Nantucket Zoning Board of Appeals for a comprehensive permit to build affordable housing on a 13-acre site at 9 South Shore Road in Nantucket. The housing would be built under the New England Fund of the Federal Home Loan Bank of Boston, and would consist of 156 units of housing, of which 25%

would be affordable. There were to be 96 condominium units in multi-family buildings and 60 single-family homes. During the local hearing, the Board and the developer explored alternative proposals for 92 and 100 units, with varying design elements, but no agreement was reached. In June 2019, after many hearing sessions, the Board granted a comprehensive permit, reducing the development to 60 housing units (40 single-family homes and 20 condominium units), and imposing over 150 conditions. On July 3, 2019, the developer appealed the Board's decision, and on July 23, 2019, this Committee opened its hearing with a conference of counsel pursuant to 760 CMR 56.06(7)(d)(1).

At the time of the conference of counsel, motions to intervene were filed by the Nantucket Land Council, Inc. (NLC), a non-profit environmental organization, and by eighteen residents of Nantucket who are either abutters or residents living in the general vicinity of the site. These proposed interveners had participated in the local hearing before the Board, and had filed lawsuits in Superior Court challenging the Board's decision granting the comprehensive permit.<sup>1</sup> On July 13, 2020, the presiding officer denied the motions to intervene, but permitted both the NLC and the residents to participate on a limited basis as interested persons pursuant to 760 CMR 56.06(2)(c).<sup>2</sup> *See* Ruling on Motion to Intervene (Mass. Housing Appeals Comm. July 13, 2020).

In the meantime, a dispute had arisen between the developer and Board as to whether, pursuant to 760 CMR 56.06(4)(h) (the comprehensive permit regulation governing compliance with procedures under Massachusetts Environmental Policy Act (MEPA), G.L., c. 30, § 62A, an Environmental Notification Form (ENF) should have been filed with the state MEPA Office. On September 6, 2019, the Board filed a motion with this Committee to dismiss this appeal for failure to comply with 760 CMR 56.06(4)(h). In late July 2019, the developer had begun discussions with the state MEPA Office with regard to the most appropriate time for filing, and, ultimately, the ENF was filed with the Secretary of Energy and Environmental Affairs in March

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<sup>1</sup> These cases were stayed pending issuance of this decision. *Meredith, et al. v. Nantucket Zoning Board of Appeals et al.*, No. 1975CV00024 (Nantucket Super. Ct., Motion to Stay allowed Sep. 6, 2019); *Nantucket Land Council, Inc. et al. v. Nantucket Zoning Board of Appeals et al.*, No. 1975CV00025 (Nantucket Super. Ct., stay automatically entered Aug. 28, 2021).

<sup>2</sup> In May 2020, Werner Lohe had been assigned as presiding officer in this hearing. Both the NLC and the Residents moved to vacate the assignment. The Committee's chair denied that motion. *See* Order Denying Motions of Board and Proposed Intervener Nantucket Land Council to Vacate Reassignment of Presiding Officer (June 22, 2020).

2020. On June 5, 2020, she issued her certificate on the ENF, determining that the proposed development does not require an Environmental Impact Report (EIR). Exh. 35(h). In July, the motion to dismiss was denied by the Committee's presiding officer. *See* Exh. 12; Ruling on Motion to Dismiss and Order (Mass. Housing Appeals Comm. July 13, 2020).

As it was preparing to file its ENF, Surfside Crossing modified the design to one in which all 156 units would be condominium units in eighteen multi-family buildings. *See* Exh. 12, p. 23 ("Page 2 of 8"). Pursuant to 760 CMR 56.07(4), it notified the Committee on April 7, 2020 of this change, noting that in certain respects, the changes reduced the development's impact on local concerns slightly. On July 31, 2020, the presiding officer ruled that the changes were not substantial under the Committee's regulatory standard, and the case moved forward to hearing based upon the modified design.<sup>3</sup> *See* Determination of Insubstantial Change (Mass. Housing Appeals Comm. July 31, 2020). Pursuant to 760 CMR 56.06(7)(e)(5), the parties submitted pre-filed direct and rebuttal testimony by seventeen witnesses.<sup>4</sup> On March 4 and March 5, 2021, a remote hearing was conducted by video communication, at which the parties had the opportunity to cross-examine witnesses, and the Interested Persons were permitted to make unsworn statements through counsel. Briefs were filed and a site visit was conducted on May 13, 2021.<sup>5</sup>

Meanwhile, in the Superior Court case filed in August 2020 seeking review of the

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<sup>3</sup> In August, the Board and NLC filed separate collateral civil actions in the Superior Court. The Board's case was dismissed. *See Nantucket Zoning Board Appeals v. Housing Appeals Committee, et al.*, C.A. No. 2075CV00022 (Nantucket Super. Ct., Memorandum of Decision and Order on State Defendant's Motion to Dismiss, Mar. 18, 2021). The NLC's case proceeded; see below.

<sup>4</sup> As in many Committee proceedings, this case involved a significant number of challenged conditions and sub-conditions that were identified in the pre-hearing order, as well as testimony from many witnesses on a wide range of issues and facts, resulting in a complex record for consideration. While the pre-hearing order sets the outer limit of issues in the Committee's hearing, it is not uncommon for parties to choose not to pursue some issues in light of evidence presented during the hearing. For this reason, it incumbent upon the parties to provide appropriate legal argument based on cited facts in the record for any legal issues they ultimately wish the committee to address in its decision. In this case, there was a great deal of the pre-filed testimony, which, though unchallenged, contained irrelevant material or addressed issues not briefed by the parties. Issues that are not briefed are waived. *Sugarbush Meadow, LLC v. Sunderland*, No. 2008-02, slip op. at 3 (Mass. Housing Appeals Comm. Jun. 21, 2010), *aff'd Zoning Bd. of Appeals of Sunderland v. Sugarbush Meadows, LLC*, 464 Mass. 166 (2013); *Hilltop Preserve Lid. Partnership v. Walpole*, No. 2000-11, slip op. at 2 n.1 (Mass. Housing Appeals Comm. Apr. 10, 2002); *An-Co, Inc. v. Haverhill*, No. 1990-11, slip op. at 19 (Mass. Housing Appeals Committee Jun. 28, 1994); *see also Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85-86 (1995), quoting *Lolos v. Berlin*, 338 Mass. 10, 13-14 (1958).

<sup>5</sup> The site visit had been postponed to lessen risks associated with the COVID-19 pandemic.

presiding officer's denial of the NLC's motion to intervene, the court had denied the NLC's motion to stay the Committee's hearing, and both cases proceeded. On June 22, 2021, after briefs in the Committee's case had been filed, but while the matter was still under consideration, the court vacated the presiding officer's ruling on intervention, and remanded the case for further consideration.<sup>6</sup> Then, the Residents, too, sought reconsideration of the denial of their motion to intervene. On September 10, 2021, the presiding officer granted the NLC's motion to intervene, and on November 9, 2021, he granted the Residents' motion to intervene. The exact scope of intervention was established based on the interveners' pleadings and discussion at a Pre-Hearing Conference held on December 3, 2021. *See* Supplemental Pre-Hearing Order, Dec. 7, 2021. Certain issues, e.g., the economics of the project, were ruled beyond the scope of intervention since they were not "special and different from the concerns of the rest of the community" or "of substantial and specific concern to an intervenor." *See Sudbury Station, LLC v. Sudbury*, No. 2016-06, slip op. at 5, 10 (Mass. Housing Appeals Comm. Ruling on Motions to Intervene Apr. 24, 2018), *citing Jepson v. Zoning Bd. of Appeals of Ipswich*, 450 Mass. 81, 88-89 (2007).

Further pre-filed testimony was filed, and an additional remote hearing session was conducted on March 23, 2022 to permit cross-examination of witnesses. The NLC and the developer filed further briefs on May 9, 2022;<sup>7</sup> the Board relied on its previously filed brief, and the Residents relied on a memorandum that they had filed on March 11, 2021.<sup>8</sup>

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<sup>6</sup> *Nantucket Land Council, Inc. v. Housing Appeals Committee and Surfside Crossing, LLC*, C.A. No. 2075CV00021 (Nantucket Super. Ct., Memorandum of Decision and Order on Cross-Motions for Judgment on the Pleadings and on the State Defendants' Motion to Dismiss Jun. 22, 2021).

<sup>7</sup> In its brief, the NLC requested a proposed decision pursuant to 760 CMR 56.06(7)(e)(9). In compliance with that regulation and G.L. c. 30A, § 11(7), a proposed decision was issued July 7, 2022, affording the parties an opportunity to file objections and argument in writing. The NLC also requested permission "to present argument orally before the close of the hearing." That request is denied; when the parties were offered the opportunity to present oral arguments at the close of testimony, counsel for the NLC declined to do so, and the hearing was closed upon filing of the briefs.

<sup>8</sup> In a May 10, 2022 email communication addressed to the Committee's clerk, the Residents' counsel, Paul N. DeRensis, Esq., stated that "the residents are not filing a post hearing brief but are relying on their original post first hearing statement filed by us [on March 11, 2021] after the first hearing that took place (before Residents had been granted intervenor status)." This is not an adequate substitute for a brief in part because it contains no specific references to evidence in the record. Under these circumstances, we would be justified in not considering the Residents' arguments since they have been inadequately briefed. *See Way Finders, Inc. and Fuller Future, LLC v. Ludlow*, No. 2017-13, slip op. at 33 (Mass. Housing Appeals Comm. Mar. 15, 2021, and cases cited; *see also* n.4, above. Nevertheless, we will consider the arguments raised by the Residents, to the extent that we can ascertain them from their pleadings.

## II. FACTUAL BACKGROUND

The housing site is a roughly rectangular, 13.6-acre parcel of land fronting on South Shore Road just south of the intersection of South Shore Road and Surfside Road in Nantucket. It is an undeveloped, wooded parcel that is served by public water and sewer systems and is surrounded by developed land—single family homes on large lots to the west, south, and east, and to the north an affordable housing development of 40 homes on smaller, quarter-acre lots. Exh. 2, p. 4. The site is in an area that is zoned Limited Use General-Two (LUG-2) with a minimum residential lot size of 80,000 square feet. Tr. I, 58-59, 67. The area consists of mostly single-family homes, although about a quarter mile to the south is a large, multi-family residential facility, Sherburne Commons, and a half mile to the south, set back from South Shore Road, is a second affordable housing development also of 40 homes also on quarter-acre lots. Tr. I, 113, 145; Exh. 2, p. 4. South Shore Road is about a mile long, ending at the municipal sewage treatment facility at the ocean front, and as a result there are three sewer force mains on or near the housing site. Exh. 3, sheet 4.

The development will consist of eighteen buildings, each with 8 or 9 condominium units, spread approximately evenly throughout the site. Between the buildings are surface parking areas, and in the center of the site is a swimming pool, a clubhouse, a basketball court, a playground, and a large, open lawn area. The residential buildings are generally set back from the lot line between 25 and 35 feet, and at the perimeter is an undisturbed open-space buffer generally between ten and twenty-five feet wide, which totals 56,151 square feet. Exh. 3, sheets 3 (“Summary of Areas”), 4; Exh. 36, ¶ 23; Tr. II, 66.

Each of the residential buildings is three stories, though they have lower-level units and terraces below the surrounding ground level, which minimizes the height of the buildings, and creates the appearance of a two-story buildings. Exh. 36, ¶ 37; Exh. 4 pp. 22, 24, 25. The buildings are architecturally similar, using three building types, and the project architect testified (and the drawings show) that the designs and building materials are intended to evoke “Nantucket’s architectural vernacular,” with individual buildings, instead of having a monolithic shape, being composed of “smaller masses sized to reflect the proportions of a typical [but very large] single-family Nantucket home,” which provides variety and visual interest.<sup>9</sup> Exh. 36, ¶¶

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<sup>9</sup> Although pre-filed testimony was submitted with regard to the Nantucket Historic District, which encompasses the entire island of Nantucket, specific historic issues were not briefed. This is



34, 35, 38, 39; *see also* Exh. 4; Tr. I, 81, 144-145.

### III. CONDITIONS BEYOND THE AUTHORITY OF THE BOARD

Although the primary focus in this case is on the Board’s reduction of the development to 60 units, and the Board in its brief for the most part only defended in general terms the conditions imposed in its decision, the developer has challenged a number of specific conditions—ones that do not relate to or are only vaguely related to the Board’s central local concerns—as beyond the authority of the Board to impose. *See Zoning Board of Appeals of Amesbury v. Housing Appeals Committee*, 457 Mass. 748, 749, 758 (2010) (local board’s power is limited to the types of conditions that the various local boards in whose stead it acts might impose; requirements concerning, *inter alia*, project funding, regulatory documents, financial documents, and the timing of sales are *ultra vires*); *Haskins Way, LLC v. Middleborough*, No. 2009-08, slip op. at 5 (Mass. Housing Appeals Comm., Mar. 28, 2011). For these conditions, the developer is not required to make a preliminary showing that they, individually or in the aggregate, render the project uneconomic. And, although, as with the conditions in Section V-H, below, many of these conditions were not addressed in detail by the Board, nevertheless, for clarity, we will review the following conditions challenged by the developer. Many of them, or parts of them, are improper since they address matters that are solely within the purview of the subsidizing agency. *See, e.g., Way Finders, Inc. v. Ludlow*, No. 2017-13, slip op. at 37-38 (Mass. Housing Appeals Comm. Mar. 15, 2021).

Conditions 1 and 97(e) are conditions which the developer suggests “seek to dictate the requirements of the regulatory agreement” that the developer must enter into with the subsidizing agency prior to construction. The conditions describe the regulatory agreement with an unusual degree of specificity, which raises the concern that there could be debate in the future as to whether the regulatory agreement prescribed by the subsidizing agency is consistent with the comprehensive permit. Clearly, the specifics of the regulatory agreement are within the exclusive jurisdiction of the subsidizing agency, but nevertheless, the language in the conditions is largely unobjectionable, and the conditions are modified to provide that they are subject to the requirements of the subsidizing agency.

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understandable since the current, new design is clearly more compatible with historic Nantucket architecture than not only the original design, but also the design approved by the Board.

Condition 6 and, particularly, the introduction to the conditions section of the Board's decision, prohibit the permit from being transferred or assigned without the consent of the Board. Since the decision refers to the controlling regulation, 760 CMR 56.05(12)(b), there is perhaps confusion resulting from a typographical error. In any case, the Board's decision is hereby modified to allow transfer of the permit as provided for in the regulation, that is, upon notice to the Board rather than approval by the Board.

Condition 84 addresses distribution of affordable units within the development, quality of materials in affordable and market-rate units, and so on. Such issues are clearly within the exclusive jurisdiction of the subsidizing agency and unnecessary; this condition is struck.

Condition 85 attempts to control the details of the affordable housing restriction, the priority of liens, and so on. The specifics of this restriction are within the purview of the subsidizing agency. The condition is modified to read simply, "The affordable units shall remain affordable in perpetuity or for as long as the housing is not in compliance with local zoning requirements." See *Zoning Board of Appeals of Wellesley v. Ardmore Apartments Ltd. P'ship*, 436 Mass. 811, 820 (2002).

Condition 87 simply requires that affordable units be sold subject to a standard deed rider prescribed by the subsidizing agency and does not attempt to dictate its terms. It is therefore acceptable.

Conditions 91 and 92 refer to profit limitations. Condition 91 is acceptable since it merely repeats the requirement that the developer's profit be limited under the terms of a regulatory agreement. Condition 92 attempts to control enforceability of the restriction and uses to which any excess profits may be put. These are within the purview of the subsidizing agency, and therefore the condition is struck.

Conditions 94 and 95 are similar to conditions 91 and 92, in that the first merely states that preference for housing shall be given to local residents, which is a common requirement, and is therefore acceptable, subject to the requirements of the subsidizing agency. Condition 95, however, attempts to prescribe those details, and therefore it is struck.

Condition 96 prescribes details of the Affirmative Fair Housing Marketing Plan, which is within the purview of the subsidizing agency, and the condition is therefore struck.

Conditions 97(d) and 100 require that the monitoring agreement that the developer is required to enter into with the subsidizing agency be modified to be consistent with the Board's

decision and describe specific details of that agreement. This impinges upon the jurisdiction of the subsidizing agency, and therefore the conditions are struck.

Condition 101 is a lengthy condition concerning a homeowners' association declaration of trust; a homeowners' association budget; a declaration of covenants, restrictions, and easements; and condominium association documents, including a declaration of trust, master deed, rules and regulations, and budget. The developer objects to this only to the extent that it "purports to dictate how the sale price of the affordable units shall be calculated...." Such sale prices are within the sole jurisdiction of the subsidizing agency, and therefore any and all provisions of the condition that are in conflict with the requirements of the subsidizing agency are struck.

#### **IV. ECONOMIC EFFECT OF THE CHALLENGED CONDITIONS**

##### **A. Standard of Review**

When a developer appeals the grant of a comprehensive permit with conditions, the ultimate question before the Committee is whether the decision of the Board is consistent with local needs. Among several ways that the conditions may be challenged, the most common is for the appellant to prove, as the first step of a shifting burden of proof provided for in the comprehensive permit regulations, that the conditions and requirements in the aggregate make the construction or operation of the housing uneconomic. *See* 760 CMR 56.02: *Uneconomic*; 760 CMR 56.07(1)(c)(1), 56.07(2)(a)(3); 56.05(8)(d); *DHCD Guidelines, G.L. c. 40B Comprehensive Permit Projects, Subsidizing Housing Inventory (Dec. 2014) (Guidelines) (Exh. 29)*, p. I-5; *Board of Appeals of Woburn v. Housing Appeals Comm.*, 451 Mass. 581, 594 (2008); *Falmouth Hospitality, LLC v. Falmouth*, No. 2017-11, slip op. at 3 (Mass. Housing Appeals Comm. May 15, 2020); *Haskins Way, LLC v. Middleborough*, No. 2009-08, slip op. at 13 (Mass. Housing Appeals Comm. Mar. 28, 2011). Specifically, the developer 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... [the developer] to proceed and still realize a reasonable return in building or operating [the project] within the limitations set by the subsidizing agency on the size or character of the development or on the amount or nature of the subsidy....

G. L. c. 40B, § 20; 760 CMR 56.02: *Uneconomic*; 760 C MR 56.05(8)(d); Guidelines (Exh. 29), p. I-5.

The comprehensive permit regulations provide that, for the purposes of determining whether the Board's conditions render an ownership development project uneconomic, a reasonable return for a limited dividend organization is a minimum of 15% of total development costs. 760 CMR 56.02: *Reasonable Return*(a). Consistent with *Matbob, Inc. v. Groton*, No. 2009-10, slip op. at 21 (Mass. Housing Appeals Comm. Dec. 13, 2010), *Haskins Way, supra*, slip op. at 17, and *Rising Tide Development, LLC v. Lexington*, No. 2003-05, slip op. at 11 (Mass. Housing Appeals Comm. June 14, 2005), we evaluate the economic impact of the Board's decision using a return on total cost (ROTC) analysis whereby the total projected revenue from unit sales is divided by total development costs. *See also* Guidelines (Exh. 29),<sup>10</sup> §§ I-A, IV-B, IV-C. This methodology allows the parties to calculate the projected ROTC for the project as conditioned by the Board and determine whether or not it falls short of the minimum reasonable return of 15% of total development costs. *See, e.g., HD/MW Randolph Ave., LLC v. Milton*, No. 2015-03, slip op. at 5 (Mass. Housing Appeals Comm. Dec. 20, 2018), *aff'd Zoning Bd. of Appeals of Milton v. HD/MW Randolph Ave., LLC*, 490 Mass. 257 (2022).

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

## **B. The Developer's Presentation**

The developer's presentation with regard to economics was based on a standard *pro forma* financial statement prepared by an expert with nearly twenty-five years of experience in affordable housing finance, Laurie Gould.<sup>11</sup> Exh. 32, ¶¶ 1-7. In her analysis, she used the methodology

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<sup>10</sup> While such guidelines do not have the force of law because they were not promulgated as regulations, in considering statutory and regulatory provisions, we generally give "deference to policy statements issued by DCHD, the state's lead housing agency." *Matter of Waltham and Alliance Reality Partners*, No. 2016-01, slip op. at 22 n.22 (Mass. Housing Appeals Comm. Decision on Interlocutory Appeal Feb. 13, 2018), and cases cited.

<sup>11</sup> In fact, Ms. Gould not only prepared a *pro forma* for the approved project to meet the developer's burden of proving that it is uneconomic, but also prepared a *pro forma* for the developer's proposal. The latter is unnecessary since there is neither a showing nor even an allegation that the developer's proposal is also uneconomic, which would require the developer to prove that the approved project is significantly more uneconomic than its proposal. *See, e.g., Falmouth Hospitality, LLC v. Falmouth*, No. 2017-11, slip

prescribed by the DHCD Guidelines. Exh. 32, ¶ 15. The underlying costs for her analysis were provided by the managing partner of Surfside Crossing, LLC, James Feeley, and the project engineer, Donald Bracken. Exh. 32, ¶¶ 11, 12. Mr. Feeley is a home builder, real estate developer, and property manager with twenty years of experience on Nantucket, having built over a hundred homes and twenty commercial buildings. Exh. 31, ¶¶ 5-14. Mr. Bracken is a professional civil engineer with over twenty-five years of experience in site design. Exh. 30, ¶¶ 1-6; Exh. 30(a).

The developer began its analysis by asking Mr. Bracken, as the project engineer, to prepare plans that conformed to the decision issued by the Board. After applying the conditions imposed by the Board—in particular, lot-area, setback, and buffer-zone requirements—he was not able to design a 60-unit development, but rather only a 59-unit development (39 single-family homes, 6 duplex dwellings, and two quadraplex buildings). Exh. 30, ¶¶ 26-27; Exh. 31, ¶¶ 26-27. Both his lotting plan and an overall site plan were admitted into evidence as attachments both to his testimony and also that of Mr. Feeley, respectively as Exhibits 30(c) and 30(d) and Exhibits 31(a) and 31(b). The financial analysis was based upon this design.

**Costs** – Mr. Feeley provided construction cost estimates to Ms. Gould. Exh. 32, ¶ 24. The figures provided in their pre-filed testimony are reflected in the *pro forma* financial statement, which is part of Exhibit 32. (There are five attachments to this pre-filed testimony, which were not entered into evidence as separated exhibits; they are referred to here as Exh. 32-1 through Exh. 32-5; the *pro forma* for the project as conditioned by the Board is Exh. 32-2. There are several minor inconsistencies between the testimony and the *pro forma*, which are noted below.)

Land acquisition cost, based on an appraisal commissioned by MassHousing during the project eligibility process, was \$3,000,000, plus \$107,568 of actual closing costs. Exh. 32, ¶ 62.

The cost of construction of the residential condominium buildings, based on Mr. Feeley's experience with per-square-foot costs for similar buildings, was estimated to be \$7,983,375 for the condominium units. Exh. 31, ¶¶ 125-129; Exh. 32, ¶ 59.

The cost of construction of the single-family or cottage units, similarly, based on per-square-foot figures, was estimated to be \$43,976,475.<sup>12</sup> Exh. 31, ¶¶ 130-140.

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op. at 4 (Mass. Housing Appeals Comm. May 15, 2020).

<sup>12</sup> In her pre-filed testimony, Ms. Gould stated that the cost would be \$43,253,700, a difference of \$722,775, a little less than 2%. Exh. 32, ¶ 58. She used the figure from Mr. Feeley's testimony, however,

Site preparation costs were estimated as \$199,728 for site clearing, \$2,305,183 for roadways and curbing (which includes the cost of granite curbing), \$526,680 for water and communications utilities, \$2,290,045 for electrical utilities, \$6,326,454 for sewer (which includes a new, mile-long sewer main required by the Board), and \$1,938,000 for the stormwater management system.<sup>13</sup> Exh. 31, ¶¶ 142-147. This totals \$13,586,090. Ms. Gould, however, stated in her pre-filed testimony that these costs are \$13,725,512, and she used that figure in the *pro forma*. Exh. 32, ¶ 57; Exh. 32, p. 17 of 26 (“Exhibit 2”). This is a small discrepancy—only \$139,422, or about 1%.<sup>14</sup> In any case, based upon Ms. Gould’s testimony, the *pro forma*, and the fact that the testimony is based upon sub-estimates, we find that the figure of \$13,725,512 is accurate.

Cost for all of the community facilities were estimated as \$300,000 for parks, \$200,000 for the swimming pool, \$50,000 for gym equipment, \$1,050,000 for the community center, \$87,631 for community center furnishings, and \$500,000 for an equipment barn for storage of maintenance equipment (which was required not by condition, but became necessary because the Board’s decision reduced the size of the community center so that it no longer would have room for that equipment). Exh. 31, ¶¶ 155-160; Exh. 32, ¶ 56. This totals \$2,187,631. Exh. 31, ¶ 161; Exh. 32, ¶ 60.

Soft costs, that is, professional fees, permitting, marketing, insurance, taxes, financing, and similar costs (all of which are listed in detail in Mr. Feeley’s testimony and in the *pro forma*), were estimated to be \$8,145,339. Exh. 31, ¶¶ 162-181; Exh. 32, ¶ 61.

In addition, Mr. Feeley provided estimates of various new features that the Board required by condition. *See* Exh. 31, ¶¶ 29-37. Providing an environmental monitor during construction would cost \$50,000. Exh. 32, ¶ 49; Exh. 2, p. 22, condition 69. Providing a construction monitor during construction would cost \$75,000. Exh. 32, ¶ 50; Exh. 2, p. 36, condition 129. The Board

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in the *pro forma*, and since that figure is supported by a breakdown of costs of all of the different types of units, we accept that slightly higher *pro forma* figure as accurate.

<sup>13</sup> Two costs resulting from conditions imposed by the Board were not broken out as separate line items in the *pro forma*, but rather included in other line items. Both were included among costs for site preparation, roads, and utilities. The first is for granite curbing at \$877,059. *See* Exh. 31, ¶ 29; Exh. 32, ¶ 48; Exh. 2, p. 15, condition 17(F). The second is construction of a new, mile-long sewer line estimated by the developer in consultation with his civil engineer and wastewater engineer to cost \$5,719,746. *See* Exh. 31, ¶ 36; Exh. 32, ¶ 55; Exh. 33, ¶ 20; Exh. 2, pp. 20-21, conditions 54-64.

<sup>14</sup> It is possible that part of this might be accounted for by the requirement to install a split-rail fence, which in testimony was estimated to cost \$63,270. That was shown as a separate line item under additional requirements in the *pro forma*, but at no cost. *See* Exh. 31, ¶ 33; Exh. 32, ¶ 52; Exh. 2, p. 33, condition 110.

required payment of traffic mitigation funds in the amount of \$200,000. Exh. 32, ¶ 48; Exh. 2, p. 39, condition 147. A contribution to a homeowners' association of \$400 per housing units was also required, for a total of \$23,600. Exh. 32, ¶ 53; Exh. 2, p. 30, condition 101. The Board also required a surety bond, which was estimated to cost \$617,648, calculated at 3% of 150% of total infrastructure cost of \$13,725,512. Exh. 32, ¶ 54; Exh. 2, p. 26, condition 97(b). All of these costs related to conditions imposed by the Board total \$966,248.

Thus, the total of all costs is \$80,092,148, the total shown on the *pro forma*. See also Exh. 31, ¶ 182.

**Revenue** – Mr. Feeley, who is a licensed real estate broker, based his sales prices on his own experience and consultation with the principal of a local real estate firm. Exh. 31, ¶ 22; Tr. I, 177.

Sales prices of the affordable units in the development are set by the requirements of the subsidizing agency. Mr. Feeley testified that the sale prices of the fifteen affordable units (three different types of single-family cottages and two different types of condominium units) would generate total revenues of \$5,408,875. See Exh. 31, ¶¶ 59-66. Revenue from three different types of market-rate single-family homes selling at three prices—\$1,650,000, \$1,800,000, and \$1,950,000—is anticipated to be \$51,750,000. See Exh. 31, ¶¶ 67-69, 74. Revenue from eight two-bedroom market-rate condominium units (estimated to sell for \$875,000 each) and seven three-bedroom condominium units (estimated to sell for \$999,500 each) is anticipated to be \$13,996,500. See Exh. 31, ¶¶ 75-76, 78-80. Subtracting 2½% in sales commissions, net market-rate revenue is anticipated to be \$64,102,838. Exh 31, ¶ 81. Thus, total sales revenue from affordable and market-rate units is estimated to be \$69,511,712. See Exh. 31, ¶ 82.

**Calculation** - Using the above figures, with total revenues of \$69,511,712 and costs of \$80,092,148, the project approved by the Board shows not a profit, but rather a loss of \$10,580,438, that is, a negative return of 13.2%. Exh. 31, ¶¶ 70-73. Thus, the evidence presented by the developer clearly shows that the project as approved by the Board fails to meet the minimum Return on Total Cost (ROTC) of 15%, and therefore is uneconomic. 760 CMR 56.02: Reasonable Return (a); see, e.g., *Haskins Way, LLC v. Middleborough*, No. 09-08, slip op. at 18, Mass. Housing Appeals Comm., Mar. 28, 2011).

### C. The Board's Response and Findings with Regard to the Parties' Positions

We note at the outset that the Board dedicates nearly half of its argument with regard to

economics to the unusual assertion that a 92-unit proposal that was briefly discussed during the local hearing would not have been uneconomic, and that as a result “a small number of units could be added to the 60 approved units... to make the project ‘no longer uneconomic,’ [and that therefore] the Committee has no authority to issue an order modify the condition to allow for a 156-unit project...” Board’s Brief, p. 40. There are a number of flaws in this argument.

Fundamentally, discussions during the local hearing in an attempt to reach a compromise are not relevant in this appeal. It is not possible to infer whether the approved project is uneconomic or not from the 92-unit proposal because both the preliminary discussion during the local hearing and also the testimony during the Committee’s hearing with regard to the compromise proposal concerned whether such a project might have been financially viable from a business point of view. As we have noted frequently, the uneconomic standard at issue now is a highly technical standard quite different from the business benchmark. It is not uncommon for a developer to make the business decision to proceed with a development that is technically uneconomic. *See Haskins Way, LLC v. Middleborough*, No. 2009-08, slip op. at 18 (Mass. Housing Appeals Comm. Mar. 28, 2011); *511 Washington Street v. Hanover*, No. 2006-05, slip op. at 10-11 (Mass. Housing Appeals Comm. Jan 22, 2008); *Rising Tide Development, LLC v. Sherborn*, No. 2003-24, slip op. at 16 n.16 (Mass. Housing Appeals Comm. Mar. 27, 2006) (noting developers may accept lowered profits for developments subject to protracted litigation); *see also Zoning Bd. of Appeals of Milton v. HD/MW Randolph Ave., LLC*, 490 Mass. 257, 265 n.11 (2022).

Moreover, the Board points to no specific evidence in the record to prove that the 92-unit proposal was in fact not uneconomic. There is no expert economic evidence with regard to it, and the developer’s testimony clearly indicated that even if 92 units might have been viable, he remained concerned that conditions might have been proposed that would have undermined its feasibility. Tr. I, 80.

In the rest of its argument, the Board pursues a more conventional approach to rebutting the developer’s proof. But still, it challenges only a limited number of facts. It engaged an expert with more than fifteen years of experience in real estate finance, including affordable housing, who reviewed the relevant pre-filed testimony submitted by the developer. But his testimony contains no analysis of his own. Rather, his testimony was largely limited to questioning the thoroughness of the developer’s presentation. Nevertheless, we will review the specific points he



made that have been raised by the Board in its brief. *See* Exh. 42.

**Costs** – The only cost included in the developer’s financial analysis that is challenged by the Board in its brief is the \$5,719,746 cost of building a new, mile-long, gravity sewer main as required by Condition 55 of the Board’s decision.<sup>15</sup> Board’s Brief, p. 42; *see also* Exh. 2, p. 20, Condition 55.

The Board first argues that the developer’s estimates of cost were presented “without any evidence or supporting documentation ....” Board’s Brief, p. 42. This alone, of course, would not be enough to rebut the developer’s testimony,<sup>16</sup> but the Board goes on to present its own

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<sup>15</sup> Any other issues concerning costs are waived since they have not been briefed. *Falmouth Hospitality, supra*, No. 2017-11, slip op. at 38, and cases cited; *Okoli v. Okoli*, 81 Mass. App. Ct. 371, 378 (2012), citing *Lolos v. Berlin*, 338 Mass. 10, 14 (1958); *see note 4, supra; see also* Board’s Brief, p. 10.

Further, the testimony of the Board’s expert is very general and insufficient to rebut the developer’s proof. He begins his discussion of costs by arguing that the developer “has not provided formal construction cost estimates, bid documents, or third-party cost schedules,” and notes that “a number of extraordinary line items exist..., which require further explanation.” Exh. 42, ¶ 9. He notes that soft cost estimates “are comparable between the projects and remain constant,” and argues in the most general terms that because the proposed project and the approved project have a different number of units, “further explanation and analysis ... is required.” Exh. 42, ¶ 10. This does not constitute evidence to be weighed against the developer’s proof.

He argues that it is inappropriate for the developer to propose construction of the two different projects in the same three twelve-month phases; he suggests that this has economic ramifications, but provides no specifics. Exh. 42, ¶ 11. Without specifics, it is not possible to evaluate his testimony, and in any case, absent some showing that the phasing schedule is unreasonable, the developer should be permitted to construct the housing at its own pace.

He also argues that “[t]he testimony makes no reference to the 92-unit proposal,” and suggests that “consideration should be made to the 92-unit program such that one could analyze the economics of the proposal.” Exh. 42, ¶ 13. But, as discussed above, in proving that the 60-unit approved project is uneconomic, there is no reason that the developer need make any reference to other hypothetical developments that may have been discussed during the local hearing.

He suggests that an independent third-party review of costs “would be required in order to determine the relevance and appropriateness of the cost estimates....” Exh. 42, ¶ 14. This misunderstands the nature of the hearing process. On occasion, “third-party” review of issues arising during local hearings is useful to the Board, but in the hearing before this Committee, if the Board wishes to contest the proof offered by the developer, it is up to it to provide detailed, factual testimony, not to simply suggest that some third party should do that work. The Board’s expert apparently concluded that he could not provide detailed testimony without “independent analysis from a cost estimator who is not a related party with and interest in the project...” Exh. 42, ¶ 14. The record in this case contains detailed site plans and architectural drawings (arguably designs in considerably great detail than the “preliminary plans” required by 760 CMR 56.05(2)(a), (c), (e), and (f)), which would have been available to such a cost estimator, but the Board chose not to engage one.

<sup>16</sup> For a general discussion of the testimony of expert witnesses on our proceedings, *see Weiss Farm Apts., LLC v. Stoneham*, No. 2014-10, slip op. at 21-24 (Mass. Housing Appeals Comm. Mar. 15, 2021).

evidence from its expert, stating that the actual cost “based on concrete bid prices already obtained for the project” is \$3,600,000. Board’s Brief, p. 13. However, neither party, in fact, provided any details to support its estimate. The developer simply testified that he consulted with his civil engineer and wastewater engineer. Exh. 31, ¶ 36; Exh. 33, ¶ 20; *see also* Tr. I, 149-154. The Board’s expert, whose qualifications are comparable to those of the developer’s expert, is particularly familiar with the Nantucket sewer system since he is the project manager for the Sewer Master Plan for the Nantucket Sewer District. Exh. 39, ¶ 6; *see also* Exh. 26. Nevertheless, his testimony was similarly general, saying only that his estimate was “[b]ased on recent bid prices on Nantucket... [with] \$2,100,000 for the gravity sewer and \$1,500,000 for the pump station, force main, and force main connection.” Exh. 39, ¶¶ 22, 24, 26, 30. The developer responds in its brief that testimony elicited from Mr. Feeley on cross-examination shows that the Board’s estimate is based upon “a bid that was three years old, from another area of town, and not based upon a specific plan, and which did not include all of the costs associated with the required separate sewer line, [including] the need to bury the new sewer line to a depth of 12’ to 13’ ... [and] the head system or manifold....” Developer’s Brief, pp. 18-19; Tr. I, 150-154. Presented with such a dearth of specific evidence, we do not find the developer’s response to be persuasive, but rather find that the Board’s evidence to be more reliable. Thus, the cost of the new sewer should be carried at \$3,600,000 or a reduction of \$2,119,746 below the developer’s figure of \$5,719,746.

The Board has also committed to contributing to the cost of the sewer, stating that that “the Town already appropriated \$1,500,000 in June of 2020 for the South Shore Gravity Sewer, which cost will not be borne by the developer.”<sup>17</sup> Board’s Brief, p. 42; Exh. 39,<sup>18</sup> ¶ 32; Exh. 40, ¶ 9; Tr. I, 155. Thus, there should be a further reduction of \$1,500,000 in the cost estimate carried by the developer *in its pro forma*. The total reduction in the developer’s figure is \$2,119,746 plus \$1,500,000 or a reduction of \$3,619,746.

**Revenue** – The Board also questions the revenue estimates provided by the developer. As noted above, the developer introduced testimony from its principal, Mr. Feeley, that estimated revenue from three different types of market-rate single-family homes selling at three prices—

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<sup>17</sup> We will not consider an additional \$600,000 that may be appropriated since it depends upon a undetermined vote of Town Meeting. *See* Board’s Brief, pp. 43; Tr. I, 155.

<sup>18</sup> This pre-filed testimony is incorrectly cited in the Board’s brief as Exh. 26.

\$1,650,000, \$1,800,000, and \$1,950,000—is anticipated to be \$51,750,000. *See* Exh. 31, ¶¶ 67-69, 74. These estimates were based on adjustments made to selling prices of \$1,695,000 to \$1,840,000 for similarly sized homes in the nearby Beach Plum Village development. Exh. 31, ¶ 73. The adjustments were that the estimates were lowered to take into consideration that, unlike the Beach Plum Village houses, the proposed houses would be subject to restrictions—against adding pools or spas in the future, against home occupations, and against converting unfinished space to habitable space. Exh. 31, ¶ 72; Exh. 32, ¶ 35; Tr. I, 125; Board’s Brief, p. 37. The Board’s expert reviewed the testimony, stated his concern that the information provided by the developer was not detailed, and concluded that the estimates “appear to understate the revenue potential,” without providing his own estimates. Exh. 42, ¶¶ 6-7. During the hearing, on cross-examination of Mr. Feeley, however, the Board introduced into evidence a list of seven sales from the Beach Plum Village development, including three sales that occurred after Mr. Feeley’s testimony was filed. *See* Exh. 47; Tr. I, 171, 181; Tr. II, 30, 43.

Mr. Feeley testified extensively on cross-examination and re-direct examination. *See* Tr. I, 124-198; Tr. II, 21-32, 43-52. He provided relatively little information that was more specific than his pre-filed testimony, though he pointed out that he “had lots of input in various parts of the pricing process.” Tr. I, 135. Overall, considering his pre-filed testimony and his oral testimony, we find Mr. Feeley to be a credible witness and that his estimates concerning sales prices have not been rebutted. *See, e.g.,* Tr. I, 193-194.

#### **D. Conclusion on Economics**

We base our calculation concerning economics on the developer’s *pro forma* financial statements, adjusted as indicated above. That is, the developer showed the total of all costs as \$80,092,148, which must be reduced by \$3,619,746 to account for the corrected cost of installation of a sewer main. Thus, total costs are \$76,472,402. Since the Board failed to rebut the evidence concerning estimated sales prices presented by the developer, revenue estimates remain unchanged at \$69,511,712. Simple calculation shows a loss of \$6,960,960, or 9.1%. Thus, the project as approved by the Board fails to meet the minimum Return on Total Cost (ROTC) of 15%, but actually shows a loss, and we find that the project as approved and conditioned by the Board is uneconomic. 760 CMR 56.02: Reasonable Return (a); *see, e.g., Haskins Way, LLC v. Middleborough*, No. 2009-08, slip op. at 18, (Mass. Housing Appeals Comm., Mar. 28, 2011).-

## V. LOCAL CONCERNS AND CONDITIONS

### A. Local Concerns Generally and the Condition Reducing the Project to 60 Units

Since the developer has sustained its initial burden, the burden shifts to the Board to prove that there is a valid health, safety, environmental, or other local concern that supports each of the conditions imposed, and that such concern outweighs the regional need for low or moderate income housing. 760 CMR 56.07(2)(b)(3). The burden on the Board is significant: the fact that Nantucket does not meet the statutory minima regarding affordable housing establishes a rebuttable presumption that a substantial regional housing need outweighs the local concerns in this instance. G. L. c. 40B, §§ 20, 23; 760 CMR 56.07(3)(a).

The most critical condition imposed by the Board is the reduction of the proposed 156-unit development to 60 units.<sup>19</sup> This unit restriction appears prominently in the first sentence of the introduction to the section of the Board’s decision entitled “Grant of Permit and Conditions Thereto” as well as in Condition 83. Exh. 2, pp. 11, 23. As is clear from the Board’s Brief and the evidence it introduced, the major justifications it has offered are four: open space and wildlife concerns (Board’s Brief, pp. 14-19, 49-56; Section V-B to V-D, below); traffic concerns (Board’s Brief, pp. 19-23, 56-58; Section V-E, below); fire safety (Board’s Brief, pp. 23-28; Section V-F, below); and sewer capacity (Board’s Brief, pp. 9-14, 44-46; Section V-G, below). The Nantucket Land Council (NLC) joins in arguing that open space and wildlife concerns justify the reduction to 60 units. The Residents join in all of the Board’s arguments.<sup>20</sup>

We will first address the central issue of the reduction of the development to 60 units and the local concerns raised by the Board to justify it. Then (in Section V-H, below), we will turn to more specific conditions imposed by the Board. The decision contained 29 single-spaced pages of conditions—154 conditions in all, many with numerous subsections. Many of these were to be applied to a 60-unit development and are not relevant to the developer’s original 156-unit proposal, nor to the current 156-unit proposal. Those that are not relevant are struck, and we address those that remain relevant and were briefed by the parties.

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<sup>19</sup> As noted above, though on its face, the Board’s decision permits 60 units to be built, the developer’s engineer determined that various conditions that restricted the design actually limited the proposal to 59 units.

<sup>20</sup> The Residents’ arguments are difficult to analyze since they chose not to file a post-hearing brief. *See* n.8, above.

## **B. The Proposed Development in Relation to Municipal Open Space Planning**

There are two different types of local concerns with regard to open space. Both are protected by Chapter 40B. First, *zoning* concerns about open space within a development site are matters of site design and density, which are described in the statute as “the need... to promote better site... design in relation to the surroundings;” second, municipal *planning* concerns are about which open *spaces* should be preserved, and are described as “the need... to preserve open spaces.”<sup>21</sup> G.L. c. 40B, § 20. With regard to planning, “Open Spaces” are defined as “land areas, including parks, parkland, and other areas which contain no major structures and are reserved for... use by the general public through public acquisition, easements, long-term lease, trusteeship, or other title restrictions which run with the land.” 760 CMR 56.02: *Open Spaces*. Our regulations describe in detail some of the sorts of evidence we may consider with regard to the need to preserve such open spaces, specifically mentioning municipal and regional open space plans. See 760 CMR 56.07(3)(f).

Preserving open spaces for public use is clearly a concern of the town of Nantucket, which has been active in protecting the environment, and of the NLC, which also has an admirable, nearly fifty-year history of preserving open space, focused in particular on acquisition of land and land restrictions in order to protect rare or endangered species and habitats. See Board’s Brief, p. 14. However, in approving a 60-unit development on the proposed site, the Board has conceded that the entire parcel need not be preserved as undisturbed open space, and that development at a density greater than the existing zoning is appropriate. Further, no suggestion has been raised that part of the site should be set aside as a park for use by the general public. The NLC, though it would prefer to see the land remain undeveloped, takes a similar position in this appeal, arguing that the comprehensive permit as issued by the Board should be upheld. NLC’s Brief, p. 23. In making this argument, both the Board and to an even greater extent the NLC have drawn our attention to Nantucket’s Open Space and Recreation Plan (the Open Space Plan), which is incorporated in the town’s Master Plan, and also to the town’s

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<sup>21</sup> Our regulations use the statutory language in defining “Local Concern” as “the need to protect the health or safety of the occupants of a proposed Project or of the resident 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 CMR 56.02.

Housing Production Plan (HPP).<sup>22</sup> Even though neither the Board nor the NLC has argued that the development site must be preserved as public open space, both parties argue that the plans are relevant to our decision, and we agree that careful examination of those plans is valuable in understanding the proposed development in relation to open-space values.

As the NLC notes, the legal framework for considering municipal plans is provided in our decision in *28 Clay Street Middleborough, LLC v. Middleborough*, No. 2008-06 (Mass. Housing Appeals Comm., Sept. 28, 2009), though it is based on cases from previous decades. *See Harbor Glen v. Hingham*, No. 1980-06, slip op. at 6-16 (Mass. Housing Appeals Comm. Aug. 20, 1982); *KSM Trust v. Pembroke*, No. 1991-02, slip op. at 5-8 (Mass. Housing Appeals Comm. Nov. 18, 1991); *Stuborn Ltd. Partnership v. Barnstable*, No. 1998-01, slip op. at 5-7 (Mass. Housing Appeals Comm. Sep. 18, 2002); *see also* 760 CMR 56.07(3)(f), (g).

Since the developer has proven that the project approved is uneconomic, the burden of proof is on the Board (and the interveners) to show a local planning concern that outweighs the regional need for affordable housing.<sup>23</sup> To consider such a claim, we examine the municipal plans in effect at the time of the developer's application. *Paragon Residential Properties, LLC v. Brookline*, No. 2004-16, slip op. at 45 (Mass. Housing Appeals Comm. Mar. 26, 2007); *Meadowbrook Estates Ventures, LLC v. Amesbury*, No. 2002-21, slip op. at 12 (Mass. Housing Appeals Comm. Dec. 12, 2006), *aff'd Zoning Bd. of Appeals of Amesbury v. Housing Appeals Committee*, 75 Mass. App. Ct. 1103 (Rule 1:28 Decision) (2009). There must be sufficient evidence concerning the town's planning to satisfy a three-part test:

1. that the plans be bona fide, that is, that they were legitimately adopted, and, more importantly, continue to function as viable planning tool in the town,
2. that the plans promote affordable housing, and
3. that they have been implemented in the area of the site.

*28 Clay Street Middleborough, LLC, supra*, No. 2008-06, slip op. at 12. If any one of these requirements is not met, we will not consider the plans in making our decision.

On the other hand, if the plans pass these tests, their requirements or recommendations

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<sup>22</sup> The Master Plan is Exh. 24; the Open Space Plan is Exh. 25; and the HPP is Exh. 45(a) ("Exhibit 1 to pre-filed testimony of Mr. Holland).

<sup>23</sup> The developer does not have to present a *prima facie* case that its proposal complies with generally recognized standards with regard to open space, as argued by the NLC, because a comprehensive permit was granted with conditions, not denied. *See* NLC's Brief, pp. 14-15; 760 CMR 56.07(2)(a)(2), (3).

will not automatically determine the outcome of the case before us. Instead, we must then analyze the plans and their relationship to the proposed affordable housing. *Id.* at 12, 19-21. This analysis has at least two, frequently related aspects.

First, the answers to the three threshold questions determine the amount of weight we give to the plans. Of particular importance in determining how much weight should be given to the plans are the second and third questions, and specifically whether the housing element of the master plan (or in the open space plan or a subsidiary affordable housing plan) has actually shown results. That is, has the housing plan resulted in construction of a substantial amount of affordable housing? 760 CMR 56.07(3)(g).

Second, we must determine whether the provisions of the plans unnecessarily restrictive as applied specifically to the proposed project, that is, would the proposed housing actually undermine the plan to a significant degree? This analysis is very similar, if not identical, to the balancing that we always engage in under the Comprehensive Permit Law. That is, focusing first on the particular planning interest articulated by the town that the proposed housing is inconsistent with, we consider the totality of the town's planning interests, and determine whether those interests are sufficient to outweigh the regional need for affordable housing. The plans are placed on the town's side of the scale, and the strength of the plans themselves, the extent to which they have actually been implemented, and the extent to which they encourage and have resulted in affordable housing all lend weight to the town's argument that local planning concerns with regard to a particular proposal outweigh the regional need for housing. *28 Clay Street Middleborough, LLC v. Middleborough, supra*, at 12, citing *Stuborn Ltd. Partnership v. Barnstable*, No. 1998-01, slip op. at 6 (Mass. Housing Appeals Committee Sep. 18, 2002).

### **1. Master Planning and Open Space Planning in Nantucket**

The Nantucket Master Plan was adopted in 2009. That plan updated goals and objectives set in 1990 and was "intended to be relevant for at least 10 years, but ideally 20." Exh. 24, p. 3. It includes a three-page chapter entitled "Open Space and Recreation," which refers to the Open Space and Recreation Plan (the Open Space Plan) prepared and submitted to state government in 2007. Exh. 24, pp. 69-71. The Open Space Plan is a much longer document prepared for the Nantucket Planning and Economic Development Commission, approved by the Nantucket Planning Board, and accepted by the Town in 2007, with parts revised in 2008 and 2009. Exh. 25.

Based upon this history and a careful review of the documents and testimony, Nantucket

has met the three tests with regard to municipal planning. That is:

1. The plans are clearly legitimately adopted, viable planning tools, satisfying our requirement that they be bona fide.

2. Second, Nantucket's planning promotes affordable housing. The Master Plan has a chapter that addresses affordable housing. Exh. 24, pp. 53-56. More significant is that the town has enacted a Workforce Housing Zoning Bylaw that includes provisions for moderate-income housing, has approved funding for affordable housing, including establishing an Affordable Housing Trust, and has developed a Housing Production Plan (HPP) approved by the Department of Housing and Community Development (DHCD).<sup>24</sup> Exh. 45, ¶¶ 3-9; *also see* 760 CMR 56.03(4).

3. There is a significant question about whether the plans have been implemented in the area of the site with regard to open-space issues. Typically, to say that a master plan has been implemented in the area of a site means that the zoning in the area is consistent with the plan. As noted below, there is some question about this, but it was not addressed in detail by the parties. But with regard to open-space planning, the question we are presented with is whether the Town has enacted any specific, mandatory open-space requirements at all to implement the Open Space Plan. We see no evidence that it has. Nonetheless, because we believe that further analysis is instructive, we will assume, without deciding, that the plans have been implemented in the area of the site.

## 2. Analysis

Our analysis first turns to the question of the amount of weight we give to the plans. Although we consider the Master Plan in its entirety, we assign particular importance to the strength of the housing element and whether it has actually shown results. The Housing Production Plan, which was approved in 2016, is particularly strong. Exh. 45, ¶ 3; *also see* Board's Brief, p. 60, n.10; 760 CMR 56.03(4)(f). Based on both of these plans, we conclude that

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<sup>24</sup> The HPP was approved by DHCD in 2016. However, the town was not certified as in compliance—that is, certified as having increased its production of affordable housing the requisite amount—until 2019. The developer's comprehensive permit application was filed in 2018, before certification, and thus the town cannot avail itself of the HPP safe harbor. *See* 760 CMR 56.03(1), (1)(b), (4)(f); *see also* *LeBlanc v. Amesbury*, No. 2006-08, slip op. at 3, n.5 (Mass. Housing Appeals Comm. May 12, 2008), citing *Casetto Estates, LLC v. Georgetown*, No. 2001-12, slip op at 21 (Mass. Housing Appeals Comm. May 19, 2003); *Zoning Board of Appeals of Canton v. Housing Appeals Comm.*, 451 Mass. 158, 161 (2008).



considerable weight should be given to the town's planning efforts.

Then, we analyze the plans in relation to the proposed project. We have described this as determining whether the provisions of the plans are unnecessarily restrictive as applied specifically to the proposed project, that is, determining if the proposed housing would actually undermine the town's planning interests to a degree significant enough to outweigh the regional need for housing. *See Stuborn Ltd. Partnership v. Barnstable*, No. 1998-01, slip op. at 6 (Mass. Housing Appeals Committee Sep. 18, 2002).

Concerns about open space and density of development are obviously related to how a parcel is zoned and also to its relationship to the surrounding area and the entire community. As both the Board and the NLC have frequently noted, the island of Nantucket is unusual, if not unique, in both geography and history. Its Master Plan states that traditionally in Nantucket “[a]s a land use strategy, zoning has received secondary priority. Instead, aggressive land use acquisitions for open space and extensive review by an island-wide HDC [Historic District Commission] have been the most actively used growth management tools.” Exh. 24, p. 48. But, “[t]he island must incorporate urban, suburban, and rural aesthetics for different areas.” Exh. 24, p. 49. Therefore, the town has attempted to strengthen its zoning by moving toward a zoning approach based upon “the Town and Country concept.” Exh. 24, pp. 48-49. That is, “the basic framework for the overall island is commercial and mixed-use areas at the core of town and mid-island neighborhoods within the TOD [Town Overlay District], bracketed by high and moderate density residences filtering into larger, rural tracts of open and green space corridors.” Exh. 24, p. 49.

The development site is zoned LUG-2 (Limited Use General-Two). Tr. I, 58-59, 67. A LUG-2 district is a “low density” Country Overlay District. Exh. 24, p. 49, fig. 14. However, the site is identified in the Master Plan as an area where “Zoning Districts [are] Inconsistent with the Town and Country Concept,” specifically, it is one of the “Country OD [Overlay District] Zoned Parcels in the Town OD [Overlay District].” Exh. 24, p. 51, Fig. 16. Thus, under the Master Plan itself, even before consideration is given to increasing density to build affordable housing under the Comprehensive Permit Law, the development site seems ripe for up-zoning or, alternatively, though its location is more suburban than truly rural, the current housing proposal might fit the category of suggested “high and moderate density residences filtering into larger, rural tracts of open... space....” Exh. 24, p. 49.

The town's HPP also refers to the "Town and Country" zoning approach, and notes that "[s]everal times since 2009, Town Meeting has rezoned land by moving it into one of the 'Town' districts," and that "Nantucket should continue to pursue 'up-zoning' opportunities in areas that are consistent with the 2009 Master Plan and have adequate means of wastewater disposal."<sup>25</sup> Exh. 45(a), p. 32. Further, though the HPP does not refer specifically to the development site, it refers approvingly to denser developments at Sachem's Path (which abuts the development site immediately to the north) and Beach Plum Village (which is located a short distance to the south), as "located within areas the Town has zoned for growth." Exh. 45(a), p. 32. Thus, the Town's own planning efforts, though they make no specific reference to the development site, imply that it is in an area that would be a prime candidate for denser development.

The NLC argues that, on the other hand, many provisions in the Master Plan and the Open Space Plan encourage the protection of undeveloped parcels of land.<sup>26</sup> For instance, the plans encourage acquisition of both land and conservations restrictions to establish open-space corridors and minimize fragmentation of habitat. NLC's Brief, p. 4-5; Exh. 24, pp. 44, 103; Exh. 25, p. 2. The Open Space Plan states that "[d]evelopment of open space parcels should be avoided, but development that does occur, for purpose such as affordable housing, wind energy, or wastewater treatment, should be carefully sited to protect rare habitats and endangered species." Exh. 25, p. 135. It also has a short section on affordable housing and open space which describes the Chapter 40B process and the need for affordable housing. It describes the work of

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<sup>25</sup> The HPP suggests that "Nantucket could make better use of Chapter 40B as a vehicle for creating affordable housing," including collaborative "'friendly' Chapter 40B developments," and notes that "[a]lthough Nantucket recently received a comprehensive permit application for a project that many people do not like, the overall track record for Chapter 40B in Nantucket has been remarkably weak. ...Nantucket does not attract many Chapter 40B developers." Exh. 454(a) (Exhibit 1), pp. 33, 35, 37-38. Although the goal in Nantucket, as in many towns, is a collaborative approach to comprehensive-permit projects, this does not preclude developers from proposing their own developments, which are often unpopular, as is the case with the Surfside Crossing proposal.

<sup>26</sup> With particular reference to open space concerns, none of the parties discussed the details of conditions imposed in the Board's decision. Only Conditions 97(h) and 97(i) were mentioned by the Board specifically. (It also referred generally to "Conditions 10 through 17, and others, [imposed] to reduce the overall footprint of the development;" these conditions contain 49 subparts.) The developer appears to accept the requirement, in Condition 97(g), that it prepare a landscape plan, which is quite routine, and it also originally challenged, but has now accepted Condition 97(h), which requires "identification of all areas... proposed for vegetative clearing." These are discussed in more detail in Section V-H, below. The developer has also withdrawn its objection to Condition 75. That is, it has agreed that it will not cut trees or otherwise disturb the site until litigation brought by the NLC under the Natural Heritage and Endangered Species Program (NHESP) and Massachusetts Endangered Species Act (MESA) is resolved.

the Nantucket Housing Authority, and concludes that “the creation of affordable housing can often presents [sic] a challenge to land use planning efforts when developments are proposed on land that may be valuable for open space...,” but suggests no specific solutions other than “the ‘recycling’ of old houses that have been donated...” Exh. 25, pp. 69-71. Further, it neither refers to any specific sites that might be acceptable for housing development, nor does it specifically refer to the site under consideration here as one to be protected, which under our regulations would “create a presumption that the site is needed to preserve Open Spaces...” See 760 CMR 56.07(3)(f)(3).

Thus, although the development site in this case, like many undeveloped parcels in Massachusetts, is an attractive and useful natural resource, examination of the three Nantucket plans confirms that it is an appropriate site for development. *Cf. 28 Clay Street Middleborough, LLC v. Middleborough*, No. 2008-06, slip op. at 19-22 (HAC Decision Sept. 28, 2009); *Stuborn Ltd. Partnership v. Barnstable*, No. 1998-01, slip op. at 7-9 (Mass. Housing Appeals Comm. Sep. 18, 2002).

### **C. The Proposed Development in Relation to Municipal Open Space Design Requirements**

As noted at the beginning of Section V-B, above, there can also be legitimate local open space concerns about open space *within* any development site. These are commonly addressed by requirements in the town’s zoning bylaw, and traditionally have been thought of as requirements that ensure that residents of the development will have a pleasant, healthy outdoor environment. More recently, there has been increasing recognition of the value of such internal open-space zoning requirements in protecting natural resources.

It is important to note at the outset, however, that if the Board wishes to limit the size of a project or impose conditions based on considerations normally addressed by zoning, it must point to specific requirements contained in the town’s bylaws. This principle has been stated by this Committee in many different contexts, and the reasoning was affirmed by the Supreme Judicial Court ten years ago when it concluded that the “local zoning board’s power to impose conditions is not all encompassing, but rather 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.” *Zoning Board of Appeals of Amesbury v. Housing Appeals Committee*, 457 Mass. 748, 749 (2010); also

*see 383 Washington Street, LLC v. Braintree*, No. 2020-04, slip op. at 26-27 (Mass. Housing Appeals Comm. Mar. 15, 2022) (“...the Board has the burden to prove a local [open-space] concern protected by the Town’s local requirements or regulations...”); *Falmouth Hospitality, LLC v. Falmouth*, No. 2017-11, slip op. at 39-40 (Mass. Housing Appeals Comm. May 15, 2020) and cases cited; *Green View Realty, LLC v. Holliston*, No. 2006-16, slip op. at 10 (Mass. Housing Appeals Comm. Jan. 12, 2009), *aff’d Zoning Bd. of Appeals of Holliston v. Housing Appeals Comm.*, 80 Mass. App. Ct. 406, 420 (2011). *See also* discussion in Section V-D, below.

The clearest example of zoning requirements that protect open space are setback requirements—that is, requirements that buildings be set back a certain distance from other buildings or lot lines. The Board argues that when the developer proposed the current changed design, it resulted in “decreasing setbacks... to residential abutting properties” and “eliminating meaningful open space on the site.” Board’s Brief, p. 34. These are also discussed in the context of preserving habitat. *See* Board’s Brief, 15, 48-50. But the Board does not refer to any specific provision in the zoning bylaw of which the proposed setbacks are in violation. In fact, the design provides not just for setback, but an undisturbed buffer zone of between 10 and 25 feet at the edge of the entire property, which results in 1.29 acres of undisturbed open space.<sup>27</sup> Exh. 3, sheets 3 (“Summary of Areas”), 4; Exh. 36, ¶ 23; Tr. II, 66.

Similarly, the Board and the NLC express concern about the not-uncommon practice of clear cutting most of the site prior to construction. But, again, the Board and NLC fail to point to any provision in Nantucket bylaws or regulations that prohibits the practice. And, the amount of site clearing for the proposed project is nearly the same as that which would be necessary to construct the 60-unit project approved by the Board. Tr. III, 92-93.

With regard to recreational open space, in comparing the developer’s initial and revised proposals in the “Factual Background” section of the Board’s brief, it claims that there is insufficient open space for “children and families to have pick-up game of football or soccer on an adequately sized open field.” *See* Board’s Brief, p. 8; Exh. 45, ¶ 12. In the argument portion of its brief, it states that the original size reduction to 60 units was necessary “[b]ecause there was no meaningful open space or outdoor recreational areas for the residents...,” and that an intermediate sized proposal that was discussed during the local hearing process was better, but

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<sup>27</sup> Though none of the parties refer to it, for the sake of comparison, one Nantucket zoning provision establishes setbacks of ten and fifteen feet for open space developments. Exh. 15, § 139-8(A)(4)(a)(2).

still provided “no ‘meaningful green space for active or passive recreation...’.” See Board’s Brief, p. 53, 55. These claims strain credulity. At the center of the development are a swimming pool, a basketball or game court, a playground, and a large, open lawn area. Exh. 3, sheet 3. Further, the Board states that “open space or outdoor recreation areas for residents are “required for a development of this size on Nantucket,” and that the developer failed to “demonstrate compliance with any objective performance standards.” Board’s Brief, p. 53-54. It does not, however, cite any such local requirements. See Board’s Brief, p. 53-56; see also *383 Washington Street, LLC v. Braintree*, No. 2020-03, slip op. at 14-15 (Mass. Housing Appeals Comm. Mar. 15, 2022); *383 Washington Street, LLC v. Braintree*, No. 2020-04, slip op. at 27-29 (Mass. Housing Appeals Comm. Mar. 15, 2022), citing *8 Grant Street, LLC v. Natick*, No. 2005-13 (Mass. Housing Appeals Comm. Mar. 5, 2007).

Also, in the “Factual Background” portion of its brief, the Board does, however, argue explicitly—and elsewhere the NLC implies—that support for its decision to reduce the size of the project and impose conditions concerning tree removal can be found in the Open Space plan. It states that “conservation restrictions are local requirements directly set forth in the Town’s Open Space Plan to address properties with wildlife habitats for rare and endangered species. Ex. 25, p. 135 (‘conservation restrictions, land donations, and other tax planning land protection techniques ... protect habitats on properties with existing ... forms of development’ and should be used to ‘reduce the cost of habitat protection’).” Board’s Brief, pp. 18, 14-15. In fact, however, the quoted provisions are not requirements, but rather “general recommendations that can be applied to any land protection strategy” which should be “[c]onsider[ed].” Exh. 25, pp. 134, 135, recommendation 9. When vacant land is developed, the retention of part of it in its natural state is an admirable goal, and Nantucket deserves credit for having negotiated for it in some developments.<sup>28</sup> But, just as a town must implement the general planning goals and objectives in

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<sup>28</sup> In this regard, both the Board and the NLC also draw our attention to two other nearby Chapter 40B developments—Sachem’s Way and Beach Plum Village—where parts of the development parcels were set aside open space. NLC’s Brief, pp. 6-8; Board’s Brief, pp. 14-15. That those developers chose to do so, presumably during negotiations for their comprehensive permits, in no way *requires* other affordable housing developers to do so—any more than developers of private housing are required to do so. Further, there is no claim that the protected areas are the “Open Spaces” *for use by the general public* as defined in the comprehensive permit regulations, 760 CMR 56.02: *Open Spaces*. They are protected by perpetual conservation restrictions that serve a number of environmental purposes that benefit the community at large, but rather than being available for use by the general public, they “provide[] an amenity that enhances the quality of life for the people who live there, as three current residents... attested.” NLC’s

a master plan by enacting specific zoning provisions, a town must enact specific regulatory requirements if there is to be mandatory implementation of its open-space goals and objectives in relation to specific development proposals. The record gives no indication that there is any local bylaw, regulation, or other formal *requirement* that open space be set aside when vacant land is developed. Thus, neither the Board nor the NLC has proven that specific, regulation-based objections to the project design elements related to open space concerns that are sufficient to outweigh the regional need for affordable housing and support the Board's decision.

#### **D. Protection of Wildlife Habitat**

As noted above, the NLC has, during its nearly fifty-year history, focused in particular on acquisition of land and land restrictions with an emphasis on protecting rare or endangered species and habitats. *See* Board's Brief, p. 14. Thus, when it initially moved to intervene, it emphasized protection of habitat for the northern long eared bat, an endangered species that roosts throughout Nantucket's pitch pine forest habitat, and it continues to raise this concern. NLC's Brief, pp. 20-22. The Board joins in this argument. Board's Brief, pp. 15-16, 48-53. Both parties refer to provisions in the Open Space Plan that stress the value of protecting habitat of endangered species and argue that the development site is natural habitat that should be preserved.

Though the Board points to quite a few sympathetic factual circumstances, many of which apply whenever a large site is cleared for development of any sort, its actual legal argument is that "the development must be 'carefully sited'..." based upon "the Town's *local requirements* set forth in its carefully studied Open Space Plan...." Board's Brief, p. 17 (citing to Exh. 25, p. 135) (emphasis added). It goes on to say that "the Board 'carefully sited' the comprehensive permit decision by imposing several conditions, including a reduction in units and prohibition on site disturbance or clearcutting until NHESP [(Natural Heritage and Endangered Species Program)] decisions are resolved...." Board's Brief, p. 18. The NLC cites similar facts and argues the value of the conditions imposed by the Board. NLC's Brief, pp. 20-22.

These arguments fail, however. First, there is no allegation of any specific Nantucket bylaw or other requirement protecting northern long-eared bats or open space generally that must

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Brief, pp. 7-8.

Finally, if the open space in these developments were open to the public, that might well be evidence that the area near the proposed site actually already has more open space than a typical suburban area.

be waived in order for the proposed development to move forward. As discussed above, the Open Space Plan does not constitute such regulation. It is only a plan. As the provision cited by the Board itself says, “The following *general recommendations* can be applied.... 12. ...affordable housing, wind energy, or wastewater treatment, should be carefully sited....” Exh. 25, pp. 134-135 (emphasis added). Such a recommendation is not an enforceable requirement recognized under Chapter 40B.<sup>29</sup> The Board may only impose conditions with regard to local concerns that have been previously regulated by the town. *HD/MW Randolph Avenue, LLC v. Milton*, No. 2015-03, slip op. at 19 (Mass. Housing Appeals Committee Dec. 20, 2018) (board is obligated to show how local requirements and regulations support its concerns), *aff’d Zoning Bd. of Appeals of Milton v. HD/MW Randolph Ave., LLC*, 490 Mass. 257 (2022); *Haskins Way, LLC v. Middleborough*, No. 2009-08, slip op. at 13 (Mass. Housing Appeals Comm. Mar. 28, 2011) (condition must be based upon some local legislative or regulatory requirement); *Lever Development Corp., LLC v. West Boylston*, No. 2004-10, slip op at 9 (Mass. Housing Appeals Committee Dec. 10, 2007) (Board failed to identify a local rule or regulation); *see also Zoning Board of Appeals of Amesbury vs. Housing Appeals Committee*, 457 Mass. 748, 756 (2010) (“the power of the board ... is generally no greater than that collectively possessed by ... other [local] bodies [and] the scope of issues that it permissibly may address through conditions is necessarily limited to the types of concerns and powers of these boards”).

Second, as the Board implicitly acknowledges in its reference to the NHESP, and as noted in the presiding officer’s July 13, 2020 Ruling on Motion to Intervene in this case, habitat concerns have been addressed in separate NHESP administrative proceedings before the Massachusetts Department of Fisheries and Wildlife under the Massachusetts Endangered Species Act (MESA), G.L. c. 131A, §§ 1-7. Not only is it therefore unnecessary for this Committee to address these concerns—which are outside of its expertise—but in addition, they

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<sup>29</sup> An alternative way of framing this issue is that G.L. c. 40B, § 20 calls for local requirements to be applied as equally as possible to affordable housing and market-rate housing, and since single-family homes could be built on this site without regard to the recommendations in the Open Space Plan or the general, locally unregulated environmental concerns cited by the Board, then an affordable housing proposal must receive the same treatment. *See, e.g., Attitash Views, LLC v. Amesbury*, No. 2006-17, slip op. at 12, n.7 (Mass. Housing Appeals Committee Summary Decision Oct. 15, 2007) (attempt to enforce uncodified requirements with regard to outdoor design “may well also run afoul of the statutory provision that all requirements be applied ‘as equally as possible to subsidized and unsubsidized housing.’ G.L. c. 40B, § 20.”), *aff’d, Zoning Bd. of Appeals of Amesbury v. Housing Appeals Committee*, 457 Mass. 748 (2010).

are not cognizable under Chapter 40B. To the extent that bats (or other species or open space) are protected here under state law, those protections remain—this Committee has no power to overrule them. *Jepson v. Zoning Board of Appeals of Ipswich*, 450 Mass. 81, 85 n.9 (2007). The developer introduced extensive evidence that it will—as it must—comply with all state and federal wildlife requirements, including all requirements imposed by the NHESP.<sup>30</sup> Exh. 35.

Finally, as discussed above, to the extent that the Board and the NLC argue that protection of endangered species is included within traditional zoning interests—undisturbed open space requirements, lot coverage limitations, or even bylaws prohibiting clearcutting of trees without a permit—though these would be within the purview of this Committee, no specific requirements of this sort have been argued in the parties’ briefs.

### **E. Traffic Concerns**

South Shore Road, the local roadway on which the development will be located, is a dead-end road which intersects with another, more heavily traveled local road—Surfside Road. Continuing across the intersection, South Shore Road becomes Fairgrounds Road. The intersection is a fairly typical crossroads, controlled by four-way stop signs. Since South Shore Road is a dead-end road, all traffic from the development will pass through and add to the traffic at the Surfside Road/South Shore Road/Fairgrounds Road intersection. Crash data for the intersection shows a crash rate well below average, indicating that no immediate safety countermeasures are necessary. Exh. 13, p. 1; Exh. 9, p. 1; Exh. 19, ¶¶ 9-10; Exh. 23, pp. 20, 22. What is in dispute, however, is how much the Level of Service (LOS) at the intersection will be affected by the increased traffic from the proposed development. The developer’ expert found that it will change from LOS C to D.

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<sup>30</sup> The species that received the most attention during the hearing was the northern long eared bat, though protection of habitat for the coastal heathland cutworm was also at issue earlier in the proceedings. The NHESP determined that the proposed development will result in a take of the cutworm, but made no finding with regard to the bat. Exh. 35, ¶ 12; 35(e). The NHESP determination was appealed by both the Town of Nantucket and the Nantucket Land Council. Exh. 35, ¶ 17. After an adjudicatory hearing, a lengthy final decision addressing both species was issued on December 5, 2019, affirming the determination of the NHESP. Exh. 35(g). The NLC appealed this decision to Superior Court, which upheld the administrative decision. Tr. III, 132-133. Based upon NHESP requirements, the developer will comply with MESA by permanently protecting about 20 acres of off-site land as habitat for the cutworm, and, even though no protection of maternity roost trees for the bat has been required since no such trees have been identified on or near the project site, it has agreed to restrict the removal of trees between June 1 and July 31 of each year. Exh. 35(i), p. 2; Tr. II, 95-96; *see also* Exh. 35(g), pp. 20, 45-48. (A summary of the proceedings under the NHESP process and responses by the developer is provided in the Developer’s Brief, pp. 10-13, ¶¶ 85-107.)



Exh. 34, ¶¶ 22-23. The peer-review consultant engaged by the Board during the local hearing questioned this, indicating that an estimated new LOS of F might be more accurate. Exh. 19, ¶ 34. The expert witness who testified for the Board during the Committee hearing was more definitive. He maintained that traffic flow will deteriorate to LOS F — “forced flow (jammed).” Exh. 41, ¶ 11; Exh. 23, pp. 41-47. In addition, the Board’s expert was concerned about traffic safety at another intersection on Surfside Road—Surfside Road with Miacomet Road and Surfside Drive, which is about a quarter mile to the north—since it will also see an increase in traffic from the new development and is a high-crash area. Exh. 41, ¶ 10.

The Board does not argue that the traffic concerns are so significant as to require a reduction in the development from 156 units to 60 units, but rather that they are sufficient to support imposition of a \$200,000 mitigation fee.<sup>31</sup> See Exh. 2, p. 39, (Condition 147). Depending on the circumstances, such fees may be appropriate. While costs associated with incremental pressure on town roadway infrastructure cannot justify denial of a comprehensive permit, nor can “the town... require the developer to remedy existing traffic problems..., [nevertheless] a developer may properly be required to mitigate specific traffic problems that the new development will cause on roads in the immediate vicinity of the site.” *Hilltop Preserve Ltd. Partnership v. Walpole*, No. 2000-11, slip op. at 13 (Mass. Housing Appeals Comm. Apr. 10, 2002). This is not inconsistent with *Zoning Board of Appeals of Canton v. Housing Appeals Committee*, 76 Mass. App. Ct. 467, 473, n.7 (2010), which is cited by the developer. That case upheld the Committee’s ruling that longer queues at an intersection, which constituted only an inconvenience rather than a safety concern, could not justify denial of a comprehensive permit. In that case, the Committee “also ruled that ‘in light of the developer's offers of mitigation... we will require as a condition of the comprehensive permit that [the developer] perform the traffic mitigation measures it has offered.’” *Ibid.*

A major reason for the disagreement between the experts results from their having used different planning horizons for their analyses. The Massachusetts Department of Transportation suggests a seven-year study horizon, which is preferred by the Board’s experts, while the

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<sup>31</sup> As noted above, the Residents did not file a post-hearing brief, and therefore it is difficult to ascertain the exact nature of their concerns or the relief they would seek. It is clear, however, that their concerns are very similar to the concerns raised with more specificity by the Board, and therefore we are addressing them together in this section.

developer’s traffic engineer used a five-year horizon, which is acceptable under other industry standards. Exh. 19, ¶ 22. The five-year horizon required consideration of only the Surfside Road/South Shore Road/Fairgrounds Road intersection, while the longer horizon not only resulted in higher estimates of future traffic, but also advised study of the Surfside Road/Miacomet Road/Surfside Drive intersection. *See* Exh. 41, ¶ 15. There are other technical differences in the approaches of the experts as well. *See, e.g.*, Exh 41, ¶ 11; Developer’s Brief, p. 31; Exh. 34, ¶ 26; Exh. 34(c). Based on these, the developer argues that “the Project will not have a significant impact..., and ... any improvement of these intersections is the responsibility of the Town.” Developer’s Brief, p. 31. We find, however, based on the testimony of all of the experts, that the Board has shown that the proposed development will have a noticeable impact on the two intersections, and the developer’s responses are not sufficient to rebut that proof. We note further that when the developer’ expert updated its Traffic Impact Assessment in 2020, in its concluding sentences it did state that “this updated TIA concludes that off-site improvements is (sic) not warranted by the limited and modest project impact,” but went on to say that “the Proponent nonetheless proposes a contribution toward long-term improvements at the two referenced intersections... subject to the consensus approach as outlined in the November 7, 2018 memorandum.<sup>32</sup>” Exh. 13, p. 19; Tr. I, 157. Although the developer is not bound by that offer, since we have found that there will be some impact from the new traffic—that is, a local concern that generally supports Condition 147—this consensus document, together with the testimony of the Board’s expert, supports setting the developer’s proportional contribution to mitigation at \$200,000.<sup>33</sup> Exh. 41, ¶¶ 13-15.

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<sup>32</sup> The November 7, 2018 memorandum is Exhibit 34(c), which “summarizes a mutually agreed basis for quantifying proportional traffic impacts... based on a teleconference ... among MDM Transportation Consultants, Inc. (MDM) [the developer’s expert], BETA Group (BETA)[the Board’s expert], TetraTech [the peer-reviewer] and Nantucket Planning.” Though other intersections were also considered, the “parties agreed that... possible off-site transportation-related mitigative actions are limited to the Surfside/Fairground/South Shore Road intersection and Surfside/Miacomet Rd/Miacomet (sic) Dr. intersection.” Exh. 34(c), p. 1.

<sup>33</sup> Condition 147 states, in part, “Payment shall be made in full upon the issuance of the initial building permit.” Because the Town has not yet developed specific plans for mitigation nor committed its own funding for design and construction, we hereby modify the provision to state, “Payment shall be made in full upon the issuance of the initial building permit if, at that time, Town funds have been appropriated for a traffic mitigation project related to the proposed development. If funds have not been appropriated at that time, then the developer shall make the payment into escrow or provide a bond or other surety, which

## F. Fire Safety

The Board raises two questions concerning fire safety: the adequacy of access for fire trucks and the possibility of forest fire.<sup>34</sup>

With regard to access, there are two respects in which the development could be considered unsafe since it is served by a single access road, which, if blocked, would prevent emergency vehicles from entering the site. *See* Board’s Brief, p. 23. First, the development itself has only one primary access road, consistent with the recommendation of the Board’s traffic consultant that “two driveways are not needed.” Exh. 23, p. 54, ¶ 3. But in response to the single-access concern, a reinforced turf emergency access road has been added. Exh. 37, ¶ 22; Exh. 3, sheet 3. Thus, the availability of only one primary access road is not a significant local concern which supports reducing the development to 60 units.

The second single-access concern is that even though the entrance to the site is only a few hundred feet from Surfside Road, a blockage in that area would prevent access since South Shore Road is a dead-end road. *See* Board’s Brief, pp. 23, 27. This, of course, is a concern for all of the residents who currently live on South Shore Road, which is about a mile long. Here, as well however, there is alternative access, one which protects the site, but not most of the other residents farther south on South Shore Road. That is, nearly all of the other roads intersecting with South Shore Road are also dead-end roads. The one exception is the entrance road into the Sherburne Commons residential community, which is the second road a few hundred feet south of the site. Tr. I, 145. That road, Sherburne Commons Lane, continues through Sherburne Commons and connects with Miacomet Road. Exh. 13, Figure 1; Tr. I, 145. It is a private, unpaved, gated, emergency-access road. Exh. 41, ¶ 19. We find the testimony of the developer’s expert that in an emergency this can be used to access South Shore Road and the development from the south to be credible. Exh. 34, ¶ 30. Just as this emergency access road alleviates concerns for Sherburne Commons, it alleviates any local concern with regard to the proposed development. *See also* Tr. I, 164-165.

The Board also argues that the ability of fire trucks to maneuver is limited once they are

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shall be released if the Town has not begun construction of the traffic improvements within three years of issuance of the last certificate of occupancy.”

<sup>34</sup> As with other local concerns, in addressing the arguments of the Board, we also address the concerns of the residents, who raise the same issues—only with less specificity.

within the development. *See* Board’s Brief, pp. 23-25. Consultants for each of the parties reviewed the site plan and performed swept-path analyses to determine if the roadways would accommodate fire trucks. The Nantucket fire chief also reviewed the plans and filed testimony. The developer’s traffic engineer and fire code specialist both testified that fire trucks are able to maneuver adequately within the site. Exh. 34, ¶¶ 28-29; Exh. 37, ¶¶ 14-16. The Board’s expert concluded that “while trucks can generally maneuver the site, on-site areas require trucks to encroach/mount corner curb radii.” Exh. 41, ¶¶ 17-18. The fire chief was more concerned. He indicated that the Nantucket Fire Department uses an aerial ladder truck to access buildings such as these, which requires the truck to be located between 20 and 40 feet from the buildings. Exh. 43, ¶ 10. He testified that it is “the Fire Department’s reasoned judgment... [is] that... the setbacks and parking as shown... would... not allow the Department to safely and efficiently respond to emergencies....” Exh. 43, ¶ 11. However, he described the changes in design that would be required to allow for better access as “minor revisions... to parking setbacks, and emergency access for buildings.” Exh 43, ¶ 12; *see also* Board’s Brief, p. 25, n.6. Minor revisions can be agreed upon by the developer’s designers and the fire chief prior to construction without the involvement of the Board or this Committee, but whether or not revisions are made, the Board has proven no specific design concerns sufficiently significant to meet its burden of proving local concerns that outweigh the regional need for affordable housing.<sup>35</sup>

The Board also notes that Nantucket is different from other communities in four respects, and questions whether the developer’s expert has sufficient expertise to adequately assess the risks on the island. Board’s Brief, pp. 25-26. First, it notes that Nantucket is subject to high winds, which make firefighting more difficult. *See* Board’s Brief, p. 25; Exh. 43, ¶ 14. While this may well be the case, and though the Board describes the factors involved in some detail, we find that it has not proven that this is a local concern that outweighs the need for affordable housing.

Second, there was testimony concerning firefighting from a neighboring resident who

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<sup>35</sup> Although the fire chief continues to have concerns, he does note that “we have worked collaboratively with the developer’s consultants thus far, which included them relocating the fire hydrants....” Exh. 43, ¶ 16. We expect such collaboration to continue, though ultimately, approval by the Nantucket Fire Department is subject to this decision and the comprehensive permit process generally, just as approval by other local boards is. *Zoning Bd. of Appeals of Sunderland v. Sugarbush Meadow, LLC*, 464 Mass. 166, 183 (2013) (“Since the H.A.C. has the same power to issue permits or approvals as the [local] board, the H.A.C. has the authority to evaluate the fire chief’s recommendation in the context of the comprehensive permit.”).

holds several wildfire fighting licenses from the National Wildfire Coordinating Group and has extensive experience in fighting wildfires. Exh. 46, ¶¶ 2, 7, 9. He testified that if there were a large fire and “concurrent incidents at the [nearby] school and the proposed project, [then, because trucks would be required to re-fill their tanks from public water sources], there would not be sufficient water to fight both fires.” Exh. 46, ¶¶ 37, 42. Particularly since this issue was not mentioned by the fire chief in his testimony, we find this concern to be too speculative to outweigh the regional need for affordable housing.

Third, the Board argues that fire risk is particularly great because the majority of the trees in the area are pitch pines and shrub oaks, which can be highly combustible. Board’s Brief, p. 26; Exh. 46, ¶¶ 38-39. Once again, this concern was not raised in the fire chief’s testimony, and we view it as speculative. In addition, though there is no definitive testimony, this type of woodland appears to be so prevalent on Nantucket that that it would likely apply to nearly any undeveloped site on which multi-family housing might be proposed. Further, logically, if this were a serious concern, it is unlikely that the Board would have required the developer to retain a no-disturb buffer around the property. *See* Exh. 2, p. 16 (Condition 20-A). In any case, neither the Board nor the Residents present sufficient evidence to prove a local concern that outweighs the regional need for affordable housing.

Finally, the Board raises concerns (and the Residents agree) that because South Shore Road is a dead-end road, there is “the significantly likely danger that exiting residents may potentially block firefighting personnel and equipment and vice versa....” Board’s Brief, p. 27. We doubt that this is a concern that is unique to Nantucket unless it is based on the naturally occurring greater incidence of dead-end roads on all islands. But, in any case, the testimony is only that “[t]his complicates firefighting.” Exh. 46, ¶ 40. Even in combination with the concerns raised above, this is not a public safety concern sufficient to outweigh the regional need for affordable housing.

### **G. Sewer Capacity**

All sewage in the island of Nantucket’s sewer system is pumped to the Surfside Wastewater Treatment Facility at the end of South Shore Road via three force mains (a 20-inch main, a 16-inch main, and a 12-inch main) that pass through or near the development site. Board’s Brief, p. 9; Exh. 26, pp. ES-1, ES-2, 4-1, 4-2; Exh. 39, ¶ 15. The existing 16-inch main failed during 2018, and though it was repaired, concerns remain about the structural condition of

the remainder of the pipe; therefore, a replacement main—the Sea Street Pump Station force main—was, at the time of the hearing, being designed, with construction planned for late 2021.<sup>36</sup> Exh. 39, ¶¶ 16-17 and p. 14, ¶ 2. Based upon the town’s 2014 Comprehensive Wastewater Management Plan, there are plans to also install a new 12-inch gravity sewer along South Shore Road, which would serve properties in the area, including the housing site.<sup>37</sup> Exh. 39, ¶ 14.

The developer proposes to connect the new housing to the existing 12-inch force main, which is under a bicycle path on South Shore Road. Exh. 33, ¶ 13. There is sufficient capacity in the existing main to allow for this connection. Exh. 33, ¶ 21; *c.f.* Exh. 39, ¶ 27. But, because simply connecting to this existing main could have some negative impact on existing pump stations, the developer proposes mitigating measures including the use of a large wet well and timers and variable frequency drive pumps to control the flow so that sewage can be pumped into the municipal system during off-peak times. Exh. 33, ¶¶ 22-23; *see also* Exh. 30, ¶¶ 46-51; Exh. 39, ¶ 18. The cost of such a connection with mitigation measures would be \$1,000,000. Exh. 33, ¶ 24.

The Board logically would prefer that the developer connect to the gravity sewer that it plans to build in the future, but in its decision went considerably further, requiring by condition that the gravity sewer “shall be constructed by the [developer],... with the Town to contribute an agreed allocated cost...” Exh. 2, pp. 20-21, Conditions 54, 63; Board’s Brief, p. 12. The Board’s desire to require the developer to contribute to the cost of a new town sewer main is perhaps understandable, but there is no basis for it under the Comprehensive Permit Law.

The Board’s wastewater engineer, who, as noted above, is equally qualified as the developer’s expert, testified that the mitigation measures would require the town to modify its existing pump stations. Exh. 39, ¶ 18. But he provided few specifics. Further, though there is no basis for it in the testimony of the developer’s engineer, he suggests that the developer proposes that various pumps stations should communicate with each other, and that “none [of the town’s 13 pump stations] have the control and communications systems [to communicate with each

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<sup>36</sup> In its brief, the Board also quotes its decision, noting, “Concerns [presumably of neighborhood residents] were also presented about private drinking water wells located in the immediate vicinity [and possible] rupture of the existing sewer line.....” Board’s Brief, p. 10; Exh. 2, p. 5. This appears to refer to the damaged 16-inch main, which will not be affected in any way by the new development. In any case, there is neither sufficient evidence presented nor briefing for this question to be considered.

<sup>37</sup> This gravity main would include a “force main and force main connection at [its terminus,] the Surfside [Wastewater Treatment Facility].” Exh. 39, p.15, last ¶.

other].” Exh. 39, ¶ 19; *see also* Exh. 40, ¶ 8. But the developer has proposed a much simpler system that will be “designed to hold peak flows on-site until they can be introduced into the municipal sewer system during off-peak hours when the existing sewage force main is not actively used by the Town.” Exh. 33, ¶ 23; *see also* Developer’s Brief, p. 36. The Board’s expert raises the very general concern that failure could result “in a sewer overflow or a backup into a home,” but his most significant concern appears to be that the use of a wet well “increases the potential for odors and the need for additional odor control.”<sup>38</sup> Exh. 39, ¶¶ 28-29. He has not identified any unusual circumstances that would preclude tying into the 12-inch force main. He also notes that final construction plans for the sewer system have not been provided, though this misunderstands the nature of the comprehensive permit process since only preliminary plans are required at the permitting stage. *See* Exh. 39, ¶ 20; 760 CMR 56.05(2)(f). Ultimately his concerns are simply practical: that a new 12-inch sewer “provides the most cost-effective option for providing sewer service to the area as a whole,” and he concludes that “[t]he gravity sewer option was recommended as it follows the Town’s sewer master planning approach for providing sewer service to the Miacomet Needs Area and the adjacent properties along South Shore Road....” Exh. 39, ¶¶ 25, 36. But this does not constitute a local concern with regard to the developer’s proposed design that is sufficient to outweigh the regional need for affordable housing. *See generally Hilltop Preserve Ltd. Partnership v. Walpole*, No. 2000-11, slip op. at 14-15 (Mass Housing Appeals Comm. Apr. 10, 2002) (town may not require developer to remedy existing infrastructure problems, but may require provision of limited off-site sewer services or mitigation of specific problems if necessitated by new development itself); *680 Worcester Road, LLC v. Wellesley*, No. 2019-09, slip op. at 22-24 (Mass. Housing Appeals Comm. Mar. 15, 2021); *Litchfield Heights, LLC v. Peabody*, No. 2004-20, slip op. at 12 (Mass. Housing Appeals Comm. Jan. 23, 2006) (mitigation measures preclude finding that sewer concerns outweigh the regional need for housing). Therefore, the conditions requiring that the developer construct a 12-inch gravity sewer are struck.

We would be remiss, however, if we did not note the practicality of the solution to the

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<sup>38</sup> The Residents are also concerned that, simply because the developer’s plans “do not show any method to protect the mains during construction from truck loading and multiple utility crossings to be installed above and below the mains,” between 30,000 and 60,000 gallons of untreated sewage could be released into the neighborhood. Exh. 63, ¶¶ 12(J), 13. This is purely speculative.

sewer controversy proposed by the Board’s expert. He stated, “A recommended cost allocation plan for the Town and the [developer] to consider—[instead of the requirement in Condition 63 of the Board’s decision that the developer construct all of the new sewer infrastructure]—is for the Town to pay for the new gravity sewer on South Shore Road and for the [developer] to pay for the cost of the pump station, force main and force main connection at the Surfside [Wastewater Treatment Facility]. The Town would need to appropriate an additional \$600,000,... [and the developer] would need to contribute \$1,500,000.” Exh. 39, p. 15. If the town in fact appropriates whatever additional funds are necessary and itself proceeds with construction on a schedule that permits the proposed development to connect to the gravity sewer, a practical solution would be for the developer to contribute a slightly smaller amount—what it would have paid to connect to the existing force main, that is, \$1,000,000—to the sewer project and connect to the new gravity sewer.

#### **H. Specific Conditions**

As noted above, once the developer has proven that the conditions imposed by the Board, considered in the aggregate, make the housing proposal uneconomic, the burden shifts to the Board to prove that there is a valid health, safety, environmental, or other local concern that supports each of the conditions challenged by the developer, and that such concern outweighs the regional need for affordable housing. In this case, perhaps because of the number of conditions involved—most of which involve minor issues—neither party has briefed them clearly nor argued or presented detailed evidence with regard to most of the individual conditions. The developer challenges over a dozen specific conditions in its brief, but its argument is somewhat opaque. That is, it does refer very specifically to conditions that it argues are beyond the authority of the Board (Developer’s Brief, pp. 22-25) and those that have not been applied equally to subsidized and unsubsidized housing (Developer’s Brief, pp. 25-30), but is less specific in arguing that the Board has not proven local concerns that outweigh the regional need for affordable housing (Developer’s Brief, pp. 30-39).<sup>39</sup> It is certainly apparent, however, that the

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<sup>39</sup> Proving that local requirements have not been “applied as equally as possible to both subsidized housing and unsubsidized housing” in violation of G.L. c. 40B, § 20 is an alternate way in which the developer may prove its case, one with no shifting of burden; the developer has the burden of proof and the Board may attempt to rebut the developer’s proof. 760 CMR 56.07(2)(a)(4); *Avalon Cohasset v. Cohasset*, No. 2005-09, slip op. at 8 (Mass. Housing Appeals Comm. Sep. 18, 2007). One of the clearest examples of unequal application of local requirements is if a condition is not based upon a local bylaw or regulation, but rather is based on concerns not previously regulated. *Way Finders, Inc. v. Ludlow*, No.



developer's intention with regard to all of the conditions it has challenged is to press its argument that local concerns have not been proven—in addition to the other arguments it has made. The Board's arguments are similarly general. It does refer specifically to Conditions 69, 97(i), and 139, but presents its arguments with regard to them as a group.<sup>40</sup> Board's Brief, p. 47-53. Its references to other conditions are even more general. *See, e.g.*, Board's Brief, pp. 53, 56. Nearly all of the issues raised by these individual conditions have been addressed in previous sections of this decision. Further, if a condition challenged by the developer has not been defended by the Board with specificity, we hereby rule that it will be struck, unless an exception is made below. Nevertheless, both to provide clarity and to ensure that all conditions are consistent with public policy, we will review individual conditions as follows.<sup>41</sup>

Condition 13 has eleven subparts. No justification is provided for subparts F, G, and J, which limit spas or pools, location of mechanical units, and bedrooms per unit, and they are therefore struck.

Condition 14 also has many subparts. It addresses the design of duplex and fourplex buildings in the earlier design, which has been superseded. It is struck in its entirety.

Condition 16 places limits on the size of the community swimming pool. The developer challenges only the size limitation. Developer's Brief, p. 26. Condition 16-B shall be modified to state, "The dimensions of the pool shall be as shown on Exhibit 3 (Site Development Plans)."

Condition 17 requires walkways to be constructed of bluestone and curbing to be granite. Condition 17-D concerning bluestone is struck. Condition 17-E is struck since it concerns driveways for single-family homes, which are no longer part of the design. The second sentence of Condition 17-F concerning granite curbing is struck.

Condition 20 concerns buffer zones, and the developer objects to a requirement for split-rail fencing and an ambiguous requirement concerning permanently protected open space.

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2017-13, slip op. at 52-53 (Mass. Housing Appeals Comm. Mar. 15, 2021); *Haskins Way, LLC v. Middleborough*, No. 2009-08, slip op. at 13, n.14 (Mass. Housing Appeals Comm. Mar. 28, 2011); *see also, Green View Realty, LLC v. Holliston*, No. 2006-16, slip op. at 10. (Mass. Housing Appeals Comm. Jan. 12, 2009), *aff'd Zoning Bd. of Appeals of Holliston v. Housing Appeals Comm.*, 80 Mass. App. Ct. 406(2011).

<sup>40</sup> The developer has withdrawn its objection to Condition 75.

<sup>41</sup> Except for the conditions addressed in Section III, above, we need not reach the question of whether these conditions are beyond the Board's authority or applied unequally to subsidized and unsubsidized housing.

Conditions 20-A through 20-D shall be replaced by a new Condition 20-A stating, “No-disturbance buffers shall be retained along the site perimeter. They shall be as shown on Exhibit 3 (Site Development Plans), sheets 3 and 4, that is, of a width of approximately ten to twenty-five feet, and greater along South Shore Road.”

Condition 21, which requires “on-street parking,” is struck.

Condition 25, which prohibits conversion of non-livable space to livable space and expansion of building envelopes is struck, though existing town requirements that apply to all homes in Nantucket remain valid.

Condition 26 prohibits “customary home occupations.” There is no specific evidence of “overburdening” “in relation to existing traffic congestion” to support this condition, and it is therefore struck.

Condition 27, which prohibits parking of various sorts of vehicle on the property is struck, though existing town requirements that apply to all homes in Nantucket remain valid.

Condition 54, which prohibits connection of the development’s wastewater system to existing sewer force mains, is struck as inconsistent with the Committee’s ruling in Section V-G, above.

Condition 69, which requires the developer to pay for an independent environmental monitor during construction lacks support in the form of a local rule requiring this or evidence of a local concern that outweighs the regional need for affordable housing and is therefore struck.

Condition 70, without providing specifics, expresses a preference for vegetated swales and bioretention basins over stormceptor-type design. Though this represents good practice, and the developer is encouraged to incorporate such features if possible, there is no evidence of a local concern that precludes using the basic design shown on Exhibit 3, sheet 4, and therefore the condition is struck.

Conditions 97(b), 150, and 152 describe bond or surety requirements in great detail. Since the Board has neither shown factual support nor made legal arguments to justify the specific provisions it would impose, these conditions are struck, and replaced with “Construction of ways and the installation of municipal services shall be secured by the methods described in G.L. c. 41, § 81(U), clauses (1), (2), (3) and (4).”

Conditions 97(g), (h), and (i), along with Condition 139, require preparation of a landscape plan, and provide some specifics with regard to protection of trees, most notably a

prohibition on clear cutting of trees. This is clearly a high priority of the NLC, and the general connection between preserving trees and preserving open-space habitat is obvious. But, the NLC simply argues that the developer could save space and money by “simply foregoing the clubhouse community building with a basketball court, gym, and pool,” or reducing the size of the development, and we find that it did not introduce specific evidence of a local concern that is so significant as to outweigh the regional need for affordable housing. *See, e.g.*, NLC’s Brief, pp. 18-20. Similarly, the Board’s brief with regard to these issues is limited. *See* Board’s Brief, pp. 47, 51. The record does show, however, that these concerns are generally addressed in the Nantucket Subdivision Rules and Regulations, which refer generally to the need to show “due regard” for large trees, and to prepare a landscape plan. Exh. 16, §§ 2.06b(14), 3.05, 4.16. And, even if not cited specifically by the Board, there is testimony throughout the record about trees on the site. Of course, it must be borne in mind that based upon the rulings in this decision, above, with regard to open space, the development will be constructed as shown on the Site Development Plans (Exhibit 3), and therefore the vast majority of trees and other vegetation will have to be removed. But given that overall context, there is adequate support for many of the practical details included in these conditions. All four of the conditions shall be replaced by a single condition, Condition 97(g):

[...no... construction... shall commence until: ...]

g. Final and detailed landscape plans prepared by a landscape architect registered in the Commonwealth of Massachusetts to the detail required for use as on-site construction and planting drawings and/or to obtain a building permit in accordance with the State Building Code, whichever requirement is more detailed, have been submitted to the appropriate Nantucket agencies for review and approval, including acknowledgement of consistency with the comprehensive permit decision. Such plans shall include shade trees along roadways, and shall specify the types, number, size and location of all trees and shrubs at the time of planting, the location and type of fence or other screening materials, plans and profiles of all planting and screening materials and details of any and all other proposed landscape materials. Such plans shall indicate the specific types of active/passive recreational equipment to be installed within the open space and recreational areas located on the approved plans. Such plans shall also indicate the location of mailboxes, dumpsters and other appurtenant structures to be located within or integral to, the project. Such plans shall identify all areas of the site proposed for vegetative clearing, and shall show the limit of construction activity, edge of clearing, sedimentation and erosion controls, a soil stockpiling area, and construction staging, refueling and storage areas. The removal of trees, shrubs, and natural groundcover shall be minimized to the extent practical. Trees,

particularly those over 8 inches in caliper, that, in the judgment of the landscape architect, can be preserved shall be flagged prior to tree clearing. The plans shall state tree protection measures with details for tree wells around existing trees that can be preserved. During construction, a representative or agent of the Board shall have the opportunity to monitor trees that have been flagged for protection.

Condition 97(l) requires the developer to enter into an indemnification agreement with the town. The Board has not supported this requirement, and therefore the condition is struck.

Condition 107 prohibits parking of construction vehicles or of vehicles of construction workers on South Shore Road or other public ways. It is difficult to imagine that all such vehicles will not be able to be parked on the 13- acre development site, and therefore is unlikely that parking on public roads will become a problem. In any case, however, existing local parking regulations and enforcement should be sufficient to address any such problems, and the Board has not proven a local concern to support this condition.

Conditions 129 and 137 require the developer to pay town's expenses in "evaluating the plans required by the [comprehensive permit decision] and in monitoring and evaluating construction," including an advance payment of \$30,000, and for "engineering reviews and the town's construction oversight." Assessment of fees during the comprehensive permit review process—that is, before the comprehensive permit is issued—are appropriate and regulated by 760 CMR 56.05(2) and 56.05(5). But the Board has provided no factual support or legal argument to justify assessing the cost of later monitoring, which is typically covered by building permit fees. Therefore, these conditions are struck.

## **VI. CONCLUSION**

Based upon review of the entire record and upon the findings of fact and discussion above, the Housing Appeals Committee affirms the granting of a comprehensive permit, but concludes that certain of the conditions imposed in the Board's decision and waiver requests denied in the decision of the Board render the project uneconomic and are not consistent with local needs, exceed the authority of the Board, or are not applied as equally as possible to subsidized and unsubsidized housing. The decision of the Board is vacated, and Board is directed to issue an amended comprehensive permit as provided in the text of this decision and the conditions below.

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. Such official may consult with other officials or offices with relevant expertise as they deem necessary or appropriate. In addition, such review shall be made in a reasonably expeditious manner, consistent with the timing for review of comparable submissions for unsubsidized projects. *See* 760 CMR 56.07(6).

2. The amended comprehensive permit issued by the Board shall conform to the application submitted to the Board, the Board’s original decision, and the modified proposal that was the subject of the hearing before this Committee, all as modified in this decision.

3. The development, consisting of 156 total units, including 39 affordable units, shall be constructed substantially as shown on plans entitled “Surfside Crossing a Proposed 40B Development in Nantucket, Massachusetts,” dated February 15, 2018, with revisions through February 28, 2020, prepared by Bracken Engineering, Inc. (Exhibit 3), and shall be subject to those conditions and requirements imposed in the Board’s decision filed with the Nantucket Town Clerk on June 14, 2019 (Exhibit 2), as modified by this decision.

4. The Board shall not include new, additional conditions.

5. The developer is required to comply with all applicable non-waived local requirements in effect on the date of its submission of its comprehensive permit application to the Board, consistent with this decision.

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

7. All Nantucket town staff, officials, and boards shall promptly take whatever steps are necessary to permit construction of the proposed housing in conformity with the standard permitting practices. Submission of plans and materials to the Town for review or approval shall be to the appropriate municipal official with relevant expertise to determine whether the submission is consistent with the final comprehensive permit, such determination shall be made

in an expeditious manner, consistent with the timing for review of comparable submissions for unsubsidized projects, and approval shall not to be unreasonably withheld.

8. 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.

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

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

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

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

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

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

(f) The Board and all other Nantucket town staff, officials, and boards shall promptly take whatever steps are necessary to ensure that building permits and other permits are issued to the applicant, without undue delay and in conformity with the standard permitting practices applied to unsubsidized housing in Nantucket, upon presentation of construction plans, pursuant to 760 CMR 56.05(10)(b), that conform to the comprehensive permit and the Massachusetts Uniform Building Code.

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

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

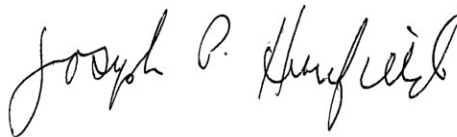
**HOUSING APPEALS COMMITTEE**

September 16, 2022



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Shelagh A. Ellman-Pearl, Chair



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Joseph P. Henefield



Rosemary Connelly Smedile



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James G. Stockard, Jr.



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Werner Lohe  
Presiding Officer