COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

ATTITASH VIEWS, LLC, Appellant	)	
v.	)	No. 06-17
AMESBURY ZONING BOARD OF APPEALS, Appellee	)	

SUMMARY DECISION

INTRODUCTION

This case raises questions that are fundamental to the statutory process for issuing comprehensive permits to build affordable housing under Chapter 40B of the General Laws. The funding, permitting, and long-term preservation of affordable housing involves a complex system that has been developed over nearly four decades. The Comprehensive Permit Law itself, G.L. c. 40B §§ 20-23, provides only the broad outlines of this process. Many legal and programmatic details are prescribed not only in regulations and formal guidelines of different state agencies, but also in policies and practices of those agencies and in precedents of this Committee and the courts.

In recent years, local boards of appeals and municipalities in general have questioned the quality of oversight that has been provided at various stages in the process. There can be no question that such oversight is critical, and there appears to be consensus that it can and should be strengthened in a number of areas. In this context, the Amesbury Board of Appeals, in granting a comprehensive permit, has attempted to exercise control in many of those areas by imposing numerous conditions. That is, going beyond its traditional role of reviewing the siting and design of the housing development, it has attempted to limit how the

housing may be subsidized (see § II-F, below), involve itself in the drafting of the documents that ensure long-term affordability (see § III-A, below), shape the group of people who will be eligible to rent the housing (see § III-B, below), influence how the housing will be marketed (see § III-D, below), dictate how parts of the calculation of the profit limitation will be conducted (see § III-C, below), restrict the choice of the agent that will monitor the development (see § III-E, below), and otherwise insert itself into programmatic aspects of the development.

There is no dispute that all of these areas are important and that effective administrative oversight in each individual area is essential. The question presented here, however, is whether that oversight may properly be taken on by a local board of appeals or whether it is more appropriately left in the hands of state housing agencies. For the reasons discussed below, we conclude that for the most part the functions that the Board would undertake are functions that, under the statutory scheme, have been reserved for state government.

I. PROCEDURAL HISTORY

In June 2005, Attitash Views, LLC, submitted an application to the Amesbury Zoning Board of Appeals for a Comprehensive Permit pursuant to G.L. c. 40B, §§ 20-23 to build mixed-income affordable housing under the Housing Starts Program at 131A Haverhill Road in Amesbury. In a decision filed with the town clerk on September 27, 2006, the Board granted a permit for 40 units of condominium housing (10 to be affordable) subject to a number of conditions. On October 16, 2006, the developer appealed this decision to the Housing Appeals Committee.

On January 17, 2007, the developer filed a motion for summary decision pursuant to 760 CMR 30.07(4), arguing that many of the conditions are beyond the authority of the Board, and therefore should be stricken or modified. The motion included supporting documentation, including an affidavit from the developer's counsel.[1] The Board filed an opposition to the motion with its own supporting documentation.[2]

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1. The Board moved to strike two exhibits filed by the developer. The motion is denied. The first exhibit is a "red-lined" version of the Board's Decision, which was attached as Exhibit 3 to the developer's Memorandum of Law (filed Jan. 17, 2007). We view this as an attempt by the developer to clarify and make concrete the modifications in the permit that it believes are legally

By letter of May 24, 2007, the Presiding Officer in this matter solicited the participation of the Massachusetts Department of Housing and Community Development (DHCD) and MassHousing (the Massachusetts Housing Finance Agency) as interested persons pursuant to 760 CMR 30.04(4). He indicated that the appeal appeared to raise "emerging policy considerations of the sort concerning which the Committee has traditionally looked to the Department of Housing and Community Development (DHCD) for guidance. See, e.g., *Stuborn Ltd. Partnership v. Barnstable*, No. 98-01, slip op. at 9, n.6 (Mass. Housing Appeals Committee Mar. 5, 1999), citing *Little Hios Hills Realty Trust v. Plymouth*, No. 92-02 (Mass. Housing Appeals Committee Sep. 23, 1993)." DHCD responded with a Motion to Participate as an Interested Person, which was granted on June 15, 2007, and thereafter it filed a memorandum of law expressing its views on the issues raised in the case. MassHousing declined to move formally to participate, but, by letter filed on June 19, 2007, it drew the Committee's attention to an *amicus* brief that it had filed in a another case pending before the Committee which raises similar issues, that is, *Whitcomb Ridge v. Boxborough*, No. 06-11 (Mass. Housing Appeals Committee).

II. BACKGROUND

To be eligible for a permit under the Comprehensive Permit Law, the developer's proposal must be fundable by a subsidizing agency under a low and moderate income

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required. As such it is similar to proposed findings. It is useful to the Committee and harmless to the Board.

The second is a letter from MassHousing of January 16, 2007, which was attached as Exhibit 1 to the developer's Affidavit of Theodore C. Regnante (filed Jan. 17, 2007) and is hereafter referred to as the "2007 MassHousing letter." To the extent that this letter—on MassHousing letterhead, signed by the "manager, comprehensive permit programs"—contains hearsay or other objectionable material, it is admissible since it is clearly the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. G.L. 30A, § 11(2); also see *Farmview Affordable Homes, Inc. v. Sandwich*, No. 02-32, slip op. at 5 (Mass. Housing Appeals Committee Ruling on Motion to Quash May 21, 2004)(the Committee will not permit cross-examination of MassHousing officials in order to "look behind" the subsidizing agency's approval process), 760 CMR 31.07(1)(f), 31.07(4)(a).

2. The Board requested a hearing on the Motion for Summary Decision, and the developer opposed that request. The presiding officer denied the request on September 14, 2007. Our regulations provide that "a hearing may be held at the discretion of the presiding officer." 760 CMR 30.07(1)(a). We believe that this matter can be decided on the record presented, and we endorse the presiding officer's exercise of his discretion.

housing subsidy program. 760 CMR 31.01(1)(b); G.L. c. 40B, §§ 20, 21. The developer received a Project Eligibility letter from Mass Housing in 2001. 2007 MassHousing Letter, p. 1; see 760 CMR 31.01(2).

As is proper under our regulations, the developer is proceeding under two, alternative funding programs. See 760 CMR 31.01(4). It proposes to finance the development either under the Housing Starts program, in which case MassHousing will serve as the subsidizing agency, or under the New England Fund (NEF), in which case the Federal Home Loan Bank of Boston, acting through a member bank, will be the subsidizing agency. In the latter case, because funding will be provided by a non-governmental entity, MassHousing will act as Project Administrator. 760 CMR 31.01(2)(g). (Certain aspects of the role of Project Administrator are summarized in the 2007 MassHousing letter.) In either case, the developer cannot proceed to construction until it receives final approval from MassHousing.[3]

As noted above, both DHCD and MassHousing submitted memoranda of law in this case. DHCD is the state's principal housing agency and the agency charged with the administration of the Comprehensive Permit Law. G.L. c. 23B, §§ 3, 3(r), 5A ("rules and regulations established by the director"). MassHousing is "an independent agency that may determine project eligibility and issue eligibility determinations for projects proposed under G. L. c. 40B, §§ 20-23. See St. 1966, c. 708, § 3, as amended through St. 1996, c. 204, §§ 43, 44." *Town of Marion v. Massachusetts Housing Finance Agency*, 68 Mass. App. Ct. 208, 209 (2007); also see G.L. c. 23B, § 2(b).

III. DISCUSSION

In this case, the developer argues that the conditions imposed by the Board are beyond its authority or otherwise in violation of the Comprehensive Permit Law, most notably because they impinge upon the prerogatives of the subsidizing agency or project

3. Though the requirements have been strengthened in recent years, the developer has always been obliged to obtain final agency approval before construction. See, e.g., *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 10, 43 (Mass. Housing Appeals Committee Jun. 25, 1992). But because the Project Eligibility letter was received prior to the effective date of certain regulatory changes, the proposal was not subject to stricter requirements imposed in 760 CMR 31.09(3). See 2007 MassHousing Letter, p. 2; 760 CMR 31.10. To facilitate funding under the NEF, however, the developer has voluntarily agreed to be subject to the same, strict final approval requirements in § 31.09(3) no matter which of the two subsidy programs it utilizes. 2007 MassHousing Letter, p. 2.

administrator. As a preliminary matter, we must address the Board's argument that even in making this sort of challenge to the Board's decision, the developer must prove that the conditions render the development uneconomic, as it would in the more typical case in which there is a factual dispute between the parties as to whether the conditions imposed are necessary to address local health, safety, or environmental concerns. See Board's Brief, pp. 2-7 (filed Mar. 1, 2007); also see 760 CR 31.06(3), 31.06(7). We find no merit in that argument.

Over the years, it has been a matter of routine for this Committee not only to review conditions imposed by local boards of appeals to ensure that they are consistent with the law, but also to remove from consideration matters improperly raised by the Board. See, e.g., *Paragon Residential Properties, LLC v. Brookline*, No. 04-06, slip op. at 14 (Mass. Housing Appeals Committee Mar. 26, 2007)("the Land Court in *Renshaw v. Board of Appeals of the Town of Tisbury*, Land Court No. 304282, 2006 WI, 2514177 (Aug. 31, 2006)... reiterated comments we made in *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 7... that 'issues such as the financial arrangements, the profit projections, the developer's qualifications, and marketability are issues which are not intended to be reviewed in detail within the comprehensive permit process' and are not 'matters of concern in the usual sense.'"), *appeal docketed*, No. 07-00697 (Norfolk Super. Ct.).

Further, we note that just as the developer has introduced no evidence that the conditions affect the economics of the development, the Board has presented no local health, safety, or environmental concerns to support the conditions. Though the record shows that MassHousing has indicated that "[i]f these conditions are not deleted or modified, [MassHousing] will be unable to issue Final Approval...," this statement was presented not to show that they render the development uneconomic, but rather in support of the developer's claim that the conditions imposed are improper as a matter of law—that they are "in conflict or inconsistent with the core programmatic approach regarding [MassHousing's] oversight obligations." See 2007 MassHousing Letter, p. 2; cf. 760 CMR 31.07(1)(f).

We conclude that that normal requirement that the developer prove that the conditions imposed render the proposed development uneconomic is not applicable since the challenge is to the legality of the conditions.

Finally, it is proper for us to decide this case by summary decision since "there is no genuine issue as to any material fact." 760 CMR 30.07(4); *Grandview Realty, Inc. v. Lexington*, No. 05-11, slip op. at 3 (Mass. Housing Appeals Committee, July 10, 2006). In this case there is no dispute with regard to what conditions were imposed by the Board since they appear clearly in the written decision rendered by the Board, that is, the Board's Decision on Application for Comprehensive Permit, which was filed with the Amesbury Town Clerk on September 27, 2006 and was attached as Exhibit 2 to the developer's Initial Pleading (filed Oct. 16, 2006)(hereafter referred to as the "Decision"). Therefore, the most appropriate way to address the developer's legal challenges to the conditions is by summary decision.

The developer challenges the following conditions: 18, 19, 20, 23, 26, 28, 29, 38, 39, 40, 42, 43A, 43B, 43D, 43E, 43F, 43G, 43H, 43J, 43K, 43L, 43N, 43Q, 43R, 43W, 54, 59, 77, 78, 79, and a portion of paragraph 4 of the preamble of the Decision. We will address each in turn.

A. Conditions 43F, 43G, 43H – Deed Rider, Monitoring Agreement, Regulatory Agreement - At the most general level, the Board has misunderstood how oversight is to be provided for developments built under the Comprehensive Permit Law. Attempting to take control of programmatic aspects of the development, it has imposed conditions that provide that the Regulatory Agreement and Monitoring Services for the development and Deed Rider for individual units be "similar in form" to those prepared by MassHousing, but "revised in content as required for consistency with [the Board's] Decision."[4] As noted above, however, this Committee has consistently taken the position that under the Comprehensive Permit Law, though the Board has primary responsibility for the local

4. The Regulatory Agreement is executed by the developer and MassHousing., and contains construction obligations, an affordability requirement (including an affirmative fair marketing requirement), a limited dividend requirement, and various other provisions. Developer's Memorandum of Law, Exhibit 3-C (Regulatory Agreement - Housing Starts Program)(filed Jan. 17, 2007). The Monitoring Services Agreement is executed by the developer, MassHousing, and a monitoring agent, and provides for "administration, monitoring, and enforcement services" throughout the term of affordability. Developer's Memorandum of Law, Exhibit 3-B (Monitoring Services - Housing Starts Program)(filed Jan. 17, 2007), p. 1. The Deed Rider is executed by the seller and buyer of each individual affordable unit, and under current procedures appears in the form of an "Affordable Housing Restriction." See § III-B, below.

health, safety, and environmental concerns that are "at the heart of any comprehensive permit review," other issues "such as the financing arrangements, the profit projections, the developer's qualifications, and marketability" are solely within the province of the subsidizing agency. *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 6-7 (Mass. Housing Appeals Committee June 25, 1992). This approach follows the suggestion offered by the Supreme Judicial Court in the first case in which it considered the Comprehensive Permit Law. In that case, the Court addressed programmatic concerns in the context of the question of who should determine whether the developer had met the requirements of a limited dividend organization eligible to receive a state or federal subsidy, and declared that "the question of standards for eligibility... is properly left to the appropriate state or federal funding agency." *Hanover v. Housing Appeals Committee*, 363 Mass. 339, 379, 294 N.E.2d 393, 420 (1973). Much more recently, with regard to the particular question presented here, we have been very specific, stating that "the final terms of the regulatory documents are within the regulatory discretion of MassHousing." *Groton Residential Gardens, LLC v. Groton*, No. 05-26, slip op. at 13 (Mass. Housing Appeals Committee Ruling Aug. 10, 2006), *appeal pending*, C.A. No. 06-03793 (Suffolk Super. Ct.).

This view of the law, as expressed in our *CMA* and *Groton Residential Gardens* decisions, is in harmony with the interpretation of the Comprehensive Permit Law by both DHCD and MassHousing. See 2007 Mass Housing Letter; Developer's Memorandum of Law, Exhibit 2 (April 27, 2006 Memorandum from Jane Wallis Gumble, Director of DHCD)(filed Jan. 17, 2007), referred to hereafter is referred to as the "2006 DHCD Memorandum." Indeed, DHCD has stated bluntly:

> "Zoning boards of appeals may not under any circumstances impose conditions in a comprehensive permit that impinge on the regulatory responsibilities of the subsidizing agency. Accordingly, ZBAs should not impose any conditions that specify how cost certification, project monitoring or the sale or rental of affordable units is to be performed, or by whom those tasks will be performed during the period the subsidizing agency retains regulatory oversight."

2006 DHCD Memorandum, p. 2. DHCD has reemphasized that interpretation in the memorandum of law it filed in this case, stating, "...the Board has exceeded its authority

under G.L. c. 40B and has infringed upon the jurisdiction and authority of the Project Administrator, MassHousing." Interested Person [DHCD]'s Memorandum of Law, p. 1.

Therefore, Conditions 43F, 43G, 43H shall be stricken and replaced by a single condition:

> "43-F. The applicant shall execute a Regulatory Agreement and a Monitoring Services Agreement for the development and Deed Riders (or Affordable Housing Restrictions) for individual units, all in form and content as approved by MassHousing either as Subsidizing Agency under the Housing Starts program or as Project Administrator under the NEF."

B. Conditions 23, 26, 28, 29 – Fannie Mae Affordable Housing Restriction - The protections provided for in the Regulatory Agreement are supplemented and implemented by a deed rider or affordable housing restriction approved by Fannie Mae and endorsed by MassHousing. 2007 MassHousing Letter, p. 3; see Developer's Memorandum of Law, Exhibit 1 (Affordable Housing Restriction)(filed Jan. 17, 2007), referred to hereafter as the "Affordable Housing Restriction." Conditions 23, 26, 28, and 29, as imposed by the Board, address specific technical provisions contained in this document. Each of these issues is a programmatic matter, which, as discussed in section III-A, above, should be left to the discretion of MassHousing. That alone is determinative and cause for striking or modifying the conditions, but a review of the conditions themselves reveals that there is little basis for the technical changes that the Board would impose.

Condition 23 prohibits rental of housing units under any circumstances. But the Fannie Mae/MassHousing Affordable Housing Restriction already has an entire section entitled "Restrictions Against Leasing, Refinancing and Junior Encumbrances," which prohibits rental of units without the prior written consent of the Monitoring Agent. Affordable Housing Restriction, ¶ 3. This more flexible limitation is the more reasonable approach. Adequate protection against rental of the homeownership units is provided for in the standard Affordable Housing Restriction, and the last sentence of Condition 23 is stricken.

Condition 26 attempts to redefine low or moderate income housing as housing affordable to households "earning no more than 80% of the median income of current *residents of Amesbury*." (emphasis added) Although the definition of low or moderate

income housing in 760 CMR 30.02 is somewhat circular, providing that it is housing "as defined in the applicable federal or state statute or regulation," nevertheless, in all other circumstances of which we are aware, housing programs define low or moderate income households as those earning no more than a certain percentage of the "area median income," that is, the median income published by the U.S. Department of Housing and Urban Development (HUD) not for a specific municipality but rather for either a Primary Metropolitan Statistical Area or a Non-Metropolitan Statistical Area. See Developer's Memorandum of Law, Exhibit 3-C (Regulatory Agreement - Housing Starts Program)(filed Jan. 17, 2007), referred to hereafter is referred to as the "Regulatory Agreement," ¶ 1 (definition of Maximum Initial Sale Price); Affordable Housing Restriction, pp. 2, 3 (definitions of Area Median Income, Maximum Resale Price); also see, e.g., *Hastings Village, Inc. v. Wellesley*, No 95-05, slip op. at 8-9 (Mass. Housing Appeals Committee Memorandum on Motion to Dismiss Mar. 21, 1996). The HUD definition is the proper one. In Condition 26, the words "of current residents of Amesbury" and the last sentence shall be stricken.

Conditions 28 and 29 require the developer to engage in a cumbersome negotiation process with "Counsel for the City [of Amesbury]" over the form of the Affordable Housing Restriction. This not only impinges on a matter that is within the province of the subsidizing agency or project administrator, but also is the sort of condition subsequent requiring future review and approval of which we have frequently disapproved (see § III-H, below). Condition 28 shall be stricken and replaced with the following condition: "Each affordable unit shall be sold subject to the Affordable Housing Restriction approved by Mass Housing." Condition 29 shall be stricken.

C. Conditions 38, 39, 40 – Profit Limitation - There is no area of policy analysis or project review that is more squarely within the expertise of MassHousing than the financial analysis of each project for which it provides funding. An important part of that analysis is the review of the developer's profit. Detailed provisions limiting such profit are contained in the Regulatory Agreement, including a provision that excess profits be returned to the municipality. Regulatory Agreement, pp. 5-6. In Conditions 38, 39, and 40, the Board restates or summarizes the profit limitations and cost certification procedures with slight

modifications. In most respects the conditions imposed by the Board are superfluous,[5] and to the extent that they create conflicting requirements and attempt to interject the Board into the review and compliance process (e.g., by "reject[ing] the [developer's] land acquisition price") they improperly interfere with matters within the province of the subsidizing agency. Therefore, Conditions 38, 39, and 40 are stricken.

D. Condition 42 – Marketing - In Condition 42, the Board attempts to take control over the marketing of units in the development by requiring its approval of a marketing plan. The Regulatory Agreement provides in great detail for Affirmative Fair Marketing, including a marketing plan approved by MassHousing and supervised by the Monitoring Agent. Regulatory Agreement (sixth "whereas" clause and ¶ 3(c)). Marketing, particularly affirmative fair marketing, is also an area in which state housing agencies have extensive expertise and unique responsibility, and interference by the Board is unwarranted.

E. Condition 42 – Monitoring Agent - Also in Condition 42, the Board attempts to assert that it has the right to approve the Monitoring Agent for the development—the organization or individual that will ensure long-term compliance with the Regulatory Agreement and affordability restrictions. The Regulatory Agreement provides for the engagement of such an agent by MassHousing, the City of Amesbury receives copies of all annual compliance reports, and the city is named as a third-party beneficiary of the Monitoring Services Agreement. Regulatory Agreement (¶ 5), Monitoring Services Agreement (¶¶ 1(b), 11). Not only is appointment of the Monitoring Agent within the province of MassHousing, but further, MassHousing's responsibility to supervise the work of the Monitoring Agent, including the right to replace it with a new agent if necessary, should not be diluted by giving the Board veto power. Condition 42 is stricken in its entirety.

F. Condition 43E – "Assignability" - Condition 43E, in an obscure formulation, appears to impose two requirements. The first is the routine requirement that final written subsidy approval be obtained prior to commencement of construction. Second, however, the Board uses the words "non-transferable and non-assignable," in an apparent attempt to prohibit financing of the development by a subsidizing agency other than MassHousing. The

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5. As noted in § III-E, below, the city has full enforcement rights as a third-party beneficiary of the Monitoring Services Agreement in the Monitoring Services Agreement, which is the primary vehicle for enforcement of the profit limitation.

developer (unfortunately in language equally opaque) has proposed a condition that provides similar protection, but permits funding by the NEF with supervision by MassHousing as Project Administrator. The NEF is clearly a *bona fide* housing program. *Middleborough v. Housing Appeals Committee*, 449 Mass. 514 (2007). Therefore, Condition 43E is stricken and replaced by the language proposed by the developer:

> "[Construction shall not commence until] MassHousing or another qualified lender has provided the Board with written correspondence indicating that it will provide the funds necessary to provide the major portion of financing required for construction of the Project, as conditionally approved by [the Board's] Decision, and a federal or state subsidizing agency has provided the Board with written correspondence indicating that the Project as conditionally approved by [the Board's] Decision, and the site are acceptable and qualify for and will receive financial assistance under a program administered by that agency to assist in the construction of low or moderate income housing, within the meaning of the [Comprehensive Permit Law]."

G. Conditions 18, 19, 20 – Applicability of Local Requirements - Conditions 18, 19, and 20 require the developer to comply with local zoning, subdivision, wetlands, and public health[6] requirements in effect either at the time of the Decision or when a building permit is sought. Our regulations and precedents establish, however, that the developer need only comply with local requirements in effect on the date of the application to the Board. 760 CMR 31.07(1)(j); *Weston Development Group v. Hopkinton*, No. 00-05, slip op. at 8-11 (Mass. Housing Appeals Committee May 26, 2004); also see *Paragon Residential Properties, LLC v. Brookline*, No. 04-16, slip op. at 45 (Mass. Housing Appeals Committee Mar. 26, 2007); *Meadowbrook Estates Ventures, LLC v. Amesbury*, No. 02-21, slip op. at 12 (Mass. Housing Appeals Committee Dec. 12, 2006); *Northern Middlesex Housing Associates v. Billerica*, No. 89-48, slip op. at 8-12 (Mass. Housing Appeals Committee Dec. 3, 1992). Therefore, these conditions shall be modified to comply with the law.

H. Conditions 43A, 43B, 43D, 43K, 43L, 43N, 43W, 59 – Conditions Subsequent - Condition 43A requires submission and approval of final construction plans by the Board. Condition 43B requires future Board approval of the deed restriction. Condition 43D requires Board approval of roadway and utility plans. Condition 43K requires Board approval of landscape plans. Condition 43L requires Board approval of various title documents.

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6. That is, regulations concerning wells, wastewater disposal, and stormwater management.

Condition 43N arguably requires subsequent approval by an *ad hoc* tree preservation committee. Condition 43W requires subsequent approval of roadways by the Amesbury fire chief. Condition 59 requires Board approval of a written "design theme" for exterior architectural features and street furniture.[7] Each of these is an improper "condition subsequent." That is, it improperly requires the developer to appear before the Board or other town official in the future for further review and approval. See *Peppercorn Village Realty Trust v. Hopkinton*, No. 02-02, slip op. at 22 (Mass. Housing Appeals Committee Jan. 26, 2004); *Hastings Village, Inc. v. Wellesley*, No. 95-05, slip op. at 33-34 (Mass. Housing Appeals Committee Jan. 8, 1998), *aff'd* No. 00-P-245 (Mass.App.Ct. Apr. 25, 2002); *Owens v. Belmont*, No. 89-21, slip op. at 13-14 (Mass. Housing Appeals Committee Jun. 25, 1992). These precedents and 760 CMR 31.09(2) permit technical review of plans before construction, and routine inspection during construction, by all local boards or, more commonly, by their staff, e.g., the building inspector, the conservation administrator, the town engineer, or a consulting engineer hired for the purpose. Such review ensures compliance with the comprehensive permit, state codes, and undisputed local restrictions, as well as any conditions included in the final written approval issued by the subsidizing agency. Because such a process is already clearly established, even the inoffensive parts of these lengthy conditions are by and large unnecessary. Nevertheless, the developer has proposed only minor changes in the conditions, preserving much of the Board's intent while protecting the developer from the burden of further review and approval. We accept the developer's proposed conditions, and modify the conditions as follows:

> Condition 43A, line 3 – "to ensure" is deleted and replaced by "or its consultant for a determination."
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> Condition 43B, line 1 – "as consistent with this Decision" is inserted after "approved."
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> Condition 43D, lines 3 and 4 – "received approval" is deleted and replaced by "been determined to be."

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7. There is no indication in the record that Amesbury has codified requirements with regard to outdoor design, and thus, this condition 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.

Condition 43K, line 6 – "approval, including acknowledgement of consistency with this Decision" is deleted and replaced by "determination that the same are consistent with this Decision."

Condition 43L, line 4 – "approval," is deleted and replaced by "determination as consistent with this Decision."

Condition 43N – "consistent with the terms of this Decision and the Plans described in Paragraph 4, above" is inserted at the end of the last sentence.

Condition 43W, line 2 – "as being consistent with this Decision" is inserted after "Chief."

Condition 59 is deleted in its entirety.

I. Preamble (para. 4) and Conditions 43J, 43R, 43Q/78, 54, 77, 79 – Miscellaneous Conditions - The developer also challenges a number of miscellaneous conditions.

The preamble to the Decision requires construction to commence within two years rather than the three years typically provided in 760 CMR 31.08(4). Such an "earlier… date" is explicitly permitted by our regulations, however, and the developer's challenge to this requirement is premature in any case since it may apply for an extension prior to end of the two-year period. 760 CMR 31.08(4).

Condition 43J requires compliance with stormwater management requirements including the state Department of Environmental Protection Stormwater Management Policy. The developer is concerned that the last sentence of the condition might be read to require it to address pre-existing stormwater problems experienced by abutters. But since meeting state requirements always, by implication at least, addresses effects on abutters, we do not believe the language can fairly be construed to extend the normal requirements to pre-existing conditions, and we therefore decline to modify the condition.

Condition 43R requires the developer to file an Environmental Notification Form (NEF) under the Massachusetts Environmental Policy Act (MEPA), which the developer argues is not required by the law. We will strike this condition since compliance with MEPA is required by our regulations. In its place, however, pursuant to 760 CMR 30.06(9), we order the developer, within ten days[8] of this decision, either to file an ENF with the Secretary

8. If necessary, the developer may request an extension of the ten-day period provided in our regulations.

of Environmental Affairs or, if no ENF need be filed, to file with the Committee an advisory opinion obtained from the Secretary. Also see 760 CMR 31.08(3).

Conditions 43Q and 78 require the developer to indemnify the city for any liability arising from the development. The record with regard to this requirement is sparse, but it appears both that there is no authority for it and that it runs afoul of the statutory provision that all requirements be applied "as equally as possible to subsidized and unsubsidized housing." G.L. c. 40B, § 20. For those reasons, the conditions are stricken, but the Board is granted leave to request by motion that the requirement be reinstated if it believes that there is good authority for it.

Though it is customary for the subsidizing agency to require the construction of affordable units at a rate proportionate to the construction of market-rate units, Condition 54 also requires the *sale* of such units prior to further construction. Again, the record is sparse, and in addition it appears likely that this deviation from normal MassHousing procedures is a drafting error. Because such policy matters are normally within the province of MassHousing, the references to "sale" or "sold" are stricken, but the Board is granted leave to request by motion that the requirement be reinstated if it believes that there is good authority for the provision.

Condition 77 requires completion of construction within five years. This provision is unusual, but the developer's challenge is premature. Even though such a time limit is not addressed in our regulations, a timely request to extend it would presumably be entertained by the Board (or this Committee) by analogy to 760 CMR 31.08(4).

Condition 79 may be interpreted to require payment of the Board's fees for general legal representation. Since this is not permitted, the condition shall be construed to permit the Board to assess only peer review fees that are proper under our precedents. See *Autumnwood, LLC v. Sandwich*, No 05-06, slip op. at 16 (Mass. Housing Appeals Committee Jun. 25, 2007); *Page Pl. Apts., LLC v. Stoughton*, No. 04-08, slip op. at 18-20 (Mass. Housing Appeals Committee Feb. 1, 2005); *Pyburn Realty Tr. v. Lynnfield*, No. 02-23, slip op. at 21-24 (Mass. Housing Appeals Committee Mar. 22, 2004).

IV. CONCLUSION

For the reasons stated above, the developer's Motion for Summary Decision is GRANTED.

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

Housing Appeals Committee

Date: October 15, 2007

Werner Lohe, Chairman

Joseph P. Henefield

Marion V. McEttrick

Christine Snow Samuelson

James G. Stockard, Jr.

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