COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

8 GRANT STREET, LLC

v.

NATICK BOARD OF APPEALS

No. 05-13

DECISION

March 5, 2007

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HOUSING APPEALS COMMITTEE

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DECISION

I. INTRODUCTION AND PROCEDURAL HISTORY

This case involves a dispute between the owner of a downtown property and the Natick Board of Appeals about how many units of affordable housing can appropriately be built on the property. They agree that the site and the neighborhood are suitable for multifamily in-fill housing.

On October 4, 2004, 8 Grant Street, LLC submitted an application to the Board for a comprehensive permit pursuant to G.L. c. 40B, §§ 20-23 to rehabilitate six existing apartments and to build eighteen new rental units at numbers 8 and 10 Grant Street in Natick.[1] The housing is to be financed under the New England Fund (NEF) of the Federal Home Loan Bank of Boston (FHLBB). In a decision filed with the Natick Town Clerk on May 12, 2005, the Board granted the permit subject to certain conditions, notably conditions limiting the new construction to ten units. That decision was appealed to this Committee,

1. The developer proposed that the housing be maintained as affordable in perpetuity, and this is reflected in the Board's decision and conditions imposed. Exh. 1, p. 1 ("Request"), p. 7, ¶ 17.

and the developer filed a motion pursuant to 760 CMR 30.07(2)(f) requesting a determination that the decision of the Board in fact constituted a denial of a permit. That motion was denied by the presiding officer.[2] The Committee then conducted a *de novo* hearing, receiving prefiled testimony from seven witnesses, conducting a site visit, and holding two days of hearings in September 2005 to permit cross-examination.[3] Following the presentation of evidence, counsel submitted post-hearing briefs.

II. FACTUAL OVERVIEW

The developer owns two adjoining late nineteenth-century houses on a residential street in a downtown area within several blocks of the historic center of Natick.[4] Exh. 5, p. 16 (location map). They are located on Grant Street, which has houses on both sides of the street on lots of about 10,000 square feet. Exh. 10. The neighborhood is made up of similar houses on streets laid out in a grid. Exh. 10. On some of the other streets, the lots are somewhat smaller, and because of the area was built prior to the enactment of zoning, many, if not all, are "legal non-conforming lots."[5] Exh. 10, 5 ("Addendum").

The houses that are the subject of this appeal are on lots that have frontage similar, if not identical, to other houses on Grant Street, but are unusually deep. The two lots have been

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2. The question of whether the action of the Board is a grant with conditions or a *de facto* denial is one of a number of matters that the presiding officer has the authority to rule upon without consultation with the full Committee. See 760 CMR 30.07(2), 30.09(5)(b).

3. The presiding officer issued a joint Pre-Hearing Order, agreed to by the parties. In it, the parties stipulated that Natick had not met any of the statutory minima defined in G.L. c. 40B, § 20 (e.g., that 10% of its housing stock be subsidized housing; see 760 CMR 31.04), thus foreclosing the defense that the Board's decision is consistent with local needs as a matter of law pursuant to that section. Pre-Hearing Order, § II-2 (May 19, 2006). The parties also stipulated that the developer satisfies the three jurisdictional requirements contained in 760 CMR 31.01(1). Pre-Hearing Order, §§ II-3, II-4, II-5.

4. The developer's principal has owned and lived in one of the buildings for over ten years. He has rented two apartments in that building and three apartments in the other building. Exh. 15, ¶¶ 1, 3, 4.

5. The current zoning is Residential General (RG), which provides a minimum lot size of 12,000 square feet and permits single-family and two-family dwellings, but not multifamily housing. Exh. 10; 17, ¶ 14; 9, pp. III-2, IV-3.

combined into a single, rectangular lot that has 152 feet of frontage on the street and is 363 feet deep, for a total of 1.27 acres.[6] Exh. 1, 2-A. The front half of the site is relatively level; from the center of the site, the land slopes upward rather steeply from an elevation of 100 feet to about 120 feet in the left rear corner of the lot and 128 feet in the right rear corner. Exh 2-B, Tr. II, 18. The developer proposes to rehabilitate the existing houses and construct three buildings at the rear of the site. Exh. 1, 2-A. One house will contain three two-bedroom apartments; the second will contain a studio apartment, a two-bedroom unit, and a four-bedroom unit; and each of the new buildings will contain six two-bedroom units. Exh. 1, p. 3. The new buildings are two- or two-and-a-half-story buildings with pitched roofs in a style that is different from, but not incompatible with, the houses in the neighborhood. Exh. 3.

III. ECONOMIC EFFECT OF THE CONDITIONS

When the Board has granted a comprehensive permit with conditions, the ultimate question before the Committee is whether the decision of the Board is consistent with local needs. Pursuant to the Committee's procedures, however, there is a shifting burden of proof. The Appellant must first prove that the conditions in aggregate make construction of the housing uneconomic. See 760 CMR 31.06(3); *Walega v. Acushnet*, No. 89-17, slip op. at 8, (Mass. Housing Appeals Committee Nov. 14, 1990). Specifically, the developer must prove that "the conditions imposed... make it impossible to proceed... and still realize a reasonable return [or profit] as defined by the applicable subsidizing agency...." 760 CMR 31.06(3)(b); also see G. L. c. 40B, § 20.

A. The Developer's Presentation

In this case, although the developer has objected to several conditions imposed by the Board, it is the reduction of the proposal from 24 to 16 units that has the greatest financial impact. Therefore, to prove its case pursuant to 760 CMR 31.06(3)(b), the

6. The site includes a third small parcel that was added to the 10 Grant Street parcel. Exh. 15, ¶ 10.

developer presented a *pro forma* financial statement based upon the 16-unit development.[7] See Exh. 7. That *pro forma* was prepared by the developer with the assistance of a senior vice president of the bank that plans to provide subsidy financing and the developer's lawyer. Exh. 15, ¶ 19; Exh. 19, ¶ 5. Testimony from the developer's principal and the bank officer was also introduced in support of the *pro forma* to show that the anticipated financial performance of the approved development would not yield a reasonable return. Exh. 15, ¶¶ 18-20; Exh. 19, ¶¶ 4-7.

The *pro forma* contains a number of elements. First, there is a "development analysis," which itself has a number of component parts. See Exh. 7, pp. 2-6. To establish land value for the analysis, the developer retained an appraiser, who estimated the market value of the property as of March 15, 2006 as $1,220,000.[8] Exh. 5, 6; Exh. 15, ¶ 21. Then, developer's costs already incurred of $154,901 were detailed and listed in the analysis. Exh. 7 (Exhibit 2); Exh. 15, ¶ 18. Road construction and site development costs were estimated at $621,983. Exh. 7 (Exhibit 3); Exh. 15, ¶ 22. Detailed estimates for building costs were obtained from a contractor, showing a cost of $1,783,790. Exh. 7 (Exhibit 4); Exh. 16; Exh. 15, ¶ 23. These were combined with future soft costs of $75,000 and construction loan

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7. The developer also argues that it has proved that the conditions render the project uneconomic since it has approached the subsidizing agency and that agency has indicated that it will not fund the approved developments. See Developer's Brief, p. 68; 760 CMR 31.06(3)(c), 31.07(1)(f); *Adams Road Trust v. Grafton*, No. 02-38, slip op. at 13 (Mass. Housing Appeals Committee Dec. 10, 2004). The proof submitted in support of this argument is a letter from TD BankNorth. See Exh. 4. When, as here, funding is provided through a non-governmental agency, it is an open question as to whether such a letter is sufficient or whether action of some sort should be required of the project administrator. See 760 CMR 31.01(2)(g). We need not reach that question, however, since we find independently that the project is uneconomic.

8. The appraisals were performed by and the appraisal reports prepared and signed by a certified appraiser employed by an appraisal company. Exh. 18, ¶¶ 4-6; See Exh. 5, 6. Prefiled testimony was prepared by his supervisor, the company's principal, who is included on the MassHousing (Massachusetts Housing Finance Agency) "approved appraiser's [sic] list." Exh. 18, ¶ 6; Exh. 18-B. The principal was unavailable at the time of the hearing, and therefore the junior appraiser appeared and was cross-examined on the reports he prepared. Tr. I, 17-18. We are not persuaded by the Board's argument that event though the principal appraiser appears on the MassHousing approved appraisers list, the appraisal is unreliable because there was "no testimony that [the junior appraiser] appears on the list." See Board's Brief, p. 12.

interest of $210,000 to establish Total Development Costs of $4,065,675. Exh. 15, ¶ 24; Exh. 7 (p. 2).

Then, estimates of operating costs and income were prepared to complete an "Operating Analysis." See Exh. 7, p. 1. This projected gross income (listed as "Net Rents") of $289,577 less annual operating expenses of $58,079, resulting in net operating income of $231,498.[9] Exh. 7 (p.1); Exh. 15, ¶ 19.

Finally, by simple division of the net operating income divided by the total development cost of the project ($231,498 divided by $4,065,675), Return on Total Cost (ROTC) for the development was calculated to be 5.69%. Exh. 7 (p.7).[10]

B. The Board's Response

The Board did not present its own financial analysis of the proposal. See Exh. 20, 21. Rather, it attempted to undercut the developer's proof through cross-examination and argument.

In its brief, the Board first argues that the figure for land value carried in the *pro forma* is too high. It challenges the use—in the appraisal—of comparable property listings in addition to comparable sale prices and the use of comparable sales in a nearby neighborhood on a street that has more traffic than Grant Street. See Board's Brief, p. 13-15. The witness, however, was credible in explaining that listings were used "just to reflect what's available

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9. The developer's testimony was that some of both the expenses and rents were underestimated. Exh. 15, ¶¶ 19(d), 19(e). The amounts do not appear to be significant.

10. As we noted in *Bay Watch Realty Trust v. Marion*, No 02-28, slip op. 10-12, n.16 (Mass Housing Appeals Committee Dec. 5, 2005), *appeal filed*, No. PLCV2006-00007-B (Plymouth Super. Ct.), it is commonly agreed that Return on Total Cost (ROTC) is the proper methodology for determining whether the development is economically feasible in a case such as this. This finds further support in a document published in 2005, "Local 40B Review and Decision Guidelines: A Practical Guide for Zoning Boards of Appeal Reviewing Applications for Comprehensive Permits Pursuant to M.G.L. Chapter 40B" (Massachusetts Housing Partnership and Netter, Edith M., November 2005). These guidelines, which were endorsed by the state Department of Housing and Community Development, MassHousing (the Massachusetts Housing Finance Agency), the Massachusetts Housing Partnership (the Massachusetts Housing Partnership Fund), and MassDevelopment (the Massachusetts Development Finance Agency), state that "[a] projected ROTC of at least 2½... percent above the current yield on 10-year Treasury notes is generally required to fairly compensate capital investors...." Guidelines, p. 19; also see p. ii.

on the market as well as to, you know, again, support what has sold in the market.... [L]enders that we work for... like to see not only what's sold in the market but what's currently available.... It's a supplement." Tr. I, 26. Similarly, the witness' testimony with regard to the location of the comparable units reveals no flaw in his appraisal. See Tr. I, 21-23. Nor does the witness' inability during the hearing to recall all the details of the configuration of the apartments within the buildings on the site call into question the quality of the appraisal he performed six months earlier. See Tr. I, 27-28, 32.

The Board also objects in general to the use of the appraised value of the land in the *pro forma*, baldly asserting that the actual purchase price paid by the owner should have been used instead. Board's Brief, p. 16. This, however, simply misunderstands the financial analysis that is part of the comprehensive permit process. It has long been the case that subsidizing agencies have permitted owners to include normal appreciation as part of the "acquisition value" or "acquisition cost;" the figure that is properly used in the *pro forma* is the appraised "as-is" market value, that is, the fair market value of the site excluding any value relating to the possible issuance of a comprehensive permit. *Atwater Investors, Inc. v. Ludlow*, No. 01-09, slip op. at 7-8 (Mass. Housing Appeals Committee Jan. 26, 2004); *Scippa v. Wayland*, No. 00-12, slip op. at 11, n.4 (Mass. Housing Appeals Committee Jul. 17, 2002); also see "Local 40B Review and Decision Guidelines: A Practical Guide for Zoning Boards of Appeal Reviewing Applications for Comprehensive Permits Pursuant to M.G.L. Chapter 40B" (Massachusetts Housing Partnership and Netter, Edith M., November 2005), p. 13 (Appendix, § A).

Second, the Board argues that site development costs in the *pro forma* are inflated. It points out that the *pro forma* indicates that $32,817 has already been spent on "Site Work and Utilities," and that an additional $13,200 is listed for "Site Preparation" among the "Road Construction/Site Development" costs that are to be incurred in the future. See Board's Brief, p. 17. These figures are correct. Exh. 7 (Exhibit 2); (Exhibit 3); Tr. I, 48-51, 59. The Board goes on to state that "sewer utilities are all separately listed and now

total $621,983. It is simply unfathomable that the list could have jumped by such a sum." See Board's Brief, p. 17. This argument in the brief is opaque at best,[11] but can perhaps be understood by reference to an argument that is implied by counsel's cross-examination during the hearing. That is, counsel showed the developer's principal a document not in evidence that apparently indicated site preparation costs had been estimated at only $200,000 when the developer originally applied to the Board for a comprehensive permit. Tr. I, 58-59. The implication was presumably that the estimate for site preparation had increased by over $400,000 for no reason. Tr. I, 58-65. But it is not at all clear that the two documents are comparable. The earlier document not in evidence may not have enumerated the road construction costs that appear in the "Road Construction/Site Development" portion of the *pro forma*. For instance, it is entirely possible that the first document described only site development costs and not both site development and road construction costs. The line items in the later document for road, curbs, sidewalks, retaining walls and earthwork total over $370,000. Exh. 7 (Exhibit 3). In any case, the evidence elicited on cross examination is confusing and ambiguous. See Tr. I, 58-65. It does not cast significant doubt upon the affirmative evidence presented by the developer in prefiled testimony and Exhibit 7.

Next the Board correctly points out that when the developer proposed a development of 24 units, the construction loan for which he applied was of $3,000,000. Tr. I, 54. The current *pro forma* still shows a construction loan of $3,000,000. Exh. 7 (p. 2). We agree with the Board that the developer has "failed to adequately explain way he would need to borrow the same amount of money of a scaled-down project...." See Board's Brief, p. 18. As with the question of site development costs, however, no affirmative evidence was presented by the Board, and the testimony elicited on cross examination is ambiguous. See

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11. The words "sewer utilities" must be intended to mean "sewers *and* utilities," since among the 13 line items in the "road Construction/Site Development" document are "water," "electric including street lights," and "gas line." Exh. 7 (Exhibit 3). The intention is presumably also to include miscellaneous line items on the document, such as "project contingency" and "project supervisor."

Tr. I, 55-56. Nevertheless, we will make the Board's implied argument explicit: If the vast majority of the original $3,000,000 construction loan was to be spent on the 18 proposed "new-construction" units, but the development as approved involves construction of only 10 new units, then the new loan would have to be only ten eighteenths (10/18) of the original amount, or $1,670,000.[12] This change would have relatively little effect on the bottom line of the *pro forma*, however. Construction loan interest (at 7% for one year) would be reduced by $93,000 from $210,000 (7% of $3,000,000) to $117,000 (7% of $1,670,000).[13] The developer's total development cost of $4,065,675 would therefore be reduced by the same $93,000 to approximately $3,972,000. By simple division of the net operating income divided by the total development cost of the project ($231,498 divided by $3,972,000), Return on Total Cost (ROTC) for the development would then be calculated to be 5.83%. As will be seen below, this slight increase in the estimated Return on Total Cost is not significant.

We conclude that the projected return on total cost for the development approved by the Board is between 5½% and 6%.

C. The development approved by the Board does not permit the developer to realize a reasonable rate of return.

The principal of the developer testified that an acceptable rate of return for the proposed development was 10%. Exh. 15, ¶ 27. The bank officer who testified on the developer's behalf did not specifically offer a professional opinion as to what would be a reasonable rate of return, but he did testify that the smaller project approved by Board would reduce the cash flow sufficiently so that the proposal would not meet the bank's underwriting

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12. In fact, the loan would have to be substantially more that this amount since site development costs would not decrease on *pro rata* basis, and renovation costs for the existing houses would remain constant. There is also a clear inference to be drawn from the testimony that the loan amount is greater that $2,100,000. The bank officer testified that the development is not financially feasible since the income generated will only support a loan of $2,100,000. Exh. 19, ¶ 7.

13. These estimates are rough, not taking into account transaction costs associated with the loan or compounding of interest. They are adequate for use in a *pro forma* such as this, however.

standards. Exh. 19, ¶¶ 6-8. The developer's principal also testified that when the *pro forma* was prepared in April 2006, the yield on a ten-year U.S. Treasury note was 5.086%. Exh. 15, ¶ 28; 15-B. It argues that if this Committee does not accept the testimony that a 10% return would be reasonable, then, in any case, the minimum acceptable return would be between 2½% and 3½% above the ten-year U.S. Treasury note yield. This is based upon the guidelines issued by state subsidizing agencies: "A projected ROTC of at least 2½% to 3½ % percent above the current yield on 10-year Treasury notes is generally required to fairly compensate capital investors for the risk associated with permitting, construction, and operations."[14] "Local 40B Review and Decision Guidelines: A Practical Guide for Zoning Boards of Appeal Reviewing Applications for Comprehensive Permits Pursuant to M.G.L. Chapter 40B" (Massachusetts Housing Partnership and Netter, Edith M., November 2005), p. 19 (Appendix, § C).

The Board presented no affirmative evidence either to challenge the stated yield on U.S. Treasury notes or to independently establish its view of what industry standards are for reasonable rate of return. It merely argues that the developer's conclusion that the project was uneconomic "is simply beyond credulity" since the 5.69% return that he estimated is greater than the U.S. Treasury note return of 5.086%. It provides no factual basis for this argument.

Though the most direct evidence before us is the testimony of the developer's principal that an acceptable return is 10%, in argument the developer has conceded that a return of as little as 2½ % above the U.S. Treasury note yield of 5.086% would be acceptable. Since the Board has presented no evidence to the contrary, we find that the minimum

14. For a detailed discussion of how reasonable rate of return is dealt with under the Comprehensive Permit Law, see *Bay Watch Realty Tr. v. Marion*, No. 02-28, slip op. at 10-12, n.16 (Mass. Housing Appeals Committee Dec. 5, 2005), *appeal filed*, No. PLCV2006-00007-B (Plymouth Super. Ct.).

acceptable return in this case is 7½%.[15] Thus, the projected return of between 5½% and 6% for the development as approved does not permit the developer to realize a reasonable rate of return, and we conclude that the conditions imposed by the Board make construction of the housing uneconomic.

IV. LOCAL CONCERNS

Since the developer has sustained its initial burden, the burden shifts to the Board to prove that there is a valid health, safety, environmental or other local concern that supports each of the conditions imposed, and that such concern outweighs the regional need for low or moderate income housing. 760 CMR 31.06(7). The Board's central concern is that too many units are proposed for the site. It has additional concerns about parking.

A. Density and Intensity

The most significant evidence concerning density and intensity was presented by two expert witnesses: for the developer, a registered professional engineer specializing in environmental civil engineering, land planning and site development engineering, and for the Board, the town of Natick's Community Development Director, who is qualified as an expert in landscape architecture and land-use planning. Exh. 17, ¶¶ 1-3; Exh. 20, ¶¶ 1-10. The issues raised by the parties in support of their positions can be grouped into five related categories:

Open Space - In any case, the discussion concerning density and intensity can be conducted at the most general level in terms of either open space or lot coverage described as a percentage of total lot area. As is true in most municipalities, the Natick Zoning Bylaws have provisions in this regard. Although the central principle of the Comprehensive Permit

15. Though this is a factual matter that may vary from case to case, we note that our finding here is consistent with *Marion, supra*, slip op. at 22, in which we also found that the minimum acceptable ROTC was 7½%.

Law is that such provisions can be overridden, they often provide a starting point for our consideration.

The two most relevant zoning districts to consider are RG (Residential General) and RM (Residential Multiple), since the site is located in an RG district and the proposed development is similar to the type of housing that would normally be permitted in an RM district.

First, the bylaws establish "maximum % building coverage" of 35% in RM districts and 30% in RG districts. Exh. 9, § IV-B (p. IV-3). The building coverage of the proposed development is 27%. Exh. 2, sheet 1; Exh. 17, ¶ 17. Thus, the proposal complies with this aspect of local zoning.

Second, the open space requirement in Natick for RM districts is 40%; there is no open space requirement in RG districts. Exh. 9, § IV-B (p. IV-3). Open space is defined as "the minimum space on a lot designated in these bylaws to be left open and in which no structures, parking, drives or other uses are found that would preclude attractive landscaping." Exh. 9, p. I-16. This may include "conventional outdoor recreational facilities such as tennis courts, playgrounds, swimming pool, etc." Exh. 9, p. IV-6, § n.

The developer's expert testified that the proposed plan provides for 39.4% open space, and that his calculation "excluded all impervious surfaces, such as building roofs, sidewalks, parking areas, and paved roadways." Exh. 17, ¶ 20; Tr. II, 9. Initially, the Board's expert appeared to agree: "The proposed project will cover… 60.6% of the lot with buildings and pavement." Exh. 20, ¶ 23, sentence 1. But he then argues, without presenting independent calculations of his own, that "the plan submitted… does not in fact show anything close to … 39.4% open space" since much of what is shown as open space "is pavement such as parking areas or driveways…." Exh. 20, ¶ 23, sentences 5, 7. This argument is neither clear nor convincing since he appears to include pavement in both his 60.6% figure and his 39.4% figure. The developer's expert's testimony, on the other hand is consistent. First, he did not dispute that total lot coverage by impervious surfaces is 60.6%.

See Exh. 17, ¶ 13. Then, as noted above, he testified that building coverage alone is 27% and open space is 39.4%. Therefore, the inference is that the remainder, 33.6%, is roadway, parking, sidewalks, and other impervious surfaces. In summary, the preponderance of the evidence shows that the proposal is in substantial compliance with the technical open space requirements, and we conclude that in this regard the Board has not proven a local concern sufficient to outweigh the regional need for housing.

This is not dispositive, however. As in nearly all cases before us, other zoning relief is also requested, and therefore even where there is substantial compliance with the technical zoning regulations, we may determine that it is appropriate to review the proposal as a whole and delve more deeply into the specific local concerns that underlie the technical lot coverage and open space requirements and into the issues of density and intensity in general. (See "Overall Density and Intensity Considerations," p. 14, below.)

Passive Recreation Area - The first such underlying concern, as the Board points out, is whether the open space is actually usable. On this site, area set aside for passive recreation is not extensive. The developer's expert testified, however, that there are several areas for sitting, barbequing, or other forms of relatively passive recreation, and that these provide sufficient area for the residents' recreational use. Exh. 17, ¶32. Most important, lawn areas near the parking lot behind the existing houses on the site are clearly visible on the plans; each is roughly 35 feet by 60 feet, providing a total of somewhat more than 4,000 square feet of open space.[16] Exh. 2-B. At the very rear of the site, there is a 24-foot wide lawn area behind the rear building. Exh. 17, ¶ 32. The developer proposes to grade this area in such a way that much of it will rise about two feet in twenty horizontal feet, but part of it, particularly the southeast corner, will rise considerably more steeply. Exh. 2-B; Exh. 20, ¶ 24; Tr. II, 18. The Board's expert contends that it "is essentially unusable for recreational

16. There was some confusion with regard to these areas since the developer's original plans called for surface stormwater drainage basins, which would have limited their usefulness for passive recreation. Exh. 22, ¶ 4(c); see Exh. 2-B. The developer agreed to modify the design to provide subsurface drainage structures, which do not limit the use of the lawns above. Exh. 22, ¶ 4(c); Tr. II, 12.

use." Exh. 20, ¶24. The developer's expert counters that for the entire length of the building, there is an area that is at least 12 feet wide, and that a substantial area in addition to that is "relatively level and available for use for outdoor activities." Exh. 22, ¶ 4(a). In fact, because the fairly level area widens from 12 feet at one end of the building to nearly the full 24 feet at other, approximately three quarters of it will be sloping, but usable space.[17] Tr. II, 29-31, 33-35. Four of the units have small entrance patios in front of their buildings next to their parking spaces. Exh. 2-A; Exh. 3, sheet 1; Exh. 17, ¶ 32. The remaining units have narrow, 8-foot wide back yards, which the developer's expert describes as consistent with apartment-type developments." Exh. 2-A; Exh. 17, ¶ 32. In summary, we conclude that the open space provided, though not extensive, is sufficient for this sort of development, and that the Board's concern in this regard does not outweigh the regional need for housing.

Play Area - The Board argues that another indicator that there is insufficient open space on the site is that there is no constructed play area for children. Its planning expert testified that "outside play area for [resident] children is an important amenity." Exh.20, ¶ 21. It is by no means clear that such an area is critical for this development since there is a large playground within five-minutes walking distance.[18] But the developer has agreed to provide such an amenity if requested by the Board. Exh. 22, ¶ 6; see section V-2(d), below.

Building Height - The existing residences that would arguably be affected by the mass or height of the proposed buildings are those to the rear (east) and the south of the site. Exh. 2, sheet 8. The Zoning Bylaw requirement in the Zoning Bylaws for RG districts is three stories or 40 feet, but none of the proposed buildings exceeds this height.[19] Exh. 9, § IV-B (p. IV-3); Exh. 17, ¶ 26. The developer's expert testified that "the height of the buildings in the proposed project is in keeping with the heights of neighboring buildings."

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17. It may well be that the grading can be altered slightly to provide a smaller area in this back yard that is entirely level. See section V-2(b), below

18. Estimates of the exact distance varied from two blocks to one quarter mile. Exh. 15, ¶ 14; Tr. I, 35.

19. The requirement in RM districts is one and one half times the width of the adjoining street. Neither party has argued that this requirement is relevant in this case.

Exh. 17, ¶ 24. This was confirmed by a supplemental site plan, which shows elevations of the roof ridges of the proposed buildings and of the surround existing buildings.[20] Exh. 22-A; Exh. 2, sheet 7. The roof-ridge elevations of the five nearby existing residences are 220.6 feet, 229.5 feet, 232.8 feet,[21] 229.1 feet, and 219.5 feet; the ridge elevations of the two proposed buildings in the center of the site will be 220 feet; and the ridge elevation of the proposed building at the rear of the site will be 232.5 feet.[22] Exh. 22-A; Exh. 2, sheet 7. Thus, in this case, building height is not a legitimate local concern.

Landscape Buffers - The existence or quality of landscape buffers often affects the question of whether the effects of increased density are acceptable in the immediate area of a development. In this case, the rear of the site is currently wooded. Exh. 2, sheet 8. The proposed design calls for removal of all trees—including those at the rear of the site—except for four maple trees near the southern property line toward the front of the site. Exh. 2-B. The testimony of the developer's expert that this "provide[s] for preservation of existing buffers to the extent feasible" has little meaning since in some areas buildings are as close as ten feet from the property line and parking areas six feet from the property line. See Exh. 17, ¶ 21; Exh. 2-B. Thus, in fact, very little buffer is proposed.

On the other hand, the neighbors who will be most affected by the development—those to the east and south—have cleared their properties to the property lines. Exh. 2, sheet 8; Exh. 17, ¶ 22. That is, vegetated buffers appear to be the exception rather than the rule in this semi-

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20. There is no explanation in the record for the fact that all of the elevations shown on this plan are about 75 feet greater than those shown on Exhibits 2, 2-A, and 2-B.

21. Between this residence and the site—and visible on Exh. 2, sheet 8—is a garage, the roof elevation of which is 217.0.

22. Because the site slopes up to the rear, if the rear building were to be moved away from the rear lot line, the entire building would be lowered slightly, reducing the elevation of the roof ridge, and reducing the impact of this large building on the abutting neighbor.

urban neighborhood; it is the sort of neighborhood in which wooden fences are likely to be common.[23] See Exh. 2, sheet 8.

Further, though the Board found, and continues to argue, that there are inadequate landscape buffers, nowhere does it state what sort of buffers should be provided.[24] See Board's Brief, pp. 39-42. Nor does it draw our attention to any requirement in the Zoning Bylaws for buffers other than Exhibit 9, § V-D(15)(a) (p. V-10). That provision provides for buffers only near parking areas, and the proposed design complies generally with these requirements except that the ten-foot parking buffer has been reduced to six feet in two locations near the rear of the site.[25] Exh. 17, ¶ 23; see Exh. 9, § V-D(15)(a) (p. V-10); Exh. 2-B.

As a rule, requirements should not be imposed on affordable housing that go beyond those imposed by regulation on other new development in the community. See *9 North Walker Street Dev., Inc. v. Rehoboth*, No. 99-03, slip op. at 4 (Mass. Housing Appeals Committee Nov. 6, 2006), and cases cited. But even though the Board has introduced little evidence to assist us in determining whether there is a legitimate local concern with regard to buffers, we will require the developer to address this concern in a practical manner, that is, by consulting with property owners to the east and south, and constructing wooden fencing in locations they request. See § V-2(f), below.

Rear Setback - The Zoning Bylaws require rear-yard setbacks of 25 feet in both RM and RG districts. Exh. 9, § IV-B (p. IV-3). The proposed design very nearly complies with this, proposing that the rear building be set back 24 feet from the rear (eastern) property line. Exh. 2-A; Exh. 17, ¶ 33. The Board imposed a condition requiring that this setback be

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23. The exception to this is two small, vacant, land-locked parcels of land abutting the site to the north, which are wooded.

24. In its decision, the Board refers to "buffer strips" in five specific conditions; these appear, however to be boilerplate and are of little help since they do not describe what those buffer strips should consist of or how wide they should be. See Exh. 1, p. 8 (conditions 28-32).

25. The Board also required irrigation, and the developer specifically objected to the cost of this. Pre-Hearing Order, § IV-3(f). The Board presented no evidence to show that this as a significant local concern. Therefore, we will eliminate the requirement. See § V-2(e), below.

increased from 24 feet to 40 feet. Exh. 1, p. 5 (condition 1(a)). In support, it argues that the building is long, occupying approximately three-fourths of the lot width, and that because of this and the steep slope at the rear of the lot, general planning principles suggest a setback of more than 25 feet "to reduce [its]... impact on abutting property." Exh. 20, ¶ 25. Even if there were no other way to mitigate the impact on abutting property, this testimony is not sufficiently detailed or conclusive to establish a local concern that outweighs the regional need for housing. Further, it appears that it is feasible to retain a wooded buffer of several feet at the property, which will be as effective as, if not more effective than, providing additional open space. By condition, we will permit the Board to require such an approach. See section V-2(b), below.

B. Parking

The Board is also concerned about parking. First, it objects to the proposal for tandem parking for the apartments in the existing houses. "Tandem parking in this location will encourage or increase the chances that Grant Street will be used for on-street parking." Exh. 13, ¶ 3. The developer's expert testified that "there is no reasonable basis for finding that the proposed tandem parking is any more dangerous than the existing parking." Exh. 17, ¶30. We agree that this is not a serious concern. In the southwest corner of the site, four spaces of tandem parking are proposed. At present, however, there are six spaces in that same location, allowing cars to park not just two deep, but three deep. Exh. 2-A (n.b. notation: "eliminate existing driveway area"); also see Tr. II, 27-28. Two tandem spaces will be provided at the northwest corner of the site, where two or more cars can easily be parked in tandem now. Exh. 2-A (notation: "...reclaimed driveway area"); Exh. 5 (cover page); also see Tr. II, 27-28. Further, there is no evidence that Grant Street cannot accommodate on-street parking for visitors and on special occasions.[26] Cf. Exh. 5 (subject property photo addendum: street scene). If in fact there is a problem, it is the sort of existing problem that is

26. The development plans do not in any way suggest that Grant Street should be used for overnight parking, which in some towns is prohibited—at least during winter months.

not significantly exacerbated by the proposed development, and therefore is not a significant local concern. See *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 38 (Mass. Housing Appeals Committee Jun. 25, 1992); *Sheridan Development Co. v. Tewksbury*, No. 89-46, slip op. at 6 (Mass. Housing Appeals Committee Jan. 16, 1991).

Second, the Board would require two parking spaces per housing unit. Exh. 1, p. 5 (condition 2). For multiple-family dwellings, the Natick Zoning Bylaws require 1 parking space for one-bedroom units, 1½ spaces for two-bedroom units, and 2 spaces for units with three or more bedrooms. Exh. 9, § V-D(3)(b) (page V-4). The housing units which will be constructed all contain two bedrooms. Exh. 3, sheet 2. The developer's proposal shows 36 spaces, and thus complies with the bylaw provision. Exh. 2-A; Exh. 17, ¶ 28.

The Board has not proven a local concern with regard to parking that outweighs the regional need for housing.

V. 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 render the project uneconomic and are not consistent with local needs. The Board is directed to issue an amended comprehensive permit as provided in the text of this decision and the conditions below.

1. The comprehensive permit shall conform to the application submitted to the Board and the Board's decision except as provided in this decision.

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

(a) The development, consisting of 24 total units, including 6 affordable units, shall be constructed substantially as shown on plans by PMP Associates, LLC (Comprehensive Permit Plan), January 18, 2005 (Exh. 2), including the Preliminary

Landscape Concept, prepared by LandWorks Collaborative, and on architectural drawings by HPA Design, Inc. (June 4, 2004), and shall be subject to those conditions imposed in the Board's decision filed with the town clerk on May 12, 2005 (Exhibit 1) that are not inconsistent with this decision.

(b) At the rear of the site (in the area between units 13-18 and the eastern property line), the Board may require such grading, retention of wooded area, and landscaping as it deems necessary to strike the most desirable balance between open space that is usable for residents and vegetative buffer between the proposed development and abutting buildings.

(c) Parking, including tandem parking, shall be provided as shown on the above plans.

(d) If the Board deems it the best use of open space, it may require the developer to construct a play area for children in a location determined by the developer.

(e) Irrigation of landscaped areas shall not be required.

(f) Landscape or other buffers near parking areas shall be provided in conformity with the above plans and, where possible, in compliance with the Natick Zoning Bylaws. See Exh. 17, ¶ 23; see Exh. 9, § V-D(15)(a) (p. V-10). The developer shall consult with abutting property owners to the east and south of the site , and construct wooden fencing in any locations they request.

3. Should the Board fail to carry out this order within thirty days, then, pursuant to G.L. c. 40B, § 23 and 760 CMR 31.09(1), this decision shall for all purposes be deemed the action of the Board.

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

(a) Construction in all particulars shall be in accordance with all presently applicable local zoning and other by-laws 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 the Board or this decision.

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

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

(e) The Board shall take whatever steps are necessary to insure that a building permit is issued to the applicant, without undue delay, upon presentation of construction plans, which conform to the comprehensive permit and the Massachusetts Uniform Building Code.

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

Issued: 3/5/07

Werner Lohe, Chairman

Christine Snow Samuelson

Joseph P. Henefield

James G. Stockard, Jr.

Dissenting:

Marion V. McEttrick

LPc\m