COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
HOUSING APPEALS COMMITTEE
Docket No. 2019-07

SURFSIDE CROSSING, LLC,

Appellant,

v.

NANTUCKET BOARD OF APPEALS,

Appellee

NANTUCKET ZONING BOARD OF APPEALS' OBJECTIONS TO PROPOSED DECISION

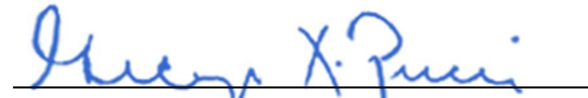
The Appellee, Nantucket Zoning Board of Appeals ("Board"), respectfully objects to the Proposed Decision served by the Presiding Officer on July 7, 2022. The Board objects to the Proposed Decision in its entirety, but for the few instances where certain of the less important of the Board's conditions of approval were upheld. As grounds therefore, the Board relies on the evidence and legal issues presented in its Post-Hearing Brief, dated May 21, 2021, which is attached hereto and incorporated by reference. These issues include but are not limited to the legal error in failing to remand the Appellant-Developer's notice of substantial project change, as was required under 760 CMR 56.07(4), and resulting consequences, and other issues raised during the course of the proceedings such as the failure to dismiss the Appellant-Developer's appeal for failure to make the required MEPA filing within ten days of the appeal under 760 CMR 56.06(4)(h). The Board also respectfully contends that the Proposed Decision ignores substantial evidence in the record contrary to the findings and conclusions set forth in the Proposed Decision, including material facts and unrebutted expert opinions set forth in the pre-filed testimony of the Board's witnesses, and evidence highlighted and further established during

the Board's cross-examination of the Appellant-Developer's witnesses at the evidentiary hearings conducted on March 4, 2021, and March 5, 2021. The Board respectfully requests that the Committee members review the Board's Post-Hearing Brief, as well as pertinent portions of the hearing transcripts and evidence noted therein, and issue a revised final decision based on substantial evidence in the record, and correcting legal errors substantially affecting material rights. The Board is amenable to further conferencing prior to the Committee's review and issuance of the final decision, and continues to be amenable to further discussions with the Appellant-Developer in an effort to narrow the areas of disagreement to the fullest possible extent.

Respectfully submitted,

TOWN OF NANTUCKET
ZONING BOARD OF APPEALS

By its attorneys,



George X. Pucci (BBO# 555346)
Devan C. Braun (BBO# 703243)
KP Law, P.C.
Town Counsel
101 Arch Street, 12th Floor
Boston MA 02110
(617) 556-0007
gpucci@k-plaw.com
dbraun@k-plaw.com

Dated: July 21, 2022

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CERTIFICATE OF SERVICE

I, Devan C. Braun, hereby certify that on the below date, I served a copy of the foregoing *Nantucket Zoning Board of Appeals' Objections to the Proposed Decision*, by electronic mail only, to all counsel of record.

Dated: July 21, 2022

____
Devan C. Braun, Esq.

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POST-HEARING BRIEF OF
NANTUCKET ZONING BOARD OF APPEALS

Now comes the Nantucket Zoning Board of Appeals ("Board") and hereby submits this post-hearing memorandum of law in the above-captioned matter. As a preliminary matter, the Board also incorporates by reference all facts, stipulations, and reservation of rights contained in the Housing Appeals Committee's Pre-Hearing Order, and objections and motions made prior to the hearing and at the hearing.

I. INTRODUCTION

On April 12, 2018, the applicant, Surfside Crossing, LLC (the "Developer" or "Surfside") submitted an application to the Nantucket Zoning Board of Appeals for a Comprehensive Permit pursuant to G.L. c. 40B, §§ 20-23 and 760 CMR 56.00 et seq. The initial application proposed to construct 156 dwelling units on an approximately 13.5 acre parcel at 3, 5, 7, and 9 South Shore Road in Nantucket, Massachusetts (the "Locus" or "Site"). Ex. 1. The 156-unit proposal included 60 standalone single-family homes and 96 condominium units in 6 multi-family buildings, for a total of 389 bedrooms. Id.

The public hearing on the Developer's application opened on May 10, 2018. During that process, Town officials and Boards, as well as members of the public, expressed substantial concerns with respect to the purposefully overbuilt and unsound initial proposal, seemingly presented as leverage in advance of a more realistic plan for the Site. In response, the Developer submitted a revised proposal for a 100-unit project seeking to address site-specific concerns relative to density, environmental and open space, and sewer system capacities, among others. Id. Thereafter, following several design workshops and meetings with consultants and Town officials in 2019, the Developer submitted a further revised proposal for a 92-unit project, comprised of 44 single family homes and 40 condominium units in 8 multi-family buildings.

After submitting the 92-unit proposal, the Developer insisted on closing the public hearing, despite an incomplete application and public hearing process on the revised submission. The Board deliberated on the 92-unit submission on May 28, 2019 and June 7, 2019, and did its best to condition the project appropriately with incomplete information, particularly with respect to sewer, density, and environmental concerns for the site. The Board ultimately voted thereafter to approve the project based on the 92-dwelling unit application with several conditions to accommodate those local concerns, including reduction of the number of approved units from 92 to 60. Id. The Board issued its decision on June 13, 2019, and filed it with the Town Clerk on June 14, 2019. Id.

The Developer subsequently appealed the Board's decision to the Housing Appeals Committee ("Committee"). On April 7, 2020, the Developer redesigned the project entirely and submitted plans for a new, 156-unit development consisting of all condominium units in 18 buildings. Ostensibly returning to the tactic of presenting a purposefully overbuilt plan as leverage to obtain additional units, it is important to note that this design was never submitted to

the Board during the underlying public hearing. Both the Board, and the public, were deprived of the right to hold a public hearing on the substantially changed proposal in the first instance, including the right to have peer review of the new proposal at the Developer's expense. Rather, the new design was only submitted to the Presiding Officer of the Housing Appeals Committee for a determination that the change from a 92-unit plan for a mix of single-family houses and condominiums to a 156-unit plan for all condominiums was not a "substantial change" requiring remand to the Board pursuant to the regulations. 760 CMR 56.07(4). Over the Board's objection, the Presiding Officer denied the Board's request for remand and concluded that the new design was not a "substantial change," as that term is defined at 760 CMR 56.07(4). This left the Board in the untenable position of having to defend a decision based upon a 92-unit plan submission in the *de novo* evidentiary hearings, while allowing the Developer to redesign and proceed with a 156-unit all condominium project that was never before the Board.

Following the submission of pre-filed direct testimony by witnesses on behalf of the Developer and the Board, the Housing Appeals Committee held two days of *de novo* evidentiary hearings prior to the submission of the parties' post-hearing briefs. See Transcript of Proceedings, Parts 1 and 2.[1] Based on the evidence, sworn testimony, and applicable legal standards, the Committee should affirm the Board's decision approving with conditions a 60-unit project because the Developer has not met its burden of proving that the project is uneconomic and the Board has shown that the conditions imposed are Consistent with Local Needs as required by G.L. c. 40B, §§ 20-23 and 760 CMR 56.00 et seq. As further grounds therefore, the Board relies on the following memorandum of law.

[1] Volume One of the Transcript of Proceedings, dated March 4, 2021, is cited herein as Tr. I-[page] and Volume Two of the Proceedings, dated March 5, 2021, is cited herein as Tr. II-[page].

II. FACTUAL BACKGROUND

A. THE TOWN'S EFFORTS TO CREATE AFFORDABLE HOUSING.

The Town of Nantucket has a demonstrated commitment to meeting its affordable and workforce housing needs and has made the creation of affordable housing an urgent priority in recent years. See Ex. 2; Ex. 45, at ¶ 3. The Town has worked with the development community to construct affordable dwelling units in accordance with its approved Housing Production Plan, which was certified in 2019, and the Town has since achieved "Safe Harbor" status. Ex. 45, at ¶ 3 (Pre-filed Testimony of Nantucket Housing Director, Hudson Tucker Holland); Ex. 45(a) (Housing Production Plan).

Specifically, in 2015, in furtherance of its significant commitment to affordable housing, the Town hired a full-time housing consultant and created a full-time Housing Specialist position in 2017 with the stated mandate of meeting the Town's affordable and workforce housing needs and continued progress toward achieving the 10% subsidized housing requirement under Chapter 40B. Id. at ¶ 8. To that end, several initiatives were brought to the voters of the Town to aggressively meet the need and reduce any barriers to the development of affordable housing in Town. Ex. 45.

For example, at the 2015 Nantucket Special Town Meeting, the legislative body of the Town voted to enact, by over a two-thirds majority, a Workforce Housing Zoning Bylaw which allowed for bonus density if 25% of the units were restricted to renters with household incomes of 80% Area Median Income ("AMI") or less. Id. at ¶ 4. A private developer has been cooperatively working with the Town to develop a 225-rental unit and 91-homeownership unit project under this new Town-supported zoning. Id. Earlier that same year, the voters at the Nantucket Annual Town Meeting unanimously voted to authorize the Select Board to use a

Town-owned property at Fairgrounds Road for the creation of additional affordable housing, which will serve an array of AMI levels with 80% of the units in the development being income-restricted. Id. at ¶ 5. Were it not for a private individual who held up the development in Court, the Town likely would have achieved Safe Harbor status at the time of the Developer's application in this case. Id.

At the 2017, 2018, and 2019 Town Meetings, the voters also unanimously supported a "Housing Bank Home Rule Petition," which would authorize a 0.5% transfer fee on real estate transactions over $2,000,000, which would provide a reliable funding stream for the Town's Affordable Housing Trust. Id. at ¶ 6. Likewise, in 2019 the voters approved a $20 million funding authorization for the creation of affordable rental housing on various sites throughout the island, which would count on the Town's Subsidized Housing Inventory, as well as an annual grant of $750,000 to the Affordable Housing Trust with an approved bond funding of up to an additional $5 million. Id. at ¶ 9.

Despite this significant effort to create affordable and year-round workforce housing, the fact remains that in a seasonal community like Nantucket, the economics are such that the vast majority of market-rate units in a 40B project are bought by seasonal buyers or investment buyers looking to rent the properties out on a weekly or monthly basis during the high seasons and summer months, and then leave them vacant in the off-seasons, which is contrary to Nantucket's local needs for year-round affordable housing. Id. at ¶ 18. As has been borne out by the Developer's first project, in which 75% of the units went to seasonal use and investment properties, the project at issue here includes an increased number of units so as to serve investment buyers. Id. at ¶ 18. The Developer, then, should include an appropriate number of units to serve the year-rounders, and may be eligible for a Land Bank loan to accommodate

greater green space and open space needs so as to level any economic impact from not having as many investment or seasonal buyers. Id. at ¶ 18.

B. The Developer's Initial and Revised proposals.

On April 12, 2018, the Developer submitted an initial application to the Nantucket Zoning Board of Appeals for a 156-unit mixed development, which grossly overburdened and maxed out the Locus, and was wholly inconsistent with the existing single-family area. Ex. 2, at 4.[2] The Project site, located at 3, 5, 7, and 9 South Shore Road, also is directly contiguous to two other Chapter 40B developments, and almost all of Nantucket's SHI-qualified affordable housing is located within a half mile radius of the project Site which is contrary to the goal of diversifying and integrating the location of affordable housing throughout Town. Id.

Upon the submission of this proposal, the Town's affordable and workforce housing experts, as well as local boards, committees, officials, and peer review consultants, expressed significant concerns with the 156-unit mix of single family homes and condominium buildings. For example, the Housing Director commented that it was "poorly designed from a site planning perspective, over-crowded the site, provided no recreational space of size where children and families might kick a ball around or play Frisbee, and the design was out of scale and character with the existing neighborhood." Ex. 45, ¶ 10. It also did not meet the Town's need for affordable year-round housing, and wasted much time and effort with needless controversy in the initial public hearing sessions. Id.

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[2] Unfortunately, the unreasonable initial proposal resulted in hundreds of residents appearing to oppose the project, such that public hearing sessions were required to be held in an auditorium to accommodate the public. Ex. 2, at 4. Even then, more than 800 residents showed up to oppose the sheer size of the initial proposal, not the need for a sound affordable housing project itself, causing an overflow to standing room only in the auditorium. Id.

In January of 2019, in response to such local concerns, the Developer submitted a revised application for a 92-unit development, which similarly consisted of a mix of single family homes and condominiums. This plan was much more realistic in terms of reducing the density and overcrowding issues, accommodating traffic and fire access needs, increasing the open and recreational space, and improving the overall site design. Ex. 45, ¶ 10. Even after the submission of the reduced-unit plans, however, the Board continued to express concern over the overcrowding of the 13.5 acre development site, with inadequate open space, buffer zones, or areas for common life-style amenities, and also expressed concern over the inconsistency between the size and scale of the development and the existing surroundings. Ex. 2, at 5. The Board was repeatedly informed during the public hearing sessions that the number of units, particularly those proposed for the large 8-unit buildings to be included in the development, was driven by the Developer's stated desire to provide housing to "middle-income" year-round residents of Nantucket, who did not otherwise qualify for affordable housing as restricted under G.L. c. 40B. Id. The Developer stated that it intended to offer a number of Studio, 1-Bedroom, 2-Bedroom, and 3-Bedroom condominium units to sell in the range of $450,000 to $750,000, and that this was a price range which the Developer believed would be affordable to "year-round Islanders" who do not otherwise satisfy the household income and asset limitations for the Chapter 40B affordable housing. Id.

Though discussions over appropriate conditions for a reduced-unit plan were still necessary to impose appropriate conditions, the Developer unfortunately insisted on closing the public hearing process after only one public hearing on the 92-unit development, leaving the Board to condition the approval as best it could without any opportunity for the Developer's input on acceptable conditions and their economics. Ex. 45, ¶ 11 (detailing how

the Developer "refused further dialogue with the Board, including discussion of what conditions on the revised plan would be unacceptable to the Applicant and why"); Ex. 2, at 6.

The refusal to continue working with the Board in public hearings to discuss project economics and mutually agreeable conditions to meet local needs ultimately left the Board with no choice but to close the public hearing and condition the project to the best of its ability, based on the application pending before the Board for a 92-unit mixed single-family and condominium development. Ex. 45, ¶ 11; Ex. 2. That the Developer refused to have any further discussion on these mutually important issues appears to highlight that the Developer never intended on proceeding in good faith with the 92-unit application. In fact, shortly after approval and after appealing the project, the Developer wholly redesigned the project to create a new, 156-unit all-condominium development in 18 multi-family buildings in order to avoid any input on the controversial elements of the project, underscoring its attempts to circumvent the comprehensive permit law and opportunity for municipal input.

Though the 156-unit all condominium plan is not properly before the Committee, as discussed *infra*, the proposal is similarly "out of scale for what works sensibly on this site within this surrounding area." Ex. 45, ¶ 12. Specifically, "[t]he excessive number of units overcrowds the site in a manner which will adversely affect the quality of life of future residents who will be living there full-time." Id. As with the initial proposals for 156 mixed units and 92 mixed units, there is no meaningful green space for active or passive recreation that would allow children and families to have a pick-up game of football or soccer on an adequately sized open field. Id. Surely on a site spanning over 13 acres, some field or lawn space is possible without undue hardship to the Developer's profit margin. Id.

Ultimately, to accommodate the density and overcrowding concerns, sewer capacity concerns, open space and recreation, and natural environmental issues, the Board issued its decision approving with conditions the 92-unit proposal, by reducing it to 60-units of single family and condominium buildings, to address each of the topic-specific local concerns as set forth below.

C. SEWER CAPACITY.

The Project as proposed was of great concern to the Town's Project Manager for the Sewer Master Plan, which is the planning document used to determine where, how, and if a new development can connect and route future wastewater flows into the Town's existing wastewater collection and treatment system, as was the 92-unit development proposal. See Ex. 39, at ¶ 6 (Pre-filed Testimony of Daniel Sheahan, Sewer Consultant); Ex. 26 (Nantucket Sewer Master Plan). By way of background, wastewater is pumped to the Surfside Wastewater Treatment Facility (WWTF) via three major existing force mains near the Locus. Ex. 26, at 91-95 (Figure 4-1 details force mains near the Locus and Figure 4-2 details future proposed systems). The force mains include a 20-inch main and 16-inch main (Sea Street Pump Station) which cross through the Locus in the "Sewer Bed Road" easement, and a 12-inch main (South Valley Pump Station), which runs along the east side of South Shore Road under the bike path. Id. at 91-92.[3] The three force mains manifold together at the WWTF prior to the headworks. Ex. 39, at ¶ 15. As such, the operation of each of the pump stations impacts the force main system hydraulics. Id.

[3] Bracken Engineering's plans show a fourth main that runs along the west side of South Shore Road in front of the Surfside Crossing development, but it is only 6 inches and serves the Sherburne Commons Assisted Living Facility. It is not an option for the project as it is too small to handle any of the flow from Surfside Crossing. Ex. 26, at 92. The small force main also will be abandoned when the South Shore Road gravity sewer and pump station are constructed.

Due to hydraulic capacity limitations and structural pipe condition concerns, connection of additional pump stations to these force mains is not possible. Ex. 39, at ¶ 15. For example, as David Gray, the Town's Sewer Director, and Daniel Sheahan, the Town's engineering consultant, each testified, in the winter of 2018, due to extreme weather conditions and temperatures, the 16-inch force main suffered a catastrophic failure and is no longer in operation except in the event of an emergency. Ex. 39, at ¶ 16; Ex. 40, at ¶ 5. This disaster created significant operational issues and has caused the Sewer Department to reevaluate all operational considerations for new developments in Nantucket, particularly those with large capacity flow potentials. Ex. 40, at ¶ 5 (Pre-filed Testimony of David Gray). Ultimately, however, the most recently submitted site plan dated October 6, 2020, and those that were before the Board when it reached its decision in April, 2019, include no information as to how the sewer connections are to be made for the Locus, which falls entirely short of local sewer standards and expectations. Ex. 40, at ¶ 9.

Local concerns were also presented about private drinking water wells located in the immediate vicinity of the Property and the protection of an existing sewer line running beneath the project site. Ex. 2, at 5. In the event of a rupture of the existing sewer line, the Town's Sewer Department estimates that approximately 30,000 to 60,000 gallons of wastewater would be released before the line could be shut down. Ex. 2, at 5.

Indeed, in Mr. Sheahan's expert opinion, who is intimately familiar with the planning needs and sewer capacities of the Town, the existing pump stations in the area and the Town's force main system could not serve a new development of this size. Ex. 39, at ¶¶ 6, 7-9, 14-15. While the proposed development properties are part of the service area to the WWTF, the density of the proposed development creates much higher wastewater flows than the current

zoning would allow. Id. at ¶ 21(e). Based on the future needs areas and the sewer system extensions recommended in the 2014 Comprehensive Wastewater Management Plan (CWMP), Ex. 27(a), as well as the future sewer routing analysis conducted as part of the Sewer Master Plan, Ex. 26, the installation of a gravity sewer along South Shore Road with a new pump station installed at the Surfside WWTF is the only option to provide sewer service to the Miacomet Needs Area, as well as the adjacent properties along South Shore Road, which includes the Surfside Crossing properties. Ex. 39, at ¶ 14. This option avoids impacting the operations of the Town's force main system and allows the Town to eliminate existing pump stations along South Shore Road, as well as future pump stations that would be required to serve properties within the Miacomet Needs Area if the gravity sewer is not built. Id.

Because use of the 16- and 20-inch mains were not feasible, the Developer proposed building a pump station within the Locus, with a connection to the existing 12-inch force main located in South Shore Road, along with a novel system of pump controls to eliminate the concerns with structural capacity limitations during peak flows.. Ex. 39, at ¶ 17-19. The Town, however, does not have the capacity, control, or communication systems required to operate in this manner, and the proposal did not address the potential for failure during peak flow. Id. at ¶ 19. Therefore, the 12-inch sewer option was also not possible for the development. Id.

In March of 2019, the Developer submitted its revised plans for reduced units. Mr. Sheahan, however, was not able to fully evaluate them due to the missing information and design components which fail to show sewer services to the buildings, plans for multi-family parcels, specifications for construction and testing, and methods to protect the existing force

mains. Id. at ¶ 20. In a March 19, 2019 letter, Bracken Engineering objected to the gravity sewer option and proceeded with final plans depicting a connection to the existing force main, contrary to the Town Consultant's recommendation and contrary to the system's capacity. Ex. 46, at ¶ 15; Ex. 40.

In April of 2019, the applicant insisted that the public hearing be closed despite the inadequate information submitted for the 92-unit plan. Id. at ¶ 20. Therefore, the Town's expert peer reviewer recommended that the Town impose a condition that the Developer not be permitted to connect to the existing force mains, and that it instead connect to the new gravity sewer included in the Town's Sewer Master Plan along South Shore Road. Id. at ¶ 21(b); Ex. 26, at 91 (discussing plans for gravity main "due to the complexities of the town's force main network" and the "mid-island high points [that] allow sections of the existing force mains to drain by gravity to the WWTF"); Ex. 40, at ¶ 8. The conditions discussed as to sewer, and ultimately imposed, included that the sewer infrastructure shall be constructed by the Developer in accordance with the preferred option presented by Weston and Sampson for the gravity line, with the Town to contribute an agreed allocated cost of construction proportionate to the degree to which the infrastructure confers a public benefit independent of servicing the project. Ex. 2, at 21 (Condition 63); Ex. 40, at ¶ 9.

The Developer contends that the wastewater conditions have imposed "additional costs in the amount of $5,719,746." Ex. 31, at ¶ 36. The Developer also testified "that the estimated cost for sewer utilities for the [156-unit] Project will be $1,746,708." Ex. 31, at ¶ 93, but that the "estimated costs for sewer utilities for the [60-unit] Project will be $6,326,454." Ex. 31, at ¶ 146. However, the Developer introduced no evidence or testimony as to how it arrives at these numbers, which are demonstrably incorrect. See generally Ex. 39

(Pre-filed Testimony of Daniel Sheahan); Ex. 46, at ¶¶ 21-32 (Pre-filed Testimony of Bruce Perry, in which he points out glaring inconsistencies and unreliable cost estimates in the Developer's pre-filed testimony). In fact, many of the Developer's cost estimates are based on a subjective guessing of prices, but provide no support as to how it arrives at those numbers, even when countered by experts who had concrete numbers in hand to contradict the assertions. Such subjective estimates by an interested party, which do not hold up upon close examination and which are entirely rebutted by the Board's expert testimony, are wholly insufficient to meet the burden of proof as to conditions that render a project "uneconomic."

Rather, based on concrete bids prices already obtained for the project, the anticipated total cost for the installation of the gravity sewer and pump station is $3,600,000, which includes $2,100,000 for the gravity sewer and $1,500,000 for the pump station, force main, and connections. Ex. 26, at ¶¶ 22-24. In addition, the Town appropriated $1,500,000 in June of 2020 for the South Shore Gravity Sewer, which costs will not be borne by the Developer. Id. at ¶ 32. The Town will also appropriate an additional $600,000 at the 2021 Annual Town Meeting for the gravity line. Tr. I-155.

Therefore, to the extent that the Developer must pay any portion of the construction price to connect to the gravity sewer main, those costs are reduced by at least $1.5 million already paid by the Town for the project costs, with additional reductions in the works. Id. at ¶ 32; Tr. I-155. That leaves the remaining costs for the new sewer line at $2,100,000, at most. Once the $600,000 is appropriated, as scheduled, that will leave the Developer to contribute a total of $1,500,000 for the pump station, force main, and force main connection at the Surfside WWTF. Ex. 26. The Board's expert pre-filed testimony on this issue was presented after the Developer's pre-filed testimony. The Developer had the express right under the

schedule set forth in the Pre-Hearing Order to file testimony to rebut the Board's expert testimony, but did not do so. The Developer also had the right to cross-examine the Board's expert witness at the administrative adjudicatory hearing, but also did not do so. Accordingly, the Board respectfully contends that the Committee must accept the Board's testimony on the preferred sewer option, and related cost, and affirm the Board's conditions with respect to sewer, in their entirety.

D. ENVIRONMENTAL AND OPEN SPACE NEEDS.

For almost 50 years, the Nantucket Land Council ("NLC") has engaged in numerous activities specifically designed to preserve the unique natural environment of Nantucket from threats associated with development, such as habitat fragmentation. Ex. 44, at ¶ 4. Once lost, these natural resources are irreplaceable. Ex. 44, at ¶ 4. As such, the Town works directly with local organizations like the NLC to evaluate projected impacts to the natural environment for new developments, and as a result of these typical conditions, the NLC holds over 90 conservation restrictions ("CRs") on some 1500 acres in Nantucket County, and it has facilitated the acquisition of many more CRs and fee purchases by the other conservation groups such as Nantucket Islands Land Bank and the Nantucket Conservation Foundation. Ex. 44, at ¶ 5. The Town shared certain efforts with the NLC in evaluating habitat issues raised by the development proposal at issue in this appeal, including the retention of Danielle O'Dell, the habitat specialist who presented expert testimony on behalf of the Board. Ex. 45 (Pre-filed Testimony of Danielle O'Dell).

Most of NLC's land acquisitions have been specifically designed to protect rare or endangered species and habitats, including globally rare and endangered habitats. Ex. 44, at ¶¶ 5-6. Indeed, NLC holds a conservation restriction on an abutting property to the Locus that

was developed under Chapter 40B for subsidized housing (Sachem's Path) to protect Lepidoptera, moth habitat, and rare and endangered plant habitat, which is a commonly applied and equally applied condition to developments of this size to protect these unique local interests. Ex. 44, at ¶ 7; Ex. 44(a). These 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 at 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"). Moreover, as the Town's Housing Specialist noted, there is significant funding available to the Developer from the Nantucket Land Bank to offset an economic impacts associated with providing increased green space, open space, and buffer zones to appropriately serve the local needs. Ex. 45, at ¶ 18.

In this case, the NLC similarly evaluated the Project's conservation lands for the impact on the natural environment and surrounding area, as well as the species' long-term viability. Ex. 44, at ¶ 6. In consultation with the habitat expert previously retained by the Town, Danielle O'Dell, the NLC concluded that endangered species in the currently-existing natural environment "will be directly impacted by the Project at issue here," subverting the Town's and NLC's longstanding investment in protecting the natural habitat of Nantucket. Ex. 44, at ¶ 5; Ex. 38, at ¶¶ 3-4 ("Based on [O'Dell's] experience surveying for NLEB and researching their use of habitat on Nantucket, [she] believe[s] there is a strong likelihood that this protected species is currently present on the Surfside project site. However, [she] was never able to scientifically confirm that or study the potential effects of the proposed project on

this species of concern because the owner refused to grant access, despite [her] entreaties and a formal written request from the Nantucket Select Board"); Ex. 38(a).

Specifically, Nantucket Island serves as a breeding ground for the endangered Northern Long Eared Bat ("NLEB"), a protected species under the federal and state Endangered Species Act. Ex. 44, at ¶ 12. Nantucket is vital to the survival of NLEB because the disease White-Nose Syndrome ("WNS") that has decimated mainland populations does not affect bats on the Island. Ex. 44, at ¶ 12. No signs of WNS have been observed on hibernating bats on Nantucket, and only a single NLEB has been found deceased with confirmed symptoms of WNS on Nantucket. Ex. 44, at ¶ 12. It is widely believed that these species have survived on Nantucket, where they have not been able to thrive in large numbers on the Cape, due to the roosting in the pitch pine forest habitat as opposed to in caves, as no caves currently exist on Nantucket. Ex. 38(a).

The Project Site currently supports NLEB, and potentially other rare and endangered species, including state listed vascular plants New England Blazing Star (Liatris novae-angliae) and Sandplain Blue-eyed Grass (Sisyrinchium fuscatum), as well as the six listed species by NHESP. Ex. 44, at ¶ 12; Ex. 35(b). The three unlisted species have been identified on nearby property with similar habitat. Ex. 44, at ¶ 12. The Developer, however, has denied permission to survey the Project Site for these species in violation of the local requirement that such surveyors be permitted to conduct surveys to minimize impact to protected species and the natural environment, so no scientific evidence has yet been collected directly from that site. Ex. 44, at ¶ 12; Tr. II-89. After being denied access to the Project Site to scientifically confirm the presence of the NLEB and the plants on the Locus, Ms. O'Dell conducted a survey of nearby properties with the same vegetation to determine whether

NLEB were present in the immediate vicinity, and detected multiple NLEB sources at all sites surveyed in May of 2019. Ex. 38, at ¶¶ 9-10. Two of her colleagues independently reviewed and verified that analysis. Id.

As the Developer's wildlife biologist even conceded, he did not review the parcel for compliance with the Town's open space plan, which explicitly directs that development on open space parcels "should be avoided" and, if necessary for affordable housing purposes, "should be carefully sited to protect rare habitats and endangered species." Tr. II-90; Ex. 25, at 135 ("Development on open space parcels should be avoided, but development that does occur, for purposes such as affordable housing, wind energy, or wastewater treatment, should be carefully sited to protect rare habitats and endangered species). Nor did the Developer or the wildlife biologist allow repeated requests for Ms. O'Dell to survey the site to document, site, and carefully protect the Property with conditions in accordance with local requirements. Ex. 25, at 135 ("wildlife surveys should be conducted" on open space parcels where development is proposed, which efforts may be "spearheaded by the town, a non-profit land conservation organization [like NLC], or a team").

But research from the nearby conservation lands shows that these endangered species exist in the habitat nearby and that several rare and endangered species exist on the Locus itself. Ex. 44, at ¶ 12. As such, the Development must be "carefully sited" by local Boards to ensure protection of these local interests and must "work with private land owners to protect wildlife habitat on their properties … as well as their adjoining parcels." Ex. 25, at 135. Moreover, the Town's local requirements set forth in its carefully studied Open Space Plan provide that the "expansion of rare sandplain grassland and coastal heathland should be

encouraged through active land management and restoration wherever possible [as] [t]hese rare habitat types are critical to many state and federally-listed species." Ex. 25, at 135.

Though the Developer has proposed an off-site conservation restriction for the endangered Coastal Heathland Cutworm that will be decimated by the clearcutting of over 12 acres of the site, that trade-off does nothing to protect that endangered species on Nantucket. Ex. 44, at ¶ 14. Nantucket is an island over thirty miles from Cape Cod. Ex. 44, at ¶ 12. The heathland moths from the Project Site are not equipped for such a journey over open ocean. Ex. 44, at ¶ 12. And the bats, who could conceivably migrate, would almost certainly be met by the lethal WNS that has killed most of NLEB populations on the mainland. Ex. 44, at ¶ 12.

As such, in accordance with local needs, 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 decisions are resolved, to protect the natural environment and the rare and endangered species that rely on that environment. Ex. 2; Ex. 44, at ¶¶ 12-13. For example, Conditions 97(h) and (i) require the Developer to identify all areas proposed for vegetation clearing, and to minimize the extent of tree removal. Though the Developer has appealed to remove those modest conditions from the comprehensive permit, the Developer did not show that they are uneconomic and the Board demonstrated that they are consistent with local needs. Ex. 2; Ex. 44, at ¶ 13. But any modification of these conditions would significantly affect the habitat that supports protected species, including trees on the Project Site for the NLEB. Ex. 44, at ¶ 13.

Additionally, the Board imposed Conditions 10 through 17, and others, to reduce the overall footprint of the development to avoid these impacts to the natural environment and rare and endangered species, such as by reducing the amount of clear cutting that needs to be

done, reducing the density of the site so that more open space and natural environmental conditions may be preserved, and reducing the lighting and noise that would disturb the NLEB in the area. Indeed, even the Developer's wildlife consultant testified that "it's intuitive that a smaller project would result in less disturbance" to the endangered species on site and in the surrounding area, such as by reducing the development footprint by conditioning the site to allow fewer units. Tr. II-87-89.

As the NLC's Director aptly summarized: "As a trained ecologist and wildlife biologist who has protected rare and endangered species on Nantucket for the past sixteen years, I am certain that the Project as permitted will cause harm to those species identified above and their habitat. That no one has even bothered to survey the Project Site to see what exactly will be lost makes this tragedy all the more absurd." Ex. 44, at ¶ 15. See also Ex. 38, at ¶ 12 ("In [O'Dell's] professional opinion as a wildlife ecologist, the project site should be surveyed to determine the presence of NLEB before that critical habitat is destroyed forever."). As such, the Board was required to carefully condition the site to protect the various local needs present on the Island, the Locus, and the immediate vicinity.

E. TRAFFIC AND SAFETY CONCERNS.

The Locus is situated west of South Shore Road and south of Surfside Road. Ex. 2, at 5; Ex. 41, at ¶ 8. South Shore Road and Surfside Road intersect with Fairgrounds Road to form a four legged all-way STOP intersection. Ex. 41, at ¶ 8. Surfside Road is posted with a 35-mile per hour speed limit, while Fairgrounds and South Shore Roads are posted with a 30-mile per hour speed limit. Ex. 41, at ¶ 8. While the intersection of Surfside Road at South Shore Road and Fairgrounds Road has not been listed as a high crash location, the nearby intersection of Surfside Road at Surfside Drive and Miacomet Road is and has been

continually reported as a MassDOT Highway Safety Improvement Program (HSIP) high crash cluster dating back to 2013. Ex. 41, at ¶ 10. To date, a Road Safety Audit has not been performed for this intersection. Ex. 41, at ¶ 10.

Additionally, there is only a single access/egress point to South Shore Road, and it is essentially a long dead-end roadway. All vehicles leaving the Locus will be required to turn left onto Surfside Road. (A right turn leads to the sewer beds.) Ex. 46, at ¶ 36. As Bruce Perry testified, even a modest percentage increase in traffic volume would have an outsized impact at a key intersection in a currently quiet area. Ex. 46, at ¶ 36. Therefore, due to the already-existing traffic congestion problems at the intersection, which provides the single point of access to the roadway where the development is proposed, the Town retained a traffic consultant, BETA Group, to review and independently evaluate the traffic impact and access for a proposed residential development to be located at 3-9 South Shore Road in Nantucket, Massachusetts. Ex. 41, at ¶ 4.[4]

BETA Group independently performed Level of Service ("LOS") analyses for the study intersections for the weekday AM and PM Peak hours for the 2018 Existing Conditions and 2025 No-Build and Build conditions for 90 condominium units and 66 single-family homes, as documented in the September 2018 Traffic Impact and Access Study. Ex. 41, at ¶ 11. This analysis methodology included the use of a seven year design horizon and approach peak hour factors in accordance with the MassDOT Traffic Impact Assessment Guidelines, historical traffic impact studies performed for sites within the Town, and as

[4] Additionally, BETA reviewed and commented on the Developer's subsequently prepared traffic plans dated March 11, 2020, in which Mr. Michaud updated his analysis to reflect substantial project revisions through February 28, 2020 for a 156-unit condominium project and assessment dated April 9, 2020, none of which were presented before the Zoning Board of Appeals, as well as an updated traffic assessment dated April 9, 2020. Ex. 41, at ¶ 6.

recommended by the Town's peer reviewer, Tetra Tech. Ex. 41, at ¶ 11. The LOS results for the study intersections of Surfside Road at South Shore Road and Fairgrounds Road and Surfside Road at Miacomet Road currently have or are projected to have a level of service rating of "F," which is inadequate per industry standards. Ex. 41, at ¶ 11; Ex. 46, at ¶ 41.

Specifically, the independent consultants determined that the project-generated traffic would deteriorate LOS to "deficient LOS F" conditions at several movements at South Shore Road, Fairgrounds Road, and Surfside Road, and would exacerbate LOS F conditions at the intersection of Surfside Road at Miacomet Road. Ex. 41, at ¶ 11. Moreover, a preliminary sensitivity LOS analysis conducted for a project with 156 condominium units for the purpose of this hearing, despite such a Project not being properly before the Committee, shows the operating conditions at these two study intersections would be similar. Id. As BETA noted, however, a full traffic impact analysis study would need to be conducted to fully evaluate the traffic impacts of the 156-condo unit scenario on the surrounding roadway network. Id.

Notably, the Developer's traffic impact and access study cannot be credited, demonstrating the further need for a remand to the Board to independently evaluate the assertions and impose appropriate traffic conditions consistent with local concerns for the site. See Ex. 41, at ¶¶ 9-13. For example, the Developer's paid consultants measured travel speeds along South Shore Road of approximately 38 miles per hour in January 2018, which is much higher than the posted 30 mile per hour speed limit and does not represent actual conditions leading to traffic jams at the intersections. Ex. 41, at ¶ 9. Additionally, as Mr. Ho pointed out in his pre-filed testimony, the Developer's consultants used lower peak hour traffic volumes; used overall intersection Peak Hour Factors as opposed to Peak Hour Factors by intersection approach; and a five-year analysis horizon as opposed to a seven-year horizon. Ex. 41, at ¶ 11.

The Developer's methodology in this regard does not comply with the MassDOT Traffic Impact Assessment Guidelines and is not consistent with historical traffic impact studies performed for other sites within the Town. Ex. 41, at ¶ 11. Therefore, it does not meet industry or local standards, and cannot be credited. Id.

In any event, to address the substantial traffic concerns presented by a development of this size, the Developer not only agreed but actually "volunteered money to offset traffic improvements which its own experts concluded were necessitated by the project." Ex. 46, at ¶ 19; Ex. 41, at ¶¶ 12-13. Indeed, the memorandum prepared on November 7, 2018 summarizes the agreement and necessity of focusing on off-site transportation mitigation at the two nearby intersections. Ex. 41, at ¶ 13. The parties wrote that such a "consensus is reached based on Nantucket's similar treatment of mitigation for prior approved projects and the experience of the various transportation consultants. Accordingly, mitigative contributions/actions for off-site intersections could be calculated by identifying ... costs ... and applying the proportional traffic impacts of Surfside Crossing (i.e. percent volume increase...) to arrive at a cost basis that is proportional to the Project impacts ...." Ex. 41, at ¶ 13. In a letter from the Town and County of Nantucket Select Board County Commissioners dated November 20, 2018, a planning level cost of intersection reconfiguration was estimated to be $2,400,000 per intersection, which was applied to the evening peak hour percentages defined in the Teleconference Summary Memorandum dated November 7, 2018 for both a 100-unit development and a 156-unit development. Ex. 41, at ¶ 13. As such, the Board imposed a traffic mitigation fee of $200,000, which is consistent with a peak hour traffic volume increase. Ex. 41, at ¶ 13. "The increase in volume as a result of the Project, coupled with the existing crash history, supports the fair share mitigative contributions for this intersection." Ex. 41, at ¶ 15. Though this fair share mitigation fee was agreed-to in

good faith by the Developer at the time, the Developer has since reneged on its representations to the Board, and attempts to challenge the rational and well-studied conditions imposed by the Board to meet local needs in this appeal.

F. <u>PUBLIC SAFETY AND FIRE EMERGENCY ISSUES</u>.

As discussed, the Locus is served via a single access road. Though the Developer's Consultant contends that there is an additional access road (Sherburne Commons Lane), Ex. 34, at ¶ 30, that lane is listed as a private, non-accepted road serving a residential development, and its connection to Miacomet Road is an unpaved gated pathway that is not regularly used or open to public vehicles. Ex. 41, ¶ 19. Therefore, this secondary route is not reliable for emergency vehicle access and egress. Ex. 41, ¶ 19.[5] Ex. 43, at ¶ 14 ("If those entrances were blocked or that portion of South Shore Road rendered impassible for any number of reasons, including the increased traffic build-up during peak times, the entire [Fire Department] would be unable to access the buildings, which could result in delays in controlling a fire, allowing it to spread within a large residential area"). As the Fire Chief testified, "the essentially single means of egress for 156-units represents a real and present threat to the residents of the project as well as the Island generally." Ex. 43, at ¶ 14.

Once a firetruck turns onto the Locus, the ability to maneuver the property and conduct turns to access a particular building or side of a building is extremely limited. Ex. 41, ¶¶ 17-19. Indeed, both the Developer and the Town's independent consultants evaluated a "roadway swept path analysis" for the Project site plan to ensure that there could be adequate

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[5] Even if the trucks could generally maneuver the site, on-site areas require trucks to encroach and mount the corner curb radii, which can be dangerous to evacuating pedestrians and residents. <u>Id</u>. This would temporarily block the respective parking area while the truck is in place or in motion. Ex. 41, at ¶¶ 17-19.

maneuvering of fire trucks and emergency vehicles throughout the property in the event of an emergency. Ex. 41, at ¶ 17. As the Fire Chief commented during all relevant stages of this hearing, the Developer's design does not comply with the Fire Safety Code, which requires access to all buildings for fire department vehicles via roadways, fire lanes, parking lot lanes, or a combination thereof. Ex. 43, at ¶¶ 8-9. Indeed, the Fire Code defines a proper Fire Department Access Road as "the road or other means developed to allow access and operational setup for fire-fighting and rescue apparatus." Id., citing Sections 18.2.3.4.1.1 and 18.2.3.4.1.2 of NFPA 1, 2015 Edition and 527 CMR 1.00.

Approval of a Fire Department Access road is a matter within the Police Chief's sole discretion. Id. Indeed, the Fire Code includes not only approval of the physical dimensions and locations of a fire access road but also the overall adequacy of fire department access and practical use of fire department access roads to the building. Ex. 43, at ¶ 9. Because of local restrictions on the staffing and resource levels provided to the Nantucket Fire Department, the Nantucket Fire Department is unable to utilize ground ladders to access buildings, as throwing ground ladders requires significant personnel and fire fighters that the Town does not have, unlike other, more populated cities in the Commonwealth. Id. Because of the make-up of Nantucket's fire department, the Department relies "frequently (if not entirely) on the use of an aerial ladder truck to reach multi-story buildings when responding to fires or public safety emergencies." Id.

To utilize an aerial ladder appended to the fire truck for rescue operations in multistory buildings, there must be adequate access so as to allow the Fire Department to position the fire truck appropriately. Ex. 43, at ¶ 10. This requires that the truck be parked close enough to a multistory building to deploy the aerial ladder, but far enough away from the building to

provide the appropriate angle of repose so that the ladder is not too steep to climb or so flat it cannot reach as high as might be necessary. Id. Access is described as a fire apparatus access road adjacent to 50 percent of the exterior perimeter of the building, with the proximal side of the fire lane between 20 and 40 feet from the building. Id. In the Fire Chief's opinion and discretion as the "local authority having jurisdiction" under the Fire Code, the layout of the parking and setbacks did not allow for such access. Id. These comments were provided to the Developer and its consultants, but they were never addressed.[6] As such, the Board reduced the volume of the buildings and the density of units permitted on site to accommodate the profound public safety concerns presented by the inadequate fire department access road and ability to maneuver on site given local conditions on the ground.

Once on site and set up, there are several local conditions which make firefighting on Nantucket particularly difficult and incomparable to other municipalities in which the Developer's fire consultant has expertise, which further supported the Town's imposition of various conditions relative to parking, curb cuts, access and egress, and a reduction in units for the site. First, as the Fire Chief testified and witness, Bruce Perry, confirmed, Nantucket is an island which experiences unusually high winds, especially during the winter season. Ex. 46, at ¶ 38; Ex. 43, at ¶ 14. Southeast and southwest winds make it difficult for fire fighters to come around buildings at the project, and they could not fight fires effectively from behind. Ex. 46,

[6] Specifically, the plans did not take into account the Fire Department's request for minor revisions to the inappropriate site design as to parking, setbacks, and emergency access for the buildings in light of the Fire Department's expressed concerns that the site plans and designs did not take into consideration the local concerns specific to Nantucket, given the limited staffing which requires us to take additional steps for safer and more proficient fire and rescue operations in a time of an emergency. Ex. 43, at ¶ 12. Otherwise put, Nantucket does not have the staffing levels for firefighters to have to manually throw a ground ladder to the building; the use of an aerial truck ladder does not require the Town to expend those limited firefighters on such operations so that we can more quickly and efficiently perform a rescue operation. Id. Therefore, the Fire Department consistently requests of subsidized and non-subsidized multi-story buildings alike that sufficient access be provided for such use of aerial ladder trucks. Id.

at ¶ 38. Fires in higher density and larger buildings also tend to run hotter, develop a larger perimeter, and be harder to fight. Ex. 46, at ¶ 38. Therefore, as the Fire Chief and Bruce Perry echoed without rebuttal, the inability to potentially reach any fire that starts as quickly as possible, particularly when it is windy, due to a single blocked access road and difficulties maneuvering on the overly dense site, is a matter of the urgency for public safety of the residents and surrounding neighbors. Ex. 43, at ¶ 15.

Second, during the public hearing process on the 92-unit plan, the Fire Chief and Bruce Perry, who are certified in construction and fire safety, expressed major concerns with respect to the inadequate water supply to South Shore Road to serve a project of this scale in the event of a fire, as well as the Developer's fire consultant, Jeremy Souza's decision to ignore these and other conditions in his analyses. Ex. 46, at ¶¶ 6-7, 37. Specifically, Nantucket's Fire Department equipment requires access to public water to refill their tanks in the event of a substantial fire, but access to public water sources in the Miacomet area is very limited. Ex. 46, at ¶ 42. If there were concurrent incidents at the nearby school as well as the Locus, available water capacity in the area would be insufficient to fight fires, and a choice regarding public safety and lives would need to be made in the event of concurrent emergencies. Ex. 46, at ¶¶ 37-42.

Third, both the Project Site and the Miacomet neighborhood are dominated by Pitch Pine Scrub Oak habitat and Maritime Shrub Coastal Heathland. Ex. 46, at ¶ 39. This vegetation is some of the most combustible and volatile vegetation in New England. Ex. 46, at ¶ 39. When a fire develops on land containing this type of vegetation, it is very difficult to control, especially during warmer and drier months and when the winds are blowing heavily. Ex. 46, at ¶ 39. Given these circumstances, several experts including the Fire Chief, opined that it is likely that

a fire occurring at a project on the scale the developer proposes would escape the project site to surrounding land and homes and present a significant safety concern to the residents. Ex. 46, at ¶ 38.

Finally, and severely compounding the firefighting challenges already described, the limited vehicular access in this neighborhood makes firefighting especially problematic. Ex. 46, at ¶ 40. South Shore Road is the only north-south vehicular access road for the project site and for that neighborhood, which is a dead-end street. Ex. 46, at ¶ 40. The evacuation route for residents and the access and egress route for firefighters are one and the same, leading to the significantly likely danger that exiting residents may potentially block firefighting personnel and equipment, and vice versa, through the single dead-end access road. Ex. 46, at ¶ 40.

Based on these significant concerns regarding public safety, the Fire Chief and others submitted comments and concerns to be incorporated into the Developer's design plans, including, for example, requests to design the site properly to allow for a mountable path for the apparatus that could get us to the middle of two buildings for each grouping; to address the lack of space and access to deploy the fire apparatus and aerial ladders in light of the parking and setback issues; the inability to position the aerial apparatus far enough away from the building to provide a safe climbing angle for the aerial ladder, a safety issue caused by being within a potential collapse zone; and the fact that placement of the apparatus in the proposed area blocks access to this side of the building for other fire and rescue personnel or equipment. Ex. 43, at ¶ 16.

The Nantucket Fire Department testified that the "proposed design and size of the building in relation to the size of the lot and the location of the site provide inadequate fire

access, creating a serious public safety concern." Ex. 43, at ¶¶ 16-18 (noting that such requirements have been applied equally to subsidized and non-subsidized projects alike in Nantucket). Though the Board reduced the units and density of the site to accommodate such profound local needs, it is the position of the Fire Department that the Developer's most recent design plans for a 156-unit all condominium project retreats to the dangerously concentrated site design that continues to threaten the health and safety of its prospective residents. Ex. 43, at ¶¶ 16-17. As such, it cannot stand.

G. PROCEDURAL POSTURE.

Following the extensive public hearing process on an application for a 92-unit mix of condominium and single family homes, the Developer insisted that the public hearing process be closed before the Board had finished gathering information as to acceptable conditions for the Developer for a project of this magnitude. Indeed, at the public hearings, "[t]he Applicant did not contend that the elimination or reduction in the number of units it intended to offer to 'middle-income' residents would render the building or operation of the housing 'uneconomic' as required under the above-referenced Chapter 40B law" and the Board ultimately found that the Applicant failed to support the proposed 92-unit development under the legal standards applicable to Chapter 40B projects. Ex. 2, at 6. Notwithstanding, due to the Board's efforts for and support of affordable housing in Nantucket, it approved the proposal and conditioned it to meet the significant local concerns presented during the public hearing process by expert independent peer review consultants and Town officials. Id. It rendered a thorough, 77-page decision on June 13, 2019, and the decision was filed with the Town Clerk on June 14, 2019. Ex. 2.

Shortly thereafter, the Developer appealed the decision to the Housing Appeals Committee on the ground that numerous conditions, but particularly the reduction in units from 92 to 60, rendered the project "uneconomic," despite never having raised an issue with project economics to the Board.[7] On July 22 and 23, 2019, respectively, the Nantucket Land Council and a group of 18 residents filed motions to intervene, both of which were denied on July 12, 2020. See Pre-Hearing Order, dated September 24, 2020, at 2. The Board filed a motion to dismiss, as well as a renewed motion to dismiss, both of which were also denied by the Presiding Officer. Id.

On April 7, 2020, the Developer filed a Notice of Project Change with the Committee, having not submitted any requests for a substantial change determination in the first instance by the Board. Id. In that Notice of Project Change, the Developer submitted an entirely new project proposal by eliminating the single-family homes all together and proposing 156-condominium units in 18 large multi-family buildings. Despite never having afforded the Board any opportunity to see this proposal during the public hearing, and despite the fact that the change in building type alone constituted an expressly stated example of a substantial change under the Comprehensive Permit Regulations, requiring remand, the Developer requested a determination that the changes were not "substantial." Despite acknowledging that these changes generally are considered "substantial" under the regulations, requiring a remand

[7] Though the Developer contends that the project is costly because of long delays, such delays are of its own making by forcing the Board to spend the initial months of the public hearing on an unreasonable and poorly designed initial proposal it had no intent to actually proceed with. In any event, the delays and appeals, and the subsequent redesign of the project to submit a proposal that was never evaluated by municipal officials, not only wasted the Board's and Officials' time and money, but also usurps the role of a local body in evaluating local needs and concerns and applying its bylaws and regulations which is wholly incongruous with the comprehensive permit law. See, e.g., Zoning Bd. of Appeals of Lunenburg v. Housing Appeals Comm., 464 Mass. 38, 40 (2013) ("[t]he structure of the [comprehensive permit] act itself reflects a careful balance between leaving to local authorities their well-recognized autonomy generally to establish local zoning requirements while foreclosing municipalities from obstructing the building of affordable housing to persons of low income" (emphasis added).

to the Board, the Presiding Officer issued a "Determination of Insubstantial Change" on or about August 10, 2020, and denied the Board's motion to remand (and renewed Motion for remand) thereafter.

On September 24, 2020, the Prehearing Order was adopted, and thereafter, the parties submitted pre-filed direct testimony. The Developer declined to submit any testimony rebutting the Board's claims and chose not to cross examine any of the Board's nine witnesses, whose testimony stands uncontradicted in this appeal. On March 4 and 5, 2021, the Committee held two days of *de novo* evidentiary hearings before Presiding Officer Lohe and a site visit is scheduled for May 13, 2021.

III. ARGUMENT

A. STANDARD OF REVIEW

Where, as here, the Board has approved a comprehensive permit with conditions, the central issues before the Committee shall be: "first, whether the conditions and/or requirements considered in aggregate make the building or operation of the Project Uneconomic; and … second, if so, whether such conditions and/or requirements are Consistent with Local Needs." 750 CMR 56.07(1)(c). Otherwise put, only if the developer proves that a condition or conditions render the project uneconomic does the burden shift to the Board to prove that the condition or conditions are consistent with Local Needs. Id. "Absent such a showing, the board is not required either under the act or the department's regulations to demonstrate that its conditions are consistent with local needs." Board of Appeals of Woburn v. Hous. Appeals Comm. of Dep't of Hous. & Cmty. Dev., 451 Mass. 581, 590 (2008) (Committee is empowered to "order [the] board to modify or remove ... [a] condition or requirement only when the board's decision makes the building or operation of such housing uneconomic and is not consistent with local needs").

In this matter, the Developer did not prove that each challenged condition, standing alone or in the aggregate, renders its project uneconomic. Rather, the Developer, in pre-filed testimony, claimed that only one condition, the reduction in units, precluded the Developer to make a 15% profit. In any event, the Board conclusively proved that there were several valid Local Concerns supporting the reduction in units from 92 to 60 as well as each condition it carefully imposed, including *inter alia*, the Town's limited sewer and water capacities, density issues, open space and environmental concerns, traffic, and emergency access, each of which was supported by expert testimony that went entirely unrefuted by the Developer. Accordingly, the Committee must uphold the Board's approval with conditions in this matter.

In the alternative, assuming *arguendo* that the Committee finds that the conditions render the Project uneconomic and do not meet local needs, without waiving any appeal rights with respect thereto, the Board would consider, on an ordered remand, whether an adjustment of the number of approved units is needed to establish 15% profitability, and if so, whether a revised permit can be issued thereon which is consistent with local needs.

B. THE NEW, 156-UNIT DESIGN PLAINLY CONSTITUTES A "SUBSTANTIAL CHANGE" TO THE PROJECT AND A NEW PROJECT ALTOGETHER, AND IS NOT PROPERLY BEFORE THE COMMITTEE, NECESSITATING A REMAND TO THE BOARD.

As a preliminary matter, which only underscores the need to remand the project to the Board if the approval decision is not upheld in full, the Board renews and reincorporates its objection to the redesign of this project from the 92-unit plan presented during the public hearing to 156 units and the attendant change in building type pursuant to 760 CMR 56.07(4)(a), which mandates that the Board evaluate all such substantial changes to a project in the first instance to incorporate such changes into its decision before *de novo* review at the Committee may occur.

760 CMR 56.07(4) provides, in pertinent part:

If an Applicant … desires to change aspects of its proposal from its content at the time it made application to the Board, it shall notify the Committee in writing of such changes, and the presiding officer shall determine whether such changes are substantial. If the presiding officer finds that the changes are substantial, he or she shall remand the proposal to the Board for a public hearing…. If the presiding officer finds that the changes are not substantial and that the Applicant has good cause for not originally presenting such details to the Board, the changes shall be permitted if the proposal as so changed meets the requirements of M.G.L. c. 40B, §§ 20 through 23 and 760 CMR 56.00.

The regulation further provides:

> If on appeal to the Committee the Applicant wishes to make changes in its proposal from its content as originally presented to the Board, the Board should have an opportunity to review changes that are substantial.
>
> …
>
> The following matters generally will be substantial changes:
>
> 1. An increase of more than 10% in the height of the building(s);
>
> 2. An increase of more than 10% in the number of housing units proposed;
>
> 3. A reduction in the size of the site of more than 10% in excess of any decrease in the number of housing units proposed;
>
> 4. A change in building type (e.g., garden apartments, townhouses, high-rises); or
>
> 5. A change from one form of housing tenure to another.

760 CMR 56.07(4)(c) (emphasis added). The types of changes generally considered insubstantial are changes to the paint color or style of materials, a change in financing for a developer, or a change in the number of bedrooms that might be offered in a unit. 760 CMR 56.07(4)(d).

As this Committee has acknowledged, a developer cannot be "able to avoid the 'uneconomic' standard of review by holding back a controversial element of the project during the local permitting process, only to present it later as a post-permit change" to the Presiding Officer during an appeal. Hanover Woods, LLC v. Hanover Zoning Board of Appeals, 2014 WL 640695, at *5 (Hous. Appeals Committee, Feb. 10, 2014) (emphasis

added). Such a procedure elucidates the significant "concern … that a developer will, in effect, try to 'game the system'" by making a post-permit change to its project by avoiding local input altogether, contrary to the purposes of the Comprehensive Permit Law. Id. See also Zoning Bd. of Appeals of Lunenburg v. Housing Appeals Comm., 464 Mass. 38, 40 (2013) ("[t]he structure of the act itself reflects a careful balance between leaving to local authorities their well-recognized autonomy generally to establish local zoning requirements while foreclosing municipalities from obstructing the building of affordable housing to persons of low income" (emphasis added)).

Additionally, it places the Board in the unfair and illogical position of defending a decision approving with conditions the 92-unit plans that were before the Board under circumstances where, in essence, the Committee has already supplanted the Board's decision on appeal absent hearing any evidence, rendering it such that the Developer ostensibly need not even prove the "uneconomic" nature of the Board's decision at all. This procedural posture is wholly inconsistent with, and involves an impermissible burden switching, under the comprehensive permit law and its implementing regulations. Indeed, here, where the project was entirely redesigned but was not remanded to the Board to open a public hearing, accommodate the new plans into its decision, and modify the conditions appropriately, the Developer does not have any decision to even challenge on appeal, contrary to the burdens of proof imposed by the regulations.

It is undisputed that the Developer's proposed project change involved "a change in building type which falls squarely within the definition of a "substantial change" requiring remand to the Board, 760 CMR 56.07(4)(c), as it eliminated entirely the stand-alone single-family housing units from the project and replaced them with an all condominium project

proposal. The revisions to the project also changed the building type and number of the multi-unit condominium buildings themselves, replacing 8 smaller scale buildings with 18 larger scale buildings, requiring height waivers, decreasing setbacks to the small scale and residential abutting properties, and eliminating any meaningful open space on the site. The change in building type is particularly notable where the return to a 156-unit proposal from a 92-unit proposal was an increase of more than 10% in the number of housing units proposed to the Board, having added 64 units. See, e.g., Hanover Woods, LLC v. Hanover Zoning Board of Appeals, 2014 WL 640695, at *5 (Hous. Appeals Committee, Feb. 10, 2014) (project change from 152 to 200 units, resulting in addition of 48 units, was "substantial change" under regulations as it increased units by more than 10% and therefore, required remand to board); One Baker Avenue, LLC v. Kingston, No. 07-09, Ruling on Notice of Project Change and Request for Remand, slip op. at 4 (Mass. Housing Appeals Comm. April 5, 2013) (remand is required when proposed changes cumulatively "amount to a totally new or different proposal" than proposal that was before Board).

There is no statutory or other authority for the Presiding Officer to have ignored the plain text of the regulations in order to retain jurisdiction over this matter, and as such, the 156-unit plans in the Notice of Project Change are not properly before this Committee. By decision dated July 31, 2020, the Presiding Officer acknowledged that the removal of single-family homes from the development is a change defined as "substantial" under the governing regulations, but nonetheless decided to retain sole jurisdiction of the matter on the unsubstantiated basis that the Board was likely to deny the new proposal. The decision to ignore the regulations and retain sole jurisdiction over the matter on the wholly unsubstantiated ground that the Board was likely to deny it was unsupported by the record evidence, contrary to the plain terms of the statute and

regulations, and was therefore arbitrary and capricious. Accord Zoning Bd. of Appeals of Hanover v. Hous. Appeals Comm., 90 Mass. App. Ct. 111, 116-117 (2016) ("reviewing judge considers whether the HAC's decision was arbitrary, capricious, lacking substantial evidence, or otherwise contrary to the law, and whether the substantial rights of any party have been prejudiced") (internal quotations and citations omitted). Where the change in this case plainly met the definition of a "substantial change" under the regulations, there was no demonstrated "good cause" for failing to present this design to the Board, and the changes do not meet the local needs requirements of G.L. c. 40B, §§ 20-23 and 760 CMR 56.00, the 156-unit plans are not properly before the Committee.

Were it otherwise, the Committee would sanction a dilatory attempt on the part of the Developer to "game the system" by redesigning its project, post-permit approval, to "avoid the 'uneconomic' standard of review by holding back a controversial element of the project during the local permitting process, only to present it later as a post-permit change." Hanover Woods, LLC, supra at *5. See also Bd. of Appeals of Woburn, 451 Mass. at 590 n.19 (leaving for another day the question of whether "the committee improperly considered the developer's proposals to develop a 540-unit complex [from the approved 300-unit complex] instead of remanding the proposals to the board because the plans constituted a substantial change"). Such a result sanctions an impermissible burden-switching under the regulations, and is contrary to comprehensive permit law and regulations requiring a remand to the Board for such a redesigned project. The only decision properly before this Committee, on which the Developer bears the burden of proof, is the comprehensive permit approving with conditions the 92-unit application that was before the Board.

C. The Developer Did Not Meet Its Burden of Proving that The Challenged Conditions Rendered The Project Uneconomic.

Where the Board has approved a comprehensive permit with conditions, the Developer bears the burden of proving that "the conditions and/or requirements considered in aggregate make the building or operation of the Project Uneconomic." 750 CMR 56.07(1)(c). Demonstrating that the conditions render a project uneconomic is "a necessary element of the developer's *prima facie* case for relief." Board of Appeals of Woburn v. Housing Appeals Comm. of Dep't of Hous. & Cmty. Dev., 451 Mass. 581, 591 (2008), citing G.L. c. 40B, §§ 22, 23. "Absent such a showing, the board is not required either under the act or the department's regulations to demonstrate that its conditions are consistent with local needs." Board of Appeals of Woburn, supra at 590, 593-594 ("The committee's authority to alter or set aside conditions imposed by a local board is … expressly delineated by the act, and it may not be expanded by recasting an approval with conditions as a denial").

A condition or conditions which render a proposed project "Uneconomic" is defined as "any condition brought about by any single factor or combination of factors to the extent that it makes it impossible for ... [the Developer] to proceed and still realize a reasonable return ...." G.L. c. 40B, § 20. The term "reasonable return" is defined as requiring "that profit to the Developer is not more than 20% and not less than 15% of the total development costs." 760 CMR 56.02. Where, as here, "one or more conditions imposed by the Board decrease the total number of units in a Project, if those conditions do not address a valid health, safety, environmental, design, open space or other Local Concern, then the amount as calculated prior to the imposition of such conditions shall be the minimum … return set forth in 760 CMR 56.02" of 15%. 760 CMR 56.02.

Here, in support of its claims that the condition reducing the approved units from 92 to 60, the Developer submitted a *pro forma* financial analysis from Laurie Gould, using numbers provided by the Developer, Mr. Feeley, himself. Ex. 32 and Ex. 32(b). The Board's decision approved a comprehensive permit for forty (40) single-family residences and twenty (20) condominium units consisting of two (2) quadraplex structures containing a total of eight (8) units and six (6) duplex structures containing a total of twelve (12) units. Ex. 32, at ¶ 34; Ex. 2. The Developer's *pro forma* analysis relied on revenue from the sale of single family homes in a comparable, newly-constructed development for the Beach Plum Village Project. Ex. 32, at ¶ 35. While the Developer used comparable revenues of $1,695,000 to $1,840,000 price range, he subjectively reduced the values because those units were not subjected to the conditions limiting spas or pools, were not prohibited from being used for home occupations,[8] and were not prohibited from converting non-livable space to livable space. Ex. 32, at ¶ 35. Based on these numbers, the consultant calculated that the total revenue from the sale of the single-family homes would be $54,249,335. Ex. 32, at ¶ 38.

Though the Developer or Ms. Gould do not indicate comparable sales prices for the condominium units on which they relied, Ms. Gould projected that the total revenue from the sale of condominium units to be $15,262,378. Ex. 32, at ¶ 39.

In total, Ms. Gould estimated that the total projected revenues for 60 units would be $69,511,712. Ex. 32, at ¶ 40. Because of the projected costs of $80,092,149, which are also grossly overestimated, unverifiable, and unsupported, as pointed out by the Board's pro forma

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[8] Home occupations is defined in the Zoning Bylaws as "an occupation, trade, profession, or business activity conducted as an accessory use … within a dwelling unit" with "workers who [are] not an occupant of the dwelling," "storage" of work materials, and generating "average daily traffic," but does not include professionals who work from home or work remotely with no attendant traffic increase, trade usage of the home, or visiting customers. Ex. 15, at 13.

consultant on appeal, Brett Pelletier, at Ex. 42, ¶¶ 9-14, Ms. Gould calculated that to make the project "economic," the Developer would need additional revenue of $22,372,208. Ex. 32, at ¶¶ 73-78.

As Mr. Pelletier pointed out, Mr. Feeley's testimony which formed the basis of Ms. Gould's *pro forma* "makes declaratory statements of the unit pricing under various scenarios with no verifiable market data or comparable sales analysis other than a single reference to the Beach Plum Village comparable prices reported between $1,695,000 to $1,840,000 for similarly sized cottages." Ex. 42, ¶ 5. "No other data or analysis was presented to support the pricing conclusions for the condominium units." Id. Without sufficient comparable sales analysis, "the data presented is inadequate to support the conclusions on unit pricing." Id.

The Board, therefore, obtained and introduced a Certified List of Recent Comparable Sales in the area, which information was publically and readily available to the Developer to conduct his analysis; indeed, the Developer corrected and confirmed several of the price ranges. Ex. 47. In fact, other Nantucket Chapter 40B developments such as Beach Plum Village have been financially viable on a much smaller scale with units at the same or substantially similar price points as this project. Ex. 46. Three of those sales from September of 2020, the relevant and most recent dates at the beginning of this hearing, for comparable single-family, 3- and 4- bedroom units were sold for $2,225,000, $1,849,000, and $2,185,000 – each of which were well over the $1,695,000 ("$1.7 million multiplier") comparable that the Developer used from sales in April of 2020. Ex. 47; Tr. II-52. At the hearing, the Developer conceded that those comparable "are significantly higher … over $2 million" per unit, than the comparable multipliers that he used to calculate projected costs. Tr. II-44, 52. The Developer contends that some $400,000 can be subjectively removed from his comparable estimates

because the Beach Plum units did not contain a prohibition on spas or limitation on home occupations and have garages. Tr. II-46.[9]

The Developer's conclusions on market rate pricing levels are important and have a "direct impact on the measures of Return on Total Cost (ROTC) because they impact the revenue potential for the project, which appears to be understated." Ex. 42, ¶ 8. If the Developer had simply used an average of the most recently comparable sales as opposed to selectively picking the lowest end of the range for his $1.7 million multiplier for 29 units, Mr. Feeley would get a more comparable and accurate multiplier of $2,106,086 for 30 units. Tr. II-45-46; Ex. 47. As such, Mr. Feeley conceded that in using this averaged multiplier for the 30 approved market-rate units, he would make an additional $11,432,580 in sales. Tr. II-46. When combined with the inaccurate numbers relative to sewer construction, yielding an additional $4,826,454 in savings, the Developer has underestimated his profits by $16,259,034. Tr. II-46. As Mr. Feeley explicitly agreed, "that leaves [Mr. Feeley] on a delta for [his] 15% profitability of only approximately $6 million."

While the Presiding Officer openly expressed doubt as to the relevance of the profitability of a 92-unit project, the 92-unit application is what was pending before the Board when it approved, with reduced conditions, a 60-unit project. Notably, the slight reduction to a 60-unit proposal was based upon the Developer's own 92-unit proposal submitted to the Board. It stands to reason that "in most cases it is logical to assume that the developer would not propose an uneconomic development." Avalon Cohasset, Inc. v. Cohasset Zoning Board of Appeals, 2007 WL 2789502, at *7 (Hous. Appeals Comm. 2007). At best, then, the Committee

[9] By this reasoning, the Committee could simply order the Board to remove the condition prohibiting spas, then, and the Developer would accept the highest-end projected sales, yielding him a much more significant revenue.

could not reasonably order a modified condition of anything greater than 92-units. In fact, the Committee has no authority to strike the Board's condition requiring 60 units and modify it to allow 156 units where a 92-unit condition, by the Developer's own proposal, would render the project economic. G.L. c. 40B, § 23 (statute allows Committee to "order such board to modify or remove any such condition or requirement so as to make the proposal no longer uneconomic" (emphasis added)); Mill Valley Limited Partnership v. Board of Appeals of the Town of Amherst, 1988 WL 1517319, at *11 (Hous. Appeals Comm. 1988) (modifying condition to allow additional units so as to make project economic, but not total number of units requested by Developer or pending before Board in initial application).

In fact, at the hearing, the Board established that a small number of units could be added to 60 approved units in order to make up the approximate $6 million allegedly needed to make the project "no longer uneconomic." Id. Thus, the Committee has no authority to issue an order modifying the condition to allow for a 156-unit project, or any condition modifying the 60 approved units beyond anything more than may be needed to make up the $6 million needed under the Developer's *pro forma* analysis, after the requisite adjustments noted above. Moreover, such authority is dependent on the assumption that the reduction in units was also inconsistent with local needs, which it is not. As such, the only relief the Developer may lawfully request is to modify the 60-unit condition to allow for the slightly higher number of units needed to make the project "no longer uneconomic." G.L. c. 40B, § 23. But, because the Board proved that the reduction in units was supported by various valid local concerns, as described below, such a condition may not be modified in any event.

The Supreme Judicial Court's holding in Board of Appeals of Woburn v. Hous. Appeals Comm., 451 Mass. 581 (2008) is illustrative in this regard. There, the developer had applied for

a comprehensive permit to build 640 units on a 75-acre parcel of land in Woburn. Id. at 590. The Zoning Board of Appeals had approved the project with conditions, one of which was to reduce the project to 300 units, a reduction of over 50%, without any justification. Id. at 590. On appeal, the Housing Appeals Committee ordered the number of units increased to 420. By increasing the units to 420 where the Developer did not prove the reduced unit project to be uneconomic, the Court held that "the committee brushed aside the language of the governing statute and the regulations …, and, in so doing, exceeded its authority." Id. (emphasis added).

Specifically, the Supreme Judicial Court has explained that the Committee does not have "unbridled discretion to consider any condition limiting the size of a proposal as the functional equivalent of a denial and, accordingly, to subject the board's decision to a more exacting review." Board of Appeals of Woburn, 451 Mass. at 594. To do so would run afoul of the Legislature's "careful balance between leaving to local authorities their well-recognized autonomy to establish local zoning requirements." Id. at 594 n.25 (rejecting argument that local boards do not have authority to limit the number of units in a proposed development as a condition of approval as "plainly incorrect"). See also Cooperative Alliance of Mass. v. Taunton Zoning Bd. of Appeals, Housing Appeals Committee, No. 90–05, at 8 n.12 (April 2, 1992) ("[T]he legislative intent of the entire statute is to permit affordable housing without undue intrusion on local prerogatives. Thus, if the condition does not make the project uneconomic, it should be upheld even if the town cannot prove that it is consistent with local needs.").

Similarly here, the evidence establishes that the Developer needs, at most, an adjustment of the number of approved units so as to make up the $6 million needed to make the project "no longer uneconomic." G.L. c. 40B, § 23. This adjustment would be somewhere below the 92

units proposed in the underlying public hearing, and again, would also be dependent on a ruling that the condition limiting the number of approved units to 60 was inconsistent with local needs.

ii. Sewer Conditions.

The Developer also contends that the conditions requiring it to connect to the new gravity sewer line rather than the existing sewer lines have rendered the Project uneconomic. Ms. Gould asserts that Conditions 54-64 of the Board's decision, requiring the Developer to construct and connect a separate gravity sewer line with a length of approximately 5,500 linear feet, imposes additional costs in the amount of $5,719,746. Ex. 31, at ¶ 5. This number was provided to her by the Developer, who also avers that the sewer conditions impose "additional costs in the amount of $5,719,746," without any evidence or supporting documentation of such estimates in Nantucket. Ex. 31, at ¶ 36. The Developer also testified "that the estimated cost for sewer utilities for the [156-unit] Project will be $1,746,708," Ex. 31, at ¶ 93, but that the "estimated costs for sewer utilities for the [60-unit] Project will be $6,326,454." Ex. 31, at ¶ 146. As noted above, however, the Developer's evidence on sewer costs was definitively refuted and negated by the Board's expert testimony, which the Developer did not attempt to rebut, either through pre-filed rebuttal testimony or through cross-examination of the Board's expert at the administrative adjudicatory appeal hearing.

Indeed, the unrebutted Board testimony details the concrete bids prices already obtained for the project such that the total cost for the installation of the gravity sewer and pump station is $3,600,000, which includes $2,100,000 for the gravity sewer and $1,500,000 for the pump station, force main, and connections. Ex. 26, at ¶¶ 22-24. In addition, the record shows that the Town already appropriated $1,500,000 in June of 2020 for the South Shore Gravity Sewer, which costs will not be borne by the Developer. Id. at ¶ 32. The Town

will also appropriate an additional $600,000 at the 2021 Annual Town Meeting for the gravity line. Tr. I-155.

Therefore, to the extent that the Developer must pay any fair share allocation of the construction price to connect to the gravity sewer main, those costs are reduced by at least $1.5 million already paid by the Town for the project costs, with additional reductions in the works. Id. at ¶ 32; Tr. I-155. That leaves the remaining costs for the new sewer line at $2,100,000, at most. Once the $600,000 is appropriated, as scheduled, that will leave the Developer to contribute a total of $1,500,000 for the pump station, force main, and force main connection at the Surfside WWTF. Ex. 26. Thus, the Developer has underestimated his profit margin by an additional $4,826,454 for this one condition alone. Tr. II-46; Tr. I-157; Ex. 26, at ¶¶ 33, 39. No matter how the Committee decides to credit this amount in favor of the Board when adjusting the Developer's pro forma analysis, it plainly establishes, at the least, that the Developer has failed to meet its burden of proof that the Board's sewer conditions render the project uneconomic. These conditions must be affirmed both factually and as a matter of law.

As this Committee has held, "[d]etermining whether and how much developers should pay for municipal services under the Comprehensive Permit Law is frequently difficult," but where the provision of municipal sewer services to a new development "requires extension of a sewer main, since its inception, the Comprehensive Permit Law has authorized a developer to do so at its own expense." Avalon Cohasset, Inc., supra at *8 (emphasis added); CMA, Inc. v. Westborough, No. 89-25, slip op. at 36 (Mass. Housing Appeals Committee Jun. 25, 1992) (fair contribution to the cost of infrastructure may be required in most cases). Here, the Developer must pay its fair share of the costs of new infrastructure to serve this development, in light of the

inability to connect to existing sewer systems and WWTFs without risking severe public health and safety risks and water contamination in the area due to a catastrophic sewer failure, as occurred recently in 2018, bought about by extreme weather conditions and structural capacity issues insufficient accommodate new flow from a development of this size. Id. at *8-9 (upholding fees of approximately $1.8 million for sewer connections and sewer expansion due to previously-existing capacity limitations because such fees were reasonable and did not render project uneconomic).

D. The Board proved that each Condition imposed, including the reduction in units, Was Supported By a Valid Health, Safety, Environmental, Design, Open space, and other Local Concerns, and The Board's Decision, Therefore, Must Be Affirmed In Full.

"Decisions or conditions and requirements imposed by a board of appeals that are consistent with local needs shall not be vacated, modified or removed by the committee notwithstanding that such decisions or conditions and requirements have the effect of making the applicant's proposal uneconomic." G.L. c. 40B, § 23. Decisions or conditions are "considered consistent with local needs if they are reasonable in view of the regional need for low and moderate housing … and the need to protect the health or safety of the occupants …, to promote better site and building design in relation to the surroundings, or to preserve open spaces, and if such requirements and regulations are applied as equally as possible to both subsidized and unsubsidized housing." G.L. c. 40B, § 20. In this case, each of the Board's carefully imposed conditions, particularly including the reduction in units, was consistent with local needs and addressed several matters of local concern that outweigh the regional need for housing. As such, the Board's decision, Ex. 2, must be affirmed.

i. Sewer Capacity

In Avalon Cohasset, supra, the Committee upheld conditions requiring the Developer to construct a new sewer main line and pay the costs of connecting thereto in the amount of approximately $1.8 million. Though it did not need to reach the issue of whether the local concerns outweighed the regional need for affordable housing, the Committee observed that the Board raised "significant local concerns with regard to sewer capacity" that appeared to justify such conditions. Id.

Similarly here, the Developer has not demonstrated that the sewer connection conditions render the project uneconomic, but in any event, the Board has proved that its capacity limitations and recent system failures, and the attendant public health and safety concerns, significantly outweigh the need for affordable housing, rendering the conditions and fees consistent with local needs. Accord Avalon Cohasset, supra. Indeed, the Board's unrefuted testimony explains that, due to hydraulic capacity limitations and structural pipe condition concerns, connection of additional pump stations to the existing 12-, 16-, or 20- inch force mains is not possible, despite being proposed by the Developer. Ex. 39, at ¶ 15. For example, in the winter of 2018, due to extreme weather conditions, the 16-inch force main suffered a catastrophic failure and is no longer in operation except in the event of an emergency. Ex. 39, at ¶ 16; Ex. 40, at ¶ 5. This disaster created significant operational issues and has caused the Sewer Department to reevaluate all operational considerations for new developments in Nantucket, particularly those with large capacity flow potentials. Ex. 40, at ¶ 5. Moreover, the 12- and 20-inch pipes cannot accommodate a development of this size. Id.

Specifically, in Mr. Sheahan's expert opinion, who is intimately familiar with the planning needs and sewer capacities of the Town, the existing pump stations in the area and the Town's force main system could not serve a new development of this size. Ex. 39, at ¶¶

6, 7-9, 14-15. While the proposed development properties are part of the service area to the WWTF, the density of the proposed development creates much higher wastewater flows than the current zoning would allow. Id. at ¶ 21(e). Based on the future needs areas and the sewer system extensions recommended in the 2014 Comprehensive Wastewater Management Plan (CWMP), Ex. 27(a), as well as the future sewer routing analysis conducted as part of the Sewer Master Plan, Ex. 26, the installation of a gravity sewer along South Shore Road with a new pump station installed at the Surfside WWTF is the only option to provide sewer service to the Miacomet Needs Area, as well as the adjacent properties along South Shore Road, which includes the Surfside Crossing properties. Ex. 39, at ¶ 14. This option avoids impacting the operations of the Town's force main system and allows the Town to eliminate existing pump stations along South Shore Road, as well as future pump stations that would be required to serve properties within the Miacomet Needs Area if the gravity sewer is not built. Id.

Local concerns were also presented about private drinking water wells located in the immediate vicinity of the Property and the protection of an existing sewer line running beneath the project site. Ex. 2, at 5. In the event of a rupture of the existing sewer line, the Town's Sewer Department estimates that approximately 30,000 to 60,000 gallons of wastewater would be released before the line could be shut down. Ex. 2, at 5.

As such, it is not unreasonable to accommodate these local conditions by requiring the Developer to pay its fair share of the costs to construct and connect to a new gravity force main, and conforms to the documented plans on the Town's Sewer Master Plan. See, e.g., Avalon Cohasset, supra at *8-9.

ii. Protection of the Natural Environment

The Developer next challenges several of the Board's conditions and waiver denials related to environmental concerns. Specifically, the Developer challenges four conditions relating to site clearing and tree preservation, as follows:

> 1) requirement that Developer "fund an independent Environmental Monitor during construction," Ex. 2 (Condition 69); Initial Pleading, ¶ 92;
>
> 2) the prohibition on any site clearing until the pending administrative appeal of the NHESP determination for the Site is fully and finally resolved, including exhaustion of court appeals, Ex. 2 (Condition 75); Initial Pleading ¶ 98;
>
> 3) the requirement that the Developer minimize any removal of trees, shrubs, and natural groundcover on the site to preserve the natural environment to the highest degree possible and prior to tree clearing, having a representative of the Board identify trees that need to be protected and preserved during construction," Ex. 2 (Condition 97(i)); Initial Pleading ¶ 128; and,
>
> 4) the prohibition on clear cutting of the Site so as to preserve all natural areas, except as necessary to construct upon a particular lot, or section of Property infrastructure within the bounds thereof, if permitted to occur contemporaneously with the construction. Ex. 2 (Condition 139); Initial Pleading ¶ 191.

The Developer also contests the Board's refusal to grant four waivers from the Town's local environmental bylaws, rules, and regulations, including: 1) Nantucket Code Chapter 132 Trees and Shrubs – granted in part as specified in the Comprehensive Permit Decision; 2) Nantucket Subdivision Rules and Regulations 2.06b(14) – denied waiver for location and size of trees to be preserved; 3) Nantucket Subdivision Rules and Regulations 3.05 – denied waiver for protection of natural features; 4)Nantucket Subdivision Rules and Regulations 4.16 – denied waiver of requirement to plant new trees. Ex. 2.

In accordance with the Pre-Hearing Order dated September 24, 2020, the Developer bears the burden to show that these conditions and waiver denials render the project uneconomic. At the hearing, the Developer failed to carry that burden. As an initial matter, the Developer failed

and refused to substantiate its waiver requests to the Board, in violation of Section 5.04 of the Board's Comprehensive Permit Rules and Regulations, which provides, in pertinent part:

> The waiver requests were without substantive explanation for the need for each waiver and no "uneconomic" justification was provided by the Applicant within the waiver requests or at any time during the public hearing process.

Ex. 2, at 10. As such, the Developer has waived any claim with respect to these conditions and waiver denials based on project economics. Indeed, the Developer's Initial Pleading contains only a passing reference to waivers, the Pre-Hearing Order fails to specify which waiver denials the Developer even challenges, and there was no testimony whatsoever at the hearing to suggest that any of the environmental conditions or waiver denials rendered the project uneconomic. See Initial Pleading, ¶ 207; Pre-Hearing Order, at 4.

Rather, the Developer's sole witness on environmental issues was a consultant named Brian Madden of LEC Environmental Consultants, Inc. At the hearing, Mr. Madden confirmed that the Developer's plan called for over 95% of the 13.56 acre site Surfside project site to be clear-cut, removing all trees from 12.27 acres and preserving just 1.29 acres in a 25-foot perimeter buffer. Tr. II, 66, 82. Mr. Madden also confirmed that pitch pine trees currently dominate the undeveloped land, and acknowledged that such trees are used as maternity roosts for Northern Long Eared Bats, a protected species under the Massachusetts Endangered Species Act ("MESA"). Id. at 67. Despite plans to denude over 95% of the property, Mr. Madden claimed that the project would not adversely affect any of the endangered species on site, including the bats, because no pitch pine trees would be cut down during maternity roost season in June and July. Id. at 74-75, 95. But he offered no testimony about where the bats might roost during the other ten months of the year, or in June and July once the trees are clear cut. Nor did he offer any expertise or solutions as to or how the other endangered species on the Locus,

including the Coastal Heathland Cutworm, will survive if the project were constructed as proposed.

Instead, Mr. Madden conceded that the protected species are not expected to survive on the site once the Surfside project has been developed as planned. Id. 82-83. The state agency that administers MESA, the Natural Heritage and Endangered Species Program ("NHESP"), has determined that the project would result in a "take" of a protected moth, the Coastal Heathland Cutworm. Ex. 35, at ¶¶ 12-14; Ex. 35D. Under the fiction that such a "take" of an endangered species can be mitigated, Mr. Madden testified that a separate 20-acre parcel of pitch pine habitat would be protected elsewhere, but has identified no such site on Nantucket that has such habitat, and suggested that the mitigation may not even be on Nantucket. Tr. II, 67. He offered no explanation how the moths or bats would be relocated from Nantucket to the Connecticut River Valley, a journey of 150-200 miles, or any proof that they could survive in such a region. Id. 80; Ex. 35, at ¶¶ 9-13. The Cutworm moths were field surveyed by a wildlife biologist, only after which point were they even located, but the Developer denied and continues to deny access to a local wildlife biologist and expert in the Northern Long Eared Bat, to conduct a similar survey. Tr. II-73, 83, 98. _Unlike the moths, that particular species of bat has a special affinity for Nantucket where it has been largely immune from a disease called White-Nose Syndrome that has decimated the population on the mainland, a phenomenon that is in dire need of further study to protect the species. Ex. 44, at ¶ 12 (Pre-filed Testimony of Emily Molden).

Mr. Madden's testimony was also refuted by the Board's wildlife ecologist, Emily Molden, and Ms. Danielle O'Dell, who studies the bats in this region. Id. The Developer chose not to cross-examine Ms. Molden or Ms. O'Dell at the hearing or submit any rebuttal testimony, so their pre-filed testimony stands unrebutted. According to Ms. Molden, the project site

supports not only the Cutworm moth and Northern Long Eared Bat, but also two protected species of vascular plants – the New England Blazing Start and the Sandplain Blue-eyed Grass. Ex. 44, at ¶ 12. She testified, based on her own extensive research on Nantucket Island dating back sixteen years, that these endangered species currently occupy the project site because they also inhabit similar habitats on the island. Id. Leaving a thin perimeter buffer results in habitat fragmentation and does nothing to protect endangered species, which need contiguous swaths of pitch pine forest like the Surfside site and other adjacent undeveloped land. Ex. 44, ¶¶ 10-11.

The evidence presented at the hearing proved the Board's tree preservation conditions and related waiver denials under the Nantucket local rules and regulations were entirely justified and reasonably tailored to protect local concerns under Nantucket's rules and regulations. Those moderate provisions require tree removal to be minimized so that the natural environment be preserved "to the highest degree possible." Ex. 2, Condition 97(i)). To achieve that aim, the comprehensive permit calls for trees over a certain diameter to be flagged, to identify trees that can be saved during construction, and to retain an environmental monitor during construction to ensure those trees are properly preserved. Id. (Conditions 69, 97i, and 139). Similarly, denying waivers of a handful of local rules, the Board requires Developer to mark the location and size of trees to be preserved, and where infeasible to do so, to plant new trees. See Nantucket Subdiv. R. & R. 2.06(b), 3.05 & 4.16); Ex. 2

Nothing in Mr. Madden's testimony suggests that the Developer cannot comply with these modest conditions. He offered no testimony whatsoever on flagging large girth trees, or the cost of an environmental monitor during construction. To the contrary, Mr. Madden's testimony actually underscored the local justification for the Board's position; that is, that pitch pine trees that dominate the site are those in which the protected Northern Long Eared Bats

roost. Tr. II, 67, 23-24. Given that undisputed evidence, the Board's desire to identify such trees on the site, and take appropriate steps to preserve those trees, was a measured effort to address the local concerns protected under Nantucket's rules and regulations, and those which are very specific to Nantucket and to this project site.

Ms. Molden's unimpeached testimony only bolsters this conclusion. She confirmed based on over a decade and a half researching wildlife on Nantucket that "these endangered species that inhabit the surrounding area are also undoubtedly on the Project Site." Ex. 44, ¶ 12. Because the Developer refused to conduct a field survey for the bats, contrary to the requirements contained in the Town's Open Space the Board imposed a condition in the permit that old growth trees where bats roost be identified and protected during construction: "A representative or agent of the Board shall have the opportunity to identify trees that need to be protected and preserved during construction." Ex. 2 (Condition 97(i)).

Eliminating the Board's few tree-preservation conditions would condemn over twelve acres of protected species habitat to be clear-cut without even finding out what exists on the site to save what might be preserved. Such wholesale destruction of protected species habitat in the name of "affordable housing" was never the intent of Chapter 40B. Doing so in this case would not only be unnecessary to construct the project, it is also wholly unjustified under the law.

Moreover, the Board's imposition of these conditions, as well as a conditions reducing units and reducing the overall footprint of the Development, were "carefully sited" to protect the natural environment and wildlife habitat, consistent with local needs. Although the Presiding Officer expressed some doubt as to whether endangered species issues were relevant or properly before the Committee, it remains the case that the protection of the natural habitat for endangered species is a listed DHCD regulatory interest and is a valid local

concern. Indeed, as explicitly outlined in the Town's Open Space Plan after thorough study, development on open and undisturbed parcels such as this one "should be avoided" and, development may be permitted only for three limited purposes, including affordable housing, but only if it is "carefully sited to protect rare habitats and endangered species." Tr. II-90; Ex. 25, at 135 ("Development on open space parcels should be avoided, but development that does occur, for purposes such as affordable housing, wind energy, or wastewater treatment, should be carefully sited to protect rare habitats and endangered species"). The Plan also directs that "wildlife surveys should be conducted" on open space parcels where development is proposed, which efforts may be "spearheaded by the town, a non-profit land conservation organization [like NLC], or a team." Ex. 25, at 135. Moreover, the Town's planning documents provide that the "expansion of rare sandplain grassland and coastal heathland should be encouraged through active land management and restoration wherever possible [as] [t]hese rare habitat types are critical to many state and federally-listed species." Ex. 25, at 135. Finally, the Board must "work with private land owners to protect wildlife habitat on their properties … as well as their adjoining parcels." Ex. 25, at 135.

In accordance with these local needs, 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 decisions are resolved, to protect the natural environment and the rare and endangered species that rely on that environment. Ex. 2; Ex. 44, at ¶¶ 12-13. Though the Developer has appealed to remove several modest conditions from the comprehensive permit, the Developer did not show that they are uneconomic and the Board demonstrated that they are consistent with local needs. Ex. 2; Ex. 44, at ¶ 13. But any modification of these conditions would significantly affect the habitat that supports protected

species, including trees on the Project Site for the NLEB, and would therefore be inconsistent with local needs when balanced against the need for affordable housing in this area. Ex. 44, at ¶ 13.

Additionally, the Board imposed Conditions 10 through 17, and others, to reduce the overall footprint of the development to avoid these impacts to the natural environment and rare and endangered species, such as by reducing the amount of clear cutting that needs to be done, reducing the density of the site so that more open space and natural environmental conditions may be preserved, and reducing the lighting and noise that would disturb the NLEB in the area. Indeed, even the Developer's wildlife consultant testified that "it's intuitive that a smaller project would result in less disturbance" to the endangered species on site and in the surrounding area, such as by reducing the development footprint by conditioning the site to allow fewer units. Tr. II-87-89, 90.

Where the Developer did not demonstrate that such conditions are uneconomic, and where the Board demonstrated that they were imposed in accordance with local requirements and are "Consistent With Local Needs," as that term is defined at G.L. c. 40B, § 20, such conditions must be upheld in full.

iii. Open Space and Recreation

The Developer also challenges various conditions relative to the reduction of the building footprint for single-family homes and condominiums, the landscaping requirements, limits to ground, and limits to impervious area subject to conditions for 60 units, among several others not even mentioned in the pre-filed or hearing testimony relative to project economics. See generally Pre-Hearing Order (noting challenges to Conditions 14, 17, 32, 38, and 83). Because there was no meaningful open space or outdoor recreational areas for the residents, as is required

for developments of this size on Nantucket, the Board conditioned the approval on a reduction in units and imposed landscaping and other impervious area requirements necessary to preserve open space on the site and reduce the overall intensity and density of the proposal.

Open space is defined as "land areas, including parks, parkland, and other areas which contain no major structures and are reserved for outdoor recreational, conservation, scenic, or other similar use." 760 CMR 56.02. As this Committee has previously held, the "[e]valuation of open space should involve both review of [1] relatively objective performance standards and [2] more subjective consideration of whether the extent of lot coverage has compromised the design to an unacceptable degree." Dennis Housing Corporation v. Dennis Board of Appeals, 2002 WL 34082291, at *3 (Mass. Housing Appeals Committee, 2002) (emphasis added). Although the Developer did not even demonstrate compliance with any objective performance standards relative to open space, recreation, intensity, or conservation interests, this Committee has observed on several occasions that, "[w]hat is ultimately more important, however, than technical compliance with standard open space requirements is whether the particular design before us responds appropriately to the site itself and the surrounding area." Dennis Housing Corporation, supra, 2002 WL 34082291, at *2; CMA, Inc. v. Westborough, supra, at 26-2 (same); Lever Development, LLC v. West Boylston Zoning Board of Appeals, 2007 MA. HAC. 04-10, 14, 2007 WL 4925109, at *9 (same). "From this perspective, two of the most important attributes of open space are that it creates an agreeable visual environment and that it provides recreational opportunities." Dennis Housing Corp., supra.

In this case, the Developer had proposed an intensely overbuilt and unsound design at 156-units, which is out of scale for what works sensibly on this site within this surrounding area. Ex. 45. The excessive number of units was determined to overcrowd the site in a manner that

will adversely affect the quality of life of future residents who will be living there full-time. Id. As such, the number of units was reduced so as to accommodate greater green space and open space needs. Ex. 45 at ¶ 18. Accord Dennis Housing Corp., Housing Appeals Committee No. 01-02, at *2 ("[a] much more difficult question, however, is whether the design of this housing is acceptable in terms of the intensity of the use on the site, that is, whether there is sufficient open space on the site or whether lot coverage by the building and unusable features is excessive"); HD/MW Randolf Avenue, LLC v. Milton Board of Appeals, 2018 WL 6804199, at *14 (Mass. Housing Appeals Committee, 2018) ("Intensity involves the functioning of the housing on the particular site, which includes questions such as the adequacy of open space and recreational space, … and related factors which look to whether the number of units are too large not for the surrounding area but for the particular parcel of land").

After working with several independent architects and project consultants to accommodate the needs of the surrounding area and develop an appropriately sized development for this site, the Developer submitted a revised proposal for 92-unit project, which was must more realistic in terms of site capacity and meaningful open spaced. Id. Even then, however, there is no "meaningful green space for active or passive recreation … that would allow children and families to have a pick-up game of football or soccer on an adequately sized open field." Id. at ¶ 12. Surely on a site spanning over 13 acres, some field or lawn space is possible without undue hardship to the Developer's profit margin. In any event, the reduction in units and conditions to facilitate less intensity on the site and greater preservation of open space and natural areas for residents to actively and passively recreate, socialize, and enjoy the space was reasonable for the site and was consistent with local requirements concerning open space planning.

In addition to meeting other needs, the reduction in units was also designed to facilitate these local concerns relative to density, intensity, the lack of open space, and creating a more agreeable visual environment from a planning perspective. Accord CMA, Inc., supra at *11 (appropriate density "is seductively easy to quantify, and yet quantification does not provide an objective answer to the question of what density is [subjectively] appropriate"). In this regard, the reduced units was appropriate in terms of the intensity of the use on the site. It cannot be shown that the Board applied its local rules and regulations arbitrarily with respect to conditioning the site so as to ensure it is not overburdened in terms of density, intensity, and open space needs, as an as-of-right project under the zoning bylaws for the13.5 acre lot at issue, the developer as of right would be allowed only 6 building lots with 2 dwellings each, and one lot for the access road. Ex. 41, at ¶ 33. Here, however, the Board approved 30 single family dwellings and 6 multi-family condominium buildings, well in excess of what would be permitted under the zoning bylaws, and imposed general landscaping and other surface area requirements necessary to preserve some meaningful open space for the residents.

iv. Traffic and Safety.

The Board next contends that the traffic mitigation fee of $200,000, along with conditions regarding parking and roadway sureties that are notably common conditions to attach to subsidized and unsubsidized developments of this size, do not render the project uneconomic. The traffic mitigation fee and like conditions were not only "volunteered [by the Developer] to offset traffic improvements which its own experts concluded were necessitated by the project," Ex. 46, at ¶ 19; Ex. 41, at ¶¶ 12-13, but were designed specifically to mitigate the Level of Service for the study intersections of Surfside Road at South Shore Road and Fairgrounds Road

and Surfside Road at Miacomet Road, which are currently have or are projected to have a level of service rating of "F." Ex. 41, at ¶ 11; Ex. 46, at ¶ 41.

Specifically, the independent consultants determined that the project-generated traffic would deteriorate LOS to "deficient LOS F" conditions at several movements at South Shore Road, Fairgrounds Road, and Surfside Road, and would exacerbate LOS F conditions at the intersection of Surfside Road at Miacomet Road. Ex. 41, at ¶ 11. Moreover, a preliminary sensitivity LOS analysis conducted for a project with 156 condominium units for the purpose of this hearing, despite such a Project not being properly before the Committee, shows the operating conditions at these two study intersections would be similar. Id. As BETA noted, however, a full traffic impact analysis study would need to be conducted to fully evaluate the traffic impacts of the 156-condo unit scenario on the surrounding roadway network. Id.

Notably, the Developer's traffic impact and access study cannot be credited, demonstrating the further need for a remand to the Board to independently evaluate the assertions and impose appropriate traffic conditions consistent with local concerns for the site. See Ex. 41, at ¶¶ 9-13. For example, the Developer's paid consultants measured travel speeds along South Shore Road of approximately 38 miles per hour in January 2018, which is much higher than the posted 30 mile per hour speed limit and does not represent actual conditions leading to traffic jams at the intersections. Ex. 41, at ¶ 9. Additionally, as Mr. Ho pointed out in his pre-filed testimony, the Developer's consultants used lower peak hour traffic volumes; used overall intersection Peak Hour Factors as opposed to Peak Hour Factors by intersection approach; and a five-year analysis horizon as opposed to a seven-year horizon. Ex. 41, at ¶ 11. The Developer's methodology in this regard does not comply with the MassDOT Traffic Impact Assessment Guidelines and is not consistent with historical traffic impact studies performed for

other sites within the Town. Ex. 41, at ¶ 11. Therefore, it does not meet industry or local standards, and cannot be credited. Id.

The mitigative contributions for off-site intersections were calculated by identifying costs and applying the proportional traffic impacts of Surfside Crossing to arrive at a cost basis that is proportional to the Project impacts." Ex. 41, at ¶ 13. In a letter from the Town and County of Nantucket Select Board County Commissioners dated November 20, 2018, a planning level cost of intersection reconfiguration was estimated to be $2,400,000 per intersection. Ex. 41, at ¶ 13. As such, the Board imposed a traffic mitigation fee of $200,000. Ex. 41, at ¶ 13. "The increase in volume as a result of the Project, coupled with the existing crash history, supports the fair share mitigative contributions for this intersection." Ex. 41, at ¶ 15. Not only does the condition not render the Project uneconomic, but it is consistent with local needs to offset the safety issues caused by the projected increases in traffic volumes at and near the Locus for such a large development.

In sum, the imposition of each carefully crafted condition, particularly the reduction in units, was designed to serve several local needs and was entirely reasonable in light of the record evidence in this case. G.L. c. 40B, § 20. Where the Board's decision is consistent with local needs, the conditions cannot be ordered stricken or modified by this Committee.

E. THE BOARD'S DECISION WAS CONSISTENT WITH LOCAL NEEDS, AND THE CONDITIONS IMPOSED WERE REASONABLE AND OUTWEIGH THE REGIONAL NEED FOR LOW- AND MODERATE-INCOME HOUSING.

As demonstrated by the Board's pre-filed testimony, the Town of Nantucket has a demonstrated and significant commitment to affordable and workforce housing needs and has made the creation of affordable housing an urgent priority in recent years. See Ex. 2; Ex. 45, at ¶ 3. To that end, the Town has worked with the development community to construct affordable

dwelling units in accordance with its approved Housing Production Plan, which was certified in 2019; has hired a full-time housing consultant and created a full-time Housing Specialist position in 2017 with the stated mandate of continued progress toward achieving and maintaining 10% subsidized housing; has enacted a Workforce Housing Zoning Bylaw which allowed for bonus density if 25% of the units were restricted to renters with household incomes of 80% Area Median Income ("AMI") or less; has appropriated Town-owned property at Fairgrounds Road for the creation of additional affordable housing, which will serve an array of AMI levels with 80% of the units in the development being income; has consistently appropriated and authorized a reliable funding stream from real estate transactions for the Town's Affordable Housing Trust; and recently approved a $20 million funding authorization for the creation of affordable rental housing on various sites throughout the island. Ex. 45, at ¶¶ 3-4, 6, 8-9.

Despite this significant effort to create affordable and year-round workforce housing, the fact remains that in a seasonal community like Nantucket, the economics are such that the vast majority of market-rate units in a 40B project are bought by seasonal buyers or investment buyers looking to rent the properties out on a weekly or monthly basis during the high seasons and summer months, and then leave them vacant in the off-seasons, which is contrary to Nantucket's local needs for year-round affordable housing. Id. at ¶ 18. As has been borne out by the Developer's first project, in which 75% of the units went to seasonal use and investment properties, the project at issue here proposed to include an increased number of units so as to serve investment buyers. Id. at ¶ 18. Because this type of investment drives up the price and the excess units to not serve the needs and affordability goals of the year-rounders, the excess units plainly did not promote the region's need for low and moderate income housing. G.L. c. 40B, § 20.

Most notably, due to these significant efforts, the Town has since achieved "Safe Harbor" status. Ex. 45, at ¶ 3.[10] "For the period that a municipality is within one of these safe harbors, the 'HAC is without authority to order that board to grant a comprehensive permit or to modify or remove conditions.'" Zoning Bd. of Appeals of Hanover v. Housing Appeals Comm., 90 Mass. App. Ct. 111, 115 (2016) (emphasis added), quoting Taylor v. Housing Appeals Comm., 451 Mass. 149, 151–152 (2008) (noting that "the act permits municipalities to attain certain safe harbors signifying that they are currently providing their share of affordable housing"). In light of the Town's substantial efforts to meet the regional need for affordable housing, a balancing of interests compels the conclusion that the conditions imposed by the Board were reasonable and consistent with local needs, and should not be overturned on appeal.

Accordingly, the Board's decision must be affirmed.

F. ASSUMING *ARGUENDO* THAT THE COMMITTEE FINDS THAT EACH CONDITION RENDERS THE PROJECT UNECONOMIC AND WERE NOT CONSISTENT WITH LOCAL NEEDS, THE PROPER REMEDY IS TO REMAND TO THE BOARD TO MODIFY THE CONDITIONS SO AS TO RENDER THE PROJECT NO LONGER UNECONOMIC, NOT TO OVERTURN OR REWRITE THE BOARD'S DECISION IN FULL.

It is "rarely wise for [the HAC] to sift through the evidence to attempt to identify an acceptable size" for a project. Board of Appeals of Woburn, supra at 587. Indeed, if the Committee finds that the reduced unit size or any other conditions render the Project uneconomic and was not supported by the numerous local concerns described above, "the HAC has the power to order a board of appeals to 'modify or remove any ... condition or requirement so as to make the proposal no longer uneconomic,'" Zoning Bd. of Appeals of Brookline v. Hous. Appeals Comm., 79 Mass. App. Ct. 1129 (2011), quoting G.L. c. 40B, § 23, inserted by St. 1969, c. 774,

[10] Were it not for three private individuals who temporarily held up a particular development effort in Court, the Town would have achieved Safe Harbor status at the time of the Developer's application in this case. Ex. 45, at ¶ 5.

§ 1 (rejecting argument that where "HAC has determined that one or more conditions operate to render a project uneconomic, it may modify or strike any condition, regardless of whether a particular condition contributes to the uneconomic state of the project"). Indeed, here, the Committee does not have the authority to modify or remove the condition itself by authorizing an increase to 156 units, and does not have the authority to modify or strike any condition imposed by the Board regardless of whether the condition contributes to the uneconomic state of the project. Id. See also Board of Appeals of Woburn, 451 Mass. at 590-591 (2008) (Committee exceeded its authority by revising conditions after finding they did not make project uneconomic).

Were the Committee to somehow find that the Developer met its burden and that the Board did not, it may only remove such conditions "so as to no longer render the project uneconomic." G.L. c. 40B, § 23. If the Committee denies the Board the requested relief of affirming the Board's decision in full, as requested in subsection E above, the Board would be willing to consider on remand, without waiving its right to appeal, whether an adjustment in the number of approved units is needed to establish 15% profitability, and if so, whether a revised permit can be issued thereon which is consistent with local needs.

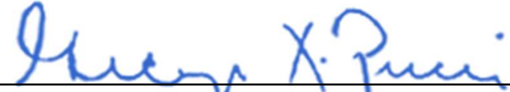
IV. CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Committee affirm, in full, the Board's decision approving with conditions the Developer's project under G.L. c. 40B, §§ 20-23 and 760 CMR 56.00 et seq.

Respectfully submitted,

TOWN OF NANTUCKET
ZONING BOARD OF APPEALS

By its attorneys,



George X. Pucci (BBO# 555346)
Devan C. Braun (BBO# 703243)
KP Law, P.C.
Town Counsel
101 Arch Street, 12th Floor
Boston MA 02110
(617) 556-0007
gpucci@k-plaw.com
dbraun@k-plaw.com

Dated: May 11, 2021

CERTIFICATE OF SERVICE

I, Devan C. Braun, hereby certify that on the below date, I served a copy of the foregoing *Post-Hearing Brief of the Nantucket Zoning Board of Appeals*, by electronic mail, to all counsel of record.

Dated: May 11, 2021

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Devan C. Braun, Esq.

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