COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

MATTBOB, INC

v.

GROTON ZONING BOARD OF APPEALS

No. 09-10

DECISION

December 13, 2010

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Appellant's Counsel
Douglas C. Deschenes, Esq.
Deschenes & Farrell
One Billerica Road
Chelmsford, MA 01824

Julie A. McNeill, Esq.
Law Office of Julie McNeill
3 Summer Street, Suite 2
Chelmsford, MA 01824

Board's Counsel
David J. Doneski, Esq.
Kopelman and Paige, P.C.
101 Arch Street
Boston, MA 02110

Appellant's Witness
Robert Engler

Board's Witnesses
Barbara Ganem
Michelle Collette
Richard H. Heaton, Jr.

COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

MATTMOB, INC Appellant	)	
v.	)	No. 09-10
GROTON BOARD OF APPEALS, Appellee	)	

DECISION

I. PROCEDURAL HISTORY

This case involves a request to modify a comprehensive permit granted by the Groton Zoning Board of Appeals pursuant to G.L. c. 40B, §§ 20-21 to Mattbob, LLC to construct 36 units of mixed-income affordable condominium housing known as "Oak Ridge" on a 29-acre site off the Boston Post Road (route 119) in Groton.[1] Construction of the housing is to be financed under the Housing Starts Program of Massachusetts Housing Finance Agency (MassHousing).

In a decision issued in March 2005, the Groton Zoning Board of Appeals granted a comprehensive permit to the developer. Condition 4 in that permit imposed an age restriction that required that at least 80% of the housing units be occupied by households in which at least one member is 55 years of age or older.[2] In 2008, an appeal of the Board's

1. The site consists of several parcels: 25.57 acres in Groton, and 2.98 acres in Littleton which will not contain any housing units or other improvements. Exh. 4, sheets 2 (Ex-1), 3 (SP-1). This includes a single-family house on a 2.49-acre lot on the Boston Post Road in Groton.

2. The restriction is to be consistent with the Fair Housing Act, 42 USC 3607(b)(2)(c); see 24 CFR 100.300, et seq. Pre-Hearing Order, § II-5 (Apr. 20, 2010). Exh. 2, p. 6; also see Board's Brief, p. 2.

decision by a group of neighbors was resolved, but due to a weakened housing market, the developer filed a request with the Board on July 1, 2008 to modify the approved project, specifically, to remove the age restriction to improve the development's marketability. See Tr. 30. The Board found that this change was substantial under 760 CMR 56.07(4) and also stated that elimination of the age restriction "triggered several ancillary changes," that is, 1) because of changes in household composition, the design of the wastewater disposal system would have to be changed, 2) the likely presence of children would require changes in the roadway network, including a bus turnaround and shelter, and 3) children might negatively affect a certified vernal pool on the site. Exh. 3, p. 2; Pre-Hearing Order, § II-7 (Apr. 26, 2010). Between August 2008 and July 2009, the Board conducted public hearings, which appear to have focused primarily on financial aspects of the development proposals. Exh. 3, p. 2, ¶ 5. On August 6, 2009, after summarizing its financial analysis, but citing no substantive grounds, the Board issued a decision denying the change. Exh. 3; Pre-Hearing Order, § II-9.

The developer appealed to this Committee pursuant to 760 CMR 56.05(11)(c). The Committee opened its hearing, and after preliminary proceedings, the parties negotiated a Pre-Hearing Order, which was issued by the presiding officer pursuant to 760 CMR 56.06(7)(d). Prefiled testimony was submitted, a site visit and one day of hearing to permit cross-examination of witnesses was conducted, and post-hearing briefs were filed.

II. PRELIMINARY ISSUES

A. No Changes in the Physical Design of the Proposed Development are at Issue.

There is considerable ambiguity about the so-called ancillary changes referred to in the Board's denial of the change in the development. The Board's Decision of August 6, 2009 states that the change requested by the developer "triggered" ancillary changes, but it gives no indication that the developer agreed that such changes would be necessary. Exh. 3, p. 2. The developer's Initial Pleading, however, raises at least the possibility of changes in the design of the wastewater disposal system and roadways. Applicant's Initial Pleading, pp. 5-7 (filed Aug. 26, 2009). The Pre-Hearing Order recites as fact that the Board deemed the ancillary changes to be substantial, but says nothing about the

developer's view of them, nor does it include the ancillary changes as issues in dispute. Pre-Hearing Order, §§ II-7, IV (Apr. 26, 2010). Further, neither side presented evidence concerning such changes, nor any costs that might be associated with them.[3] In fact, the clear implication of statements by the developer's counsel, which were not challenged by the Board's counsel, is that there will be no such changes.[4] Finally, neither side discussed possible ancillary changes in its brief.[5]

Since this hearing before the Committee is *de novo*, contested matters which were addressed in the hearing before the Board are waived if they are not explicitly raised during the Committee's hearing. The developer has requested only the elimination of the age restriction imposed in the 2005 comprehensive permit; is has not proposed to change the design of the wastewater disposal treatment facility, roadways, or any other aspect of the development. The Board has not presented any evidence or argument that any ancillary changes are necessarily included within the developer's requested change. Therefore no changes in the wastewater disposal system, in the roadways, or related to the vernal pool are before us. Should the developer determine at some time in the future that changes in these or other aspects of the development are necessary or desirable, it may once again request approval of such changes pursuant to 760 CMR 56.05(11).

B. The Board's Motion to Strike Testimony of Robert Engler

The Board moved to strike Exhibit 21-D, a one-page report by Kris Kramer of Exit Assurance Realty in Groton. This report contains opinions concerning the marketability of the proposed development and other over-55 developments near Groton. It was attached to the prefiled testimony of the developer's expert witness, Robert Engler, and

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3. The developer's expert noted that "there was a debate in previous [financial] reviews about the increased cost of an on-site septic system,...but ... the original system... was designed to support a larger capacity...." Exh. 21, ¶14. The implication of this statement is that the developer is not requesting any change in the wastewater disposal system.

4. Counsel: "...nowhere in this testimony is there anything to establish that these [ancillary] issues are even relative [sic] to this proceeding or, in fact, ...are actual; changes that are required...." Tr. 35.
Counsel: "If no physical changes were proposed to the project..." Tr. 39.
Counsel: "Again, my question is, that if there were no physical changes..." Tr. 39.

5. The Board did discuss the vernal pool, but not any changes in the design that might be related to it. Board's Brief, pp. 5-6; also see Exh. 22, ¶¶ 4-6; Exh. 24, ¶¶ 20-23.

filed on May 14, 2010. The Board's objection to this exhibit as hearsay was raised for the first time when cross-examination of the developer's expert witness was scheduled, on August 10, 2010. At the same time the Board moved to strike 16 words in the prefiled testimony of that witness: "[Information from the small number of sales during the past year would not enable any conclusions to be drawn] *other than to reiterate what the realtor concluded which is that age-restricted units are not selling.*" The developer opposed the motion to strike, and noted the document is "the basis of [the witness'] testimony with respect to market data for sales in this area." Tr. 15. Mr. Engler also testified that he relied on the document for purposes of market analysis. Tr. 132-133.

Exhibit 21-D is clearly hearsay. But, if we were inclined to rely on it as independent evidence, we—as an administrative body rather than a court—would undoubtedly be entitled to do so since "it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs." G.L. c. 30A, § 11(2). Although we might well consider this evidence, allowing its hearsay nature to affect the weight we give it, in this case we have no need to rely directly upon the facts or opinions in the document. But we see no need to strike it from evidence, nor will we rule that the testimony of the expert is tainted by the fact that his conclusions were based in part on this document. It is clear from Mr. Engler's testimony in its totality that this was far from the only information upon which he based his testimony, and that in forming his opinions he obtained information in a number of different ways—as is typical when housing consultants attempting to draw conclusions about a highly complex, yet often data-poor housing market.[6] See *Commonwealth v. Roman*, 414 Mass. 235 (1993).

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6. For instance, in this case, as is common in cases before us, the expert relied on various cost figures provided to him by the developer, and neither those figures nor testimony from the developer as to how they were derived were admitted into evidence. More specifically, while it is clear that he used Ms. Kramer's information, he did not accept it in place of his own judgment: "It's my opinion, having been in this business a long time.... I took our broker... as the expert on the market out there.... I used the towns that she used... when she produced a lot of MLS data. ...I did not do an independent analysis of where 55 and older people would move and how far they would move. I took her towns as my market area." Tr. 132. Mr. Engler clearly reviewed MLS data himself, and drew his own conclusions. See Tr. 134; Exh. 25, ¶ 2. And, the general conclusions that Ms. Kramer reached fell far short of the more detailed analysis performed and opinions and conclusions reached by Mr. Engler. See Exh. 21-D.

Certainly if "presented in some other form," the facts and data in Exhibit 21-D would have been admissible, and there is nothing here that "would automatically preclude [the expert] from relying on those materials...." *Commonwealth v. Markvart*, 437 Mass. 331, 337-338 (2002). Finally, this is not a case in which the data underlying the expert's opinion is undisclosed or disguised; it is the opposite. As the Supreme Judicial Court has noted more than once, the thrust of the Massachusetts approach is to address questions about the basis of expert testimony on cross-examination. *Commonwealth v. Barbosa*, 457 Mass. 773, 785 (2010); *Dept. of Youth Services v. A Juvenile*, 398 Mass. 516, 532 (1986). The Board had full opportunity to cross-examine the primary expert witness here, and has appropriately drawn the Committee's attention to the fact that his opinion is based in part on the work of a secondary expert.[7] See, e.g., Tr. 147-148. The motion to strike is denied.

III. DISCUSSION

A. Burden of Proof

Under our regulations and precedents, when a change in a permit has been denied, the burden is initially upon the developer to prove that the denial makes the proposal uneconomic. *511 Washington Street, LLC v. Hanover*, No. 06-05 (Mass. Housing Appeals Committee Jan. 22, 2008), *aff'd* 17 LCR 243 (Land Court No. 381349, Apr. 2, 2009); *Avalon Cohasset, Inc. v. Cohasset*, No. 05-09, slip op. at 8 (Mass. Housing Appeals Committee Sep. 18, 2007), citing *Drumlin Development, LLC v. Sudbury*, No. 01-03, slip op. at 3 (Mass. Housing Appeals Committee Sep. 27 2001); *Shamrock Construction and Dev. Corp. v. Whitman*, No. 96-02, slip op. at 2 (Mass. Housing Appeals Committee Sep. 26, 1996); *Cooperative Alliance of Massachusetts v. Taunton*, No. 90-05, slip op. at 7 and

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7. In addition, because all of the testimony, including Exhibit 21-D, was prefiled, the Board also could have moved to strike before the day of the hearing or it could have asked that Ms. Kramer, who prepared the report, be made available for cross-examination. It did neither. Under such circumstances, it was well within the discretion of the presiding officer not to strike the evidence on the day of the hearing. He exercised similar discretion later on the same day of testimony in ruling that the developer would not be permitted to admit into evidence back-up calculations that the same witness had failed to include in his prefiled testimony. Tr. 140. In both of these situations there is a strong interest in protecting the opposing party from surprise and in preserving the orderliness and efficiency of the hearing.

n.11 (Mass Housing Appeals Committee Apr. 2, 1993); also see *Maritime Housing Fund, LLC v. Medway*, No. 06-14, slip op at 8 (Mass. Housing Appeals Committee Apr. 25, 2007); also see 760 CMR 56.07(2)(a)(3); also see Pre-Hearing Order, § IV-3.[8] The more specific question before us is whether the projected profit for the development as approved—without any change, that is, with the age restriction in place—exceeds the minimum reasonable return of 15% established by the MHP Guidelines.[9] See Exh. 8, p.4; 9, p. 2; 24, ¶ 37(e); also see DHCD Comprehensive Permit Guidelines, § IV-B(1), Exhibit 20, p. IV-4; also see *Autumnwood, LLC v. Sandwich*, No. 05-06, slip op. at 3 (Mass Housing Appeals Committee Decision on Remand Mar. 8, 2010), *appeal after remand pending,* No. 07-462 (Barnstable Super. Ct.).

If the developer sustains its burden, the burden shifts to the Board to prove that there is a valid local concern that supports the denial of the change, and that this concern outweighs the regional need for affordable housing. 760 CMR 31.06(7); also see Pre-

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8. The Pre-Hearing Order allowed for the rare situation in which the evidence showed that even *without* the age restriction the development is uneconomic, but the Board made no such allegation in its testimony or brief, and therefore the developer's burden is simply to prove that the development with the age restriction is uneconomic. See *511 Washington Street, LLC v. Hanover*, No. 06-05, slip op. at 11 (Mass. Housing Appeals Committee Jan. 22, 2008), *aff'd* 17 LCR 243 (Land Court No. 381349, Apr. 2, 2009); also see *Autumnwood, LLC v. Sandwich*, No. 05-06, slip op. at 13, n.12 (Mass Housing Appeals Committee Decision on Remand Mar. 8, 2010), *appeal after remand pending,* No. 07-462 (Barnstable Super. Ct.).

9. The 15% standard is established in section B of the appendix to the guidelines, p. 17. The formal title of the MHP Guidelines is "Local 40B Review and Decision Guidelines: A Practical Guide for Zoning Boards of Appeal Reviewing Applications for Comprehensive Permits Pursuant to M.G.L. Chapter 40B" (Massachusetts Housing Partnership and Netter, Edith M., November 2005). These guidelines were endorsed by the state Department of Housing and Community Development, MassHousing (the Massachusetts Housing Finance Agency), the Massachusetts Housing Partnership (the Massachusetts Housing Partnership Fund), and MassDevelopment (the Massachusetts Development Finance Agency). See *Webster Street Green, LLC v. Needham*, No. 05-20, slip op. at 4, n.6, 11 (Mass. Housing Appeals Committee Sep. 18, 2007); *8 Grant Street, LLC v. Natick*, No. 05-13, slip op. at 6, n.10 (Mass. Housing Appeals Committee Mar. 5, 2007); *Bay Watch Realty Trust v. Marion*, No. 02-28, slip op. at 11 (Mass. Housing Appeals Committee, Dec. 5, 2005), *aff'd* No. 07-P-1372 (Mass. App. Ct. Oct. 10, 2008). The methodology to used in analyzing the economics of an ownership housing proposal is a Return on Total Cost (ROTC) analysis. *Webster Street Green, LLC v. Needham*, No. 05-20, slip op. at 4, n.6 (Mass. Housing Appeals Committee Sep. 18, 2007); *Rising Tide Development, LLC v. Sherborn*, No. 03-24, slip op. at 4, 8 (Mass. Housing Appeals Committee Mar. 27, 2006).

Hearing Order, § IV-3. If the Board sustains its burden, will its denial of the change be upheld.

B. The Developer's Presentation

To establish that the proposed housing with the age restriction would be uneconomic, the developer presented testimony from Robert Engler, an experienced affordable housing financial consultant. He had not been involved in the local hearing before the Board, but began his review by considering the financial analysis prepared during the hearing by a similar consultant who had been retained by the Board during that hearing. That consultant, Michael Jacobs, who was not the consultant later retained by the Board to testify in this Committee's hearing, prepared three reports: a financial analysis with *pro forma* financial statements prepared September 1, 2004 (during the original local hearing)(Exhibit 7), a second, updated analysis with *pro forma* prepared November 4, 2008 (after the developer's request for removal of the age restriction)(Exhibit 8), and a third, updated analysis and *pro forma* dated July 8, 2009 (a month before the Board's denial of the change)(Exhibit 9). The original 2004 Jacobs analysis, including the age restriction, projected a profit of 16.4%. The 2008 analysis, after making certain adjustments to the developer's underlying figures,[10] projected profit ranging from 15.7% to 12.5%, depending on the market absorption rate assumed for the housing, that is, the length of time that is likely to be required to sell units after construction. Exh. 8, pp. 5, 8, 13. The 2009 Jacobs analysis, which updated sales prices, waste water system construction estimates, and market absorption rates, projected a profit of 12.3% for the age-restricted proposal. Exh. 9, pp. 2, 4.

The developer's expert, Mr. Engler, then prepared his own analysis and *pro forma* financial statements. Most of figures upon which the analysis was based were, as is typical, provided to the expert by the developer, with any corrections that the expert

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10. This analysis also assumed a $60,000 increase in costs related to changes in the wastewater disposal system. As discussed in section II-A, above, there is no evidence that any such changes will be made.

thought were necessary.[11] Thus, for example, the actual acquisition cost of the land was $723,000.[12] Exh. 21, ¶ 10. For the purposes of the economic analysis in question here, it is appropriate to add carrying costs of $258,000 for total allowable acquisition costs of $981,000. Exh. 21, ¶ 10; see MHP Guidelines, p. 13 (Appendix, § A).

Similarly, the developer provided Mr. Engler with information concerning site development and construction costs. He agreed with Mr. Jacobs that the original estimate for landscaping costs was high, and therefore used the Jacobs figure of $216,000. Exh. 21, ¶ 11. Mr. Engler testified that he accepted the developer's cost estimates of $95 per square foot since "in [his] experience the represents the middle of the range of cost for this type of project." Exh. Exh. 21, ¶ 11; also see Tr. 137. He reduced the hard cost contingency factor to 5% to conform to the MHP Guidelines. Exh. 21, ¶ 11.

To estimate revenues, the developer's expert first set sales prices for affordable units based upon state policy, calculating what would be affordable for a three-person household at 70% of median income in the Boston area, taking into consideration Groton residential real estate tax rates, and appropriate mortgage rates. Exh. 21, ¶ 13. Sales prices for market-rate units were based on the developer's estimate. He noted that these had been accepted by Mr. Jacobs. Exh. 21, ¶ 13.

Also important to the financial analysis are the estimates of soft costs, which Mr. Engler based on his own experience, on figures given to him by the developer for certain fees, and on standards set by the MHP Guidelines. Exh. 21, ¶ 12. First, he

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11. His figures represented the financial status as of the date of the hearing, that is, April 26, 2010. Exh. 21, ¶ 8; see Pre-Hearing Order, § IV-3. As a practical matter, however, great precision is not possible in these estimates, and therefore many of the figures used for April 26, 2010 were the same figures used in earlier *pro forma* financial statements, without adjustments for changes in market conditions. See Exh. 7, p. 1 ("...review is confined to determining whether the numbers fall within acceptable ranges..."); Tr. 104 ("...within [any] *pro forma*, there's a wide variance...."), 120 ("My purpose... is to see whether that's within industry standards."), 137 ("Construction line items can vary widely."), 142, 147.

12. Ideally, valuation is based upon an appraisal. Current policy requires an appraisal to accompany the developer's Project Eligibility Application. See MHP Guidelines, p. 13, Appendix § A; also see DHCD Comprehensive Permit Guidelines, § IV-B(1)(Feb. 22, 2008). In this case, however, that application was made long before the MHP Guidelines were adopted in November 2005, and therefore no appraisal was required. Thus, the actual purchase price is the best estimate currently available of the fair market value of the land.

reduced the water connection fee estimate based on Mr. Jacobs' earlier research with the Groton Water Department. Exh. 21, ¶ 12. But, he testified, the most significant factor that he considered was the construction-loan-interest line item, which varied considerably depending on whether or not the units were age restricted. Mr. Engler explained this as follows.

Because the design of the development will not change, most line items in the *pro forma* financial statement remain constant, but five line items vary because of differences in the market absorption rate for market-rate units. Exh. 21, ¶ 14, p. 6. Specifically, due to several factors, including that older people typically having more equity available to purchase housing, age-restricted units generally sell at a premium. Exh. 21, ¶ 14, p. 7. In the Groton region in recent years, however, age-restricted condominiums have been selling poorly, and average sales price on a per-square-foot basis has actually been lower than for unrestricted units.[13] *Id.* In preparing his financial analysis, however, Mr. Engler made the professional judgment to use the same sales prices for restricted and unrestricted units. *Id.* As a result of both the sales prices and the overall market for age-restricted units, his opinion is that restricted units will sell (be absorbed in the market) more slowly than if they had no restrictions, and thus, in his analysis, he factored in higher construction loan costs (resulting from interest being paid over a longer period), as well as the somewhat less significant factor of higher carrying costs for taxes and maintenance of unsold units.[14] Exh. 21, ¶ 14, p. 8. The resulting mathematical analysis shows that the projected profit for the development with the age restriction would be 13.8%. Exh. 21-A. Without the restriction, his profit projection is 16.1%. Exh. 21-B.

C. The Board's Response and Our Findings

The Board also presented testimony from an experienced affordable housing financial consultant, Richard Heaton. Mr. Heaton reviewed the testimony and *pro forma*

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13. Mr. Engler noted that only five age-restricted units were sold in Groton and three surrounding towns in the year from April 2009 to April 2010, making it difficult for him to draw any conclusion other than his opinion that this sort of housing is not selling well. Exh. 21, ¶ 14, p. 7. (He noted that Ms. Kramer—the local realtor—had reached the same conclusion. *Id.* We rely on Mr. Engler's opinion, not that of Ms. Kramer. See discussion in section II-B, above.)

14. The figures for accounting and contingency would also vary slightly. Tr. Tr. 114-115.

financial statements prepared by the developer's witness, and conducted his own analysis. Exh. 24, ¶ 11. Based upon this, the Board challenges several aspects of the developer's case.[15]

1. Acquisition Cost - The Board argues that in setting the land value at $981,000, the developer "has not complied with accepted requirements for establishing its land value/acquisition cost by means of an appraisal (or even another device) to demonstrate the 'as-is' value of the land." Board's Brief, pp. 10-11.

As the Board correctly notes, "The allowable land value of a site... is the fair market value of the site under current zoning (As-Is Market Value) at the time of submission of a request for Project Eligibility, plus reasonable and verifiable carrying costs...." DHCD Comprehensive Permit Guidelines, § IV-B(1), Exhibit 20, p. IV-4; also see MHP Guidelines, p. 13 (Appendix, § A); *Autumnwood, LLC v. Sandwich*, No. 05-06, slip op. at 7-8 (Mass. Housing Appeals Committee Mar. 8, 2010)), *appeal after remand pending* No. 07-462 (Barnstable Super. Ct.). But the current practice of requiring an appraisal for state-subsidized developments at the very beginning of the Comprehensive Permit process—when an application for a project eligibility letter is filed—began only with the adoption of the MHP Guidelines in November 2005.[16] 760 CMR 56. The

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15. The manner in which issues are presented both in the testimony of the Board's expert and in the Board's brief, makes it difficult to discern which are being pursued, and which have been waived. Of course, as we have noted frequently, issues not briefed are waived. See *Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85 (1995). The "executive summary" of the Board's expert appears helpful in listing four discrete issues. See Exh. 24, ¶ 12. And yet confusion arises since it appears that other arguments are alluded to later in the testimony. See, e.g., Exh. 24, ¶ 13(b). More importantly, the Board abandons some of these arguments in its brief. For instance, it is clear that it decided not to press its claim with regard to the cost of certain traffic signal controls. See Exh. 24, ¶ 12(b); Board's Brief, pp. 12-13. The appropriateness of the soft costs carried in the developer's *pro forma* financial statements appears as a single sentence in the Board's argument, even though such costs are mentioned in the facts section of the brief. See Board's Brief, pp. 9, 10. How soft costs are accounted for is not merely a factual question, but also one of policy, and for that reason, we will address it even though it is not properly briefed. Thus, we have addressed the arguments that we believe the Board is relying upon, but we have no obligation to ferret out arguments that have not been clearly presented.

16. The Board's expert refers to a now superseded 2003 policy entitled "Guidelines for Housing Programs in which Funding is provided through a Non-Governmental Entity." Exh. 24, ¶ 29. (Like the MHP Guidelines, this document was not offered into evidence by either party.) The very title of these guidelines shows that they apply only to developments funded by

developer in this case applied for its project eligibility letter before that; it received the letter on March 28, 2003, well before the MHP Guidelines were adopted. Exh. 1. In such cases, it is common for land value to be based upon purchase price rather than an appraisal. See *Webster Street Green, LLC v. Needham*, No. 05-20, slip op. at 6-7 (Mass. Housing Appeals Committee Sep.18, 2007).

The Board's expert witness, Mr. Heaton, presented his own analysis of the value of the land, based upon a July 1, 2009 appraisal commissioned by the Groton Conservation Commission, when it was considering purchasing part of the site. That appraisal showed the value of the land to be $450,000. Exh. 24, ¶ 32. But Mr. Heaton, based on his own analysis and without offering the appraisal into evidence, concluded that the proper land acquisition value is $335,345. Exh. 24, ¶¶ 30-34; 24-C; 24-D. His analysis is flawed, however, since the appraisal did not consider the entire site; it apparently excluded the only house lot that has frontage on the Boston Road. See Exh. 25, ¶ 5, p. 6; Tr. 42; also see n.1, above. Because of this and because we do not have the appraisal before us the credibility of Mr. Heaton's analysis is in serious doubt. Further doubt is cast on Mr. Heaton's figure by the testimony of the Groton Conservation Administrator that the town entered into a purchase and sale agreement to buy part of the property (presumably the rear area, excluding the house lot with frontage) for $750,000. Tr.43-44.

In reviewing the evidence before us, we are also drawn to the analysis originally done by Mr. Jacobs for the Board. His is the clearest and least biased statement of issue. In his 2004 analysis, he cites the developer's acquisition figure of $723,000 and notes, "Given the amount of upland, the acquisition price should easily meet the state acquisition value guidelines." Exh 7, p. 1. In 2008, he went on to say that the $258,000 in carrying costs included by the developer "seem reasonable." Exh. 8, p. 3.

We find that the developer has proven that the proper land acquisition value to be considered in evaluating the economics of the housing proposal is $981,000.

"non-governmental" entities, presumably under the New England Fund of the Federal Home Loan Bank of Boston. The project eligibility letter for development before us was issued by MassHousing under the state Housing Starts Program. Exh. 1, p. 1. The letter includes the MassHousing "Acquisition Value Policy," which explicitly permits the value to be established by either an appraisal or the purchase price plus carrying costs. Exh. 1, p. 4.

2. Developer's Costs - The Board also argues that the $125,000 cost of a fire suppression sprinkler system should not be a separate cost line item, but rather included in the $95.00 per-square-foot estimate of construction costs. Board's Brief, p. 12-13. Its expert witness, Mr. Heaton, noted in his prefiled testimony that this item was not included in the *pro forma* financial statement that the developer included in its application to the Board, and that a sprinkler system is required by law. Exh. 24, ¶ 22; see Exh. 10, last page. He created ambiguity by at one point saying, "...any requirement in the ZBA's comprehensive permit decision respecting sprinklers should not be used as a cost factor," and later saying, "the cost... should not be included as an *additional* cost." (emphasis added) Exh. 24, ¶¶ 22(a)(i), 22(b). On cross-examination, he clarified his position, stating that while sprinklers are a legitimate cost, they should not be carried as a separate line item since the industry standard he worked with—RS Means construction data—includes their cost in its per-square-foot estimates. Tr. 68-73.

The developer's expert, Mr. Engler, in his rebuttal testimony, responded only to the ambiguity in Mr. Heaton's position. That is, he argued only that sprinklers are required by state law and therefore a proper cost, and that the developer "was not arguing that the ZBA imposed [the requirement]." Exh. 25, ¶ 3. He did not address the question of whether they were or should be included in the per-square-foot construction-cost estimate. (No additional elaboration of the developer's position is provided in the developer's brief. See Developer's Brief, p. 14.)

Mr. Jacobs's analysis provides little guidance on this issue. In the 2004 Jacobs analysis, the *pro forma* financial statement has no line item for sprinkler, presumably because the developer's application did not. See Exh. 7, pp. 7, 12. The 2008 Jacobs analysis simply says, "A building sprinkler system adds another $3,472 [per unit] and $2.39 per square foot, bringing the total to $136,472 per unit and $95.17 per square foot." Exh. 8, p. 3. And, the 2008 *pro forma* financial statement *does* have a $125,000 line item. Exh. 8, pp. 9, 14. The 2009 Jacobs analysis simply continues to carry the line item with no comment in the narrative. Exh. 9, pp. 4, 7. But Mr. Jacobs simply "analyzed the financial projections supplied by the [developer]," and thus, while he did not find fault with this line

item, neither can it fairly be read as an endorsement of the developer's position that sprinklers are not only an allowable cost, but should be shown as a separate line item.

Neither expert witness provided us with a great deal of background concerning general practices or standards for accounting for sprinkler costs in financial statements. But from the evidence that has been provided in this case, there is nothing to suggest that a sprinkler system is such an unusual construction component that it should be accounted for separately. In any case, we find the developer has not met its burden in this case of making that showing, that is, of showing that the cost of the sprinkler system is a separate cost that should be added to the per-square-foot construction cost of the development. Although the $125,000 sprinkler cost is an allowable cost, we find that it is included in the per-square-foot-estimate, and the separate line item should be removed as duplicative.

3. Sales Price and Absorption Rate of Market-Rate Units[17] - The price of residential condominiums and their absorption rate are inversely related—higher priced units have a lower absorption rate in the marketplace, that is, they sell more slowly. Therefore we consider these issues together.

a. Sales Price of Market-Rate Age-Restricted Units - As the Board's expert, Mr. Heaton, points out, all of the financial consultants agree that age-restricted units generally tend to sell at higher prices. Exh. 24, ¶¶ 14-15; also see Exh. 21, ¶14, p. 7; Exh. 9, ¶ 1. But the developer's expert, Mr. Engler, testified, "Age-restricted units (condominiums) are not selling in this region, and average sales price on a square-foot basis is actually lower than non-age-restricted units (condominiums). However, since there is not a large body of comparable age-restricted sales in the region, I have chosen not to reduce the sales prices in my *pro forma*... and thus have kept all costs and revenues the same in both [restricted and unrestricted] models...." Exh. 21, ¶ 14, p. 7. He did not cite data in support of this judgment.

The Board first argues that "[Mr. Engler's] position is unsupported by any market analysis," and that therefore his testimony "cannot form the basis of 'proof'" that is

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17. Only market-rate units are in issue since the price of affordable units is set by formula, and they typically sell quickly due to their discounted price. See Exh. 21-C.

necessary to meet its burden of proof. Board's Brief, p. 13. Unfortunately, however, the problem here is not the failure of Mr. Engler's analysis, but rather that neither he nor either of the other consultants had good data to work with. But even with limited data, *some* figure must be used to estimate revenues for the financial analysis that must be developed here. There is no indication in the record that, with the small number of comparable sales available, any reliable market analysis could have been performed. Neither party commissioned a more formal market analysis, but instead rather relied on their consultants to simply assess the sparse data that was to be had, and draw the best conclusions they could, using their professional judgments. Therefore, we accept Mr. Engler's view—stated slightly more clearly with respect to the related issue of absorption—that the small number of sales "would not enable any conclusions to be drawn…," and reject the Board's argument that on its face the evidence submitted by the developer was insufficient to meet its burden. Exh. 21, ¶ 14, p. 7.

At the same time, neither of the parties presented the substantive evidence with regard to sales price in a comprehensive, convincing manner. Thus, we will review what underlying data is available ourselves to determine whether the evidence presented by Mr. Engler, considered in light of the rebuttal presented by Mr. Heaton, is in fact sufficient to meet the developer's burden of proof with regard to sales-price estimates for use in the *pro forma* financial analysis. That is, our own review is necessary in order to consider the Board's second argument, that market-rate, age-restricted units will sell at a higher price than market-rate units without such restrictions, and that this will result in additional revenue not shown in the Mr. Engler's financial analysis. See Board's Brief, p. 14-15.

The comparable sales data available for review is as follows:

From 2004 Jacobs Analysis (Exh. 7, p. 9):

Fourteen comparable sales and eight offerings are shown, though only four of each were described in the narrative as fully comparable. (All are presumably age-restricted.) None of these are useful data since they date from 2002, 2003, and 2004.

From November 2008 Jacobs Analysis (Exh. 8, pp. 6, 11):

Eleven comparable sales are shown. (All are presumably age-restricted.) All of these units are larger than those proposed, and sold in 2008 between $306,500 and $365,400. Five offerings were shown. Some are larger than those proposed and some smaller, but their average size is quite similar to the proposed housing. They were offered in 2008 between $259,900 and $353,900.

A larger group of sales—which were not included in the analysis as comparable—were also considered, but in less detail. Six age-restricted units sold for an average of 297,883, while 102 unrestricted units sold for an average of $271,415, implying (by calculation) a premium for restricted units of 9.8%.

From July 2009 Jacobs Analysis (Exh. 9, p. 2; 24-E):

Nineteen comparable sales are shown.[18] Of these, three are irrelevant since they are affordable units. Thus, two age-restricted units, both sold for $345,000, can be compared to fourteen unrestricted units sold for an average of $296.657, implying (by calculation) a premium for restricted units of 16.3%. Exh. 24, ¶ 15(d); 24-F.

Other sales—which presumably were not comparable—were also considered, but in less detail. Five age-restricted units sold for an average of $232,740, while 72 unrestricted units sold for an average of $236,379, implying (by calculation) a premium for restricted units of 1.6%.

From Engler Testimony:

As noted previously, Mr. Engler reviewed sales from April 26, 2009 through April 26, 2010,[19] and found only five sales of restricted units, which he considered too few to draw meaningful conclusions from. Exh. 21, ¶ 14, p. 7; 25, ¶ 2, p. 2.

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18. Though Exhibit 8, p. 11 (2008 Jacobs analysis) and Exhibit 24-E (2009 Jacobs analysis) appear very similar, there is no reason to assume they contain fully comparable data. Exhibit 8 shows "sold" and "for sale" units separately, while Exhibit 24-E shows only "sold" units. Exhibit 24-E notes which units are age-restricted, while Exhibit 8 does not. It appears that all of units on Exhibit 8, p. 11 are restricted since they are all in six developments—the same number referred to on the top of page 6 of Exhibit 8. We cannot account for the fact that only 6 age-restricted "listings" appear on the top of page 6 of Exhibit 8.

19. Mr. Engler testified that he "did not do an independent analysis of where 55-and-older people would move…," but at least in preparing his rebuttal testimony, and presumably in preparing his direct testimony, "MLS data was provided" to him and reviewed. Tr. 132, 134.

What is most apparent from our review of the above evidence is that the data is meager and the implications that might be drawn from it inconsistent. Mr. Engler reviewed the Jacobs data as well as sales from April 2009 to April 2010, and concluded that there was insufficient data for meaningful analysis of sales price, but that from his general experience, restricted units would not sell at a premium and it was therefore appropriate to carry the same sales price for restricted units as for unrestricted units. Exh. 21, ¶¶ 7, 14, p. 7; 25, ¶ 2, p. 2. Mr. Heaton considered the two of the three sets of figures above that implied a premium for restricted units, that is, he discussed the figures that implied premiums of 16.3% and 9.8%, but ignored those that implied 1.6%. Exh. 24, ¶ 15. He concluded that the middle figure could be used to estimate a reasonable premium for setting the price of restricted units. Exh. 24, ¶ 15(g). He agreed that he would like to have seen a "much larger sample" and that the data was "grossly inadequate," and yet he provided no additional data. Tr. 87, 109.

Considering all of the evidence, including the credibility of the witnesses in their pre-filed testimony and on cross-examination, we conclude that it was reasonable for Mr. Engler, based upon his experience and judgment, the estimates of the developer itself, and the limited data before him, to conclude that the sales-price estimates used in the *pro forma* financial analysis should be the same for restricted and unrestricted units.[20] Exh. 21, ¶¶ 13, 14; 24, ¶ 15; 25, ¶ 3; Tr. 84-91, 106-110, 132-134, 143-145.

b. Absorption Rate of Market-Rate Units - The Board also argues that market-rate restricted units will sell (that is, be "absorbed" by the market) more quickly than the developer estimates, and therefore that the amount carried in the *pro forma* financial statement for construction loan interest—which must be paid while the units remain unsold—should be reduced from $368,000 to $224,000. Board's Brief, p. 14. Similarly, its expert points out there would be other, smaller reductions in total taxes paid, in

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20. There is also support for Mr. Engler's approach in that Mr. Jacobs used the same approach in performing his analysis for the Board—without comment in 2008 and noting in 2009 that there was insufficient data to establish a premium for age-restricted units and that therefore he used the same sales prices for restricted and unrestricted units. Exh. 8, pp. 8, 13; 9, p. 2.

accounting and maintenance costs, and in the contingency calculation, for total reductions in soft cost of $193,021. Exh. 24, ¶ 16(a)(iii).

The data used to analyze absorption rate is nearly identical to that used to estimate sales price. That is, the same comparable sales are examined, but the length of time that units remained on the market is considered instead of sales price. Thus, as described above, the experts had only a limited amount of data to rely on. Again, we accept Mr. Engler's opinion that "it is difficult … to draw any specific conclusions…." Exh. 21, ¶ 14, p. 7.

Mr. Heaton draws our attention to the sale a dozen and a half age-restricted units in five different developments during the past two years and to 16 similar developments selling units from 1002 to 2008. Exh. 24, ¶¶ 19(c) to 19(e). For one of these, he says that there is "a combined absorption rate of two units per month for approximately the past four months." Exh. 14, ¶ 19(b). But we are not told how many units are for sale in that development, nor for any of the developments are we told how long units remained on the market. Mr. Engler provides more specific information in his rebuttal testimony noting that his review of MLS data shows that—in the development with the two-unit-per-month absorption rate—the average time between when a unit was first listed and when it was sold was 252 days, and that some of the units had been taken off the market when they were not selling, relisted later, and then resold at a lower price in 2010. Exh. 25, ¶ 2, p. 2. Mr. Engler also provides other specific facts to refute the more general statements made by Mr. Heaton. See Exh. 25, ¶ 2, pp. 3-4; also see Tr. 134-136, 143-145; cf. Tr. 91-101.

On balance, we find the testimony of Mr. Engler with regard to absorption rates to be the more credible, and therefore conclude that the five line items that are larger for age-restricted units are appropriate.

4. Soft Cost Limit - The Board also argues that the soft costs included in the developer's financial analysis exceed the percentage permitted under state policy. Board's Brief, pp. 9, 10.

The DHCD Comprehensive Permit Guidelines state, "Soft costs should not exceed 28% of the residential construction line item on the Schedule of Total Chapter 40B Costs (see Section IV-F [Cost Examination])…. If total soft costs exceed the 28% limit, a facts-

and-circumstances test shall be employed to determine reasonableness of the excess costs. …the developers shall be required to provide documentation… with a detailed explanation…, for example, reasons for a particularly complex legal structure resulting in high legal fees. This explanation shall be included in the notes for cost certification…." Exh. 20, §§ IV-B(5)

We note first that this section of the DHCD (Department of Housing and Community Development) policy applies primarily to subsidizing agencies as they enforce limitations on profits under the Comprehensive Permit Law after a development has been constructed. To provide as much consistency as possible within the statutory scheme, we will apply DHCD policy whenever possible, but the inquiry in which we engage in our cases is different from the subsidizing agency's "cost certification" process. Thus, while the DHCD guidelines quite reasonably require the developer to "provide documentation… with an explanation," we rely on testimony and other evidence presented during our hearing—which may or may not be similar.

The developer's expert, Mr. Engler, initially testified that soft costs for the non-age-restricted development did not exceed the 28% limit, and that the soft costs for the restricted development only "slightly exceed this threshold." Exh. 12, § 12. This was in error. His *pro forma* financial statements showed, respectively, ratios of 36% and 40%.[21] In his rebuttal testimony, he acknowledged that the threshold would be exceeded, and added that he was "confident, given [his] knowledge of such costs, that the *pro forma* [he had] submitted included legitimate soft costs which would be upheld upon examination." Exh. 25, ¶ 4.

The Board's expert, Mr. Heaton, simply explained the soft-cost-limitation policy, noted that the soft costs listed in the developer's financial statements total more than 28%, stated that "[n]o explanation is provided to justify the greater-than-permitted costs," and then suggested that in the financial analysis, the total soft costs figure should arbitrarily be

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21. Soft costs of $1,741,898 divided by construction costs of $4,860,000 are 36%. Exh. 21-B. Soft costs of $1,934,919 divided by $4,860,000 are 40%. Exh. 21-A. Mr. Heaton also erred in his calculations, showing soft costs of $1,934,919 divided by $4,860,000 as 37%. Exh. 24, ¶ 26.

reduced to 28% of construction costs. Exh. 24, ¶¶ 24-27. He did not testify than any specific costs might actually be excessive.

We have also considered the analysis done by Mr. Jacobs for the Board in 2004. He concluded, "Most of the [soft] costs are reasonable." He then adopted the developer's figures (which he labeled "Base *Pro Forma*"), with certain appropriate adjustments, preparing an "Adjusted Pro *Forma*" which showed total soft costs of 1,508,152, or 31% of construction costs.[22] Exh. 7, pp. 7, 12.

The total soft costs showed by the developer for the age-restricted development are $1,934,919. In section III-C(3), above, we concluded that increases in five line items which result from lower absorption rate caused by changes in the housing market are appropriate. It is not unreasonable to expect other increases as well. For example, legal fees alone rose, partly as a result of the instant litigation, from $50,000 in the Jacobs *pro forma* to $160,000 in Engler *pro forma*. Exh. 7, p. 12; 21-A; 21-B. In light of Mr. Engler's *pro forma* financial statements enumerating specific soft costs, and his testimony that the stated soft costs are legitimate, and in the absence of specific testimony from Mr. Heaton with regard to any of those costs, we find that the developer has proven that $1,934,919 is an appropriate estimate of total soft costs.

D. Synthesized *Pro Forma* Analysis

As indicated above, we have reviewed the areas of agreement and disagreement between the parties, and based upon that now provide a synthesized analysis:

22. He also raised a "concern" about the $150,000 construction management fee, although he included it in his analysis. There is no such line item in Mr. Engler's later *pro forma* financial statements. See Exh. 21-A, 21-B.

Development of 36 Age-Restricted Units

1. Development Costs

Acquisition	**981,000**	developer's figure	§ III-C(1)[23]
Hard Costs			
Site Development			
site improvements	1,147,000	uncontested	
landscaping	216,000	uncontested	§ III-B
sprinkler	---	Board's figure	§ III-C(2)
radio master box/traffic light opt.	42,000	uncontested	§ III-C, n.15
Construction	4,860,000	uncontested	§ III-B
Hard Cost Contingency @ 5%[24]	313,250	calculation	
Sub-Total Hard Costs	**6,578,250**	calculation	
Soft Costs			
Building Permits & Fees	216,000	uncontested	
Architectural & Engineering Fees	150,000	uncontested	
Legal, Title, & Recording Fees	160,000	developer's figure	§ III-C(4)
Insurance (builder's risk)	46,967	uncontested	
Taxes	72,419	developer's figure	§ III-C(3)(b)
Accounting & Cost Certification	12,000	developer's figure	§ III-C(3)(b)
Marketing & Commissions	474,750	uncontested	
Deed Stamps	49,832	uncontested	
Financing Fee & Loan Costs	82,140	uncontested	
Development Overhead	102,000	uncontested	
Construction Loan Interest	368,000	developer's figure	§ III-C(3)(b)
Utilities	40,000	uncontested	
Application Fees	13,580	uncontested	
Appraisal	13,000	uncontested	
Maintenance of Unsold Units	23,069	developer's figure	§ III-C(3)(b)
Lottery Administration	43,713	uncontested	
Soft Cost Contingency @ 5%	67,450	developer's figure	§ III-C(3)(b)
Sub-Total Soft Costs	**1,934,919**	calculation	§ III-C(4)
Total Development Cost	**9,494,169**	calculation	

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23. The citations in this column refer to sections in this decision, above.

24. The hard cost contingency is 5% of site development and construction costs; that is, it excludes acquisition cost.

Thus, we find that a fair estimate of the total development cost for the age-restricted development is $9,494,269.

2. Projected Sales Proceeds

Market Units			
2 BR @ 1,436 sq.ft. - 9 x $345,000	3,105,000	developer's figure	§ III-C(3)(a)
2 BR @ 1,474 sq.ft. - 18 x $355,000	6,390,000	developer's figure	§ III-C(3)(a)
Affordable Units			
2 BR @ 1,436 sq.ft. - 9 x $161,900	1,457,100	uncontested	
Net Sales Proceeds	10,952,100	calculation	

3. ROTC

Using the standard analysis, the return on total cost (ROTC) is projected sales proceeds minus total development costs, and if this is less than 15% of total development costs, the proposed development is uneconomic. See section II-A, above. In this case, the projected sales proceeds of $10,952,100 minus total development costs of $9,494,169 yields an ROTC of a profit of $1,457,931, which is a profit of 15.3% of total development costs. Therefore, we conclude that the developer has not met its burden of proving that the conditions imposed by the Board make construction of the housing uneconomic.

E. Local Concerns

Since the developer has not proven that the development approved by Board exceeds the 15% threshold of economic viability, we need not consider whether the Board has proven the existence of local concerns that outweigh the regional need for housing.

IV. CONCLUSION

Based upon review of the entire record and upon the findings of fact and discussion above, the Housing Appeals Committee rules that decision of the Groton Board of Appeals filed with the town clerk on December 15, 2006 is consistent with local needs.

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

Housing Appeals Committee

Date: December 13, 2010

Werner Lohe, Chairman

Joseph P. Henefield

Theodore M. Hess-Mahan

:

Marion V. McEttrick

James G. Stockard, Jr.

LPc\g