

HOUSING APPEALS COMMITTEE
Lexington Ridge Associates

Decision # **90-13**
Appellant: **Lexington Ridge Associates**
Appellee: **Lexington Board of Appeals**
Date: **June 25, 1992**
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APPENDIX

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DECISION

I. STATEMENT OF THE CASE

This is an application for a comprehensive permit, submitted under the provisions of G.L. c. 40B, s. 20-23.[1] The application was submitted, on June 22, 1990, by Dennis Sargent, et. al, d/b/a Lexington Ridge Associates[2] to the Lexington Zoning Board of Appeals.[3] The applicant

[1] St. 1929, c. 774. Established G.L. c. 40B s. 20-23; the so-called Anti-Snob Zoning Law. Referred to hereinafter as "the Statute." Reference to "sections" refer to sections of G.L. c.

40B.

[2] Hereinafter referred to variously as the "Developer," the "Applicant," the "Appellant," or "Lexington Ridge."

[3] Hereinafter, the "Board," the "Appellee," the "Town."

seeks to build a development of fifteen buildings, containing 198 units, on an eighteen acre site in Lexington. Twenty-eight percent (28%) of the units are to be low- or moderate-income housing. The applicant has applied to the Lexington Housing Authority for subsidy funding under the "TELLER" program, and has received "Official Action Status." [4]

After due notice and public hearing, the Lexington Zoning Board of Appeals, on December 6, 1990, rendered its decision (Exhib.1, I:9). The Board's decision granted the comprehensive permit for 198 units as prayed for in the application, subject to thirty-two conditions. These conditions had been worked out over a period of fairly harmonious negotiation between the developer and his consultant, Robert Engler, on the one side, and Robert

[4] "TELLER" is an acronym for the "Tax Exempt Local Loans to Encourage Rental Housing" program, operated by local housing authorities. Under this program, subsidy loans are made available to developers of low or moderate income housing. The funds are obtained through sale of tax-exempt bonds.

The Board has argued that the Housing Appeals Committee should dismiss this appeal on the ground that the Developer failed to establish jurisdictional prerequisites in that Official Action Status had been ostensibly granted before a proper application had been filed, and the fee paid (I:16).

We rule, on the basis of the affidavit filed by William Spencer, Chairman of the Lexington Housing Authority, that the application was properly before the Authority, and that the vote approving it and granting "Official Action Status," is valid, and creates a presumption that the proposal is fundable (See Exhib. 22; also n.2, pp. 3-4 of Appellant's Brief; also Stoneham Heights Ltd. Partnership v. Stoneham, No. 87-04, slip op. at 42 (Mass. Housing Appeals Committee Mar. 20, 1991)).

Bowyer, the Town Planning Director, and other Town officials, on the other. As a result, the developer raised no objection, on this appeal, to thirty of the conditions. As to the remaining two, conditions numbered three and four, the developer's position is that these two conditions render the project uneconomic and are not consistent with local needs.

The developer also contends that these conditions have deprived Lexington Ridge of its constitutional right to equal protection of the laws, and also that they constitute a taking of property without compensation. The developer contends that the Committee is without jurisdiction to decide these constitutional

issues, but that such jurisdiction resides in the Superior Court. In this position the Town concurs.

On December 20, 1991, the developer filed an action in the Middlesex Superior Court to pursue its rights under the constitutional issues it has raised. By agreement of the parties these proceedings have been stayed pending resolution of the HAC proceeding. The following day, on December 21, 1991, Lexington Ridge submitted to the Housing Appeals Committee (hereinafter "HAC" or "the Committee") this appeal from the decision of the Board seeking modification or removal of conditions three and four, on the ground that they are uneconomic and not consistent with local needs.

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H.A.C. Proceedings:

There were four days of evidentiary hearings before HAC: March 5, April 17, June 18, and September 5, all 1991. Testimony was submitted on behalf of the developer by the developer's principal, Dennis Sargent, by his two consultants, Matthew Hobbes and Nicholas Iacuzio, and by the Town Manager, Mr. Robert Bowyer. Mr. Bowyer, although called by the developer, was considered essentially a Town witness, so that cross-examination by developer's counsel was allowed. In addition, the Board introduced its own consultant, Ms. Emily Achtenberg.

The HAC proceeding, as required by the Statute, was conducted as an adjudicatory hearing, with sworn witnesses, full right of cross-examination and a complete stenographic transcript.

II. CONDITIONS THREE AND FOUR

In general, the purpose of condition three is encapsulated in its title: "Affordable Units to be Maintained in Perpetuity." It provides that at the conclusion of the "TELLER" lock-in period, or 20 years, whichever is longer, the low and moderate income units will remain affordable in perpetuity, through whatever federal, state or local subsidy program is available. If there are no subsidies available, however, and the Town is unable financially to assist the subsidized tenants, then

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the developer must reduce the rents of those units to the degree that the project's annual cash flow, given the reduced rents, is sufficient to cover operating costs and required replacement reserves, and to maintain the debt service ratio of 1:10. The condition also requires the developer to supply income and cost projections for the Board of Selectmen's review at that time.

Condition three also gives the developer five years after the expiration of the lock-in period, or twenty years, whichever is longer, to restore 28% of the units to affordable status if the financial criteria outlined in the condition cannot be met, with a pro-rated share restored in each of the five years.

Condition four is entitled "Rental Housing in Perpetuity," which again states its intended purpose. The development is required to remain as rental housing in perpetuity, unless the developer petitions the Board of Selectmen to convert the market rental units to ownership under one of five options.

Under the five options the developer agrees to

- 1) increase the percentage of affordable units from 28% to 35%;
- 2) offer the Town an option to purchase 35% of the units (which includes the low or moderate income units);
- 3) convey 20% of the units to the Town at developer's depreciated cost;

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- 4) sell 35% of the units to the tenants on a "limited equity" basis which guarantees their continued availability as affordable units; or

- 5) pay 7% of the proceeds of the conversion process to the Town to maintain the supply of affordable units.

The Selectmen have the choice of which option to approve, and may not unreasonably withhold approval.

III. ISSUES

A. "Uneconomic" and Consistent with Local Needs: Definitions

The questions before the Committee, in the case of an appeal by a limited dividend developer from conditions in a comprehensive permit are:

- 1) whether the conditions make the building or the operation of such housing uneconomic;
and
- 2) whether the conditions are consistent with local needs.[5]

[5] Statute, s. 23:

The hearing by the housing appeals committee in the department of community affairs shall be limited to the issue...in the case of an approval of an application with conditions and requirements imposed, whether such conditions and requirements make the construction or operation of such housing uneconomic and whether the are consistent with local needs...

Regulations, s. 31.05(3):

(3) Approval with conditions. In the case of approval of a comprehensive permit with conditions or requirements imposed, the issues shall be:

What constitutes "uneconomic" is also defined in the statutes and regulations.[6] The same regulation (31.06) specifies that the initial burden of proof is on the applicant. The applicant has the burden of proving that the condition makes it impossible for the developer to proceed and still realize a reasonable profit, i.e. that the condition is "uneconomic." The burden then shifts to the Board to prove that the condition is consistent with local needs.[7]

-
- (a) first, whether the conditions considered in aggregate make the building or operation of such housing uneconomic,
 - and
 - (b) second, whether the conditions are consistent with local needs.

Commentary. A condition which makes a project uneconomic will not be removed or modified if as a result of such action the project would not be consistent with local needs.

[6] Statute, s. 20:
"Uneconomic," any condition brought about by any single factor or combination of factors to the extent that it makes it impossible...for a limited dividend organization to proceed and still realize a reasonable return in building or operating such housing...

And, from our Regulation, 31.06(3)(b):

- (b) in the case of a limited dividend organization, the conditions imposed by the Board make it impossible to proceed in building or operating low or moderate income housing and still realize a reasonable return as defined by the applicable subsidizing agency....

[7] Regulation, 31.06(3), 31.06(7):

- (3) In the case of an approval with conditions, the applicant shall have the burden of proving that the conditions make the building or operation of the housing uneconomic.
- (7) In the case of an approval with conditions in

Conditions three and four are not "consistent with local needs," argues the developer, because they are in violation of that portion of the statutory definition of "consistent with local needs" in s. 20 of the statute which requires the Board to apply its requirements and regulations "as equally as possible to both

subsidized and unsubsidized housing..."

B. "Uneconomic" and Consistent with Local Needs:
Interrelationship

In dealing with the issues of "uneconomic" and consistency we have found it impracticable to assemble the evidence, the arguments of counsel, and our own observations into two neat and separate sections. Much of the evidence and argument relates to both issues and their relationship to each other. This is particularly pointed up by that section of the Statute which provides that a condition imposed by a Board of Appeals which is consistent with local needs is not to be modified or removed by the Committee even when the effect of the condition is to make the applicant's proposal uneconomic.[8]

which the applicant has presented evidence that the conditions make the project uneconomic, the Board shall have the burden of proving, first, that there is a valid health, safety, environmental, design, open space, or other local concern which supports such conditions, and then, that such concern outweighs the regional housing need.

[8] Statute, s. 23 (last sentence, first paragraph):
Decisions or conditions and requirements imposed by a board of appeals that are consistent with local

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This section of the Statute not only exemplifies the interaction between the concept of consistency with local needs and the question of whether a particular condition is uneconomic, but it also emphasizes the overarching importance of the concept of consistency with local needs in every aspect of the "774" program: in the details of the proposal, in the actions, and in the policies which motivate the actions, of the Board and of the Town, and in the decisions and actions of the Board and of the Committee This is clearly expressed in s. 31.05 which relates to the scope of the hearing before HAC.[9]

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.

[9] Regulations, s. 31.05:
31.05: Scope of the Hearing
(1) General Principle. Consistency with local needs is the central issue in all cases before the Committee. Not only must all local requirements and regulations applied to the applicant be consistent

with local needs, but decisions of the Board and the Committee must also be consistent with local needs.

- (2) Denial. In the case of the denial of a comprehensive permit, the issue shall be whether the decision of the Board was consistent with local needs.
- (3) Approval with conditions. In the case of approval of a comprehensive permit with conditions or requirements imposed, the issues shall be:
 - (a) first, whether the conditions considered in aggregate make the building or operation of such housing uneconomic, and
 - (b) second, whether the conditions are

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C. Outline of Applicant's Argument

The applicant has submitted a succinct and excellent outline of the main points of its argument in pp.1-2 of the brief submitted to HAC. We restate that outline verbatim, since we propose in assembling the evidence, and indicating the reasons for our decision, to follow the sequence suggested in the outline.

The applicant presents its argument under four general headings:

consistent with local needs.

Commentary. A condition which makes a project uneconomic will not be removed or modified if as a result of such action the project would not be consistent with local needs.

[10] "Lexington Ridge urges the Committee to modify the permit by striking or annulling the challenged conditions of the grounds that the power to impose such restrictions is not authorized by G.L. c. 40B, and their imposition is not consistent with local needs and renders the project uneconomic within the meaning of G.L. c. 40B. Lexington Ridge requests findings and rulings by the Housing Appeals Committee that:

(a) no other housing project in Lexington has been similarly burdened with perpetual conditions and therefore the Town has not applied such conditions as equally as possible to both subsidized and non-subsidized housing; (b); the conditions imposed render the project uneconomic because they prevent the developer from obtaining financing for the project so uncertain that a reasonable developer would not proceed with this development; (c) the Board exceeded its authority since such restrictions on ownership are not authorized by Chapter 40B or by any other statute or zoning by-law; and (if the Committee has jurisdiction) (d) the conditions deprive Lexington Ridge of the equal protection of the laws and constitute

an uncompensated taking of Lexington Ridge's interest in the property."

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1. Consistency with Local Needs;
2. Does the Board Have the Power to Change the Form of Ownership?
3. Are the Conditions Uneconomic?
4. Constitutional Issues.

We proceed to the first of these four areas: Consistency with Local Needs.

IV. Specific Issues: Evidence, Findings and Rulings

A. Consistency with Local Needs

The general basis for the developer's contention that conditions three and four are not consistent with local needs is that portion of the definition of "consistent with local needs," in s. 20 of c. 40B (see also Regulations, s. 31.06(4)) which requires the Board to apply local requirements as equally as possible to subsidized and unsubsidized housing.[11]

[11] Statute, s. 20:

"Consistent with local needs," requirements and regulations shall be considered consistent with local needs if they are reasonable in view of the regional need...and if such requirements and regulations are applied as equally as possible to both subsidized and unsubsidized housing...

Regulations, s. 31.06(4):

(4) In the case of either a denial or an approval with conditions, the applicant may prove that local requirements or regulations have not been applied as equally as possible to subsidized and unsubsidized housing. The applicant shall have the burden of proving such inequality.

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We repeat the statement of this issue, from the developer's brief, as follows (Appellant's Brief: p.2):

"(a) no other housing project in Lexington has been similarly burdened with perpetual conditions and therefore the Town has not applied such conditions as equally as possible to both subsidized and non-subsidized housing."

The developer's contention requires us to examine into the evidence relating to the treatment of other housing projects in Lexington, with particular attention to the imposition of perpetual

conditions.

The applicant did not submit testimony on this issue through his own witnesses but through cross-examination of the Town's witnesses, Richard Bowyer, the Town Planning Director, and Emily Achtenberg, the Board's consultant.[12]

Mr. Bowyer, who had participated on behalf of the Town in the negotiations in the developments used for comparison, testified to the terms arrived at in the negotiations on the basis of which permits were granted by the Town. Both Mr. Bowyer and Ms. Achtenberg testified on the policy considerations that underlay the terms in the grant of those permits, and in the grant of the comprehensive permit in this case.

It is essential to understand the historical back-

[12] Richard Bowyer, the Planning Director, was called as a witness by both the developer and the Board. Since he was primarily the Board's witness, cross-examination by the developer's counsel was permitted.

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ground, the emerging problem of "expiring use," and the development of the Town's "inclusionary policy" in order to understand properly the increasing reliance by the Town and by government subsidy programs, generally, on perpetual restrictions and perpetual conditions to meet the legislature's concern for the provision of adequate affordable housing.

The term "expiring use" refers to the phenomenon whereby in the middle of the 1980's and continuing thereafter, as lock-in periods for affordable housing units in subsidized housing developments began to expire, the affordable units reverted to "market rate" rentals, or were sold as condominiums. They were no longer counted towards the Town's 10% "774 goal" (see s. 20 of the Statute), and the attempts of conscientious municipalities to meet the affordable need began to unravel.

Testimony on the development of the expiring use phenomenon was given by Emily Achtenberg, whose resume indicates her particular expertise in this area.[13] We repeat the following points from her testimony:

Approximately thirty thousand affordable subsidized

[13] Ms. Achtenberg's expertise in this field of "expiring use" is reflected (1) in her testimony, (2) in the list of publications on the subject in her impressive resume (see Exhib. 17, p. 3), (3) in her experience drafting Federal legislation on the subject, and (4) testimony before Congressional committees approximately a dozen times over the past three or four years. She also prepared an inventory of all Massachusetts "expiring use" projects for the Mass. Housing Partnership (IV:62).

units are at risk of being lost from the rolls of existing affordable housing over the next ten to fifteen years. (IV 70-71).

Her own opinion is that steps should be taken toward ameliorating the increasing problem of "expiring use:"

"...passing, for the moment, on what should be done with those units that already exist, I think...and it's an emerging view within the affordable housing community that, in the future...affordable housing should be built with long-term restrictions so that we won't have to confront this problem again in the future, as we have in the past" (IV:72).

The witness described how long-time subsidy programs have converted existing restrictions to long-term restrictions, and the

new programs recently set up have long-term restrictions to begin with. For instance, SHARP (State Housing Assistance for Rentals Program) was changed in January 1988 to require perpetual affordability after an initial lock-in period of fifteen years. This is done by giving the state an option to purchase, in exchange for (1) the outstanding SHARP debt, or (2) value of the units, whichever is less (IV:78; Exhib.18).[14]

The RHDAL Program (Rental Housing Development Action Loan Program), a state subsidy program which operates similarly to SHARP, and is available to SHARP, to other affordable housing projects, including TELLER, and to conventionally financed projects, has similar restric-

[14] Cf. the Arrangement in the Katahdin Woods case, discussed below.

tions, and gives the state an option to purchase in exchange for the debt. Both this program and the SHARP program have the effect of reducing the residual value of the development. Nevertheless, in spite of a shortage of subsidy funds, projects are being developed under this program. The witness is associated with one of them (IV:82-84; Exhib.19).

In the Tax Credit program, which provides a low income tax credit to eligible developers who agree to set aside at least twenty percent of the units for affordable tenants, the lock-in period, which was fifteen years, was raised in 1990 to thirty years (IV:84-86; Exhib.20).

Parallel efforts in Lexington to deal with the twin problems of meeting the escalating need for affordable housing, while coping with the eroding problem of "expiring use," are described by Robert A. Bowyer, the Town's Planning Director.

He described the evolution of this inclusionary housing policy

beginning in the 70's, and its revision through the 80's. The most recent revision is the wording of the policy in the adoption in December, 1985 (Exhib.12).

The objectives of the inclusionary policy are best described by Mr. Bowyer in his own words:

"...it is the Town's policy and practice to provide affordable housing on a permanent basis. We don't through all of the efforts that we go through, in the variety of programs that we use, to have the

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affordable housing only there temporarily, such as, for the length of the lock-in period...

...our objective is to provide housing for people, residents of the Town, diversity. And we wouldn't want to

have a situation where we wake up from the first day of the sixteenth year and find it's 100 percent market development. That would be contradictory to everything that we try to do in our housing program. We're both sympathetic to the tenants. We don't want to end up with no place for people to go. And it's inconsistent with a program of the Town to provide affordable housing units.

So, in that sense, it's important that the conditions run for a long time..."(III:61-62).

In 1987, the Town received an award from the Massachusetts Housing Partnership in 1987 for the pro- motion of affordable housing, partly in relation to this inclusionary housing policy. Lexington has also been cited by the Metropolitan Area Planning Council as a model for the development of affordable housing (III:22).

We turn to a review of the terms negotiated by the Town in each of the seven developments examined into by the developer in pursuit of his argument that the Town's disposition represented "unequal" treatment under s. 20 of the Statute.

All the testimony on this subject was given by Mr. Bowyer, who testified on two occasions, once under summons from the developer (I:47-69) and again as witness for the Board, at which time he was further cross-examined by developer's counsel. His testimony on this occasion fills the whole of volume III of the Transcript.

These developments are all listed in Exhibit 13, which is entitled "Town of Lexington's Use of Continuing

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Affordability and Rental Guarantees." [15]

Exhibit 13 lists seven developments plus two categories titled "Special Needs Housing" and "Scattered Site Housing." All of this

housing contains features or provisions that insure the implementation of the twin objectives of the Town's Inclusionary Housing Policy as follows:

- (1) They provide for affordable housing units to fulfill the housing need;
- (2) They provide long-term or perpetual requirements for use as affordable housing to insure the indefinite availability of these units for that purpose, and to guard against "expiring use."
- (3) In all but one case they provide for affordable rental, rather than affordable condominium ownership.

The two categories, Special Needs (Handicapped) Housing and Scattered Site (Family) Housing are assured perpetual use as affordable units by virtue of their ownership by the Lexington Housing Authority (affordable low-income public housing) or LexHAB (affordable moderate-income).[16] All the housing in these two categories is

[15] Hereinafter referred to as the "guarantees list."

[16] LexHAB--a Lexington housing agency set up by special

legislative act for the purpose of owning, developing, and managing affordable housing, particularly for moderate income tenants not served by the Lexington Housing Authority's "low-income" projects.

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100% affordable, 100% rental, and perpetually protected, through their ownership, for use as affordable housing.

Of the seven housing developments in the Guarantees List, five contain various percentages of affordable housing units as worked out in the negotiations with the Town in connection with the rezoning, as follows. Muzzey and Franklin Schools, 100%; Countryside Manor, 50%; Parker Manor, 25%; and Katahdin Woods, 20% (see Exhib.13).

The remaining two projects made cash contributions in lieu of, an option under the Inclusionary Housing Plan. Parker Manor, one of the first developments under the plan (1979) made a cash contribution of \$897,864, which was used to purchase, off-site, ten rental units from Muzzey, plus scattered site units, all now owned by the Lexington Housing Authority, and thereby under perpetual protection.

Brookhaven, the last of these developments (1986), is essentially a medical care facility, which did not lend itself to the inclusion of on-site affordable units. Instead, Brookhaven made a cash contribution of \$402,000 to the Lexington Housing Trust Fund to be used for the purchase of scattered site units (Exhib.13).

We describe briefly the means employed to assure perpetual or long-term protection for the affordable units in the five developments which contain those units.[17]

[17] The details about the developments on the "Guarantees List" (Exhib. 13) are taken from the tabulations on the list and the testimony of Robert Bowyer (III:25-45).

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Parker Manor (1979), Muzzey High School (1983) and Franklin School (1985) are three school conversions where the Town negotiated sales and re-zonings, each under a different subsidy or financial scheme to promote the affordable housing objectives of its inclusionary housing policy. Muzzey's ten rental units were transferred to LexHAB. The balance of the seventy units is a limited equity ownership development, where every owner had to meet "affordable" criteria, and there are resale restrictions which assure that its seventy units remain 100% "affordable." Parker Manor was turned over to private ownership where permanent protection of its 25% afford-able rental units was assured by their L.H.A. ownership. In the Franklin School development, financed by SHARP, 100% of its thirty-eight units was assured availability as 100% rental and affordable by a number of Guarantees, including a deferred second mortgage to the Town.

Countryside Manor (1985) is a private development with private financing. Its twenty-five affordable rental units are assured

perpetual protection by virtue of the requirement for a 2/3 Town meeting vote to change their status.

The Katahdin Woods development, in 1986, requires special mention. Of the developments listed on the "Guarantees List," this is the only development, which, like Lexington Ridge, involves an application for a

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comprehensive permit. Katahdin was an application for 200 units. The developer was represented by Mr. Lund, who also represents the developer in Lexington Ridge. Robert Engler, who is the developer's consultant in Lexington Ridge, was the Town's consultant in Katahdin (III:38). Mr. Bowyer participated in the negotiations on behalf of the Town in both cases.

Both Mr. Lund and Mr. Bowyer are agreed that the climate between the negotiating parties during the Katahdin negotiations was excellent, that the negotiations were "a model" (III:91) of resolving differences locally.[18] The key feature of the Katahdin settlement was the option given to the Town to purchase the affordable units, before the year 2003, at the developer's 1988 cost.

During the negotiations on Lexington Ridge, the developer offered to accept the whole set of terms on which Katahdin Woods was settled, including the option to be given to the Town to purchase the affordable units at the developer's cost. The offer was not accepted by the Town, and forms one of the principal bases for the developer's contention that this difference in treatment renders the Town's action not consistent with local needs.

[18] Both the developer and Mr. Bowyer have also testified that the negotiating climate in this case (Lexington Ridge) has been equally cooperative. This explains in part why, of thirty-two conditions, an unusually high number, the developer has contested only two: conditions three and four.

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The Town counters this argument by contending that it had to make its decision in each case based on the different circumstances in each case. The Katahdin comprehensive permit was agreed on in 1986, five years before the Board's decision in Lexington Ridge. Katahdin was the first time the Town had been faced by such a major Comprehensive Permit application (200 units) filed by a Boston developer in what they perceived to be a "hostile" proceeding (III:37). They were most reluctant to take a chance on the outcome of a possible appeal to the Housing Appeals Committee (III:37). In the circumstances, they felt that the deal they worked out in Katahdin, which in a period of escalating costs enabled Lexington to acquire units in 2003 at 1988 prices, and averted an appeal to the Housing Appeals Committee, was a "pretty good deal." Both EOCD and MAPC agreed with them (III:38). The option to buy in effect protected the affordable units in perpetuity.

But now it is four year later. The Legislative Committee investigating the effectiveness of the comprehensive permit process had recommended a larger role for the Town. The Local Initiative Program, and the Community Participation Program incorporated this new approach.

These developments, and the fifteen year experience of the Town in negotiating with developers, made the Town feel that it was no longer dealing with a "gun at its

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head" (III:41).

On a more practical level, the Town accepted the obligations involved in its option in Katahdin in the 80's when money was free and easy. To exercise that option required raising \$98,000 for each of twenty-six units in Katahdin at a time when money had become almost non-existent (III:40-42). This was something they had to think about when contemplating the obligations they would be undertaking in accepting an option in Lexington Ridge similar to that in Katahdin.

"So we never really saw Lexington Ridge as having to be a duplicate of Katahdin Woods any more than Katahdin Woods was a duplicate of other housing developments we've done...provisions applicable to every development were unique or relevant

to that particular development...(Bowyer, III:42).

B. Form of Ownership

While this analysis and comparison of the handling of the other developments indicates that the conditions three and four are consistent and in consonance with the treatment in the other developments, and not "unequal," the developer attempts to distinguish Lexington Ridge on the basis of the following arguments:

Condition three, in requiring the affordable units to be kept so in perpetuity, and condition four, in requiring that the units be maintained as rentals, imposed conditions which affect the "form of ownership." There is no specific ordinance that empowers the Board to change the form of ownership. Therefore, argues the developer, the

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Board cannot do this by a condition in a comprehensive permit.

Further, although the terms in the other developments resulted in affordable units, many in perpetuity, and practically all as rentals, those cases are distinguishable because they resulted from negotiation and agreement, whereas in Lexington Ridge they are conditions which are imposed, and for the first time.

In our opinion, there is no merit in any of these arguments. While the Board put into evidence several general zoning ordinances which easily could be found to cover the subject matter, we prefer to rule on the broader ground that one does not need a specific

ordinance to override in order to impose this sort of a condition. The only test is whether or not the condition is consistent with local needs. This conforms with our recent ruling in Hamlet Development Corp. v. Hopedale, No.90-03, slip op. at 10 (Mass. Housing Appeals Committee, Jan.23, 1992) that even where traditional zoning regulation is at issue, a major public health or safety concern is reviewable whether or not it was previously regulated by the town.

Similar considerations apply to the arguments that perpetual affordability or perpetual rental may be included as conditions in a comprehensive permit if agreed to by the applicant, but may not be imposed as conditions

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by the Board as a limitation on a comprehensive permit.

All conditions are imposed by the order of the Board, whether in fact the developer has, in negotiation, assented to some and not to others. And all have a "first time." The only test they have to pass is that they are consistent with local needs.[19]

The Committee has commented previously on the significance of rentals as against condominiums in dealing with affordable units:

"...A distinct interest of the Town, exercised through the Board, is whether the proposal is for rental or condominium. Each type of occupancy has distinct design, health, safety and economic ramifications which differ" (Stoneham Heights v. Stoneham ZBA, HAC slip op. #87-04, Mar.20, 1991).

It is really a question of affordability. Prospective tenants of affordable units can afford to rent, not to buy. This is the consideration that underlies the Town's concern in condition four, and it is a legitimate concern.

On the basis of this review of the developments we find and rule that in the negotiations and agreements between the Town officials and the various developers the Town has followed a developing and consistent policy designed to carry out the twin objectives of providing affordable housing and at the same time providing against

[19] And, of course, not "uneconomic." We are dealing here only with the validity of the condition under the principle of consistency with local needs.

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the effects of "expiring use."

We find and rule that such a policy is in accord with legislative intent and purpose, and is consistent with local needs.

We find that in the application of this policy to Lexington Ridge the Town has been uniform in its approach, and has treated all the developments with due regard for the differences in their circumstances, and in their time frame, as equally as possible, and

is not in violation of s. 20 of the Statute.

We find and rule that conditions three and four are consistent and in consonance with this policy, and that in applying these conditions to Lexington Ridge the regulations are applied as equally as possible to subsidized and unsubsidized housing, and that conditions three and four are consistent with local needs.[20]

C. Are the Conditions Uneconomic?

As we have ruled that conditions three and four are consistent with local needs, it seems that to deal with the question of whether or not these conditions are "uneconomic" is an exercise in futility, since s. 23 of the Statute specifically forbids us to vacate, modify or

[20] We have chosen not to rule on the Board's procedural contention that s. 20 does not apply in this case because all the developments in the examples were "subsidized," since there was

enough evidence in the record that the Statute was compiled with, and the conditions are consistent with local needs.

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remove the conditions, even if they have the effect of making the applicant's proposal uneconomic.[21]

A practical consideration impels us to examine the evidence on the issue of "uneconomic" and to make findings. On appeal from our decision, a court may disagree with our ruling that the conditions are consistent with local needs. The court may then want to remand the case to us for findings as to whether the conditions are uneconomic. In applications under our Statute, the time factor is important--often critical. The time involved in a remand will be saved if the decision has already made clear our findings on "uneconomic."

The record itself contains adequate evidence from which to make such findings.

The developer presents two major arguments in support of the contention that the conditions are uneconomic:

(1) A major inducement of the subsidy program, which is designed to attract limited dividend developers, is the "residual value" of these developments, the fact that after the lock-in period, the developer has heretofore been free of the restrictions imposed by the subsidy, and

[21] S. 23, last sentence, which we repeat at this point for convenience:

...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.

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has been able to raise all the rents to market rate levels, or, better still, to convert the buildings to condominium ownership and sell them off at market rates. The effect of condition three, which imposes perpetual requirements for affordable units, and condition four, which inhibits the easy possibility of conversion to condominiums, impairs this residual value to the point of destroying it altogether, and removes the attractiveness of this program to developers to the point of discouraging their participation--certainly not an objective of legislative intent.

Dennis Sargent, the developer, testified that in these circumstances he would not proceed with the project (I:83;II:20). Any reasonable developer may be willing to accept restrictions in the early years, to be later rewarded, after the lock-in period,

with increased residual value. Conditions three and four, however, since they are perpetual, eliminate the residual value, because it becomes an unknown quantity. In these circumstances, he testified, no reasonable developer would proceed with this project (I:83-84; II:21).

In this position he was partially supported by the testimony of Emily Achtenberg, the Board's consultant, who, on cross examination, testified that conditions three and four will negatively affect the residual value of the project (IV:97,126). The witness admitted that it is

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necessary to insure an adequate return to developers of these projects, and that financial feasibility is "essential" for participation of "for profit," i.e. limited dividend, developers. She testified that without such financial feasibility, it is unlikely that "for profit" developers would participate (IV:112-113).

On direct examination, however, Ms. Achtenberg testified that the perpetual restrictions in the new SHARP program, the long-term restrictions in the R-DAL program and the thirty year restrictions in the Tax Credit Program all affect the residual value.[22] Nevertheless, twenty developers have received commitments and have gone into construction under the SHARP program, with perpetual restrictions (IV:80). Projects are being developed under the R-DAL program, with one of which the witness is associated (IV:822-84). In the Tax Credit Program the witness indicated there were a number of projects, describing three she had worked on (IV:87-89).[23]

(2) The developer's second argument is that the conditions are uneconomic in that they impede the financing of the project to the point of financial unfeasibility.

[22] SHARP: IV:78; Exhib. 18.
R-DAL: IV:82-84; Exhib. 19.

Tax Credit: IV:84-86; Exhib. 20.

[23] Clarendon Hill Towers, Columbia Point, North Canal (Lowell).

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This, it is alleged, takes place in two ways. Both result from the negative effect of the conditions on the residual value. This makes it almost impossible to obtain a letter of credit, which seriously affects the marketability of the TELLER bonds. Further, the conditions inhibit the financing of the project, i.e. obtaining a construction loan or a permanent mortgage. Conversion to condominiums, or raising all rents to market level, or a foreclosure sale free of restrictions --all remedies generally

available in case of default--are impeded in this case by the restrictions in conditions three and four.

Professional opinion on the effect of the conditions on the financing of the project came from the developer's two expert witnesses. Matthew Hobbes is vice-president of Adams, Harkness and Hill, Inc. He has substantial experience in obtaining financing under the TELLER bond financing programs (I:20-23). Mr. Hobbes testified that no lender will sign on to the project with conditions three and four attached (I:32-33) for the following reasons:

(1) The letter of credit provider is taking all the risk on the transaction (I:30);

(2) In case of a default, the provider would have no power to sell the property at market value, or change the ownership to condominiums and achieve a quick recovery on the investment. He would instead be at the mercy of the

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Board of Selectmen, or else be required to maintain the property at subsidized rentals (where he might have to supply the subsidy himself) which would further reduce return (Exhib.I; I:34-35).

Further, testified Mr. Hobbes, were the developer to proceed without a letter of credit, selling the bonds with conditions three and four would be difficult or impossible because of the same limited options in the event of default (I:32).

Nicholas Iacuzio, the second of the developer's expert witnesses, is a partner at Coopers and Lybrand with experience in obtaining and analyzing the financing of subsidized housing projects. He testified that the effects of conditions three and four would be:

- (a) to limit the residual value of the project and thus to limit the equity available should refinancing be desired in case of a default or for any other reason, or to draw equity out of the project, thus creating project instability (I:40-44; IV:22-23,25).
- (b) by limiting ability to raise rents and by limiting returns after lock-in, to dilute the collateral and thus impair residual value (IV:36,54-56).
- (c) the conditions (particularly after the lock-in, if no

government subsidy is available), reduce current as well as residual value of the project by adding financial demand on the non-subsidized units, making

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it more difficult to make the mortgage and other payments, and thereby causing greater risk of default (IV:46-49, 53, 54-6).

On cross examination, the following additional information was

elicited on the extent to which conditions three and four render the project uneconomic.

From the developer, Dennis Sargent:

He has not quantified, that is, actually calculated the financial effect of conditions three and four on this project, i.e. the rate of return without conditions three and four, nor has anyone done so on his behalf (I:20,22); the conditions would not take away all the residual value, but predicting the residual value twenty years out is, at best, educated guesswork which cannot be presented with any precision (II:23,24).

From Mr. Hobbes:

There are other alternatives in addition to a letter of credit to facilitate or enhance the financing of this project: (1) selling the bonds without enhancement, (2) obtaining bond insurance, and (3) obtaining FHA mortgage insurance. Mr. Hobbes testified that he has not actually made an inquiry to obtain a letter of credit, or bond insurance or FHA mortgage insurance. The development has not yet reached that stage. His comments and concerns are based on his general understanding of the market, not from

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specifically shopping this deal (II:44).

All of the developer's witnesses were in agreement as to the difficulty of obtaining financing for a real estate deal in the current market climate. Mr. Iacuzio was not aware of any tax-exempt bond project in Massachusetts that was able to obtain a letter of credit within the last two years (IV:28). Mr. Sargent testified that even without conditions three and four, it was possible that Lexington Ridge would be unable to obtain a letter of credit for the project because of current conditions of the real estate and lending markets (II:33). Mr. Hobbes indicated that it would be extremely difficult, in the current market, for a developer to find a financially secure bank that will issue a letter of credit on the project even if conditions three and four were struck down (II:47,51). Mr. Hobbes, too, could not identify one letter of credit enhanced transaction issued for a residential housing project in the two years preceding his testimony (I:46-47).

Emily Achtenberg, who, as we have seen, agreed with the developer as to the necessity for adequate financial inducement to get developers to build affordable housing, and who testified

further that she could not speak to the likelihood of selling TELLER bonds not enhanced by a letter of credit (IV:95), testified also that she can think of two projects that she has been involved in that

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have recently obtained letters of credit (IV:89).[24]

With respect to conditions three and four, the witness

testified that during the first five years (the period to be covered by the first letter of credit) the conditions would not create any likelihood of default; that during that period the operating conditions are those of the TELLER program itself; and during this five years, conditions three and four would have no effect on the operating costs, or income or expenses of the projects (IV:90-92).

She also testified that there are additional supplementary programs available that improve the economics of this project. In particular she described the Tax Credit Program which is available to TELLER project (IV:95-96).

Also, in pointing out the number of developments that have gone forward under SHARP, R-DAL, Tax Credit and other subsidy programs involving perpetual and long-term restrictions to preserve affordability and to stave off "expiring use," despite the dampening effect of these requirements on residual value, the witness indicated that not only have these restrictions not impeded the developments, but in at least two instances, these restrictions survive and are not wiped out by a mortgage foreclosure. These are two cases she worked on personally, but she is

[24] Columbia Point in Boston and North Canal in Lowell.

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familiar with others as well (IV:87-89).

As indicated, the testimony as to whether the restrictions in conditions three and four rendered the project uneconomic came from four witnesses: the principal developer, Dennis Sargent, the developer's two consultants, Matthew Hobbes and Nicholas Iacuzio, Emily Achtenberg, and the Board's consultant.

Mr. Sargent we found to be an open and forthcoming witness. His testimony about his own hesitancy to go forward with the project in view of these restrictions we found of less probative value than his opinion that any reasonable developer would similarly hesitate, particularly as this opinion was corroborated by the opinion of Mr. Hobbes.

Mr. Hobbes is known to the Committee, both from testimony as an expert in other cases and by his well-deserved excellent reputation. Mr. Iacuzio, the accountant, appears before us for the first time. His credentials are impeccable, and he, too, was open, forthright, and well-informed on his subject.

Miss Achtenberg also appears before us for the first time, but her reputation precedes her. She is a top authority in the housing

field, as is attested by her resume, her publications, and the record of her testimony before Congressional committees.

In evaluating the testimony of the expert witnesses,

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the conspicuous difference is that the testimony on behalf of the developer had to be somewhat speculative. As Mr. Hobbes testified, the project had not reached the stage where letters of credit are customarily solicited or financing generally arranged for. As a result both Mr. Hobbes and Mr. Iacuzio could submit no more than their professional opinion that the conditions would inhibit--possibly prevent altogether--the obtaining of letters of credit, or mortgage financing.

Ms. Achtenberg was able to testify based on actual facts--that she knew of recent cases where letters of credit had been obtained, that in spite of the fact that SHARP and other housing programs had perpetual and long-term restrictions, that fact had not inhibited other developers or prevented other projects from being constructed, in spite of the negative effect that these restrictions have on residual value in those cases.

The evidence makes clear that a major factor the developer faces is the current real estate climate. The difficulty in obtaining financing facing all developers at the period exacerbates the admittedly negative effects of the conditions. On the other hand, the evidence does not convince us that development in general is impossible at this time, or that these conditions make it so.

We find that conditions three and four impair the residual value of the proposal. We find that the impair-

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ment is not such as to make it impossible to proceed in building or operating the project and still realize a reasonable return as defined by the applicable subsidizing agency.

We rule that conditions three and four are not uneconomic.

D. Limited Dividend Organization

The concept of "limited dividend organization" has both practical and legal significance. Its practical significance is underscored by Emily Achtenberg's testimony, previously referred to, which emphasizes that there must be a financial reward sufficient for developers to participate in this program (IV:112-113).

The legal significance is that the "limited dividend organization" is one of three classes specified in the Statute as eligible applicants for a comprehensive permit.[25] The meaning of "limited dividend" is spelled out in Section 20 of the Statute and in Section 31.06(3)(b) of the Regulation. The definition inferentially requires that so long as the affordability restriction remains in force, a developer continues to be a "limited dividend organization" under the Statute, and is entitled to realize a

reasonable return as defined by the applicable subsidizing agency. The right to such a return cannot be impaired by a condition imposed by the Board, or

[25] Statute, s. 21; Regulations. s. 31.01(1)(e)

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in any other way except by the economics of the project itself.

Condition number three provides that at the conclusion of the lock-in period or twenty years, whichever is longer, the low or moderate income units shall remain low or moderate income units in perpetuity, through whatever federal, state or local subsidy program is available.

We have already ruled that the "in perpetuity" requirement is consistent with local needs.

The condition goes on, however, to state that if there are no subsidies available, and the Town or one of its agencies is unable financially to assist the previously subsidized tenants, then the developer must reduce the rents of those units to the degree that the project's annual cash flow, given the reduced rents, is sufficient to cover operating costs (including a management fee) and required replacement reserves, and to maintain the debt service ratio of 1:10.

If the term "operating costs" is intended to include the statutorily mandated "limited dividend," we have no problem with the condition. If there was no intention to provide for the limited dividend, along with operating costs and required replacement reserves (and management fee), then the condition by its very wording has removed the developer's statutory right to his limited dividend. It has reduced the developer's return to below the minimum

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provided for by the terms of the subsidy, and thus is violative of the Statute.

This is a different situation from a condition which is subject

to a judgment call as to whether it is so uneconomic as to prevent the developer from actually making his limited dividend. Such a condition may still be ruled to be consistent with local needs and therefore beyond the power of the committee to modify or to vacate, under the provision of the last sentence of Section 23 of the Statute (see n.20).

Necessary modifications to condition three will be provided for in our final order.

We now turn to two final issues which were dealt with at some length in the developer's brief. The first is the developer's contention that the five alternative methods through which the developer may convert from rental to condominium involve a choice by the Town, and that this constitutes an illegal delegation of the

Board's authority under the Statute. The second is that conditions

three and four deprive Lexington Ridge of the equal protection of the law and constitute an uncompensated taking of property. The Housing Appeals Committee, contends the applicant, has no jurisdiction to decide constitutional issues.

E. Unlawful Delegation of Authority

The Committee has ruled in several of its decisions

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that it will not enforce a condition subsequent: for instance, a condition requiring the developer, after the grant of the comprehensive permit, to obtain the fire chief's approval for the location of fire hydrants or type of smoke detectors to be used is improper.

Such a condition, it is true, involves a delegation of the Board's authority, but that is not the reason we frown on it. Rather, we want to minimize opportunities for delay and dispute. The issue of the location of the fire hydrants or the type of smoke detector can be raised and settled before the comprehensive permit is issued, so that all that is left for the developer to do after the comprehensive permit is to submit a plan to the building inspector that meets the State Building Code requirements, and obtain his permit.

This does not mean that we have an iron-clad rule against conditions subsequent.[26] Nor does it mean that we will hesitate to arrive at a different conclusion whenever we find a difference in facts or circumstances that warrants not following a previous decision.

In several cases we chose not to follow a master plan which had been gathering dust, unused, for years. But in Harbor Glen v. Hingham, No.80-06 (Mass. Housing Appeals Committee, Aug. 20, 1982), we followed a master plan which

[26] In our final order, we routinely allow for changes made by the subsidizing agency in connection with the grant of a subsidy.

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had recently been adopted by the town after a series of about twenty public discussions under the direction of a well-known planner.

Thus, while the Committee, like all adjudicatory bodies, likes to facilitate its decision-making responsibilities as much as possible by using its previous decisions as precedent, it recognizes, as does the Town of Lexington, that each situation is sui generis, and that each decision, to be faithful to the law, and particularly to the intent of the Legislature, must fit the facts and the time frame of the particular case.

We have gone to some length to trace the emerging policy in Lexington that led to the Board's decision and the conditions in this case. Practically every one of the options in condition four has been utilized by the Town in another development--the increase in the number of affordable units (Muzzey), the option to the Town to purchase the affordable units (Katahdin), the offer to the Town or the Housing authority to purchase at original cost (Katahdin), the payment of money in lieu of providing affordable units (Potter Pond, Brookhaven). In every one of the other developments it is the Town which has considered the facts and made the decision.

The Town has demonstrated its eminent qualification to make these decisions as part of an evolving policy we have already ruled to be consistent with local needs. We

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rule that the designation of the Town to make the choice among the alternatives in condition four in this case is consistent with that policy and is not an illegal delegation of authority. The designation of the selectmen to choose among the alternatives in condition four is consistent with local needs.

F. Constitutional Issues

The Developer's brief states the issue baldly thus:

IV. The Housing Appeals Committee Has No Jurisdiction to Decide the Question of Whether or Not Conditions Imposed by the Board are Constitutional.

The Developer cites no case or statute that directly supports this proposition, but presents an argument as follows:

The Committee has previously ruled that remedial statutes, such as the Anti-Snob Zoning Law, G.L. c. 40B, s. 20-23, are to be construed broadly to effectuate their purposes, and an agency has considerable leeway in interpreting the statute through regulation (Westwood).[27] Thus, the Committee has taken upon itself to interpret various provisions of c. 40B, s. 20-23, particularly in an effort to further the legislative intent behind the

[27] Commons at Westwood, Inc. v. Westwood, No. 89-47, slip op. at 3 (Mass. Housing Appeals Committee, June 20, 1990, citing Altschuler v. Boston Rent Board, 12 Mass. App. 452, 425 N.E.2d 781/1982); Wedde v. Mayor of Taunton, 343 Mass. 485, 179 N.E.2d 890 (1962).

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Statute in the face of ambiguity (Stoneham).[28] The Committee has also recognized that its jurisdiction is not without reasonable

limits (Hamilton) [29] and it has noted that "the duty of statutory interpretation is for the courts". [30]

[28] Stoneham Heights Ltd. Partnership v. Stoneham, No. 87-04, slip op. at 56-57 (Mass. Housing Appeals Committee, Mar. 20, 1991).

[29] Hamilton Housing Authority v. Hamilton Board of Appeals, No. 86-21 (Mass. Housing Appeals Committee Dec. 15, 1988 (determination of title issues not within the jurisdiction of the Committee, but belongs in the Superior or Land Court)).

[30] This is a partial quotation from Cleary v. Cardullo's as quoted in our decision in Stoneham at pp. 56-57 (n.26). As stated in the developer's brief, this partial quotation is intended to imply limits on the power of the Committee to interpret the statute. A reading of the entire quotation in the Hamilton case conveys a considerably different message:

"The Statute itself is not a model of clarity. Every section of it has required painstaking construction and interpretation over the years by the Committee. In that task we have been immensely aided by the doctrine of Cleary v. Cardullo's, Inc., [347 Mass. 337](#), at page 344, quoted in n. 20 (page 368) of the Hanover decision. ([363 Mass. 339](#), 1973; the leading case)

"The duty of statutory interpretation is for the courts, Nevertheless, particularly under an ambiguous statute...the details of legislative policy, not spelt out in the statute, may appropriately be determined, at least in the first instance, by an agency charged with administration of the statute."

In interpreting Chapter 774, the intent of the Legislature in setting up this program has been the cardinal guideline, as the Committee has been called upon to construe various provisions of the Statute over the past twenty years. Its success in doing so is attested to by the uniform approval of its decisions by the courts, over that period.

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The developer's argument cites "Greenfield" for the proposition that questions of law not committed to an administrative agency's discretion may be heard in the Superior Court and are not subject to the Administrative Procedures Act. The brief then quotes Section 23 of the Statute which states that when a comprehensive permit has been granted with conditions, the hearing before the Committee is limited to the issues of whether the conditions are uneconomic and consistent with local needs.

The applicant then points out that the Statute, at s. 21, allows "any person aggrieved" by the issuance of a comprehensive permit to appeal directly to the Superior Court as provided in c. 40A, s. 17 and concludes:

"Additionally, since Chapter 40B, s.21 specifically allows any

person aggrieved by the issuance of a comprehensive permit to appeal directly to the Superior Court as provided in Chapter 40B (sic), s.17, the Legislature no doubt contemplated direct appeal to the Superior Court for the purpose of resolving questions of law which are not committed, by either the statute or the regulations, to the Committee for determination...The Committee should, therefore, decline

to

pass upon the constitutionality of the Board's conditions and leave such a declaration to the Superior Court...

While we agree, except as noted, with each of the premises on which the developer relies in reaching this conclusion, we disagree with the conclusion. The legisla-

[31] School Committee of Greenfield v. Greenfield Education Associates, [385 Mass. 70](#), 76 (1982).

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ture referred to c. 40A, s. 17[32] not primarily because it contemplated direct appeal to the Superior Court on questions of law, but rather to provide a day in court for any person who feels aggrieved by an action of a board of appeals or any other special permit-granting authority, whether such person was previously a party or not. Chapter 40B, s. 22, by its terms, grants a right of appeal to the Housing Appeals Committee (and thence to the Superior Court) to the applicant, but not to any other "aggrieved person." That gap is covered in c. 40B, s. 21 by a reference to c. 40A, s. 17.

The appellant's conclusion, based on this recitation of premises, is that conditions three and four raise questions of constitutionality; that review of such questions "clearly exceeds the jurisdiction of the Committee, which should therefore decline to pass on the questions of constitutionality, and leave such declaration to the Superior Court, in which an action is currently pending challenging the Board's decision".[33]

[32] Appellant's Brief, p. 24. The reference to c. 40B, s. 17, is in error. It should be c. 40A, s. 17.

[33] We question whether Appellant followed proper procedure in appealing Board's decision directly to Superior Court. The developer's administrative remedy, under Chapter 40B and 30A is to appeal an unfavorable judgment from HAC to the Superior Court, and thus get his constitutional argument before the Superior Court that way. Had the Superior Court action not been stayed, the Committee might have been deprived of making the initial decision as to the extent of its own jurisdiction.

Any tribunal which is directed by its enabling legislation to conduct hearings, particularly appellate or review hearings, is faced constantly by the requirement to determine the limits of its jurisdiction. If the issue is specifically raised, the tribunal may make a specific finding or ruling and proceed thereafter accordingly. Merely proceeding with its own hearing implies an assumption that it has jurisdiction.

In our decision in the Hamilton case, cited in the Appellant's brief on p.23 (see our n. 27) we stated that the Housing Appeals Committee is not the tribunal for the determination of title issues, that such issues belong in the Land Court or Superior Court. We proceeded to state, however, that it was not necessary for us to deal with that issue, that all that was necessary for the applicant to establish standing was to show a color of title (citing authorities) which the applicant had done. Our decision in the Hamilton case was not, therefore, that our jurisdiction did not include the power to deal with the issue of title, but that it was unnecessary for us to do so.

If the jurisdictional issue is not specifically dealt with in the presentation, but the Committee is made aware of the issue either because it is mentioned in the pleadings, or in the brief, or even in the initial or final argument, the Committee must deal with it nevertheless, because a jurisdictional argument attacks the very

power of a tribunal to act, and this may be raised at any stage of the proceedings.

That corresponds to the way in which the issue was raised in this case. The issue was mentioned in the initial pleadings. The applicant contended that conditions three and four represent unequal treatment and constitute an uncompensated taking under the Federal Constitution, and that the Legislature has not given power to the Committee to deal with these constitutional issues.

The counsel for the Board has indicated his agreement with counsel for the developer in this position. Neither counsel has asked for a stay of these proceedings. Instead, counsel for the developer appealed under Chapter 40B to the Housing Appeals on the ground that the conditions are uneconomic and not consistent with local needs, and practically simultaneously appealed directly to the Superior Court under Chapter 40A, s.17, to preserve his opportunity to press his constitutional claims. The agreement by both counsel that the Superior Court proceedings be stayed until there was an adjudication of the appeal to the Committee indicates their agreement that the issues of "uneconomic" and consistency with local needs be adjudicated first. If our findings and rulings were favorable to the developer, the constitutional issues could be dropped, and if unfavorable, the developer still had his chance

to defeat conditions on constitutional

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grounds.

The fact that the Committee proceeded with its hearing on the issues of "uneconomic" and consistency with local needs is not to be taken as implying that the Committee "went along" with the apparent agreement between counsel as to the order in which the issues should be adjudicated. Nor does it imply any agreement with both counsel that the Committee has no power, even on a preliminary basis, to make findings or rulings on the constitutional issues,

but is required instead to defer these decisions to the Superior Court.

As we have indicated, the Committee cannot avoid dealing with a constitutional issue as soon as it becomes aware of such an issue, because the very power of the Committee to act at all is being questioned.

Because the jurisdictional issue was not directly presented to the Committee for a determination does not mean that no determination was made. By implication, the fact that the Committee continued on with its hearing on the merits indicates our determination on the constitutional issue raised in the pleadings and the applicant's opening.

We do not find that the facts present the constitutional issues which the developer claims. The developer in effect claims that he received certain rights under a comprehensive permit, and that those rights were then

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impaired by conditions which a) were never imposed on anyone receiving a comprehensive permit before, and b) constituted a taking of property for which he wasn't being compensated.

But that does not correspond to the facts. The grant of a conditioned comprehensive permit is a single act. It is not the grant of an unencumbered comprehensive permit followed by the imposition of a condition which then encumbers the comprehensive permit. The rights conferred by a conditioned comprehensive permit are less than the total bundle of rights granted by an unconditioned comprehensive permit, but in either case, they represent the total of the rights that the developer has received. Nothing has been "taken away" from him.

Had the developer received a comprehensive permit without conditions three and four, and thereafter, when his rights under the comprehensive permit had vested, the Town attempted to impose conditions three and four, it could reasonably be argued that there was a violation of the developer's constitutional rights. But those are not the facts here.

The interpretation advanced by the applicant, that a conditioned comprehensive permit implies that something has been taken

from the applicant, is admittedly novel. It is the kind of situation contemplated in Cleary v. Cardullo's (see n. 28), where the Housing Appeals Commit-

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tee is designated as the agency to make the initial interpretation. Our interpretation certainly more closely represents legislative intent.

Counsel for the developer has done considerable research to prove that his client's constitutional rights have been infringed. This material appears in the Appellant's brief at pp. 25-29. The material was kindly made available for our use in the event that we determined that our jurisdiction did extend to a determination

of the constitutionality of the Board's conditions. We have carefully examined the research and the arguments and have carefully read all the federal cases cited on pp. 26 and 27 of the brief. In all of these cases, no one questions that a constitutional issue indeed is raised by the facts of that case. In that particular aspect those cases shed no additional light that would induce us to change our determination that the facts of this case do not present any constitutional issues with respect to conditions three and four.

Particularly we should add that every factual aspect in the conditions, relied on by the appellant to prove unconstitutionality, has been raised by the Appellant on the issues of "uneconomic" and consistency with local needs, where they were indeed relevant, and have been thereby discussed in this memorandum under those headings.

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We have found in all instances (with the exception of the limited dividend status of the developer) that the conditions were not uneconomic, and were consistent with local needs.

We must take exception with some of the parallels attempted in the applicant's brief between this case and some of the federal cases cited in the brief.

Thus at p. 24, the brief states:

"There is no question that had the Town of Lexington simply required Lexington Ridge to convey a percentage of its housing permanently to the Town for the purpose of providing low and moderate income housing to the residents of Lexington, the Town's action would be an uncompensated exercise of its eminent domain power."

With that statement we have no quarrel. However, the argument then goes on to say:

"There is no difference between requiring a developer to convey land for a public purpose and conditioning a permit to build on the basis of such a requirement. Nolan v. California Coastal Commission, 107 s.Ct. 3141, 4145 1987)."

Here we must very carefully distinguish the factual situations between "Nolan" and our case. In Nolan, a very long 5-4 U.S. Supreme Court decision, with three written dissenting opinions, the case involved an application for a permit to build on a beach-front lot. The condition required the owner to provide access to the public to walk along the beach. Sixty similar permits had issued, of which 47 were similarly conditioned. Nowhere in the report did anyone raise the issue of the right of the

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applicant to the permit in the first place. The sole issue was

whether the condition was in furtherance of a public land use policy or whether it should be compensated as a taking--whether to spread the burden to all the taxpayers or to confine the burden to a small group of beach-front landowners and to compensate them.

No one has a "right" to a comprehensive permit. The testimony of Emily Achtenberg was that a comprehensive permit that permitted 200 units of housing instead of the twelve allowed by the existing zoning requirements was worth about 6 million dollars. It is hard to see how conditioning such a permit consistent with an affordable housing policy carefully worked out over a considerable period constitutes an invasion of the right of the developer to the quiet enjoyment of his property. The condition here is not the same as requiring a developer to convey land for a public purpose.

V. Findings, Rulings and Order

1. As we have indicated in section IV, D. of this memorandum under the heading "Limited Dividend Organization" we find that there is a possibility that condition three could be construed so that the developer could under some circumstances be deprived of his status as a limited dividend developer under the Statute. We find and rule that such deprivation, whether deliberate or by oversight,

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would be violative of the Statute, and both uneconomic and not consistent with local needs. To eliminate possible confusion, and to bring that portion of condition three within the purview of the Statute we order the following change in condition three:

The sentence in the second paragraph of condition three which reads as follows:

"Operating cost estimates must carry a management fee which

is within the range of fees acceptable to the Massachusetts Housing Finance Agency at that time"

shall be changed to read as follows:

"Operating cost estimates must carry a management fee and an item for the developer's limited dividend. Both the management fee and the limited dividend shall be within the range of such items acceptable to the Massachusetts Housing Finance Agency at that time.

2. With this change, and in view of our subsidiary findings and upon review of the whole record, we find and rule that conditions three and four are consistent with local needs and are not uneconomic.

3. The decision of the Board of Appeals is hereby affirmed, and the Board is directed to issue a comprehensive permit to the Appellant in accordance with its decision, in accordance with the Appellant's application, and incorporating the change indicated by the Committee in this order.

This decision may be reviewed in accordance with the

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provisions of G.L. c. 40B, s. 22 and G.L. c. 30A by instituting an action in the Superior Court within 30 days of receipt of the decision.

| | |
|---------------------|---------------------|
| Committee | Housing Appeals |
| Date: June 25, 1992 | /s/ |
| Chairman | Maurice Corman, |
| | /s/ |
| | Grace A. Abruzzio |
| | /s/ |
| | Joseph P. Henefield |

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APPENDIX
CONDITIONS THREE AND FOUR

3. AFFORDABLE UNITS TO BE MAINTAINED IN PERPETUITY

At the conclusion of the "Lock-In" period under the TELLER program (or if the project is financed under any other program, then whatever similar "Lock-In" period or financing period is required before mortgage refinancing or prepayment is allowed), or 20 years, whichever is longer, the low- and moderate-income units shall continue in perpetuity to serve low- and moderate-income households. This can be accomplished by using whatever federal, state or local subsidy program is available at the time, or by whatever other arrangement the developer can make with the approval of the Town.

If there are no subsidies available to the development or its tenants at that time, and the Town, or one of its agencies is unable to financially assist the low- and moderate-income tenants to pay the rents being collected by the development at that time, then the developer agrees to reduce the rents on those units to rent levels which are affordable to low- and moderate-income households -- to the degree that the project's annual cash flow, including the reduced rents, is sufficient to cover operating costs and required replacement reserves and maintains a debt service coverage ratio of housing obligation as part of the project's cash flow projections. Operating cost estimates must carry a management

fee which is within the range of fees acceptable to the Massachusetts Housing Finance Agency at that time. The developer shall be responsible to produce these income and cost projections to the Board of Selectmen for review at that time.

If, after the "Lock-In" period or 20 years (whichever is longer), the developer is unable to use project resources in lieu of external subsidies to maintain 28% of the units as affordable because of the financial criteria outlined above, the developer shall have five years to restore the project to 28% of the units as with equal number of units being restored in each of the five years.

4. RENTAL HOUSING IN PERPETUITY

The development shall continue as rental housing in perpetuity after the "Lock-In" period (or comparable period which precludes the developer from prepaying or refinancing the mortgage) unless the developer petitions

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the Board of Selectmen to convert the market rental units to ownership under one of the options set forth below.

Prior to approving a petition, the Board of Selectmen shall make a determination that the change would be consistent with the Town's

objectives for the provision of affordable housing after consideration of the following factors:

- (a) whether conditions in the Lexington housing supply have changed so that there is sufficient supply of rental housing to allow for conversion of the rental units to ownership;
- (b) whether the financial condition of the development will allow it to be continued as a rental development in an economically sound condition and without a decline in the physical quality of the buildings and grounds and in the services provided to tenants;
- (c) whether the change to ownership would affect the number of housing units to be included in the subsidized housing inventory as determined by EOCD and the Housing Appeals Committee.

Approval of the petition shall not be unreasonably withheld by the Board of Selectmen.

The Board of Selectmen may approve the conversion to ownership of the market rate units, and in some circumstances the low- and moderate-income units, under one of the following options:

- (1) the developer increases the number of affordable units to 35% to be maintained as rental units; or
- (2) the developer offers the Town, or one of the Lexington housing agencies, an option to purchase 35% of the units (with the Town or housing agency having the right to purchase less than the entire number of units offered) including the low- and moderate-income units;

[In that case, the price of each unit shall be the proportionate share of the total development costs of the project determined by a fraction having as its numerator the square foot area of the unit and as its denominator the total square foot area of all units in the project. The development costs shall be those costs as established by the Lexington Housing Authority pursuant to the TELLER program regulations, or established under any other applicable subsidy programs, plus (a) the costs of

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making the units ready for sale, and (b) any federal and state income taxes assessed against the developer as a consequence of the sale of the unit. Federal and state income taxes shall be determined on the basis of the tax laws in effect as of the date of this permit.

The developer shall, within six (6) months of the date on which a certificate of occupancy on 100% of the units is issued by the Building Commissioner, furnish to the Town Manager financial data showing the initial development costs. The financial records of the Project shall be available to such individuals as may be designated by the Town Manager. The Town Manager and the developer shall establish the purchase price for each unit, or unit type, to which this provision relates;] or

- (3) the developer conveys, at developer's depreciated cost, at least 20% of all units in the development to the Town or to the Lexington Housing Authority; or
- (4) the developer sells at least 35% of the units to qualifying low- or moderate-income households on a "limited equity" condominium basis, with limitations on the resale price of units so that the units remain in an affordable status and with sales and occupancy to be monitored by LexHAB; or
- (5) the developer agrees to provide the Town 7% of the proceeds of the conversion process, which sum must be used by the Town to assist in the creation or preservation of its supply of affordable housing.

The Board of Selectmen shall make its choice after review of each option with the developer.

End Of Decision