C O M M O N W E A L T H O F M A S S A C H U S E T T S

H O U S I N G A P P E A L S C O M M I T T E E

WALL STREET DEVELOPMENT CORP., Appellant, v. TOWN OF WALPOLE ZONING BOARD OF APPEALS, Appellee.	)	No. 2020-01

RULING ON APPELLANT'S MOTION FOR CONSTRUCTIVE APPROVAL AND MOTION FOR SUMMARY DECISION

I. Background and Procedural History

In a decision filed with the Walpole Town Clerk on January 13, 2020, the Walpole Zoning Board of Appeals (Board) granted a comprehensive permit with conditions, pursuant to G.L. c. 40B, §§ 20-23, to Appellant Wall Street Development Corporation (Wall Street or Appellant) for a rental project at 48 Burns Avenue. Appellant, acting *pro se*, appealed the decision to the Housing Appeals Committee on January 31, 2020. At issue now is whether, following a subsequent order of remand to the Board by the Committee's presiding officer, the Board failed to timely render its decision such that a constructive grant of the comprehensive permit application is warranted. Appellant also has moved for summary decision determining that consultant fees imposed by the Board during the public hearing on remand are unreasonable and excessive.

Shortly after Appellant appealed the Board's original comprehensive permit decision to the Committee, it secured an agreement to purchase land adjacent to the project site, which it alleges would allow for changes to the project that would resolve certain conditions in the comprehensive permit. On February 26, 2020, with the Board's assent, Appellant moved to stay the Conference of Counsel originally scheduled for February 18, 2020 for 60 days, to allow for

the submission of proposed changes to the Board for its review. The presiding officer granted the motion to stay and ordered the parties to submit a joint status report on the matter on or before May 1, 2020.

On April 21, 2020, the parties submitted a status report, advising the presiding officer that due to difficulties resulting from onset of the COVID-19 pandemic, they had been unable to review any revised project plans, and a continuance was granted on April 28, 2020 for an additional ninety days. The presiding officer also ordered a joint status report to be submitted on or before July 31, 2020.

On April 23, 2020, Wall Street submitted a written Notice of Project Change, with revised project plans, to the Board. The Board held a virtual meeting on May 6, 2020, at which it voted that the project changes were substantial and required a public hearing. The Board voted to open a public hearing within 45 days of the termination of the COVID-19 state of emergency that had been declared by the Governor, pursuant to St. 2020, c. 53, § 17.

On May 16, 2020, Appellant moved to lift the stay so the Conference of Counsel could be rescheduled, and the appeal process restarted. On September 17, 2020, the presiding officer ruled that the stay expired on July 31, 2020 by its agreed-upon terms, and therefore the appeal would proceed before the Committee. The conference of counsel took place on October 5, 2020, at which the parties discussed a remand to the Board.[1] The parties agreed to bring to the Board a request for reconsideration of its decision to postpone the public hearing on Wall Street's proposed modification, with the Board's counsel to report to the Committee the status of those discussions on or before November 12, 2020. *See* October 20, 2020 Letter to Parties from Presiding Officer.

The Board voted to open a public hearing on Wall Street's proposed changes starting on November 18, 2020. On November 16, 2020, the parties filed a joint motion to remand the matter to the Board, subject to certain conditions, which was granted by order of the presiding officer. Specifically, the presiding officer remanded the matter subject to the following eight conditions:

1. "The Board's hearing shall commence on November 18, 2020, unless the parties agree to a later date.

[1] On August 2, 2020, Wall Street filed a motion for summary decision. At the October 5, 2020 conference of counsel, Wall Street's new counsel represented to the presiding officer that the motion was withdrawn.

2. The Board's hearing shall be limited to the proposed changes to the subject project, provided however that the parties may discuss original conditions of approval that gave rights to this appeal.
3. The Board shall conduct such hearing in a deliberate manner on the Board's customary schedule, unless the parties agree to a longer time period or unless [the Appellant] fails to respond to the Board's reasonable request for information or fails to fund reasonably request peer review.
4. The Board shall be permitted to require reasonable peer review of any proposed change to the project.
5. The public hearing shall close upon the conclusion of the presentation of the evidence but no later [than] 180 days from November 18, 2020, unless extended by the parties.
6. The Board's decision shall be issued no later than 40 days following the close of the public hearing.
7. The Housing Appeals Committee shall retain jurisdiction over this matter.
8. In the event that the Board issues a decision that is satisfactory, the [Appellant] shall notify the Committee it wishes to have this matter [dismissed], and it shall file a motion for withdrawal of pleadings pursuant to 760 CMR 56.06(4)(e), with the assent of the Board if possible. In the event [the Appellant] objects to the Board's decision or any part thereof, it shall notify the Committee within twenty (20) days from the filing of the decision with the Town Clerk and an appeal may ensue, provided that said appeal is based upon the changed project and not the original project."

See Order of Remand on Joint Motion to Remand, Nov. 16, 2020 (Remand Order).

The Board opened its public hearing on November 18, 2020, continued it to November 30, 2020, and voted to close it on January 6, 2021. The Board deliberated at subsequent meetings on January 27 and February 11, 2021. At the meeting on February 11, the Board voted to deny the Notice of Project Change. The Board filed its decision with the Town Clerk on February 18, 2021.

On February 24, 2021, Wall Street filed a "Motion for Determination that Project Change was Constructively Approved; and Appeal of Appellee's Decision on Notice of Project Change," with a memorandum in support. On April 15, 2021, Wall Street filed a motion for summary decision entitled "Motion for Summary Decision," seeking a determination that Board imposed excessive and unreasonable peer review fees in its consideration of the Notice of Project Change, and requesting that the Committee remand the matter to the Board instructing it to impose a reasonable fee. The motion was accompanied by a memorandum in support and the following exhibits: peer review reports by BETA Group Inc., dated May 28, August 28, September 12 and

November 4, 2019, from the initial public hearing on Wall Street's comprehensive permit application (Exhibit A); original and revised site plans provided by Wall Street to the Board (Exhibit B); Tetra Tech's peer review proposal, dated November 24, 2020 (Exhibit C); and BETA Group's peer review proposal, dated November 30, 2020 (Exhibit D). The Board filed oppositions to both motions with the following exhibits attached to its opposition to Wall Street's motion for summary decision: the Board's Decision on Notice of Project Change (Exhibit 1); the Remand Order (Exhibit 2); and the Board's Comprehensive Permit Regulations (Board Regulations), adopted November 20, 2019 (Exhibit 3). Wall Street filed a reply to the Board's opposition to the Motion for Determination that Project Change was Constructively Approved. Wall Street did not reply to the Board's Opposition to the Motion for Summary Decision. For the reasons set forth below, the motion for constructive grant is denied; on the issue of peer review fees, Wall Street's motion for summary decision is denied pursuant to 760 CMR 56.06(5)(d).

II. Constructive Grant

Wall Street argues that the project change considered by the Board on remand was constructively approved. Specifically, it argues that Requirement 6 of the Remand Order required the Board to issue its decision no later than 40 days following the close of the public hearing, but the decision was not issued until 42 days after the close of the public hearing, in violation of the Remand Order. While 760 CMR 56.05(8)(a) requires the Board to render a decision within 40 days following the termination of the public hearing, Wall Street argues the language of the Remand Order specifically required that a decision in this matter be officially issued. *See* Appellant's Motion for Determination that Project Change was Constructively Approved (Constructive Approval Motion), p. 7. Because the decision was not issued until 42 days following the close of the public hearing, in the developer's view, the project change was constructively approved.

The Board responds that the use of the word "issued" in the Remand Order is a distinction without meaning and should be interpreted as requiring the Board to issue or render its decision within 40 days of the close of the hearing. *See* Board's Opposition to Appellant's Motion for Determination that Project was Constructively Approved (Board Opposition), p. 4. In its view, the word "issued" means the same as the word "rendered" in this context, and was not

intended to decrease the amount of time in which the Board could otherwise file its decision with the Town Clerk under 760 CMR 56.05(8)(a). *Id*. The Board argues this is further supported by the presiding officer's language elsewhere in the Remand Order, specifically Requirement 8, which required Wall Street to file an appeal with the Committee "within twenty days from the filing of the Board's decision with the Town Clerk." Remand Order at 2. Because this provision of the Remand Order did not state that the appeal must be filed within twenty days of the date the decision was *issued*, the Board argues the word can be viewed as interchangeable with *rendered*, and therefore the Remand Order should not be interpreted as modifying the time allotted to the Board to render its decision under 760 CMR 56.05(8)(a).

In this case, the Board's decision was rendered in less than 40 days after the close of the hearing, but the written decision and filing with the Town Clerk took a few days more. A constructive grant is a "heavy penalty." *See Aldermen of Newton v. Maniace*, 429 Mass. 726, 729 (1999). As held in *Archstone Communities Trust v. Woburn*, No. 2001-07 (Mass. Housing Appeals Comm. June 11, 2003), *aff'd* 61 Mass. App. Ct. 118 (2004), the Board's failure to issue its written decision within the statutory 40-day period under G.L. c. 40B, § 21 will not be deemed, as a matter of law, to constitute a constructive grant of approval. *See Archstone*, No. 2001-07, slip op. at 8 (finding that board filing its written decision more than 40 days after close of hearing, after voting on 31st day, did not constitute constructive approval). The Board's vote on February 11, 2021 satisfied its statutory mandate to "render a decision" within the statutory 40-day period. *See Cardwell v. Board of Appeals of Woburn*, 61 Mass. App. Ct. 118, 119 (2004). In discussing the statutory provision regarding constructive approval of a comprehensive permit application, the Appeals Court stated in *Cardwell, supra,* that a "board's failure to issue a written notice of decision within [40] days after termination of the public hearing will not result in constructive approval of the permit so long as the board has reached its decision … within the specified statutory period." *Cardwell*, 61 Mass. App. Ct. at 121. In this matter, the Board complied with the deadlines provided by statute and regulation.

The single use of the word "issued" in the Remand Order does not support the argument that the presiding officer intended to circumvent the statutory 40-day period referenced in 760 CMR 56.05(8)(a). The Remand Order specifically refers to the standard 20-day appeal period to

the Committee.[2] Moreover, a "requirement for written notice of a decision of the board … on an application for a comprehensive permit is directory rather than mandatory." *Cardwell*, 61 Mass. App. Ct. at 121.

Further, Wall Street relies primarily on 760 CMR 56.07(5)(d) to support its assertions the Board failed to comply with the Remand Order, and that the Board was required to issue its decision on the Notice of Project Change within the 40 days following the close of the public hearing. However, the cited regulation allows for a constructive grant determination only if a board fails to meet statutory deadlines provided in G.L. c. 40B, § 21, or the 180-day deadline provided in the regulation itself (*see* 760 CMR 56.05(3)). *See Way Finders, Inc. and Fuller Future LLC v. Ludlow*, No. 2017-13, slip op. at 2 (Mass. Housing Appeals Comm. Dec. 21, 2018) (noting that 760 CMR 56.07(5)(d) specifically allows determination of constructive grant in two circumstances).[3]

Finally, the Remand Order does not provide a sanction for failing to issue the written decision within the 40-day period, supporting the Board's asserting that the use of the word "issued" effected no substantive change. *See Archstone*, No. 2001-07, slip op. at 8. "The procedural posture of a case changes considerably once an appeal to [the] Committee has been filed under G.L. c. 40B, § 22, and there is no specific statutory authority requiring the Committee

[2] The Remand Order adopted or took most of its language from the parties' joint motion to remand, and the presiding officer did not significantly alter or revise the language provided by the parties in their conditions for remand; therefore, an attempt to derive the presiding officer's intent from such language, provided by the parties, is misguided. Indeed, Wall Street argues similarly: because the parties drafted the joint order to remand, they made a "deliberate decision" to use the word "issued" and deviate from the word "render" as used in the regulation. *See* Appellant's Reply in Further Support of Motion for Constructive Approval (Wall Street Reply), p. 2. However, 760 CMR 56.05(8)(a) only allows for the 40-day time period to be *extended* by written agreement of the board and the developer and is silent on whether the parties can agree to shorten the time periods provided under the regulations. Even if the parties had clear authority under the regulations to do so, the joint order to remand does not provide sufficient detail or specificity indicating that the parties intended it to be a written agreement shortening any relevant time periods.

[3] While 760 CMR 56.07(5)(d) is silent as to specific repercussions should a board fail to meet the provided deadlines, the presiding officer has authority under 760 CMR 56.06(12) to impose "appropriate sanctions, including the imposition of costs, exclusion of evidence, dismissal of a claim or defense, exclusion form the proceeding, and dismissal of the appeal," if a party fails to comply with a rule or order. However, Appellant did not seek the constructive grant as a sanction under this provision. Even if Appellant had done so, it has not, as noted above, demonstrated that the Board failed to comply with the Remand Order justifying any sanction.

to rule that the Board's delay in issuing a written decision results in the constructive grant of the [Notice of Project Change] when the appeal was already properly before [the Committee]." *Archstone*, No. 2001-07, slip op. at 8.[4]

Accordingly, I rule that the Appellant's Notice of Project Change was not constructively approved by virtue of the issuance of the decision after 40 days had expired from the close of the public hearing. Appellant's Motion for Determination that Project Change was Constructively Approved is **denied**.

III. Peer Review Fees

A. Summary Decision Standard

Appellant also moved for a summary decision on April 15, 2021, seeking a determination that the Board imposed excessive and unreasonable peer review fees during its consideration on remand of the project change.

Summary decision is appropriate on one or more issues that are the subject of an appeal before the Committee if "the record before the Committee, together with the affidavits (if any) shows that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor as a matter of law." 760 CMR 56.06(5)(d); *see Catlin v. Board of Registration of Architects*, 414 Mass. 1, 7 (1992); *Warren Place, LLC v. Quincy,* No. 2018-10, slip op. at 4 (Mass. Housing Appeals Comm. Aug. 17, 2018); *Delphic Assocs., LLC v. Duxbury,* No. 2003-08, slip op. at 6 (Mass. Housing Appeals Comm. Sept. 14, 2010); *Grandview Realty, Inc. v. Lexington,* No. 2005-11, slip op. at 4 (Mass. Housing Appeals Comm. July 10, 2006). "Summary decision may be made against the moving party, if appropriate." 760 CMR 56.06(5)(d).

B. Factual Record for Consideration[5]

[4] Furthermore, while there is no statutory authority, the comprehensive permit regulations clearly provide the applicable time periods. 760 CMR 56.05(8)(a) states a board must render a decision within 40 days of the close of the public hearing and file its decision with the Town Clerk within 14 days. Even if the presiding officer in this matter had intended to revise or shorten the time periods provided, an agency must follow its own regulations. *Town of Northbridge v. Town of Natick*, 394 Mass. 70, 76 (1985).

[5] The relevant facts are based on the documents submitted by the parties. Where applicable, I consider undisputed assertions made in the parties' memoranda.

In its initial application for a comprehensive permit, filed with the Board on February 13, 2019, Appellant proposed a 36-unit project, which was subsequently reduced to thirty-two units. During the public hearing on the application, BETA Group conducted peer review on matters relating to civil engineering and traffic and provided comments to the Board. *See* Exhibit A to Appellant's Motion for Summary Decision (Summary Decision Motion). The Board granted the comprehensive permit, with conditions, on January 6, 2020. During the appeal to the Committee, Wall Street secured an agreement to purchase land adjacent to the project site. Asserting that the adjacent land would allow project changes that would resolve some of the Board's conditions in the comprehensive permit, it submitted a revised site plan and proposed project changes to the Board in or around February 2020.

As outlined above, the parties filed a joint motion to remand the case to the Board. The Remand Order permitted the Board to "require reasonable peer review of any proposed change to the project." *See* Remand Order at 1. The Remand Order also stated that the "Board's hearing shall be limited to the proposed changes to the subject project, providing however that the parties may discuss original conditions of the approval that gave rise to [the appeal before the Committee]." *Id*.

Appellant submitted a Notice of Project Change to the Board by letter dated April 23, 2020. It sought to amend the comprehensive permit to allow for the following proposed changes: (i) increase the lot size by 16,536 square feet (due to the pending acquisition of an adjacent lot); (ii) increase the number of buildings from six to eight; (iii) increase lot coverage from 15.8% to 22.6%; (iv) increase the lot coverage by structures by 13,392 square feet, or sixty percent; (v) increase the impervious surface associated with the project by 12,995 square feet, or 27%; (vi) increase the number of units from 32 to 40; (vii) eliminate guest parking spaces; (viii) decrease setbacks by 73% from 26 feet to 15 feet; and (ix) construct a through street to provide a second means of access and egress to the Project. *See* Exhibit 1 to Board's Opposition to Appellant's Summary Decision Motion.

After opening the public hearing on the proposed project changes on November 18, 2020, the Board determined that peer review was needed to advise the Board on technical issues related to the proposed changes. On November 30, 2020, the Board reviewed proposals for engineering

review from BETA Group and Tetra Tech.[6] BETA Group had conducted peer review for the project during the public hearing on the original project, and also conducted peer review of the project for the Walpole Conservation Commission. BETA Group's estimated costs for its review totaled $7,500. Tetra Tech's estimated costs for its review totaled $13,624. For peer review of the Notice of Project Change, the Board accepted the Tetra Tech proposal.

Wall Street appealed the Board's selection to the Town's Select Board, pursuant to 760 CMR 56.05(e), which states that an administrative appeal of the selection of a consultant may be lodged with the town board of selectmen within 20 days of the consultant's selection. Grounds for such appeals are limited to claims that the selected consultant "has a conflict of interest or does not possess the minimum, required qualifications." *Id*. It does not appear that the developer raised either of those claims in its appeal to the Select Board, instead focusing on the failure to select a consultant previously used for the same project, as well as the amount of Tetra Tech's fee.

The Select Board affirmed the Board's selection of Tetra Tech on December 22, 2020. The Board's public hearing resumed on January 6, 2021, at which time Wall Street informed the Board it would not pay the fees requested by Tetra Tech for its peer review. *See* Exhibit 1 at p. 3. The Board then voted to close the hearing, deliberated at public hearings on January 27 and February 11, 2021, and thereafter denied the Notice of Project Change. In its decision, the Board stated that the peer review proposal from Tetra Tech was reasonable, in light of the complexity and scope associated with the proposed project changes, which it deemed substantial. The Board stated "[b]ased upon the substantial changes enumerated in paragraph two [of this decision] and [Wall Street's] refusal to provide the reasonable peer review funds for the Board's selected engineering peer reviewer, which deprived the Board of the ability to obtain necessary information to deliberate on the notice of project change and, consistent with 760 CMR 56.05(d) and Section 4 of the Board's Rules, the Board denies the Applicant's Notice of Project [C]hange requesting substantial modification of the Comprehensive Permit." *See* Exhibit 1, p. 4.[7]

[6] The Board received a proposed scope of work from Davis Square Architects for design review. At the request of the developer, the Board agreed to table its selection of the peer reviewer for the design of the modified project. *See* Board Opposition, p.2.

[7] Section 4 of the Board Regulations, attached as Exhibit 3 to the Board's Opposition, provides that if the applicant does not provide the Board with the requested fees within seven days of the request, the Board may deny the comprehensive permit.

C. Discussion

It is well-settled that the Board may impose reasonable peer review fees pursuant to applicable law and regulations. Section 21 of G.L. c. 40B, and the comprehensive permit regulations, 760 CMR 56.00, *et seq.,* contemplate that boards will be able to impose fees on developers for the purpose of obtaining peer review consultation on matters beyond the technical knowledge of municipal staff. 760 CMR 56.05(5); *see Oceanside Village, LLC v. Scituate*, No. 2005-03, slip op. at 39 (Mass. Housing Appeals Comm. July 17, 2007) (noting comprehensive permit statute allows boards to use consultants for testimony or explanation on technical aspects of proposed projects). Generally, fees that are not already established by regulation in a municipal fee schedule are prohibited. Pursuant to 760 CMR 56.05(5)(b)4, a fee may only be imposed in compliance with applicable law and the Board's rules and, pursuant to 760 CMR 56.05(5)(a), the Board "should not impose unreasonable or unnecessary time or cost burdens on an Applicant." *See Weiss Farm Apartments, LLC v. Stoneham*, No. 2014-10, slip op. at 77 (Mass. Housing Appeals Comm. Mar. 15, 2021) (discussing when fees may be imposed, in accordance with 760 CMR 56.05(5)). In its past decisions, consistent with 760 CMR 56.05(b), the Committee has made clear that such costs must be consistent with requirements established by local requirements or regulations. *Id.* (and cases cited).

760 CMR 56.05(5)(c) addresses the assessment of consultant review fees, requiring them to be "reasonable in light of" the following factors:

"(1) the complexity of the proposed project as a whole;

(2) the complexity of the particular technical issues;

(3) the number of housing units proposed;

(4) the size and character of the site;

(5) the project construction costs;

(6) fees charged by similar consultants and scopes of work in the area."

Appellant correctly points out that during a hearing on a proposed project change only those changes or aspects of the project affected are at issue. *See* Wall Street Motion, p. 4, citing 760 CMR 56.05(11)(c). It argues the proposed project changes in this matter only amounted to adding a new entrance and eight additional units, and therefore were modest in nature. *See* Wall Street Motion, pp. 4-5. Therefore, in Appellant's view, the complexity of the proposed project as a whole and of specific technical issues is "limited in scope" justifying a lesser fee. *See* Wall

Street Motion, p. 5. The Appellant argues that BETA Group has superior knowledge of the property, given its past involvement in reviewing it during the original hearing, and is therefore in the best position "to assess the cost[s] of reviewing the proposed Project [C]hange." *Id*. at p. 5. It argues that Tetra Tech's proposal, at nearly double the cost of the proposal submitted by BETA Group, cannot be reconciled with the requirement that peer review fees be reasonable when compared to those charged by "similar consultants and scopes of work in the area." *See* Wall Street Motion, p. 6.

The Board argues that the Tetra Tech fee is reasonable in light of the proposed project changes, which include the addition of a means of ingress and egress by replacing a turnaround with a through street, and a reduction in parking spaces, implicating traffic impacts on the property. The Board further argues the addition of eight new units could affect municipal water and wastewater systems, and the increase in impervious land could change an earlier stormwater assessment. *See* Board Opposition, p. 6. Although Tetra Tech's fee is higher than BETA Group's fee, the Board argues the regulations do not require it to hire the same consultant that was engaged during prior comprehensive permit proceedings for a project, nor do they require the Board to minimize a fee or accept the lowest possible proposal. Rather, the Board argues the regulations require that a fee be reasonable. In the Board's view, Tetra Tech's fee is reasonable in light of the scope of the proposed review.

The Board has discretion to impose peer review fees, provided they are reasonable. 760 CMR 56.05(5)(c)1-6 provides the factors to be considered when determining the reasonableness of fees, such as the complexity of the proposed project, number of housing units proposed, and fees charged by similar consultants and scopes of work in the area. Appellant has not demonstrated that Tetra Tech's fee was unreasonable in light of several of these factors. *See Schimmel v. Conservation Comm'n of Andover*, 88 Mass. App. Ct. 1104 (2015) (finding plaintiff failed to carry burden that consulting fee imposed was unreasonable); *Zoning Board of Appeals of Sunderland v. Sugarbush Meadow, LLC*, 464 Mass. 166, 191 n.26 (2013) (noting developer carries burden of proving fees were unreasonable). Appellant argues that the scope of the proposed project for review is limited to the additional eight units and a second ingress and egress, resulting in a modest and limited review. While this may be interpreted as an attempt to address factors 1, 2, and 4 when assessing the reasonableness of a fee (the complexity of the proposed Project as a whole, complexity of particular technical issues, and the number of

housing units proposed), Appellant provides only cursory statements. Appellant argues Tetra Tech's fee is unreasonable when compared to those charged by similar consultants but compares it only to the fee provided by BETA Group. No information or evidence regarding other consultants or scopes of work in the area, specifically or generally, was provided, and Appellant provides no information or argument as to the remaining factors to be considered (the size and character of the site, or the projected construction costs).

The Board, however, lists several other items identified in the Notice of Project Change that will cause changes to the project site and require review, such as an increase in impervious surface area, a reduction of guest parking space, and a decrease in setbacks, among others. *See* Board Opposition, pp. 4-7. Specifically, it states that the Notice of Project Change included "1) a 16,536 square foot increase in the lot…; 2) an increase from 6 to 8 buildings; 3) an increase in lot coverage from 15.8% to 22.6%; 4) an increase in structural lot coverage by 60%, or 13,392 square feet; 5) an increase in impervious surface of 27% or 12,995 square feet; 6) an increase in the number of units from 32 to 40; 7) elimination of guest parking; 8) decrease in setbacks from 26 feet to 15 feet…; and 9) construction of a through street, creating two means of access and egress, as opposed to the original plan's turnaround and single point of access." *See* Board Opposition, p. 2. It views the proposed changes as "fundamentally alter[ing] the nature of the project," and requiring substantive "technical guidance." *See* Board Opposition, pp. 4, 6. It cites the complexity of the project as a whole as well as specific potentially complex technical issues, such as effects on municipal water and wastewater systems, stormwater management, and traffic (factors 1 and 2). *See* Board Opposition, p. 6. It further argues that the proposed additional units and square footage affect the size of the project (factors 3 and 4) and a peer review fee of $13,624 should be considered reasonable considering proposed construction costs of nearly $10 million (factor 5). *See* Board Opposition, p. 7. The regulations do not require a board to accept the lowest proposed consultant fee, and Appellant has not demonstrated that the Tetra Tech fee is unreasonable, in light of the factors to be considered when weighing the reasonableness of such fees.

While the Board does not provide much more specificity than the Appellant as to the factors to be considered when assessing a fee's reasonableness, it addressed them more comprehensively, and on this record the developer has not shown the Board's selection of Tetra

Tech is unreasonable or inconsistent with 760 CMR 56.05(5)(c). Therefore, the Appellant's Motion for Summary Decision is hereby **denied**.

IV. Conclusion and Order

Accordingly, for the reasons outlined above, Appellant's Motion for Determination that Project Change was Constructively Approved and Appeal of Appellee's Decision on Notice of Project Change is **denied**. Appellant's Motion for Summary Decision is hereby **denied**.

This matter is remanded to the Board to engage Tetra Tech at the expense of Appellant for reconsideration and review of its decision on the proposed changes to the subject project, in accordance with the original Remand Order. Numbered paragraphs 1 and 5 of the Remand Order are stricken and are replaced with the following:

"1. The Board's hearing shall commence no later than on December 6, 2021, unless the parties agree to a later date;" and

"5. The public hearing shall close upon the conclusion of the presentation of evidence but no later than 120 days from the date the public hearing commences, unless extended by the parties."

Caitlin Loftus

November 8, 2021

Caitlin Loftus
Presiding Officer