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COMMONWEALTH OF MASSACHUSETTS

NANTUCKET, SS.

SUPERIOR COURT
CIVIL ACTION No. 2075-0021

NANTUCKET LAND COUNCIL, INC.,
Plaintiff,

vs.

THE MASSACHUSETTS DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT, THE HOUSING APPEALS COMMITTEE and SURFSIDE CROSSING, LLC,
Defendant.

MEMORANDUM OF DECISION AND ORDER ON CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS AND ON THE STATE DEFENDANTS' MOTION TO DISMISS

The Nantucket Land Council, Inc. ("NLC" or "Plaintiff") brought this action pursuant to G.L. c. 30A, § 14 and G.L. c. 231A, against the Massachusetts Housing Appeals Committee ("HAC"), the Nantucket Zoning Board of Appeals ("ZBA") and Surfside Crossing, LLC ("Developer"). NLC challenges a decision of the HAC, dated July 13, 2020 ("Decision"), denying NLC's motion to intervene in a HAC proceeding initiated by the Developer over a proposed affordable housing project ("Project") at 3, 5, 7, and 9 South Shore Road in Nantucket ("Site"). On May 7, 2021, NLC filed "Plaintiff's Motion for Judgment on the Pleadings" ("Motion"), along with the defendants' oppositions and a reply memorandum pursuant to Superior Court Rule 9A. The court heard oral argument in person on May 13, 2021.

Previously, on February 22, 2020, the State Defendants filed a "Motion to Dismiss." ("Motion to Dismiss"), in which the Developer joined. The NLC opposed the Motion. After remote hearing by zoom on March 10, 2021, the court recognized that the Motion to Dismiss raised difficult issues of first impression, which should not be addressed separately from the merits of this case, so that any appeal could proceed upon all issues and a complete record, rather

than in a potentially piecemeal fashion. The court therefore deferred action on the Motion to Dismiss, pending briefing and argument on the Motion.

BACKGROUND

The Developer applied for a comprehensive permit under G.L. c. 40B, §§ 20-23, to build an affordable housing project on Nantucket. The ZBA granted the permit with conditions. Asserting that the conditions made the project "uneconomic," the Developer appealed to the HAC and submitted a revised project that, among other things, increased the number of condominiums relative to single-family units and increased the height of certain buildings. HAC ruled that these changes were "insubstantial" under HAC regulations, 760 Code of Mass. Regs. § 56.07(4) ("Substantial Change Regulation") and therefore did not require remand to the ZBA for consideration in the first instance.[1]

On July 23, 2019, NLC filed a motion to intervene in the HAC proceedings, supported by an affidavit of its Executive Director. The ZBA assented to NLC's motion. Nearly a year later, on July 13, 2020, HAC denied NLC's Motion to Intervene, stating, among other things:

> The NLC has shown that it is "likely" that the site of the proposed housing provides habitat for the northern long-eared bat, a listed species under the Massachusetts Endangered Species Act, and that the site is "likely" used by bats for feeding or breeding. [citation omitted]. I assume that there is in fact such habitat and that bats are in fact present on the site, at least at certain times.
>
> The NLC has unquestionably done much to protect natural resources and wildlife on Nantucket. . . . The sincerity of its concern about the impact on bats is undeniable.
>
> * * *

[1] In the companion case, Nantucket Zoning Board of Appeals v. Department of Housing and Community Development, No. 2075cv00022, the ZBA challenged the HAC's determination that the Developer's changes were insubstantial. It alleged that the HAC's substantial change determination was arbitrary and capricious. It also challenged the Substantial Change Regulation as conflicting with c. 40B and as ultra vires. At that time, at least two issues remained for HAC's decision, after hearing: (1) whether the NLC's conditions rendered the Project uneconomic and, if so, (2) whether the conditions are consistent with local needs. See 760 Code Mass. Regs. 56.07(1)(c) ("Scope of Committee Hearing"). The HAC "will not hear evidence concerning . . . an alleged substantial change raised by the Board." 760 Code Mass. Regs. 56.07(h). Because the administrative proceedings were not final as to the ZBA, the court dismissed the ZBA's companion lawsuit on exhaustion of administrative remedies grounds.

> Even assuming the NLC's concern [for the time and money invested to protect habitat on nearby parcels of land were a private legal interest], it is not an interest that Chapter 40B is intended to protect. The only matters that may be considered in an appeal before the Committee are local concerns that have been previously regulated by the town. [citations omitted]. There is no allegation of any specific Nantucket bylaw or other requirement protecting northern long-eared bats that must be waived in order for the proposed development to move forward. [footnote omitted]. And, whatever legal rights the NLC may have in relation to protecting bats here arise under state endangered species law, not any local bylaw.

Decision at 4-5 (AR 776-777). The HAC allowed NLC to participate "on a limited basis as interested persons pursuant to 760 CMR 56.06(2)(c)."

NLC then filed this action on August 12, 2020, which was within the 30-day appeal period provided in G.L. c. 30A, § 14. It argues that HAC's ruling erred as a matter of law, because G.L. c. 40B expressly protects "open spaces" like those of the Land Council. See G.L. c. 40B, § 20 (Definition of "Consistent with local needs' includes, among other things "the need . . . to preserve open spaces").[2] See also 760 Code Mass. Regs. 56.02 (defining Open Spaces to include interests protected by conservation restriction).

While the hearing officer had NLC's motion to intervene under advisement, the Developer submitted a revised site plan on April 7 and requested a determination that the proposed changes were "insubstantial" under 760 Code Mass. Regs. 56.07(4). The ZBA disagreed and argued that the changes were substantial enough to require remand to the ZBA for

[2] The definition reads, in full: "'Consistent with local needs', requirements and regulations shall be considered consistent with local needs if they are reasonable in view of the regional need for low and moderate income housing considered with the number of low income persons in the city or town affected and the need to protect the health or safety of the occupants of the proposed housing or of the residents of the city or town, to promote better site and building design in relation to the surroundings, or to preserve open spaces, and if such requirements and regulations are applied as equally as possible to both subsidized and unsubsidized housing. Requirements or regulations shall be consistent with local needs when imposed by a board of zoning appeals after comprehensive hearing in a city or town where (1) low or moderate income housing exists which is in excess of ten per cent of the housing units reported in the latest federal decennial census of the city or town or on sites comprising one and one half per cent or more of the total land area zoned for residential, commercial or industrial use or (2) the application before the board would result in the commencement of construction of such housing on sites comprising more than three tenths of one per cent of such land area or ten acres, whichever is larger, in any one calendar year; provided, however, that land area owned by the United States, the commonwealth or any political subdivision thereof, or any public authority shall be excluded from the total land area referred to above when making such determination of consistency with local needs.."

local consideration. Ultimately, HAC agreed with the Developer and has proceeded with its hearing. As of the time of the oral argument, the evidentiary record had closed, apart from a site visit, scheduled for later on the day of the argument.

On May 28, 2020 HAC's chair reassigned this case from herself to Werner Lohe as Presiding Officer. NLC filed a motion to vacate that reassignment on June 8, 2020. Based on Attorney Lohe's "Disclosure of Appearance of a Conflict of Interest as Required by G.L. c. 268A, § 23(b)(3), dated June 19, 2020, HAC's Chair denied the motion. That disclosure was supplemented on July 30, 2020.

DISCUSSION

I.

In their Motions to Dismiss, and again in their presentation on the merits, the defendants challenge this court's jurisdiction to hear NLC's appeal of the Decision under doctrines of finality, standing and exhaustion of administrative remedies. This court declined to decide the motion to dismiss, following the Supreme Judicial Court's repeated cautions against premature adjudication on the pleadings in administrative review cases, which is often error. See Doe 6969 v. Sex Offender Registry Board, 99 Mass. App. Ct. 533, 539 (2021) ("review of [an agency] decision "should be resolved through a motion for judgment on the pleadings rather than a motion to dismiss the plaintiff's claim.""), citing Doe No. 209081 v. Sex Offender Registry Board, 478 Mass. 454, 457 n. 6 (2017). See also Crowell v. Parole Board, 477 Mass. 106, 109-110 (2017). Having reserved decision on this question at the motion-to-dismiss stage, the court now considers and rejects these arguments.

There is no question that, at some point, an unsuccessful intervenor in adjudicatory proceeding before a state agency may appeal the ruling that denied intervention. See

Cablevision Systems Corporation v. Department of Telecommunications & Energy, 428 Mass. 436 (1998) (Appeal of denial of intervention after final agency action under G.L. c. 25, § 5). In the civil litigation context, denial of intervention as of right[3] is immediately appealable, because the decision is final as against the putative intervenor. See Reznik v. Garaffo, 466 Mass. 1034, 1035 (2013); Massachusetts Federation of Teachers v. School Committee of Chelsea, 409 Mass. 203, 204-05 (1991) ("the denial of leave to intervene functions as a final order, because it eliminates the intervener from the litigation. A rule allowing an applicant for intervention to appeal the denial of his motion only after final judgment would render his appeal futile."). Moreover, in some instances, an interlocutory order in an administrative proceeding may be considered "final" for appellate purposes as to a particular party who has no further recourse before the agency. See, e.g. Town of Wrentham v. W. Wrentham Village, LLC, 451 Mass. 511, 516 (2008), citing Cliff House Nursing Home, Inc. v. Rate Setting Commission, 378 Mass. 189, 191 (1979). These rules, however, do not specifically address appeals of an interlocutory denial of intervention in an administrative proceeding.

The parties have not cited Massachusetts appellate authority addressing whether, as to an unsuccessful intervenor in an agency proceeding, denial of intervention is "a final decision of any agency in an adjudicatory proceeding" subject to appeal under G.L. c. 30A, § 14. They do agree that Massachusetts would follow the federal "collateral order doctrine" as articulated in Rhode Island v. United States Environmental Protection Agency, 378 F.3d 19, 25 (1st Cir. 2004). Under that doctrine, an order qualifies for interlocutory review only if it meets three criteria: "the order must [1] 'conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal

[3] As noted below, NLC's petition does, in fact, assert intervention as of right under 760 Code Mass. Regs. 56.06(2)(b).

from a final judgment.'" Id. (bracketed numbers added), quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 468, 98 (1978). In the Rhode Island case, 378 F.3d at 26, the plaintiff could not meet the third criterion, because the federal Clean Water Act allows "any interested person" to obtain judicial review of a final order, even if they were not party to the administrative proceedings.

The third criterion is crucial here, as well, because the Decision conclusively denied intervention (prong 1) and resolves issues completely separate from the merits of the Developer's efforts to obtain a favorable HAC decision (prong 2). The parties do not appear to argue otherwise on prongs one and two. See, e.g. Comm. Mem. at 14 n. 8 ("Because the Land Council cannot show that the intervention ruling is unreviewable, the Court need not reach the first two prongs.").

The question whether an unsuccessful intervenor may, as a non-party, bring a judicial review action at all under G.L. c. 30A, § 14 is an issue of first impression in Massachusetts. Indeed, the defendants themselves do not agree what the answer is. The Commonwealth argues that NLC may appeal from the final HAC decision under G.L. c. 30A, § 14, in addition to seeking full judicial review of the ZBA's final comprehensive permit after conclusion of the HAC proceedings. The Developer argues that NLC has no right to appeal under G.L. c. 30A, § 14. Perhaps taking a cautious and protective approach, NLC itself proceeds on the premise that it will have no future right of review under G.L. c. 30A, § 14.

Under G.L. c. 30A, § 14, "any **person** or appointing authority **aggrieved** by a final decision of any agency in an adjudicatory proceeding, whether such decision is affirmative or negative in form, shall be entitled to a judicial review thereof." [Emphasis added]. The Commonwealth does not suggest that NLC itself will have a right to appeal a HAC decision, but

rather that, if aggrieved, the ZBA is "entitled to judicial review." It acknowledges that G.L. c. 30A, § 14(2) provides: "[a]ll parties to the proceeding before the agency shall have the right to intervene in the proceeding for review" and that NLC is not a "party" to the HAC proceeding. But, it points out, "[t]he court may in its discretion permit other interested persons to intervene." Id. So, NLC can participate in judicial review of a final HAC decision – but only if the ZBA decides to appeal and if the court exercises its discretion to permit intervention.

As the Commonwealth sees it, this doubly contingent prospect of review meets the third prong of the collateral order doctrine. In Rhode Island, the unsuccessful intervenor did not have to depend upon a third party's decision to bring a suit in which it could intervene permissively. The Commonwealth points out that the ZBA and NLC have supported each others' positions in this case, but there is no guarantee that that will continue, or that the Town will make the same resource expenditure decisions. More importantly, it injects factual and legal uncertainty into an area of law that demands clarity – the time for taking an appeal. A jurisdictional rule that depends upon assessment of the current and predicted future alignment of the interests of unrelated parties is unacceptably unpredictable. It is not what c. 30A, § 14 contemplates.

Even if the ZBA were certain to appeal any decision that aggrieved NLC and the court were certain to grant discretionary intervention, permissive intervention is different in kind from the statutory right of an "interested person" to bring its own CWA action. It also falls short of the intervention of right that NLC sought before HAC. For all these reasons, the court does not believe that Massachusetts would treat the possibility of permissive intervention in another party's possible appeal as foreclosing NLC's argument that the Decision is "effectively unreviewable on appeal from a final judgment."

The Commonwealth has a second argument: that, under prong 3 NLC lacks standing to appeal now, because NLC may challenge the final comprehensive permit issued by the ZBA under G.L. c. 40B, § 21. Section 21 provides: "Any person aggrieved by the issuance of a comprehensive permit or approval may appeal to the court as provided in section seventeen of chapter forty A." This avenue provides "full judicial review" of the comprehensive permit. See Taylor v. Board of Appeals of Lexington, 451 Mass. 270, 274-276 (2008). But it does not, at least in terms, provide for review of procedural errors in HAC's decision.

Moreover, the ZBA's final comprehensive permit will reflect orders and directives that HAC has statutory authority to require the ZBA to include: "If an application was allowed with conditions that render the project uneconomic and that are not consistent with local needs, the HAC 'shall **order [the] board** to modify or remove any such condition or requirement" subject to minimum safety standards **and 'to issue any necessary permit or approval.'"** Id., 451 Mass. at 276, quoting G.L. c. 40B, § 23 (Emphasis added). See also c. 40B, § 23 (If HAC finds that the Town improperly denied a permit, it "shall vacate [the ZBA's] decision and **shall direct the board to issue a comprehensive permit** or approval to the applicant.") (Emphasis added). HAC's orders therefore have the force of law.

Nothing in Taylor suggests that c. 40B, § 21 makes available a right to mount a collateral attack on HAC's alleged procedural rulings, such as the denial of intervention. It is highly doubtful that a party can use a c. 40B, § 21 appeal to challenge matters that may also be the subject of a c. 30A appeal directly from the HAC decision. The § 21 appeal concerns the validity of ZBA's final comprehensive permit itself, or of the ZBA's proceedings. Moreover, the 30-day appeal period from the HAC decision under c. 30A, § 14 will run before or shortly after the filing of the c. 40B, § 21 appeal. The validity of the HAC's procedures, directives and orders

therefore either will be final and beyond direct appeal, or will be the subject of a prior pending action. The usual rules and policies against collateral attack thus apply with full force here.

The stakes for NLC in obtaining party status at the administrative level concern the ability to create a record and argue for favorable content in the HAC's decision, including orders and directives to the ZBA. An intervenor in the HAC hearing has the opportunity to do just that. The Commonwealth does not explain how the loss of that opportunity can be remedied by challenging the comprehensive permit. For one thing, there is no opportunity to ask HAC to make discretionary decisions in such a court proceeding. HAC may not even be a party, because an appeal under G.L. c. 40B, § 21 proceeds "as provided in" c. 40A, § 17, which does not contemplate that HAC will be a party to the appeal.

Finally, at the oral argument, the court asked whether NLC could appeal in its own right as a "person aggrieved by a final decision of" the HAC. G.L. c. 30A, § 14. The court pointed out that the reference to "person" was not necessarily limited to a "party" and asked the parties for supplemental briefing on the issue, including the possible relevance of Rinaldi v. State Building Code Appeals Board, 56 Mass. App. Ct. 668, 671-672 (2002).[4] In that case, the court held that an abutter was an "interested party" who was deprived of his right to notice required under G.L. c. 30A, § 11 in a state building code appeal, even though he never appeared before the agency because he was not aware of the proceeding.

The Rinaldi case also highlights the relationship between sections 11 and 14 of c. 30A. Under G.L. c. 30A, § 11(8), "**[p]arties** to the proceeding shall be notified in person or by mail of the decision; of their rights to review or appeal the decision within the agency or before the

[4] Rinaldi is puzzling, because the court held that the c. 30A appeal was untimely, but nevertheless vacated the agency decision because of lack of notice to an interested party (an abutter) under G.L. c. 143, § 100. But if the c. 30A appeal was jurisdictionally time-barred, it is unclear what authority the court had to vacate the state agency's adjudicatory decision.

courts, as the case may be; and of the time limits on their rights to review or appeal. A copy of the decision and of the statement of reasons, if prepared, shall be delivered or mailed upon request to each **party** and to his attorney of record." (Emphasis added). Thus, only parties receive statutorily required notice of a decision. Under G.L. c. 14, § 14(1), "The action shall. . . be commenced in the court within thirty days **after receipt of notice** of the final decision of the agency or if a petition for rehearing has been timely filed with the agency, within thirty days after **receipt of notice** of agency denial of such petition for rehearing."(Emphasis added). The statutes therefore seemingly contemplate appeals by parties, since they are the only ones entitled to "recei[ve]" the agency decision. But the statute does not actually say that in so many words by, for instance, using the phrase "aggrieved party" as opposed to "aggrieved person." Rinaldi helps resolve any uncertainty. Even though he brought suit within 30 days of receipt of the decision, Rinaldi's suit was untimely, because he received the decision more than eight months after the agency rendered the decision. Id., 56 Mass. App. Ct. at 671. – While Rinaldi was literally an aggrieved person who filed suit within 30 days of receiving the board's decision, the court declined to apply the words of § 14 in an overly literal fashion.[5] Otherwise, it would have had to tolerate the potential for "leav[ing] open decisions of the board for inordinate lengths of time and defeat the principle that there must be finality to proceedings before administrative agencies." Id., 56 Mass. App. Ct. 671-672.

The defendants argue that allowing NLC to appeal at this time will defeat the purpose of c. 40B, which they describe as "to provide a streamlined procedure for processing applications for the necessary local approvals of construction of low or moderate income housing." See

[5] Indeed, it cited a case arising under a differently-worded statute (G.L c. 112, § 64). Friedman v. Board of Registration in Med., 414 Mass. 663, 664 (1993) for the proposition that "the requirement was interpreted to mean 'within thirty days from the time the party receives final notice of the agency." Rinaldi, 56 Mass. App. Ct. at 671. Under that statute, "a person whose . . . license . . has been suspended, revoked or cancelled" had a right of judicial review. The court in Friedman had no occasion to consider more general "person aggrieved" language.

Taylor, 451 Mass. at 278, quoting Board of Appeals of Hanover v. Housing Appeals Committee, Mass. at 347. That policy concern, even if valid, is no reason to depart from the controlling and generally applicable principles of judicial review. It is also worth noting that the defendants have cited only "one purpose of G.L. c. 40B" (see Taylor, 451 Mass. at 277) but have ignored others, including the goal of c. 40B, § 20 to protect local interests in preserving open space. See generally Freeman v. Quicken Loans, Inc., 566 U.S. 624, 132 S. Ct. 2034, 2044 (2012).[6] There is no reason to alter generally-applicable rules of administrative law to serve one of c. 40B's goals.

Moreover, delay would occur here only if HAC's ruling was correct on the merits. If HAC was wrong, waiting to correct that error until resolution of the entire administrative proceeding will actually delay, not expedite matters. Indeed, in this case, delay cuts the other way. Because HAC committed a reversible error of law, deciding the intervention question now, instead of later, will expedite resolution of the matter as a whole. While jurisdiction turns entirely on other considerations discussed above, it is reassuring to know that no undue delay will result from an early correction of the agency's legal errors.

II.

With NLC's appeal properly before the court, the question becomes whether the court should grant relief. Because HAC denied intervention on standing grounds, its decision must be consistent with its regulation providing that "any person shall be allowed to intervene to the

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[6] The premise that a statute should always be construed by reference to a single purpose is, at best, an oversimplification:

> "[N]o legislation pursues its purposes at all costs," Rodriguez v. United States, 480 U.S. 522, 525-526 (1987) (per curiam), and "[e]very statute purposes, not only to achieve certain ends, but also to achieve them by particular means," Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122, 136 (1995).

Freeman v. Quicken Loans, Inc., 566 U.S. 624, 132 S. Ct. 2034, 2044 (2012).

extent that he or she would have standing as a person aggrieved to appeal the grant of a special permit in accordance with M.G.L. c. 40A, § 17." 760 Code Mass. Regs. 56.06(2)(b). Phrased with the mandatory word, "shall," this regulation entitles a person to intervention as of right, where it applies.

The court has only limited authority to review HAC's decision to deny intervention under this regulation. Under G. L. c. 30A, § 14(7), it may vacate the Decision if the substantial rights of any party may have been prejudiced because the agency decision is based on an error of law or on unlawful procedure, is arbitrary and capricious or unwarranted by facts found by the agency, or is unsupported by substantial evidence. G. L. c. 30A, § 14(7)(c)-(g). Substantial evidence is "such evidence as a reasonable mind might accept as adequate to support a conclusion." G. L. c. 30A, § 1(6). The court must consider the entire record, including whatever "fairly detracts" from the agency's finding, but the Court has no power to substitute its judgment for that of the agency if the record contains substantial evidence to support conflicting propositions; nor may it second guess the agency's judgment regarding credibility of witnesses and the weight to be given to particular evidence. See Doherty v. Retirement Board of Medford, 425 Mass. 130, 135 (1997). When reviewing an agency decision, the court must give "due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it." G. L. c. 30A, § 14(7).

As appealing party, NLC bears the burden of demonstrating the invalidity of the agency decision. See Bagley v. Contributory Ret. Appeal Bd., 397 Mass. 255, 258 (1986). The Supreme Judicial Court has noted that the appellant's "'burden is heavy.'" Springfield v. Dep't of Telecomms. & Cable, 457 Mass. 562, 568 (2010) (citation omitted).

A.

For many reasons, HAC committed an error of law in holding that NLC's interests were not among those that c. 40B "is intended to protect." AR 776-777.

First, standing does not turn solely upon whether the local zoning bylaw recognizes a particular interest. A plaintiff may also establish standing by pointing to an interest recognized by the applicable statute. The rule is phrased in the disjunctive: "standing to challenge a zoning decision is conferred only on those who can plausibly demonstrate that a proposed project will injure their own personal legal interests and that the injury is to a specific interest that the applicable **zoning statute**, ordinance, **or bylaw** at issue is intended to protect." Standerwick, 447 Mass. 20, 30 (2006) (Emphasis Added) and cases cited. Only if the statute fails to preserve a particular interest must a plaintiff point to an interest specifically protected by the Town's zoning bylaw. See Kenner v. Chatham Zoning Board of Appeals, 459 Mass. 115, 120-121 (2011) and cases cited.

Second, chapter 40B does protect interests in preservation of open space. G.L. c. 40B, § 23 requires HAC to consider, among other things, whether the ZBA's conditions are "consistent with local needs:

> The hearing by the [HAC] shall be limited to the issue of whether, in the case of the denial of an application, the decision of the board of appeals was reasonable and **consistent with local needs** and, 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 they are consistent with local needs**. . . . If the committee finds, in the case of an approval with conditions and requirements imposed, that the decision of the board makes the building or operation of such housing uneconomic and **is not consistent with local needs**, it shall order such board to modify or remove any such condition or requirement so as to make the proposal no longer uneconomic and to issue any necessary permit or approval; . . .. 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. (Emphasis added).

G.L. c. 40B, § 20 defines the key phrase "consistent with local needs" and provides in relevant part:

> The following words, wherever used in this section and in sections twenty-one to twenty-three, inclusive, shall, unless a different meaning clearly appears from the context, have the following meanings:—
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> * * *
>
> "Consistent with local needs", requirements and regulations shall be considered consistent with local needs if they are reasonable in view of the regional need for low and moderate income housing considered with the number of low income persons in the city or town affected and the need to protect the health or safety of the occupants of the proposed housing or of the residents of the city or town, to promote better site and building design in relation to the surroundings, **or to preserve open spaces**, and if such requirements and regulations are applied as equally as possible to both subsidized and unsubsidized housing. . . . (Emphasis).

See also Standerwick, 447 Mass. at 31 ("the interest in the provision of critically needed affordable housing must be balanced against the statutorily authorized interests in the protection of the safety and health of the town's residents, development of improved site and building design, and **preservation of open space**. See G. L. c. 40B, § 20.") (Emphasis added).

The c. 40B regulations expressly recognize privately-owned conservation restrictions as a means of preserving open space:

> Open Spaces – means land areas, including parks, parkland, and other areas which contain no major structures and are reserved for outdoor recreational, **conservation**, scenic, or other similar use by the general public through public acquisition, **easements**, long-term lease, trusteeship, or **other title restrictions** which run with the land.

760 Code Mass. Regs. 56.02 (Definitions) (Emphasis Added). The open space policy goals implemented through private conservation restrictions ultimately "protect public, not private, right[s]." Wildlands Trust, Inc. v. Cedar Hill Retreat Ctr., Inc., 98 Mass. App. Ct. 775, 785 n. 12 (2020). It follows that NLC's claim that the project will adversely affect the open space on which it holds a conservation restriction is a private interest in open space within the meaning of c. 40B and the implementing regulations.

Third, HAC gives c. 40B an unreasonably cramped reading if it claims that the local bylaw must, in so many words, refer to open space as a protected interest. HAC wrote: "The only matters that may be considered in an appeal before the Committee are local concerns that have been previously regulated by the town." This observation does not weigh against NLC here. The HAC proceeding addresses conditions that the ZBA imposed pursuant to the Nantucket Zoning Bylaw. NLC intervened to address issues arising from those conditions – in favor of some and against others. NLC's intervention therefore addresses local concerns previously regulated by the Town's bylaws.[7] Local bylaws protect open space in many ways, not just be a general reference to "open space" in a zoning bylaw. Open space is a means to an end, including "conservation," as the above-quoted regulation recognizes. Because standing turns upon legal interests, rather than subjective motivation, the fact that NLC is interest in the ends (conservation) does not detract from its legally cognizable interest in the means (local bylaw provisions and ZBA conditions).

It is true that the record does not include the Nantucket Zoning Bylaw, but Appendix C to the ZBA's comprehensive permit sets forth a summary of zoning by-law requirements, including lot size, frontage, setbacks and ground coverage. AR 105 ff. It appears that § 3.02 of the Subdivision Regulations specifically require public open spaces in some cases. AR 111. Numerous other filings in the record, including HAC's Decision reflect the very same density, setback, lot size and frontage and other limitations from which the Developer sought relief. Each of those provisions reduces the impact of a development on a portion of the Site and, at least to that extent, preserves open space and provides habitat that enhances adjacent or nearby open space. There can be little question that, as a matter of statutory construction of c. 40B and the

[7] To read the HAC Decision, one might think that NLC was solely asserting that HAC should engage in independent regulation of endangered species interests. That is not a fair reading of the intervention petition.

Nantucket Bylaw, the protection of open space is a cognizable interest for purposes of standing. Cf. also Jepson v. Zoning Bd. of Appeals of Ipswich, 450 Mass. 81, 89 ("flooding constitutes an injury to an interest that G.L. c. 40B was intended to protect."); Reynolds v. Zoning Bd. Of Appeals of Stow, 88 Mass. App. Ct. 339, 350 (2015) ("it is unreasonable to conclude that the local need for affordable housing outweighs the health concerns of existing abutters," namely potential contamination of drinking water wells).

B.

HAC committed two additional, closely-related, errors of law. It said: "There is no allegation of any specific Nantucket bylaw or other requirement protecting northern long-eared bats ["NLEB"] that must be waived in order for the proposed development to move forward. [footnote omitted]." HAC continued: "[a]nd, whatever legal rights the NLC may have in relation to protecting bats here arise under state endangered species law, not any local bylaw." These statements were erroneous and an abuse of discretion.

First, neither the statute or regulations articulates any requirement to point to specific local protection of a particular species. They do not require anything more than the general articulation of interests that appear in c. 40B, the Nantucket Bylaw and the Town's Subdivision Regulations. They are phrased in general ways that negate HAC's cramped construction. Pointing to concrete private investment in conservation restrictions that address open space concerns was sufficient.

Second, HAC did not give NLC's papers a fair reading. NLC asserted an interest in "habitat protection" generally. The references to the NLEB and moth (Lepidoptera) were phrased as examples ("like the protected bat and moth" see AR 431-432), advanced in support of the NLC's overall effort "to preserve wildlife habitat and protect endangered species on

Nantucket by creating habitat corridors that link its conservation lands." NLC pointed out that its conservation restrictions in the area formed a "nearly contiguous area" of habitat, including the Site, and that "virtually clear-cut[ting]" the area would fragment the nearly contiguous ecosystem. While NLC also argued that the Project would result in a take of endangered species, its concerns were not limited the question whether the impacts of this Project itself rose to the level of a "take."

HAC erred by imposing a requirement to show a specific local reference to NLC's specific concern with protection of the NLEB. This was an independent legal error. That error was compounded by the overly narrow reading of NLC's assertion of its interest.

C.

Finally, HAC's Decision was arbitrary and capricious, because it failed to acknowledge the full content of NLC's motion to intervene. Allen v. Boston Redevelopment Auth., 450 Mass. 242, 254 (2007) (the process by which information is gathered, identified, and applied to MEPA's statutory standards must be logical); Sierra Club v. Commissioner of the Dept. of Envtl. Mgmt., 439 Mass. at 749. Cf. Teamsters Joint Council No. 10 v. Director of Dept. of Labor and Workforce Dev., 447 Mass. 100, 106 (2006) (agency decision is arbitrary and capricious when it lacks any rational explanation that reasonable persons might deem proper to support it); Receiver of the Boston Hous. Auth. v. Commissioner of Labor & Indus., 396 Mass. 50, 58 (1985) (agency's method of reaching conclusion must have rational foundation);

It is simply not true, as the Decision asserted (at 5) that "whatever legal rights the NLC may have in relation to protecting bats here arise under state endangered species law, not any local bylaw." NLC's motion to intervene specifically asserted that NLC had "successfully prevailed on the Board to impose conditions to protect [its] legal interests" in avoiding impacts

to its conservation properties and that "[b]ecause the Appellant Surfside Crossing, LLC . . . now seeks to strip those protections from the comprehensive permit, NLC would be substantially and specifically affected by the outcome of this proceeding." AR 171.[8] In particular, NLC asserted an interest in protecting conditions 97(h) and (l), which require the Developer to identify all areas proposed for vegetation clearing and to minimize the extent of tree removal – i.e. to minimize alteration of habitat for wildlife that use both the Site and space protected by NLC's conservation restrictions. AR 175. Intervention designed to support conditions challenged by the Developer shows the requisite interest, because supporting a condition may also serve a statutorily protected interest. HAC committed an error of law when it misread NLC's motion to intervene as asserting only an interest to protect endangered species, because, among other things, NLC specifically claimed broader interests:

> Further, and more broadly, the NLC's interests are also affected by the numerous zoning dimensional nonconformities proposed in the Developer's 156-unit plan. Under that plan, the project site would be virtually clear-cut, eliminating any habitat for protected wildlife on the site. Even the 60 units permitted by the Board will require significantly more habitat alteration than would be necessary for a development that conforms to the Zoning Bylaws.

AR 175. This statement squarely tied NLC's interests to the Town's zoning bylaws. Failure to consider this broadly-stated interest was an abuse of discretion and error of law.

D.

For all these reasons, HAC committed an error of law when it ruled that NLC's interests did not fall within the zone of interests protected by c. 40B or the Local Bylaw; when it faulted NLC for not pointing to a provision of the Nantucket By-law that protected the NLEB; and when it read NLC's motion to intervene as addressing only interests covered exclusively by the

[8] The Commonwealth's argument that NLC only challenges 3 of 154 conditions is beside the point. Challenge to a single condition would meet the statutory and regulatory criteria for intervention. Moreover, nothing limits standing to parties challenging a condition.

endangered species act. NLC suffered prejudice because of those errors, since it was denied intervention as of right. The Decision therefore must be reversed.

While the defendants urge other reasons to affirm the Decision, the court cannot make its own determination in the absence of an agency decision. Neither counsel nor the court may supply that finding where the agency did not. See Costello v. Department of Public Utilities, 391 Mass. 527, 535-536 (1984).[9] Thus, for instance, the court will not determine whether NLC's lands are too far from the Site to be affected. HAC made no such finding. NLC has asserted the factual connection, with affidavit support that HAC did not reject and, with a correct application of the law, may be able to establish standing as a matter of fact, just as it established standing to be heard regarding the endangered species issues affecting the Eastern Long-Eared Bat before the NHESP. Nor will the court decide the issue, unresolved at the agency level, whether the ZBA adequately represents NLC's interests – if that issue is at all relevant to intervention of right. Finally, consideration of post-Decision matters, which the Developer urges the court to do, is not proper because the Agency has not ruled upon the effect, if any, of those matters upon NLC's intervention.

III.

Finally, NLC seeks an order in the nature of mandamus to remove the officer presiding over the HAC proceeding.

> In the absence of an alternative remedy, relief in the nature of mandamus is appropriate to compel a public official to perform an act which the official has a legal duty to perform. Massachusetts Soc'y of Graduate Physical Therapists v. Board of Registration in Medicine, 330 Mass. 601, 605-606 (1953). Stated negatively, a court may not compel

[9] Litigation counsel may not defend a decision by asserting reasons upon which the agency did not rely:

> While we can conduct a meaningful review of "a decision of less than ideal clarity if the agency's path may reasonably be discerned," we will not "supply a reasoned basis for the agency's action that the agency itself has not given".

Costello v. Department of Public Utilities, 391 Mass. 527, 535-536 (1984).

> performance of a discretionary act, Channel Fish Co. v. Boston Fish Mkt. Corp., 359 Mass. 185, 187 (1971); Scudder v. Selectmen of Sandwich, 309 Mass. 373, 375-377 (1941), and, even if the act sought to be compelled is ministerial in nature, relief in the nature of mandamus is extraordinary and may not be granted except to prevent a failure of justice in instances where there is no other adequate remedy. Coach & Six Restaurant, Inc. v. Public Works Comm'n, 363 Mass. 643, 644 (1973).

Lutheran Service Assn. of New England, Inc. v. Metropolitan District Commission, 397 Mass. 341, 344 (1986).

In this case, HAC has no legal duty to assign a different hearing officer. Prior employment with the agency in question does not necessarily require recusal. New York Times v. Commissioner of Revenue, 427 Mass. 399 (1998) (Commissioner who was previously counsel for the commission and handled a case arising from similar (but not the same) facts is not necessarily required to recuse herself)Even in agencies that have both a prosecutorial and adjudicative function, there is no due process violation in having both functions performed by officials within the same agency, and many bias-based challenges to actions of such agencies have failed. D'Amour, supra (chairman of the board was the one who asked an expert to testify at the hearing); Craven v. State Ethics Commission, 390 Mass. 191, 198-199 (1983) (Chairman participated in authorizing a preliminary inquiry, participated in the issuance of a show cause order and sat as hearing officer); Raymond v. Board of Registration in Medicine, 387 Mass. 708 (1982) (board member moved for issuance of the show cause order and sat as hearing officer); Dwyer v. Commissioner of Insurance, 375 Mass. 227, 235 (1978) (Commissioner prompted an investigation of his employees and saw a report of the investigation prior to hearing); Georgetown v. Essex County Retirement Board, 29 Mass. App. Ct. 272 (1990) (pending suit by interested party against Board member does not disqualify, particularly where rule of necessity applies).

The hearing officer has no alleged personal interest in the proceeding or other conflict within the meaning of G.L. c. 268A. NLC asserts that there is an appearance of bias (impropriety), but the hearing officer has filed a disclosure with the State Ethics Commission under G.L. c. 268A, § 23, which removes any claim of illegality. See G.L. c. 268A, § 23(b)(3) ("It shall be unreasonable to . . .conclude [that improper influence or favor exists] if such officer or employee has disclosed in writing to his appointing authority or, if no appointing authority exists, discloses in a manner which is public in nature, the facts which would otherwise lead to such a conclusion"). "[I]t would be a rarity that alleged bias and interest which did not violate our strict Conflict of Interest Law could nevertheless violate the constitutional right to a fair hearing." Varga v. Board of Registration of Chiropractors, 411 Mass. 302 (1991). But see John Doe, SORB 12491 v. Sex Offender Registry Board, 84 Mass. App. Ct. 537 (2013) (hearing officer's social media posts created both the appearance of bias and an inference of actual bias). Nothing in this case arises to the level of such a "rarity." It was discretionary whether to appoint a different hearing officer. As noted above, mandamus does not lie to order exercise of discretion in a particular way.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that:

1. The Defendant Housing Appeals Committee's Motion to Dismiss all Counts Pursuant to MRCP 12(b) (P #7) is DENIED.
2. The Plaintiff's Motion for Judgment on the Pleadings (P # 9) is ALLOWED as to the c. 30A count and DENIED as to the mandamus count.
3. The Defendants' Cross-Motions for Judgment on the Pleadings are DENIED as to the c. 30A count and ALLOWED as to the mandamus count.

4. Final Judgment shall enter (a) vacating the decision of the HAC, dated July 13, 2020, denying NLC's motion to intervene in a HAC proceeding and remanding the matter for further consideration consistent with this Memorandum and (b) dismissing the count for Mandamus on the merits.

Date: June 22, 2021

s/ Douglas H. Wilkins
Douglas H. Wilkins
Justice of the Superior Court

A TRUE COPY, ATTEST:
Mary Elizabeth Adam
Nantucket Superior Court