COMMONWEALTH OF MASSACHUSETTS

FRANKLIN, ss.

SUPERIOR COURT
FRCV2010-00076

SUNDERLAND ZONING BOARD OF APPEALS

vs.

SUGARBUSH MEADOW, LLC & another[1]

MEMORANDUM OF DECISION AND ORDERS ON PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS; DEFENDANT SUGARBUSH MEADOW, LLC'S CROSS-MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION BASED ON LACK OF STANDING; PLAINTIFF'S CROSS-MOTION TO STRIKE DEFENDANT SUGARBUSH'S MEADOW'S MOTION TO DISMISS; AND PLAINTIFF'S MOTION TO STRIKE PARAGRAPHS OF AFFIDAVIT OF SCOTT NIELSEN

INTRODUCTION

The Sunderland Zoning Board of Appeals ("ZBA") filed this action seeking judicial review pursuant to G. L. c. 30A, § 14 of a final decision of the Housing Appeals Committee ("HAC") ordering the ZBA to issue a Chapter 40B comprehensive permit to defendant Sugarbush Meadow, LLC ("Sugarbush").

This matter is before the court on the ZBA's Motion for Judgment on the Pleadings pursuant to G. L. c. 30A, § 14 and Mass. R. Civ. P. 12©), and Sugarbush's Cross-Motion to Dismiss for Lack of Subject Matter Jurisdiction pursuant to Mass. R. Civ. P. 12(b)(1). Also before the court is the ZBA's Motion to Strike Defendant Sugarbush's Motion to Dismiss and the ZBA's Motion to Strike Paragraphs of Affidavit of Scott Nielsen. For the reasons discussed below, the ZBA's Motion to Strike the Motion to Dismiss is **DENIED**. The ZBA's Motion to Strike Paragraphs of Affidavit of

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[1]Massachusetts Housing Appeals Committee

Scott Nielson is **ALLOWED** in part and **DENIED** in part. Sugarbush's Motion to Dismiss is **DENIED** and the ZBA's Motion for Judgment on the Pleadings in its favor is **DENIED**.

BACKGROUND

1. The Application for Comprehensive Permit

On September 19, 2006, Sugarbush submitted a Chapter 40B comprehensive permit application to the ZBA, seeking approval for a 150 unit apartment complex ("the Project") on an irregularly shaped fifty-seven acre parcel located on Route 116 in the southeast corner of Sunderland ("the Property").

In connection with Sugarbush's application, the Town charged a filing fee of $23,500, which included $10,000 allocated to "Services for Legal Counsel." In relevant part, section 3 of the ZBA's Comprehensive Permit Rules provides: "the application fee shall include . . . $10,000 for any project in excess of 75 units. This cost is a reasonable estimate of the administrative costs for counsel retained to assist the Board with the multitude of legal issues that must be explored in the c. 40B process."

The Town of Sunderland ("the Town") is a small rural community with only 1,600 total housing units, and, according to the pleadings, the Project would increase the Town's overall housing stock by nearly 9%. The Property is located in Sunderland's Rural Residence zoning district, which allows multi-family housing or major residential developments by special permit only. The Property abuts the town of Amherst and has less than 100 feet of frontage on Route 116, the Town's major north-south, two lane highway, and Plumtree Road, a smaller but well-traveled road. Plumtree Road has a number of single family homes. Route 116 has some commercial development along it.

Vehicular access to the Property is through two narrow strips of land between wider lots not controlled by Sugarbush. The Property contains open fields, wetlands, forested wetlands, and several small natural and artificial ponds.

The Project would consist of 150 apartments in 5 wood-frame buildings, parking areas, and a community center spread across the Property, as well as an access road and storm water management systems. The Project would be financed under the Expanding Rental Affordability program of the Massachusetts Housing Finance Agency. As regards the Project, the Secretary of Energy and Environmental Affairs issued a Certificate determining that it does not require preparation of an environmental impact report. The Division of Wildlife and Fisheries issued a determination that the Project would not result in a "take" of any state protected species.

Sugarbush included in its Chapter 40B application a market study conducted by Equity Alliance LLC which set forth the following conclusions: there is a very low vacancy rate in the available rentals in the Sunderland area, with most units rented to students; most of the available rentals lack modern amenities including two full bathrooms; and there is a strong need for additional rental housing. No new rental units have been constructed in Sunderland for 18 years. The nearby University of Massachusetts at Amherst has a one year waiting list for apartments.

Sugarbush hired Traffic Engineering Solutions ("TES") to conduct a traffic study for the Project, using what TES described as conservative assumptions. TES concluded that the Project would not create any significant change in the level of service at the two relevant intersections and that under the Manual on Uniform Traffic Control Devices standards, the intersection of Route 116 and Plumtree Road would not warrant a traffic signal.

II. The Public Hearing before the Sunderland Zoning Board of Appeals

The ZBA held a public hearing over the course of several days between October 17, 2006 and November 15, 2007. During the hearing, the ZBA and other municipal departments and boards raised a variety of concerns including vehicular safety, pedestrian safety, fire protection, wetlands impact, housing need, water supply, and consistency with accepted planning principles. The Sunderland Board of Selectmen ("Select Board") reported to the ZBA that the cost of purchasing and housing a fire ladder truck to reach the roofs of the proposed buildings was beyond the Town's means and would require a Proposition 2 ½ override. The Select Board also expressed concern for public safety if the Project were permitted and emphasized that the Town cannot rely on mutual aid from those neighboring fire departments which have ladder trucks as a primary response to an emergency. The Sunderland Conservation Commission ("SCC") submitted a letter to the ZBA expressing concern about impact to the wetlands buffer zone, a potential vernal pool on the Property, and flood protection.

Sunderland Police Chief Jeffrey Gilbert ("Gilbert") submitted a letter detailing his reservations about the Project, which included his concern that the 50 miles per hour speed limit on Route 116 might make it difficult for cars to stop for pedestrians (and particularly children) in a cross-walk. Gilbert also expressed concern about increased accidents from intoxicated college students living in the new apartments, and increased traffic congestion from apartment residents. The Franklin Regional Council of Governments expressed similar concerns about vehicular accidents and pedestrian safety.

During the proceedings, the Town retained Vanasse Hangen Brustlin, Inc. ("VHB") to conduct an independent technical review of the traffic impact study prepared by TES. In a January

5, 2007 report, VHB concluded that TES's study was professionally prepared and technically accurate in the means and methods of preparation. VHB suggested that Sugarbush work with the Town to provide pedestrian accommodations along Route 116, reexamine the issue of parking spaces, provide a warrant analysis for the Plumtree Road intersection, and demonstrate that emergency vehicles could safely enter and exit the Property. Thereafter, in a report dated April 24, 2007, VHB indicated that TES had substantially addressed its traffic related concerns.

Ultimately, based on its traffic, fire, and wetlands concerns, as well as its concerns with what it considered Sugarbush's failure to cooperate and provide adequate information, the ZBA denied Sugarbush's Chapter 40B application in a decision filed with the Town Clerk on January 10, 2008. In its decision, the ZBA stated that the Town has a very high rate of affordable market rate apartments and does not need additional rental units. The ZBA concluded that the Project would be inconsistent with local needs because Sunderland Zoning Bylaws do not permit three story residential buildings, the town has never granted a special permit for a three story commercial building, and the Sunderland Fire Department does not have a ladder truck capable of combating a fire in a three story building. The ZBA also found that the Project created traffic and pedestrian safety concerns, as well as wetlands protection concerns which Sugarbush had failed to adequately address.

III. The Appeal to the Housing Appeals Committee

On January 22, Sugarbush appealed to the HAC. Sugarbush moved for a Partial Summary Decision with respect to certain issues raised by its appeal. The HAC hearing officer granted this motion with respect to the project eligibility determination, the Town's argument justifying denial of the permit based on unacceptable burdens on municipal services and infrastructure, and based on

wildlife habitat concerns.

The HAC hearing officer received pre-filed testimony from nineteen witnesses, took a site view, and held a two day evidentiary hearing on November 18 and 19 at which witnesses were cross-examined. The parties stipulated that low or moderate income housing in the Town is less than one percent of the total housing stock. On pertinent issues, the HAC hearing officer received evidence and opinions as set forth below.

A. Regional Need for Housing

Lynne Sweet ("Sweet") of LDS Consulting Group, an active observer on the Governor's Chapter 40B Task Force, testified that she conducted a regional needs study of six towns (Sunderland, Amherst, Deerfield, Hadley, Montague and Whately) along the driving corridor adjacent to the Property which covered approximately a 20-mile radius. She determined the area in accordance with standards used by the national council of affordable housing market analysts. Sweet conceded that the towns of Amherst and Hadley exceeded the 10% affordable housing threshold. With regard to Sunderland, she studied thirteen market rate apartment complexes and found that most had market rates lower than the proposed restricted rental rate for the Project. However, she also opined that these units were of small size, lacked amenities, were occupied primarily by students, and were not suitable for families.

A Town of Sunderland Housing Plan ("Plan") prepared in April of 2007 was approved by the Department of Housing and Community Development ("DHCD")[2] on June 1, 2007. The Plan noted that the Town has a large supply of rental housing that is affordable to residents, but that only 0.4% is subsidized and deed restricted to ensure continued affordability. It concluded that the Town

[2]HAC is an agency within DHCD.

has a substantial need for affordable single family homes. In March of 2009, DHCD reported that Sunderland was not in compliance with the goals set in the Plan to increase affordable housing.

Richard Heaton ("Heaton"), Executive Director of the Municipal Coalition for Affordable Housing, testified that the ZBA retained him to review the Project. He conducted an analysis of demographic information for Sunderland and the surrounding area, an analysis of local housing complexes, and a survey of area rents. He reported that Sunderland's population increased 1.5 % between 2000 and 2007 while the number of occupied housing units increased 2.1% from 1,633 to 1,668 units. He noted that Sunderland has a high percentage of college age residents and a low percentage of residents age 65 and older. It has one of the highest percentages of rental housing in the state, at 53%, compared to 38% statewide. In addition, 83% of these rental units lease for less than the calculated 2007 affordable rent amounts, even though they are not subsidized. Accordingly, Heaton opined that Sunderland provides affordable housing in 46% of its total housing inventory, and not less than 1% as recorded by DHCD. He noted that the thirty-eight affordable units in the Project would exceed the market rental rates for most other apartments in Sunderland.

Heaton opined that additional rental units were unnecessary in the Town because the University of Massachusetts at Amherst was expanding its North Campus residence halls by 215 units. However, he also acknowledged that the ground had not yet been broken on this project and there was no available funding. Finally, Heaton conceded that he did not analyze the regional need for affordable housing.

B. Traffic and Pedestrian Safety

The Executive Office of Transportation and Public Works issued a Memorandum dated February 28, 2008 in which it concluded that the traffic associated with the Project would have

minimal impact on the state highway (Route 116), requiring no further environmental review. The Memorandum noted that Sugarbush proposed a comprehensive mitigation package, and suggested that Sugarbush continue discussions with MassHighway about pedestrian safety crossing Route 116.

Professional engineer Mark Darnold ("Darnold") of Berkshire Design Group ("BDG") designed the site plan for the Project. Darnold testified that the Project met Sunderland's zoning regulations with respect to sight distances at both access roads.

Registered professional engineer Bruce Hillson ("Hillson") of TES testified that Sugarbush retained him to study the traffic impact of the Project. The Project would have two separate entrances: a driveway from Route 116 and a driveway from Plumtree Road. Hillson testified that TES consulted with the Town's peer reviewer, VHB, and Massachusetts Highway Department to create a Concept Access Plan to mitigate traffic and pedestrian impacts at the Route 116 intersection. The Concept Access Plan includes a left turn lane, pedestrian crosswalk, and sidewalks on both sides of Route 116. Hillson opined that the Route 116 intersection would comply with state statutes and regulations and generally accepted standards for traffic and pedestrian safety. Hillson testified that the Plumtree Road intersection would be expected to experience very little pedestrian use, and has very good operating levels of service and sightlines exceeding accepted standards, and therefore would comply with state statutes and regulations and generally accepted standards for traffic and pedestrian safety.

Police Chief Gilbert testified about his safety concerns regarding the Project, noting that there had been 32 accidents on Route 116 since August of 2007, including one pedestrian fatality near an apartment complex. Gilbert explained that cars traveling 50 m.p.h. on Route 116 would speed past cars stopped to take a left to enter the Project and would not have a full view of the crosswalk,

thereby affecting pedestrian safety. In his view, bus traffic near the Project would increase the risk of accidents, as would the fact that college students tend to engage in unsafe behavior. Gilbert opined that the Project would increase the Town's population by 9%, which would in turn require that the Town hire two additional police officers (each at starting salaries of $38,000) to deal with increased traffic accidents, calls for domestic violence, and calls for noise violations, illegal drugs, and underage drinking due to the college student population.

Registered engineer and professional traffic operations engineer Matthew Chase ("Chase") of VHB testified that the ZBA retained him to conduct a peer review of the Project. Chase noted that Route 116 is Sunderland's busiest road, with most motorists traveling approximately 53 m.p.h. He opined that the location of the proposed crosswalk would not ensure pedestrian safety because vehicles would pass other vehicles stopped to take a left turn into the Project and would not have a full view of the crosswalk. Chase claimed a need to relocate bus stops to avoid possible accidents between buses and cars near the entrance to the Project. He concluded that the Project design presented concerns for motor vehicle and pedestrian accidents.

C. Wetlands

Sugarbush concedes that the Project would require work within the 100 foot wetlands buffer zone. It retained New England Environmental, Inc. ("NEE") to review the Project plans and a memorandum from the SCC. NEE concluded that the Project was in compliance with the Wetlands Protection Act ("WPA") and opined that the Sunderland Wetlands Protection Bylaw does not give the buffer zone resource area status.

Michael Marcus ("Marcus"), a senior biologist and professional wetland scientist for NEE, testified that the Project does not alter wetlands and that the buffer zone work complies with the

WPA as well as the Town Wetlands Bylaw. The work occurring in the buffer zone would involve detention basins, catch basins, storm water piping, some areas of parking lots and buildings, and sections of roadway, sidewalks, and emergency access pathways. According to Marcus, both the WPA and the Town Wetlands Bylaw require a permit for work in the buffer zone, and the Town Bylaw does not list the buffer zone as a resource area, using language similar to that of the WPA regulations. Nonetheless, Marcus noted that Sugarbush applied for a waiver from the Town Wetlands Bylaw requirements. Marcus noted that, in his experience, SCC's practice has been to permit projects to be built within the buffer zone. He expressed his belief that Sugarbush had submitted adequate information for an analysis under the WPA and Town Wetlands Bylaw, including information set forth in the superseding order of resource area delineation, monitoring well test results, drainage calculations, storm water management plans, and project plans. Marcus opined that the Project met performance standards, would provide proper mitigation to ensure that no short term or long term alteration of the wetlands on the Property, and could properly be permitted by the SCC under the Town Wetlands Bylaw. Finally, Marcus noted that Sugarbush would have to file a Notice of Intent with the DEP to obtain final wetlands approval for the Project.

Professional engineer Darnold, who designed the site plan for the Project, testified that the Project would not involve work within a wetlands resource area and that work within the buffer zone had been designed to avoid adversely impacting resource areas.

Professor of Natural Resources Conservation and SCC member Curtice Griffin ("Griffin") testified that he was familiar with the Property which contains significant wetlands and a very high water table. Griffin opined that the Town Wetlands Bylaw regulates the buffer zone as a resource area itself. Griffin stated that the Project would require construction of several detention basins

entirely in the buffer zone and in close proximity to actual wetlands. According to Griffin, Sugarbush never provided the SCC or ZBA with adequate data to enable it to determine if the Project could meet storm water management performance standards and that it would cause no harm the buffer zone. According to Griffin, the ZBA would need such information before determining whether to grant a waiver under the Town Wetlands Bylaw. Griffin noted that the SCC had in the past denied permits based on inadequate information and did not always approve work in the buffer zone.

Registered engineer John Furman ("Furman") of VHB testified that the ZBA hired him to review the Project. Furman opined that the application submitted by Sugarbush did not provide sufficient information to conclude that the Project would be consistent with state and local wetlands standards, particularly recently enacted DEP storm water management standards. Furman further opined that Sugarbush failed to submit sufficient information to the ZBA to enable it to determine if the Project would comply with the Town Wetlands Bylaw.

D. Fire Safety

Darnold acknowledged that Sunderland does not have a full sized aerial fire truck, but noted that the neighboring town of Amherst has such a truck. His design group, BDG, obtained the specific geometric configuration of that vehicle from the Amherst Fire Department and then determined that the vehicle could safely maneuver through the Property and access each building. In a letter dated August 1, 2007, Sunderland Fire Chief Robert Ahern ("Ahern") indicated he reviewed this turning analysis and found it adequate. Ahern advised Darnold that currently, the Town would call for assistance in the event of a fire at a two and a half story apartment building, but emphasized that the Town lacked adequate equipment to access the roofs of the three story buildings proposed in the Project. Darnold opined that the Project complied with federal and state regulations

and generally recognized standards of firefighting access.

Professional engineer Kevin Hastings ("Hastings") of R.W. Sullivan Engineering testified that for the type of apartment buildings in the Project, the 6th edition of the State Building Code (in effect at the time of Sugarbush's application) required a sprinkler system designed in accordance with National Fire Protection Association ("NFPA") Standard 13R. Hastings noted, however, that the Project would contain more protective sprinkler systems as set forth in NFPA Standard 13 of the 7th edition of the Building Code. A 2006 study revealed that in apartment buildings, sprinkler systems failed in only 2% of cases, overwhelmingly because of system shut-off. Hastings opined that the proposed buildings would not pose an unusual fire or life safety hazard requiring a ladder fire truck. Instead, he testified, the advanced sprinkler system would substantially reduce the likelihood that exterior ladder access to the roof would be necessary. Hastings opined that buildings with the advanced sprinkler system are safer than a single family home without fire sprinkler protection. He noted that the maximum height of the Project's buildings (42 feet at the roof peak) would only slightly exceed the maximum permitted height of 35 feet, and would not make the Project unsafe, even if the Town did not have a ladder fire truck. Finally, Hastings opined that the State Building Code gives the Fire Chief the right to approve fire lane locations and vehicle access to buildings, but does authorize the Fire Chief to limit building size in area or height to levels more restrictive than those allowed under Chapter 5 of the Building Code.

Walter D. Adams ("Adams"), a registered architect, licensed construction supervisor and certified building official, testified. A member of the State Board of Building Regulations and Standards, he serves on the Fire Prevention-Fire Protection Advisory Board responsible for recommending the adoption of the 7th edition of the State Building Code. Hired by the Town to

review the Project, Adams opined that under the State Building Code, a town Fire Chief has authority to refuse the approval of a building permit if the submitted design does not provide acceptable building access for firefighting. Adams spoke of firefighters' need to access the third floor and roof to rescue victims, and to allow ventilation of smoke and heat to avoid a flashover. According to Adams, the Sunderland Fire Department's ladder was near the height limit required to enter the third floor windows of the proposed buildings, and could not reach the roof to vent smoke and hot gasses. Adams noted that all buildings' sprinkler systems fail to perform properly 16% of the time due to lack of proper maintenance, lack of adequate water supply, or because of system shut-off; as a consequence, he opined that reliance on a sprinkler system alone to suppress a fire would be unreasonable and unsafe. He further stated that mutual aid firefighting agreements apply only in the most catastrophic circumstances and that a Town cannot rely upon participating communities to provide specialized equipment they do not possess. According to Adams, Amherst Fire Chief Keith Hoyle told him that he would not send his ladder truck on a first alarm to a Sunderland apartment complex.

Fire Chief Ahearn testified that a universally accepted practice in combating fire involves obtaining quick access to the roof to ventilate heat and smoke. According to Ahern, the 42 foot high buildings proposed in the Project would be too high for the Fire Department's existing trucks to reach. He described the trucks as having 35 foot ladders capable of reaching only the sills and not the tops of third story windows for safe access. Despite Insurance Services Office standards recommending that a ladder truck or ladder company can properly respond to areas with 5 buildings that are 3 stories or 35 feet in height, Ahearn opined that access to the roof is necessary to properly protect life and property. In his view, the lack of such access substantially increases the risk of severe

injury or death to residents and firefighters and the existence of a sprinkler system would not substitute for roof access. Ahearn opined that the Fire Department could not rely on mutual aid as a primary first response, because the Amherst Fire Department would take 10-20 minutes to respond. Finally, Ahearn expressed concern that the Project would cause a 10% increase in calls to the Fire Department, including for emergency medical services, thereby necessitating hiring two full time firefighters/EMTs at salaries of approximately $36,000 each.

Sunderland Town Administrator Margaret Nartowicz ("Nartowicz") testified that the Town was contemplating a proposed 16% tax override to maintain its general operating budget and could not afford an additional debt exclusion override to purchase and house a fire ladder truck. According to Nartowicz, the Project would increase the Town's population and housing stock by almost 9%, requiring that the Town hire two additional police officers and two additional firemen at a 1% increase in the Town's budget, which she testified the Town could not afford. She cited the Town's inability to afford adequate educational services for 54 additional children estimated to enroll in the school system as a result of the Project. The Project would be expected to pay taxes of only $225,000 to the Town.

After considering all the evidence, the HAC issued its final decision dated June 21, 2010, and reversing the ZBA's decision and ordering it to issue a comprehensive permit to Sugarbush for the Project. The HAC noted that only 0.4% of the total housing in Sunderland was low and moderate income housing, which constituted compelling evidence that the regional need for housing outweighed objections to the Project. The HAC rejected the ZBA's argument that it should consider inexpensive market-rate rental housing units in Sunderland when determining the need for low or moderate income housing. The HAC also rejected ZBA's argument that the area had no housing

need. The ZBA argued that within a 20 mile radius of the Property, an area encompassing Northampton, Holyoke, Chicopee and Springfield, 10.7% of all housing was affordable. The HAC concluded that area was not the proper one for determining regional need.

The HAC rejected the ZBA's argument that because the Sunderland Fire Department did not have a ladder truck capable of reaching the roof of three story apartment buildings, the Project would pose a public safety hazard which outweighed the need for affordable housing. The HAC noted that given the state of the art sprinkler system to be installed in the buildings, the availability of a ladder truck in neighboring Amherst, and the fact that the Sunderland Zoning Bylaws permit building heights of up to 45 feet, the Sunderland Fire Department's ability to access the roofs of buildings in the Project was not essential.

The HAC also rejected the ZBA's argument that traffic and pedestrian safety concerns would outweigh the need for affordable housing. It found that traffic studies by Sugarbush's experts had established that the Project design provided safe intersections, and further found the testimony of the ZBA's traffic experts speculative. In addition, the HAC rejected the ZBA's argument that Sunderland's Wetlands Bylaw is more restrictive than the WPA, and noted that the Project would proceed in accordance with a Superseding Order of Resource Area Delineation issued by DEP. Finally, the HAC concluded that because Sunderland has not promulgated smart-growth regulations, the ZBA could not oppose the Project on the ground that it would violate smart-growth principles.

IV. Appeal to the Superior Court

According to Town Administrator Nartowicz, the Select Board controls all litigation on behalf of the Town. The Select Board met and decided to appeal the HAC's decision. Because the ZBA was the defendant in the proceeding before the HAC, the Select Board permitted it to serve

as the Town's agent in appealing the HAC's decision. Accordingly, the ZBA filed this action for judicial review on July 19, 2010, and the Select Board maintains control over this litigation.

DISCUSSION

I. Motion by Sugarbush Meadow LLC to Dismiss

Sugarbush moves to dismiss the complaint pursuant to Mass. R. Civ. P. 12(b)(1) on the ground that this Court lacks subject matter jurisdiction over the claims asserted therein.

A. ZBA's Motion to Strike Motion to Dismiss

The ZBA has moved to strike Sugarbush's Motion to Dismiss, arguing that it is untimely under Standing Order 1-96 because Sugarbush did not file the motion until five months after the filing of the administrative record. Paragraph 3 of the Standing Order provides in relevant part:

> The following motions raising preliminary matters must be served in accordance with Superior Court Rule 9A not later than twenty (20) days after service of the record by the administrative agency.
>
> (a) Motions authorized by Mass.R.Civ.P. 12(b) or 12(e) . . .
>
> Any party failing to serve such a motion within the prescribed time limit, or within any court-ordered extension, shall be deemed to have waived any such motion (unless relating to jurisdiction) and the case shall proceed solely on the basis of the record.

Mass. Super. Ct. Standing Order 1-96. A motion to dismiss based on the plaintiff's lack of standing raises an issue of subject matter jurisdiction. See Ginther v. Commissioner of Ins., 427 Mass. 319, 322 (1998). Lack of subject matter jurisdiction cannot be waived and may be raised at any stage of the proceeding. See Mark v. Kahn, 333 Mass. 517, 519 (1956); Warrington v. Zoning Bd. of App. of Rutland, 78 Mass. App. Ct. 903, 905 (2010). Accordingly, Sugarbush's Motion to Dismiss for

Lack of Subject Matter Jurisdiction Based on Lack of Standing is not untimely under Standing Order 1-96.

B. ZBA's Motion to Strike Paragraphs of Affidavit of Scott Nielsen

In support of its motion to dismiss, Sugarbush has filed the affidavit of its principal, Scott Nielsen ("Nielsen"). The ZBA moves to strike every paragraph of the affidavit, except for the first paragraph which identifies Nielsen's relationship to Sugarbush.

In paragraph 2, Nielsen opines that neither the ZBA nor the Town owns any real property adjacent to the Property or any real property which would be affected by the Project in a manner that differs from the rest of the Town. As to paragraph 2, the ZBA is correct, as the affidavit fails to set forth any basis for Nielsen's purported knowledge of the Town's real estate holdings, and his statement about the effect of the Project is a legal conclusion concerning standing rather than a statement of fact.

Paragraph 3 states that the Executive Office of Energy and Environmental Affairs has not required an Environmental Impact Report for the Project, and that the MEPA Certificate for the Project concludes that the Project will not significantly add to traffic problems. Paragraph 3 also cites from HAC's final decision on Sugarbush's application. The ZBA moves to strike this paragraph as "pure hearsay and not the proper subject of an affidavit." Nielsen has personal knowledge of the findings of the permitting agencies involved in this case and, in any event, the referenced documents appear in the administrative record. The request to strike this paragraph is denied.

In paragraph 4, Nielsen opines that the ZBA will not suffer injury different from other locations in the Town due to construction in the wetlands buffer zone. This is a legal conclusion and

will be stricken. However, the remainder of paragraph 4 states that the Secretary did not require an Environmental Notification Form and cites from the HAC final decision. The request to strike these aspects of paragraph 4 is denied.

In paragraph 5, Nielsen opines that the Town failed to substantiate its claim of financial hardship in the HAC proceedings. This paragraph asserts a legal conclusion and the request to strike it is allowed.

In paragraphs 6, 7, 8, 9 and 10, Nielsen recounts various conversations with several members of the Sunderland Planning Board and the Fire Chief in which those individuals indicated their opposition to any Chapter 40B project and their intended lack of cooperation in the process. Regardless of whether these statements are admissible under one or more exception to the hearsay rule, they are irrelevant to the legal question of standing. Accordingly, acting within my discretion, I allow the request to strike these paragraphs.

In paragraph 11, Nielsen states that the Amherst Fire Department Chief and Associate Chief told him that they would respond to a fire in Sunderland. This statement must be stricken as hearsay. However, because it is based on his personal knowledge, Nielsen's statement that the Amherst Fire Department responded to a fire at a commercial building next door to his property is proper.

In paragraph 12, Nielsen states that the ZBA failed to respond to the opportunity granted in the HAC final decision to make fire safety suggestions for the Project, and he opines that the proposed buildings are similar to apartments across the state and country and will have a National Fire Protection Association Standard 13 fire suppression system. The ZBA's lack of response is a matter of fact, even though no inferences may be drawn from it. Nielsen's opinion on whether the

proposed buildings will have a Standard 13 fire suppression system is permissible. The request to strike those portions of paragraph 12 is denied . His opinion as to the similarity of the buildings in the Project to others in Massachusetts and the United States is stricken.

E. Merits of Motion to Dismiss

A motion under Rule 12(b)(1) challenges the court's jurisdiction over the subject matter of the complaint and is an appropriate mechanism by which to challenge a plaintiff's standing. See Ginther v. Commissioner of Ins., 427 Mass. at 322. A Rule 12(b)(1) motion, when unsupported by affidavits, presents a facial attack on jurisdiction based solely on the allegations of the complaint, taken as true. Callahan v. First Congregational Church of Haverhill, 441 Mass. 699, 709 (2004). In contrast, a Rule 12(b)(1) motion which is supported by affidavits, documents, or other materials outside the pleadings contests the accuracy of the jurisdictional facts pleaded by the plaintiff. Id. at 710-711. In that instance, the court may consider all the materials submitted by the parties in addressing the merits of the jurisdictional claim, giving no presumptive weight to the averments in the complaint and resolving any factual disputes. Id.; Ginther v. Commissioner of Ins., 427 Mass. at 322 & n.6.

When faced with a Rule 12(b)(1) motion, the plaintiff bears the burden of proving sufficient jurisdictional facts. Williams v. Episcopal Diocese of Mass., 436 Mass. 574, 577 n. 2 (2002). Sugarbush argues that under the relevant statutory provisions, the ZBA cannot be a "person aggrieved" with standing to appeal the HAC's final decision. General Laws Chapter 40B, section 21 provides that "[a]ny 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." Municipal boards and officers do not have standing under G. L. c. 40B, § 21 because the word "person" does not ordinarily

include the state and its subdivisions, and the Legislature expressed an intent to limit the classes of parties able to challenge a local zoning board's issuance of a comprehensive permit. See Town of Hingham v. Department of Hous. & Cmty. Devel., 451 Mass. 501, 506 n. 9 (2008) (town is not person aggrieved for purposes of appeal of local zoning board's issuance of 40B permit); Planning Bd. of Hingham v. Hingham Campus, LLC, 438 Mass. 364, 367-370 (2003) (planning board lacks standing to appeal zoning board's issuance of 40B permit); Board of Water Commrs of Hanson v. Zoning Bd. of App. of Hanson, 2004 WL 2452690 at *1-2 (Mass. App. Ct. Rule 1:28) (town water commission is not person aggrieved under § 21 who may appeal town's issuance of 40B permit); Town of Cohasset Water Comm'n, v. Avalon Cohasset, Inc., 2005 WL 64335 at *4-5 (Mass. Land Ct.) (Sands, J.) (town water commission lacks standing to appeal zoning board's issuance of 40B permit). Cf. Jepson v. Zoning Bd. of App. of Ipswich, 450 Mass. 81, 92-93 (2007) (municipal housing authority was "person" who might challenge 40B permit where it owned land abutting locus which would be impacted by proposed development).

This case, however, does not involve judicial review of a zoning board's issuance of a permit under G. L. c. 40B, § 21. Chapter 40B, section 22 provides that when a permit application is denied by the local board under § 21, the applicant may appeal to HAC, which must render a decision within a specific period of time, and "such decision may be reviewed in the superior court in accordance with the provisions of chapter thirty A." G. L. c. 40B, § 22. Section 22 of Chapter 40B does not expressly limit standing to appeal to "persons aggrieved" as does section 21; instead, it provides for review in the Superior Court pursuant to the procedures set forth in G. L. c. 30A. Section 14 of c. 30A permits judicial review of an agency's final decision by "any person or appointing authority aggrieved" by the decision. Cf. Town of Middleborough v. Housing App.

Comm., 449 Mass. 514, 516 (2007)("A party aggrieved by a decision of the [HAC] may appeal to the Superior Court.").[3] Here, in its final decision, HAC ordered that the ZBA (which was a party to the proceedings before it) issue the comprehensive permit to Sugarbush. As noted above, the Select Board, which controls litigation for Sunderland, determined that the ZBA would file the appeal. Accordingly, because the court has subject matter jurisdiction over this appeal, Sugarbush's motion to dismiss is denied.[4]

II. Motion for Judgment on the Pleadings

A. Chapter 40B Overview

General Laws Chapter 40B, §§ 20-23, popularly known as the Anti-Snob Zoning Act ("the Act"), and the regulations adopted thereunder, 760 Code Mass. Regs. § 30.02 *et seq.*, were enacted to eliminate impediments to developers seeking to build low or moderate income housing. Zoning Bd. of App. of Amesbury v. Housing App. Comm., 457 Mass. 748, 760 (2010); Zoning Bd. of App. of Wellesley v. Ardemore Apartments Ltd. P'ship, 436 Mass. 811, 814 (2002). The Act allows

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[3]Indeed, in numerous cases, local zoning boards have appealed an HAC decision under § 22 without any standing challenge. Cf. Zoning Board of Appeals of Amesbury v. Housing Appeals Committee, 457 Mass. 748, 753 (2010) (town's ZBA appealed HAC decision striking certain conditions imposed by town in comprehensive permit); Board of Appeals of Woburn v. Housing Appeals Committee, 451 Mass. 581, 586-587 (2008) (town's ZBA appealed HAC decision modifying conditions imposed by town in comprehensive permit); Zoning Board of Appeals of Wellesley v. Housing Appeals Committee, 385 Mass. 651, 653-658 (1982) (town's ZBA appealed HAC decision ordering it to grant comprehensive permit); Board of Appeals of Hanover v. Housing Appeals Committee, 363 Mass. 339 (1973)(ZBAs of Hanover and Concord sought review of HAC decisions, under G. L. c. 40B, § 22, and G. L. c. 30A, § 14).

[4]There is no merit to Sugarbush's argument that because G. L. c. 40B, § 22 references Chapter 30A generally, this Court must apply the specific standing requirements of G. L. c. 30A, § 14 to an HAC appeal. Cf. Planning Bd. of Hingham v. Hingham Campus, LLC, 438 Mass. at 367 (in determining standing under G. L. c. 40B, § 21, court focuses on specific language of that section and not more general statutory scheme of Chapter 40A).

limited dividend or nonprofit organizations proposing to construct such housing to submit a single application to a city or town's board of appeals in lieu of separate applications to the numerous local boards or officials having jurisdiction over the project. See G. L. c. 40B, § 21; Zoning Bd. of App. of Amesbury v. Housing App. Comm., 457 Mass. at 761; Zoning Bd. of App. of Wellesley v. Ardemore Apartments Ltd. P'ship, 436 Mass. at 815. In order to address the Legislature's concern that municipalities might use their zoning powers to exclude low and moderate income housing, the Act authorizes both local boards and the HAC to override local zoning requirements to promote affordable housing in particular areas. Zoning Bd. of App. of Wellesley v. Ardemore Apartments Ltd. P'ship, 436 Mass. at 821-822; Board of App. of Hanover v. Housing App. Comm., 363 Mass. 339, 354-355 (1973). A key aspect of the Act's framework is the requirement that each municipality devote 10% of its housing stock to low or moderate income housing. See G. L. c. 40B, § 20; Town of Hingham v. Department of Housing and Cmty. Develop., 451 Mass. 501, 503 (2008).

If a local zoning board denies an application for a comprehensive permit, the developer may appeal to HAC, which conducts a de novo review to determine whether the board's decision "was reasonable and consistent with local needs." G. L. c. 40B, § 23. See also Zoning Bd. of App. of Wellesley v. Ardemore Apartments Ltd. P'ship, 436 Mass. at 815; Board of App. of Hanover v. Housing App. Comm., 363 Mass. at 369. The developer may establish a prima facie case by proving that its proposal complies with federal or state statutes and regulations, or with generally recognized standards as to matters of health, safety, the environment, or other matters of local concern. 760 Code Mass. Regs. § 56.07(2)(a)2. The burden then shifts to the local board to prove that there is a valid health, safety, environmental or other local concern which supports the denial of a permit and outweighs the regional housing need. 760 Code Mass. Regs. § 56.07(2)(b)2.

In weighing consistency with local needs under § 20, there is a rebuttable presumption that when a municipality has failed to meet the statutory minimum of 10% low or moderate income housing, there is a substantial regional housing need which outweighs local concerns. See 760 Code Mass. Regs. § 56.07(3)(a). See also Board of App. of Hanover v. Housing App. Comm., 363 Mass. at 367; Zoning Bd. of App. of Greenfield v. Housing App. Comm., 15 Mass. App. Ct. 553, 557 (1983) (failure to meet 10% threshold provides "compelling evidence" that regional need for housing does in fact outweigh objections to a proposal). If the 10% threshold has not been met in the municipality, HAC may find the board's denial to be inconsistent with local needs, and may override the decision and order issuance of a permit. G. L. c. 40B, § 23.

B. Judicial Review under Chapter 30A

Pursuant to Chapter 30A, section 14, the court must uphold HAC's decision if it is supported by substantial evidence, that is such evidence as a reasonable mind might accept as adequate to support a conclusion, taking into account that which detracts from the weight of HAC's conclusion. Zoning Board of App. of Wellesley v. Housing App. Comm., 385 Mass. at 657; Board of App. of Hanover v. Housing App. Comm., 363 Mass. at 376. The court must give due weight to HAC's specialized knowledge, technical competence, experience, and discretionary authority. Zoning Bd. of App. of Amesbury v. Housing App. Comm., 457 Mass. 748, 759 (2010). The court may not displace HAC's choice between two fairly conflicting views, even if the court justifiably would have made a different choice had the matter been before it de novo. Zoning Bd. of App. of Wellesley v. Housing App. Comm., 385 Mass. at 657. The ZBA bears the burden of demonstrating the invalidity

of HAC's decision. Town of Middleborough v. Housing App. Comm., 449 Mass. 514, 524 (2007).[5]

1. **Regional Housing Needs**

The ZBA first contends that the HAC erred in its determination that because only 0.4% of the total housing in Sunderland is low and moderate income housing, there is compelling evidence that the regional need for housing outweighs the Town's objections to the Project. As discussed above, HAC regulations create a rebuttable presumption that the housing need outweighs local concerns where the municipality has failed to achieve the statutory minimum of subsidized housing inventory units exceeding 10% of its total housing units. See 760 Code Mass. Regs. § 56.03(3)(a); 760 Code Mass. Regs. § 56.07(3)(a). See also Board of App. of Hanover v. Housing App. Comm., 363 Mass. at 367 (town's failure to meet minimum housing obligation provides compelling evidence that regional need for housing outweighs local objections to project). It is undisputed that Sunderland has failed to achieve this statutory threshold.

Nonetheless, HAC regulations permit the ZBA to attempt to rebut the presumption, and provide that in doing so:

> 1. the weight of the Housing Need will be commensurate with the regional need for Low or Moderate Income Housing, considered with the proportion of the municipality's population that consists of Low Income Persons;
>
> 2. the weight of the Local Concern will be commensurate with the degree to which the health and safety of occupants or municipal residents is imperiled, the degree to which the natural environment is endangered, the degree to which the design of the

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[5]On April 4, 2011, the ZBA filed a Reply to HAC's Opposition to Motion for Judgment on the Pleadings. Sugarbush has filed an Emergency Motion to Strike Plaintiff's Reply Brief on the ground that it violates the mandate of Sup. Ct. R. 9A(a)(3) that a reply memorandum "shall be limited to addressing matters raised in the opposition that were not and could not reasonably have been addressed in the moving party's initial memorandum." Sugarbush's Motion to Strike is **DENIED** on the ground that the interests of justice require full consideration of the parties' positions and no prejudice is occasioned by consideration of the plaintiff's reply brief.

> site and the proposed housing is seriously deficient . . . and the degree to which the Local Requirements and Regulations bear a direct and substantial relationship to the protection of such Local Concerns; and
>
> 3. a stronger showing shall be required on the Local Concern side of the balance where the Housing Need is relatively great than where the Housing Need is not as great.

760 Code Mass. Regs. § 56.07(3)(b). "Housing Need" is defined as "the regional need for Low and Moderate Income Housing considered with the number of Low Income Persons in the municipality affected." 760 Code Mass. Regs. §56.02. "Low and Moderate Income Housing" is defined as "any housing subsidized by the federal or state government under any program to assist the construction of low or moderate income housing as defined in the applicable federal or state statute . . ." G. L. c. 40B, § 20. DHCD maintains a Subsidized Housing Inventory ("SHI") to measure a municipality's stock of low or moderate income housing. See 760 Code Mass. Regs. § 56.02; 760 Code Mass. Regs. § 56.03(2). For inclusion in the SHI, housing must be subsidized, defined as assistance provided by a subsidizing agency to construct or rehabilitate low or moderate income housing, including direct financial assistance; indirect financial assistance through insurance, guarantees, tax relief, or other means; and non-financial assistance including in-kind assistance, technical assistance, and other supportive services. Id.

The ZBA contends that the HAC committed an error of law or abuse of discretion in refusing to consider inexpensive market-rate housing in determining the extent of the regional housing need to be balanced against the Town's local concerns. HAC concluded that market rate housing is not relevant because such housing can fluctuate in affordability and quality, creating instability in the affordable housing inventory. In enacting Chapter 40B, the Legislature intended to ensure not only an adequate supply of safe and affordable housing but also the long-term availability of such

housing. See Zoning Bd. of App. of Wellesley v. Aredmore Apartments Ltd. P'ship, 436 Mass. 811, 824-825 (2002) (purpose of 40B not met when subsidized units converted to market rents). Requiring units to be subsidized, and thus subject to controls such as deed restrictions, quality standards and marketing guidelines, furthers this goal. See Town of Middleborough v. Housing App. Comm., 449 Mass. at 428 (noting that subsidy provisions of Chapter 40B serves broadly meliorative purpose of statute). HAC's regulations, which require units to be subsidized in order to be included on the SHI, are consistent with the enabling statute.

This Court must defer to HAC's expertise and discretion in interpreting and applying the statute and its own regulations. See Town of Middleborough v. Housing App. Comm., 449 Mass. at 523; Zoning Bd. of App. of Greenfield v. Housing App. Comm., 15 Mass. App. Ct. at 560. HAC's refusal to consider market rate units which are affordable but do not qualify for inclusion on the Town's SHI is not legally erroneous or an abuse of discretion.[6] HAC's conclusion that there is a compelling need for low or moderate income housing in Sunderland is thus supported by substantial evidence in the record.

2. Traffic and Pedestrian Safety

The ZBA argues that the HAC erred in concluding that the regional housing need outweighs the Town's traffic and pedestrian safety concerns. Sugarbush established a prima facie case by establishing through the TES traffic study that the Project complies with state regulations and

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[6]There is no merit to the ZBA's argument that the SHI is not critical in determining regional need. The case that it cites for this proposition is inapposite. See Zoning Bd. of App. of Canton v. Housing App. Comm., 76 Mass. App. Ct. 467, 470, rev. den., 457 Mass. 1104 (2010) (noting that attainment of 10% minimum should be not conflated with satisfaction of need for affordable housing in context where proposed development would overshoot minimum by creating 12% affordable housing in town).

generally recognized standards with respect to traffic and pedestrian safety. See 760 Code Mass. Regs. § 56.07(2)(a)2. Accordingly, the ZBA bore the burden to demonstrate that its traffic concerns outweigh the regional housing need, which the HAC properly determined to be compelling. See 760 Code Mass. Regs. § 56.07(2)(b)2.

The HAC heard conflicting expert testimony on the degree to which the design of the Project mitigates the risk of traffic accidents and protects pedestrians. The Town's expert, Chase, concluded that the Project design presents concerns for motor vehicle and pedestrian accidents; however, he did not opine that the design is unsafe. As to Police Chief Gilbert's testimony about the likelihood of increased accidents, the HAC deemed much of it to be speculative. It is for the agency, not the reviewing court, to weigh the credibility of expert witnesses and resolve factual disputes involving contradictory testimony. MacLean v. Board of Registration in Nursing, 458 Mass. 1028, 1038 (2011); Zoning Bd. of App. of Wellesley v. Housing App. Comm., 385 Mass. at 657. In applying the substantial evidence test, the court cannot make a de novo determination of facts, make different credibility choices, or draw different inferences from the facts found by the agency. RicMer Props., Inc. v. Board of Health, 59 Mass. App. Ct. 173, 180 (2003). There is substantial evidence for HAC's conclusion that the ZBA did not meet its burden of proving a valid traffic safety concern that outweighs the regional housing need.

3. Wetlands

The ZBA contends that the HAC erred in concluding that the regional housing need outweighs the Town's concerns under the Town Wetlands Bylaw. Sugarbush established a prima facie case through its experts' opinions that the Project complies with the WPA and the Town Wetlands Bylaw and was designed to mitigate the impact of the work performed in the buffer zone.

See 760 Code Mass. Regs. § 56.07(2)(a)2. Therefore, the ZBA bore the burden of demonstrating that its wetlands concerns outweigh the regional housing need. See 760 Code Mass. Regs. § 56.07(2)(b)2.

The ZBA argues that the HAC erred in determining that the Town Wetlands Bylaw is not more restrictive than the WPA. The HAC concluded that jurisdiction under the Town Wetlands Bylaw is identical to that under the WPA because both regulate activity within 100 feet of a resource area. Under the WPA, a Notice Of Intent is required for activity inside the 100 foot buffer zone only if it will alter the wetlands or other area subject to protection. See 320 Code Mass. Regs. § 10.02(2)(b). In contrast, under the Town Wetlands Bylaw, an NOI is required for all activity proposed within the buffer zone, without regard to whether it alters a resource area. This is a significant difference which renders the local bylaw more restrictive than the WPA. See FIC Homes v. Conservation Comm'n of Blackstone, 41 Mass. App. Ct. 681, 687 (1996), rev. den., 424 Mass. 1104 (1997); T.D.J. Develop. Corp. v. Conservation Comm'n of N. Andover, 36 Mass. App. Ct. 124, 126-127 (1994) (town bylaw which regulates all buffer zone activity has more expansive scope of control than state act). Accordingly, there is merit to the ZBA's objection that the HAC erred in concluding that the Town Wetlands Bylaw is not more restrictive.

Nonetheless, this error does not warrant reversal of the HAC's decision. The HAC reasoned that even if the local bylaw were more restrictive, the ZBA failed to show that its wetlands concerns outweigh the regional need for affordable housing because the Town of Sunderland's Wetlands Bylaw permits the SCC to allow work within the buffer zone with proper review and approval. None of the Town's experts testified that the Project as designed would adversely impact the wetlands or other protected areas on the Property. Rather, they opined that Sugarbush had failed to

provide sufficient information to determine whether the Project complies with the standards articulated in the Town Wetlands Bylaw. On the other hand, Sugarbush's experts testified that the information provided to the ZBA, including a superseding order of resource area delineation, monitoring well test results, drainage calculations, storm water management plans and project plans, demonstrated that the design of the Project would not adversely impact the wetlands.

In appealing HAC's decision, the ZBA must do more than just point out the environmentally sensitive nature of the Property. See Zoning Bd. of App. of Amesbury v. Housing App. Comm., 2009 Mass. App. Unpub. LEXIS 1019 at *4-5. Instead, it must establish that the Project poses an actual, not just speculative, local environmental concern. Id. It is for the agency, not the reviewing court, to weigh the credibility of expert witnesses and resolve factual disputes involving contradictory testimony. MacLean v. Board of Registration in Nursing, 458 Mass. at 1038. In applying the substantial evidence test, the court cannot make a de novo determination of facts, make different credibility choices, or draw different inferences from the facts found by the agency. RicMer Props., Inc. v. Board of Health, 59 Mass. App. Ct. at 180. There is substantial evidence for HAC's conclusion that the ZBA did not meet its burden of proving a specific wetlands concern that outweighs the regional housing need.

4. Fire Safety

The ZBA contends that the HAC erred in concluding that the regional housing need outweighs the Town's fire safety concerns. Sugarbush established a prima facie case by establishing through its experts that the Project complies with state regulations and generally recognized standards of fire safety. See 760 Code Mass. Regs. § 56.07(2)(a)2. There is no merit to the ZBA's argument that under the State Building Code, a local fire chief has absolute and final authority to

reject a project if he deems building and site access to be inadequate for firefighting. See Board of App. of N. Andover v. Housing App. Comm., 4 Mass. App. Ct. 676, 678 (1976) (HAC lacks authority to override state law, including State Building Code). The regulation cited by ZBA provides in relevant part:

> Complete *fire protection construction documents* shall be submitted . . . and a building permit obtained prior to the installation of all "required" or "non-required" fire protection systems.

780 Code Mass. Regs. § 901.7.1. Fire protection construction documents must include "[b]uilding and site access for fire fighting and/or rescue vehicle(s) and personnel." 780 Code Mass. Regs. § 901.7.1.1. The State Building Code further provides in relevant part: "the building of official [sic] shall transmit one set of the *fire protection construction documents* (780 CMR 901.7.1.1) and *building construction documents* to the head of the fire department or his designee for review and approval of the items specified in 780 CMR 901.7.1.1." 780 Code Mass. Regs. § 901.7.2. Nothing in these regulations establishes that, as a matter of state law, the ZBA and/or HAC is precluded from overriding the opinion of the Fire Chief with respect to fire safety. See Zoning Bd. of App. of Amesbury v. Housing App. Comm., 2009 Mass. App. Unpub. LEXIS 1019 at *8 ("The Board's argument that HAC could not substitute its own judgment for the fire chief's once he determined that he would not approve the design is unsupported by any citation to authority."). Accordingly, Sugarbush established a prima facie case and the ZBA bore the burden to demonstrate that its fire safety concerns outweigh the regional housing need. See 760 Code Mass. Regs. § 56.07(2)(b)2.

The ZBA has not cited, nor has this Court discovered, any provision of the State Building Code which requires that the roof of an apartment building be accessible by the fire department's

firefighting apparatus. Cf. 780 Code Mass. Regs. § 903.2.11.3 (requiring automatic sprinkler system in building with floor level located 55 feet or more above lowest level of fire department vehicle access). The Town's Zoning Bylaw permits construction of buildings of up to 45 feet by special permit. There was conflicting expert testimony with respect to whether roof access is essential to ensure the safety of occupants and firefighters. Here, it is apparent that the HAC found Sugarbush's expert more credible than the Town's experts on this issue. While the Court could have given more deference to the opinion of the Fire Chief, it may not displace HAC's choice between two fairly conflicting views, even if it justifiably would have made a different choice had the matter been before it de novo. See Zoning Bd. of App. of Wellesley v. Housing App. Comm., 385 Mass. at 657. There is substantial evidence for the HAC's conclusion that given the presence of an advanced sprinkler system to provide a good first response, the ZBA failed to meet its burden of proving that the degree to which fire safety may be compromised by the inability to reach the roof of the buildings outweighs the regional housing need. See Zoning Bd. of App. of Amesbury v. Housing App. Comm., 2009 Mass. App. Unpub. LEXIS 1019 at *7-8.[7]

5. Fiscal Impact

The ZBA contends that the HAC erred in failing to adequately consider the fiscal impact of the Project on the Town. The ZBA notes that the Sunderland Zoning Bylaw specifically permits the Town to consider the financial impact of a project when considering a comprehensive permit

[7]There is no merit to the ZBA's argument that HAC's decision is arbitrary when compared to two other decisions. In both Lexington Woods, LLC v. Waltham Zoning Bd. of App., HAC No. 02-36 (February 1, 2005) and O.I.B. Corp. v. Braintree Bd. of App., HAC No. 03-15 (March 27, 2006), the HAC upheld a local board's denial of a 40B permit based on project designs involving dead end developments with steep, winding, or narrow access roads with no secondary access, posing a safety risk relating to both fire trucks and general medical emergency response. These cases are distinguishable from the specific fire safety concern raised here.

application. The ZBA also emphasizes that the Project will result in a dramatic 9% increase in the Town's housing stock and population, requiring increased expenditures on police, fire, and education services. Nonetheless, the HAC properly granted summary decision in favor of Sugarbush on this issue. The Legislature did not include fiscal impact in its definition of "issues of local concern." See G. L. c. 40B, § 20; 760 Code Mass. Regs. § 30.02 (defining local concerns as need to protect health and safety of residents, natural environment and open space, and promote site and building design in relation to surroundings). Moreover, HAC regulations provide:

> In the case of either a denial or an approval with conditions, if the denial or conditions are based upon the inadequacy of existing municipal services or infrastructure, the Board shall have the burden of proving that the installation of services adequate to meet local needs is not technically or financially feasible. Financial feasibility may be considered only where there is evidence of unusual topographic, environmental, or other physical circumstances which make the installation of the needed service prohibitively costly.

760 Code Mass. Regs. § 56.07(2)(b)(4). In light of Chapter 40B's purpose of overriding local opposition to critically needed low income housing and forcing each community to bear responsibility for providing such housing, this regulation is reasonable. See Standerwick v. Zoning Bd. of App. of Andover, 447 Mass. 20, 28-29 (2006); Zoning Bd. of App. of Wellesley v. Ardemore Apartments Ltd. P'ship, 436 Mass. at 822. Accordingly, the HAC did not err in refusing to consider the general fiscal impact of the Project on the Town.

6. Legal Counsel Fees

Finally, the ZBA contends that the HAC erred in ordering that it refund to Sugarbush $10,000 charged for legal fees. HAC regulations provide:

> The [ZBA] may require the payment of a reasonable filing fee with the application, if consistent with subdivision, cluster zoning, and other fees reasonably assessed by the municipality for costs designed to defray the direct costs of processing

> applications, and taking into consideration the statutory goal of M. G. L. c. 40B, §§ 20 through 23 to encourage affordable housing development.

760 Code Mass. Regs. § 56.05(2). HAC regulations also provide that a local zoning board may, if necessary, employ outside consultants to review an application and:

> require that the Applicant pay a reasonable review fee in accordance with 760 CMR 56.05(b) for the employment of outside consultants chosen by the Board alone. The Board should not impose unreasonable or unnecessary time or cost burdens on an Applicant. Legal fees for general representation of the Board or other Local Boards shall not be imposed on the Applicant.

760 Code Mass. Regs. § 56.05(5)(a).

HAC could properly reject the ZBA's argument that the $10,000 it charged Sugarbush was a reasonable filing fee for the assistance of counsel in light of the novelty and complexity of the issues raised by the proposed Project. It is within HAC's expertise and discretion to determine that the attorney's fees incurred by the ZBA in this case were neither a proper element of a general filing fee under 760 Code Mass. Regs. § 56.05(2) nor a proper review fee under 760 Code Mass. Regs. § 56.05(5)(a).[8] See Cardwell v. Board of App. of Woburn, 61 Mass. App. Ct. 118, 121 n.3 (2004) (HAC has considerable leeway in interpreting Chapter 40B and its regulations are presumed to be valid).[9]

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[8]HAC has concluded that in some cases, fees for technical peer review of legal documents and legal opinions prepared by the developer, as opposed to general representation of the ZBA, may qualify as legitimate review fees. See Autumnwood, LLC v. Sandwich Zoning Bd. of App., HAC No. 05-06 (June 25, 2007).

[9]This Court is not persuaded by the argument that the HAC lacks authority to invalidate improper fees assessed by the ZBA because G. L. c. 40B, § 23 states that the HAC hearing "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 . . ." See Moot v. Department of Envtl. Prot., 448 Mass. 340, 346 (2007) (agency has wide discretion in establishing parameters of its authority to effectuate purposes of enabling legislation).

ORDER

For the foregoing reasons, it hereby **ORDERED** as follows:

(1) The Plaintiff's Motion to Strike Defendant Sugarbush Meadow's Motion to Dismiss is **DENIED**.

(2) The Plaintiff's Motion to Strike Paragraphs of Affidavit of Scott Nielsen is **ALLOWED** with respect to paragraphs 2, 5, 6, 7, 8, 9, 10, the first sentence of paragraph 4, and the first two sentences of paragraph 11, and is otherwise **DENIED**.

(3) The Defendant Sugarbush Meadow's Cross-Motion to Dismiss for Lack of Subject Matter Jurisdiction pursuant to Mass. R. Civ. P. 12(b)(1) is **DENIED**.

(4) The Plaintiff's Motion for Judgment on the Pleadings is **DENIED** and the June 21, 2010 decision of the Housing Appeals Committee is **AFFIRMED**.

Mary-Lou Rup
Justice of the Superior Court

DATED: June 28, 2011

Entered: June 30, 2011