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COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2577CV0002

TOWN OF MANCHESTER-BY-THE-SEA
ZONING BOARD OF APPEALS

vs.

MASSACHUSETTS HOUSING APPEALS COMMITTEE & another[1]

Consolidated with:

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2577CV0005

MANCHESTER ESSEX CONSERVATION TRUST, INC. & another[2]

vs.

MASSACHUSETTS HOUSING APPEALS COMMITTEE & another[3]

MEMORANDUM OF DECISION AND ORDER ON THE PARTIES' MOTIONS AND CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS

In these consolidated cases, the Town of Manchester-By-The-Sea Zoning Board of Appeals ("ZBA"), and Manchester Essex Conservation Trust, Inc. ("Trust") and a Ten Persons Group ("Group") (collectively, "Trust Group") appeal a decision of the

[1] SLV School Street, LLC
[2] Ten Persons Group
[3] SLV School Street, LLC

Massachusetts Housing Appeals Committee ("HAC") vacating the ZBA's denial of SLV School Street, LLC's ("SLV"), application for a permit under the Massachusetts Comprehensive Permit Act, G.L. c. 40B, §§ 20 - 23 ("Act"), and directing the ZBA to issue the comprehensive permit.

These cases came before the Court on December 4, 2025, for a hearing on the following motions: Motion For Judgment On The Pleadings Of Plaintiff Manchester By-The-Sea Zoning Board Of Appeals (Paper No. 14) ("ZBA Motion"); Plaintiffs' Motion For Judgment On The Pleadings (Paper No. 15) ("Trust Group Motion"); Defendant SLV School Street, LLC's Cross-Motions For Judgment On The Pleadings (Paper Nos. 14.2 and 15.3) (collectively, "SLV Motions"); and, Defendant Massachusetts Housing Appeals Committee's Cross-Motions For Judgment On The Pleadings (Paper Nos. 14.3 and 15.2) (collectively, "HAC Motions").[4]

As is fully explained below, the SLV Motions and the HAC Motions are **ALLOWED**; the ZBA Motion and the Trust Group Motion are **DENIED**; and the HAC's Decision (hereinafter defined) is **AFFIRMED**.

[4] In the Trust Group Motion and accompanying memorandum, the Trust Group attempts to "incorporate by reference" arguments they made in their Motion To Remand. See Trust Group Motion, p. 2; Plaintiffs Memorandum In Support Of Motion For Judgment On The Pleadings, pp. 1, 7-8 (Paper No. 15.1) ("Trust Group Memorandum"). The Court has not considered the Motion to Remand because, *inter alia*, this request is unreasonable in light of the voluminous nature of the administrative record, which is in excess of 4,300 pages, and the parties' motions and supporting memoranda and exhibits.

BACKGROUND

On September 27, 2021, SLV applied to the ZBA for a comprehensive permit seeking to develop a 136-unit apartment building ("Project") on land located at 0 School Street in Manchester-By-The-Sea ("Property").

The Property is an undeveloped, 23-acre, wooded parcel which contains a hill, rock ledge, and wetlands. Pursuant to the Town's Zoning Bylaw, the Property is located in the Town's Limited Commercial District ("LCD") and the Ground and Surface Water Resource Overlay Protection Districts.

The Property abuts the Sawmill Brook, a state-certified cold water fishery, and a 1600-acre wilderness known as the Manchester-Essex Wilderness Conservation Area. Sawmill Brook is identified in the Town's Open Space and Recreation Plan ("OSR Plan") as a resource for the protection of wildlife and is one of the few remaining brooks in northeastern Massachusetts that provide adequate water quality and habitat to support populations of wild brook trout, which were found in surveys of the brook as recently as 2019. Six state-certified vernal pools also lie within or abutting the Property.

The Project consists of construction of a single building with 136 rental apartment units ("Building"), 34 of which will be reserved for low or moderate income households. The Building will be three stories and contain an underground parking garage. The topography of the Property contains a significant slope that will require substantial regrading to accommodate the construction of the Building and an 1800-foot long access driveway, which will serve as the sole means of access to the Building from School Street. Four sections of the driveway, which will be 24 feet wide and have no shoulder, will be bounded by a three-tiered retaining wall system that reaches a

maximum height of 22 feet. Portions of the driveway will be bordered by wooden guardrails that will be placed seven feet away from the driveway and inside the retaining walls.

On August 22, 2022, the ZBA denied SLV's application for a comprehensive permit and SLV appealed to the HAC.

In March 2024, evidentiary hearings were conducted before a hearing officer of the HAC who had conducted a site visit at the property in November 2023. Seventy-six exhibits were admitted into evidence.

On December 3, 2024, in a thoughtful, thorough 66-page decision ("Decision"), the HAC vacated the ZBA's decision and ordered it to issue the comprehensive permit subject to certain conditions. See Record Appendix ("App."), pp. 4112 – 4177.

DISCUSSION

The Court will address the Motions in turn after setting forth the relevant legal framework.

I. THE LEGAL FRAMEWORK

A. Overview Of The Act

"[T]he Massachusetts comprehensive permit act [is] sometimes referred to as the anti-snob zoning act." Zoning Bd. of Appeals of Sunderland v. Sugarbush Meadow, LLC, 464 Mass. 166, 168 (2013). "The purpose of the [A]ct, now into its sixth decade of operation, is well established. '[The SJC] ha[s] long recognized that the Legislature's intent in enacting [the [A]ct] is 'to provide relief from exclusionary zoning practices which prevented the construction of badly needed low and moderate income housing' in the

Commonwealth.'" Zoning Bd. of Appeals of Milton v. HD/MW Randolph Ave., LLC, 490 Mass. 257, 258 - 259 (2022) (citations omitted).

As the SJC has observed:

> A key aspect of the Act's framework is the requirement that each municipality devote ten percent of its housing units to low or moderate income housing. . . . In order to encourage and expedite the construction of such housing, the Act 'streamlines' the permitting process by allowing a developer who wants to construct low or moderate income housing to file a single application for a comprehensive permit with the local zoning board of appeals rather than seeking separate approval from each local board having jurisdiction over the project. . . . Municipalities may grant or deny such permits in light of their obligations under the Act to achieve the ten percent statutory minimum.

Town of Hingham v. Department of Hous. & Cmty. Dev., 451 Mass. 501, 502 – 503 (2008) (citations omitted).

"Once a municipality has achieved the ten per cent statutory minimum, the local zoning board of appeals may 'deny comprehensive permits with impunity' and the HAC has no authority to order a local zoning board of appeal to issue a comprehensive permit." Id. at 503 – 504 (citations omitted).

In sum, "[a] qualified developer of [affordable] housing can 'circumvent the often arduous process of applying to multiple local boards for individual permits and, instead, ... apply to the local board of appeals for issuance of a single comprehensive permit.'" Zoning Bd. of Appeals of Milton, 490 Mass. at 259 (citations omitted).

B. <u>Proceedings Before The HAC After Denial Of Comprehensive Permit</u>

When, like here, "the local board of appeals denies the [comprehensive] permit application . . . the developer can appeal from that decision to HAC." Id. at 259. In such case, "[t]he hearing by the [HAC] shall be limited to the issue of whether . . . the decision of the [ZBA] was reasonable and consistent with local needs." G.L. c. 40B, § 23. In the case of the denial of a comprehensive permit application by the municipality, "[i]f the [HAC] finds . . . that the decision of the [ZBA] was unreasonable and not consistent with local needs, it shall vacate such decision and shall direct the [ZBA] to issue a comprehensive permit or approval to the applicant." G.L. c. 40B, § 23. Nevertheless, "[w]hen a municipality has failed to meet its statutory minimum[, like the Town,] the 'HAC may still uphold denial of the permit as 'reasonable and consistent with local needs' if the community's need for low or moderate income housing is outweighed by [the ZBA's] valid planning objections to the proposal based on considerations such as health, site, design, and the need to preserve open space.'"[5] Town of Hingham, 451 Mass. at 504 n.6 (citation omitted); see also G.L. c. 40B, § 20 (municipality's planning objections "shall be considered consistent with local needs if they are reasonable in view of the regional need for low and moderate income housing . . . and the need to protect the health or safety of the occupants of the proposed housing or of the residents of the . . . town, to promote better site and building design in relation to the surroundings, or to preserve open spaces"); 760 Code Mass. Regs. § 56.02 ("[c]onsistent with [l]ocal [n]eeds means . . . that" a municipality's planning objections are "reasonable in view of the regional need for [l]ow and [m]oderate [i]ncome [h]ousing,

[5] Here, there is no dispute that the Town has not achieved the ten percent statutory minimum.

considered with "the need to protect the health or safety of the occupants . . . or of the residents . . ., to protect the natural environment, to promote better site and building design in relation to the surroundings and municipal and regional planning, or to preserve [o]pen [s]paces").

The HAC has promulgated regulations that govern the procedural and substantive aspects of an appeal of the denial of an application for a comprehensive permit by a developer. See 760 Code Mass. Regs. §§ 56.01 – 56.08.

"'Before the HAC, a developer whose comprehensive permit has been denied may establish a prima facie case by proving that its proposal complies with federal or state statutes or regulations, or with generally recognized standards as to matters of health, safety, the environment, design, open space, or other matters of Local Concern.'" Eisai, Inc. v. Housing Appeals Comm., 89 Mass. App. Ct. 604, 611 (2016) (quotations and citation omitted); 760 Code Mass. Regs. § 56.07(2)(a)(2) (same). The developer carries this burden "only [to] those aspects of the Project which are in dispute (which shall be limited) . . . . " 760 Code Mass. Regs. § 56.07(2)(a)(2). "Once the developer establishe[s] its prima facie case, the burden shift[s] to the [ZBA] to prove 'first, that there is a valid health, safety, environmental, design, open space, or other Local Concern which supports such denial, and [second], that such Local Concern outweighs the Housing Need.'" Eisai, Inc., 89 Mass. App. Ct. at 611 (quoting 760 Code Mass. Regs. § 56.07(2)(b)(2)).

C. Judicial Review Of The HAC's Decision

"[U]nder G.L. c. 40B, § 22, the HAC's decision may be reviewed by a judge of the Superior Court in accordance with G.L. c. 30A. The reviewing judge considers whether the HAC's decision was arbitrary, capricious, lacking substantial evidence, or otherwise contrary to the law, and whether the substantial rights of any party have been prejudiced." Id. at 610 (citations omitted); see also Zoning Bd. of Appeals of Milton, 490 Mass. at 262 (noting SJC's "review is governed by the familiar standards of G.L. c. 30A, § 14"). The court "'must indulge all rational presumptions in favor of the validity of the HAC's determinations, including its choice between two fairly conflicting views, giving due weight to its experience, technical competence, and specialized knowledge.'" Eisai, Inc., 89 Mass. App. Ct. at 611. Moreover, "'[a] court may not displace [the HAC's] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.'" Zoning Bd. of Appeals of Sunderland, 464 Mass. at 172 (citations omitted).

II. THE ZBA MOTION MUST BE DENIED BECAUSE THE HAC DID NOT COMMIT AN ERROR OF LAW AND THE DECISION IS SUPPORTED BY SUBSTANTIAL EVIDENCE

In the ZBA Motion, the ZBA makes two arguments in challenging the Decision, which the Court will address in turn.

A. The HAC Did Not Commit An Error Of Law By Refusing To Consider The ZBA's Evidence When Deciding Whether SLV Showed A Prima Facie Case

In the ZBA Motion, the ZBA first argues that the HAC erred as a matter of law by refusing to consider its evidence (and that of the Trust Group) when determining if SLV met its burden to show a prima facie case. The ZBA asserts that the HAC failed to comply with its own precedent and the general meaning of a prima facie case.

As stated, a developer "may establish a prima facie case by proving . . . that its proposal complies with federal or state statutes or regulations, or with generally recognized standards as to matters of health, safety, the environment, design, open space, or other matters of Local Concern." 760 Code Mass. Regs. § 56.07(2)(a)(2).

On its face, the ZBA's argument that the HAC's refusal to consider evidence supplied by the ZBA and the Trust Group is arguably contrary to the usual application or meaning of a prima facie case. For example, "[i]n determining whether a plaintiff can survive summary judgment [in an action for employment discrimination, the court] use[s] 'the familiar three-stage, burden-shifting paradigm first set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-805 (1973).'" Adams v. Schneider Elec. USA, 492 Mass. 271, 281 (2023). "In the framework, first, the plaintiff must make out a 'prima facie case of discrimination.'" Id. While "'the plaintiff's initial burden of establishing a prima facie case is not intended to be onerous,'" id., the Court is not aware of any **prohibition**

against a reviewing court considering evidence offered by the employer when determining if the employee met her initial burden. See e.g., Sullivan v. Liberty Mut. Ins. Co., 444 Mass. 34, 46 n.17 (2005) (in action for employment discrimination, observing that "[employer] produced evidence it normally would not be required to produce until after [employee] had established her prima facie case" and that "[s]ome courts have suggested that in these circumstances it is not necessary to analyze a plaintiff's prima facie showing, but to proceed directly to the third stage of the McDonnell Douglas formulation").

Nevertheless, the Court is not convinced that the HAC erred as a matter of law. As the Court stated at the hearing (and the HAC stated in the Decision), the phrase "prima facie case" is a term of art, which the HAC is free to define differently than in its precedents. See Zoning Bd. of Appeals of Milton, 490 Mass. at 265 n.12 (recognizing "that '[p]olicies announced in [HAC] adjudicatory proceedings may serve as precedents for future cases'"). In essence, the HAC's ruling is procedural in nature and "'agencies have broad discretion over procedural matters before them.'" Commercial Wharf E. Condo. Ass'n v. Department of Envtl. Prot., 93 Mass. App. Ct. 425, 433 (2018).

More importantly, even if the Court assumes that the HAC committed an error of law, the ZBA has not shown that its "substantial rights . . . have been prejudiced." Eisai, Inc., 89 Mass. App. Ct. at 610; see also Craft Beer Guild, LLC v. Alcoholic Beverages Control Comm'n, 481 Mass. 506, 524 (2019) ("a party seeking to set aside an agency decision must ... establish that it was 'substantially prejudiced' by [the] error [of law]"); G.L. c. 30A, § 14(7) (granting reviewing court to authority to set aside agency decision "if it determines that the substantial rights of any party may have been prejudiced

because the agency decision is . . . based on an error of law"). The Decision clearly reflects that the HAC thoroughly considered the ZBA's evidence in reaching its decision.

At the hearing before the Court, the ZBA argued that the HAC also committed an error of law by rejecting the opinions of the ZBA's expert on issues related to the safety of the roadway simply because the expert is not an engineer. This argument is without merit. "'[W]here, as here, the HAC heard competing experts, [i]t is for the agency, not the reviewing court, to weigh credibility of witnesses.'" Eisai, Inc., 89 Mass. App. at 611 (quotations and citations omitted). Moreover, the Court is not aware of, and the ZBA has not cited, any legal authority that prohibited the HAC from rejecting the ZBA's expert's opinions even though SLV stipulated to his "credentials" and did not cross-examine him during the hearing. As the HAC noted in the Decision, notwithstanding that "the parties stipulated [that] all of their proffered expert witness were experts," Decision, p. 19 n.11, the fact that the ZBA's roadway safety expert was not an engineer was relevant to the HAC's determination of the expert's credibility and the weight to afford his opinions.

B. The Decision Is Supported By Substantial Evidence

The second argument made by the ZBA is that the HAC's ruling that the ZBA failed to rebut SLV's prima facie case is not supported by substantial evidence.

As stated above, once SLV established its prima facie case at the hearing before the HAC, the burden shifted to the ZBA to show that: (1) "there is a valid health, safety, environmental, design, open space, or other Local Concern which supports [its] denial [of SLV's application for a comprehensive permit]"; and, (2) the Local Concern(s) cited

by the ZBA "outweighs the Housing Need." 760 Code Mass. Regs. § 56.07(2)(b)(2).[6]

Here, as best as the Court can decipher, the ZBA contends in the ZBA Motion that its denial of SLV's application for a comprehensive permit was based on valid planning concerns established in the Town's planning documents, i.e., the Town's Master Plan and its OSR Plan, and valid safety concerns regarding the layout of the Project's roadway.[7]

"Substantial evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion." Zoning Bd. of Appeals of Wellesley v. Hous. Appeals Comm., 385 Mass. 651, 657 (1982). "The substantial evidence standard is particularly appropriate 'in light of the heavy burden borne by a local board that denies a comprehensive permit application' to prove 'a specific health or safety concern of

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[6] According to the regulations:

> Local Concern - means the need to protect the health or safety of the occupants of a proposed Project or of the residents of the municipality, to protect the natural environment, to promote better site and building design in relation to the surroundings and municipal and regional planning, or to preserve Open Spaces.
>
> Housing Need - means the regional need for Low and Moderate Income Housing considered with the number of Low Income Persons in a municipality affected.

760 Code Mass. Regs. § 56.02.

[7] The ZBA's legal arguments in its supporting memorandum of law meander a bit between different theories and are not the model of clarity. See Memorandum In Support Of Plaintiff's Motion For Judgment On The Pleadings, pp.16-20 (Paper No. 14.1) ("ZBA's Memorandum"). In fact, the ZBA failed to directly address how it believes it met its burden in the second stage of the regulatory framework to show that its myriad valid reasons outweigh the need for community's need for affordable housing. The Court has done its best to identify and address each of the specific rulings that the ZBA seemingly argues are unsupported by substantial evidence. Nevertheless, the Court has thoroughly reviewed the administrative record and has little difficulty ruling that the Decision, as a whole, and the HAC's myriad rulings, in particular, are supported by substantial evidence, including the HAC's "ruling on environmental issues," which the ZBA mentions in passing. See id. at p. 20.

sufficient gravity to outweigh the regional housing need.'" Eisai, Inc., 89 Mass. App. Ct. at 610 (quotations and citations omitted).

As the Appeals Court has observed:

> The substantial evidence test is almost as low a bar as there is in terms of standards of review. "In order to be supported by substantial evidence, an agency conclusion need not be based upon even a preponderance of the evidence." . . . The substantial evidence test "takes into account the entire record, both the evidence supporting the agency's conclusion and whatever in the record fairly detracts from the weight of that evidence." . . . "Under the substantial evidence test, a reviewing court is not empowered to make a de novo determination of the facts, to make different credibility choices, or to draw different inferences from the facts found by the [agency]." . . . "As to facts, where there is substantial evidence to support the findings of the agency, the court will not substitute its own view of the facts."

Kyle K. v. Department of Children & Families, 103 Mass. App. Ct. 452, 458 (2023) (citations and ellipses omitted).

As to the ZBA's argument that the HAC's "ruling on the bona fide planning issue is not based on substantial evidence" (and "ignores all relevant evidence"), see ZBA's Memorandum, p. 18, the Court disagrees substantially for the reasons cited by the HAC in its opposition to the ZBA Motion. See HAC Opposition to ZBA's Motion, pp. 14-16 (Paper No. 14.3).[8]

As to the ZBA's argument that the HAC's ruling on the driveway safety issue is not supported by substantial evidence, it is nothing more than an impermissible challenge to the HAC's determination that SLV's experts were more credible than the ZBA's expert on this topic. At bottom, as stated, "'[c]redibility of witnesses is for the

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[8] In the Trust Group Motion, the Group argues that the HAC committed an error of law by disregarding certain aspects of the Town's planning documents, which the Court addresses in § III(D), *infra*.

[HAC] . . . and [it] ha[d] the benefit of observing the witnesses in judging credibility.'" Cherubino v. Board of Registration of Chiropractors, 403 Mass. 350, 356 (1988).

In fact, the ZBA's argument that the HAC ignored evidence on any pertinent topic is belied by the numerous instances in the Decision where the HAC directly addressed and rejected the ZBA's evidence. See e.g., Decision, pp. 18-20, 25-27 (ZBA's roadway safety expert); pp. 30-31 (ZBA's vernal pools expert); p. 32 (ZBA's hydrologist); p. 38 (letter from Massachusetts Division of Fisheries and Wildlife ("DFW") about designation of Sawmill Brook as a cold water fish resource).

Moreover, the ZBA's failure to address how it believes it met its burden in the second stage of the regulatory framework to show that any of its purported valid planning, safety, and environmental reasons **outweigh the community's need for affordable housing** significantly detracts from the ZBA's challenge to any aspects of the Decision for lack of substantial evidence. "Where, as here, a town's stock of affordable housing is below ten percent at the time of the application, and the town has not otherwise fulfilled its minimum housing obligation, . . . 'the regulations and our [appellate] cases provide that **there is a rebuttable presumption that there is a substantial Housing Need which outweighs Local Concerns**.'" Eisai, Inc., 89 Mass. App. Ct. at 609 - 610 (quotations and citations omitted) (emphasis added). In fact, the ZBA's wholesale avoidance of addressing the Town's substantial need for affordable housing is arguably due to: (1) the ZBA's failure to "br[ing] any evidence to [the HAC's] attention to demonstrate that the Town has actually facilitated development of affordable housing," Decision at 56, other than paying it lip service in its planning

documents and Zoning Bylaws; and, (2) the evidence before the HAC "of [a] potential exclusionary zoning practice." Id.

C. Conclusion

For the reasons explained above, the ZBA Motion (Paper No. 14) must be **DENIED** and the Cross-Motions (Paper Nos. 14.2 and 14.3) must be **ALLOWED**.

III. THE TRUST GROUP MOTION MUST BE DENIED BECAUSE THEY HAVE NOT SHOWN THAT THEY HAVE BEEN SUBSTANTIALLY PREJUDICED BY AN ERROR OF LAW COMMITTED BY THE HAC

In the Trust Group Motion, the Trust argues that the HAC committed an error of law by denying its motion to intervene, and the Group argues that the HAC committed errors of law by disregarding: (a) evidence that the Project does not comply with several environmental regulatory rules; (b) the Town's municipal plans that restrict the Property to Limited Commercial Development and prohibit all residential development; and, (c) state law that prohibits use variances except where authorized by a municipal bylaw.

A. The HAC Did Not Commit An Error Of Law Or An Abuse Of Discretion By Denying The Trust's Motion To Intervene

In the Trust Group Motion, the Trust argues that the HAC committed an error of law and an abuse of discretion by denying its motion to intervene. See Ruling On Manchester Essex Conservation Trust's Motion To Intervene, App. 3488 – 3496 ("Intervention Decision"). The Trust contends that the HAC erred when ruling that it failed to show an aggrievement related to matters at issue in the appeal. See 760 Code Mass. Regs. § 56.06(2)(b) (intervention permissible only if putative intervenor "show[s] that [it] may be substantially and specifically affected by the proceedings" by showing it has "interests and concerns ... which are germane to ... whether the Project is Consistent with Local Needs").

Citing a decision by the Superior Court (Wilkins, J.)[9] in a purportedly "materially indistinguishable" case,[10] the Trust contends that it has a cognizable interest in the protection of open space because it holds conservation easements on nearby land which will be harmed by the Project.[11] The Trust contends that it suffered prejudice from the HAC's ruling because, like the putative intervenor in the NLC Decision, it was unable to seek to protect its property interests in the conservation easements.[12]

Under the regulations,

> The presiding officer may allow any person **showing** that he or she **may be substantially and specifically affected by the proceedings** to intervene as a party in the whole or in any portion of the proceedings. In determining whether to permit a person to intervene, the presiding officer shall **consider only those interests and concerns of that person which are germane to the issue[] of . . . whether the Project is Consistent with Local Needs**. The presiding officer **shall not allow** a person to intervene if his or her **interests are substantially similar** to those of any party and no showing is made that one or more of the parties will not diligently represent those interests.

760 Code Mass. Regs. § 56.06(2)(b) (emphasis added).

The Court need not decide whether the HAC erred in denying the Trust's motion to intervene because, even if the HAC committed an error of law, the Trust has not

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[9] See Nantucket Land Council, Inc. v. Massachusetts Dep't of Hous. and Cmty. Dev., 2021 WL 6973718 (Mass. Super. June 21, 2021) ("Nantucket Land Council" or "NLC Decision").

[10] The Court makes two observations about the Trust's argument regarding the NLC Decision. First, the absence of any mention of, or citation to, that decision in the Intervention Decision does not necessarily mean that the HAC failed to consider it. Second, in the Trust Group Motion (and during the hearing before this Court), the Trust seemingly argues that this Court must treat the NLC Decision as precedential and controlling in this case. The Court disagrees.

[11] The regulations define "open spaces" to include, *inter alia*, undeveloped land that is "reserved for ... conservation ...through ... easements [and] ...other title restrictions which run with the land". 760 Code Mass. Regs. § 56.02.

[12] Although the Trust holds conservation easements on "nearby" land, unlike the intervenor in the NLC Decision, the land does not abut the Property.

shown that it was "substantially prejudiced" by the error, i.e., that its "substantial rights . . . have been prejudiced." G.L. c. 30A, § 14(7); Eisai, Inc., 89 Mass. App. Ct. at 610. The Trust's interests in open space, conservation, and the environment were fully addressed at the hearing before the HAC. Afterall, the Trust and the Group have the same lawyers, see App. p. 3823, the HAC heard testimony of the two experts that the Trust and the Group jointly retained,[13] and the HAC allowed the Trust to participate as an "interested person."[14]

B. The HAC Did Not Commit An Error Of Law By Refusing To Consider The Trust Group's Evidence When Deciding Whether SLV Showed A Prima Facie Case

In the Trust Group Motion, citing a Superior Court (Barry-Smith, J.) decision,[15] the Group argues that the HAC committed an error of law by refusing to consider their expert evidence when determining if SLV met its burden to show a prima facie case.

The Court rejects this argument for the same reasons as discussed above in § II(A). Like the ZBA, the Trust Group has not shown that their "substantial rights . . . have been prejudiced." Eisai, Inc., 89 Mass. App. Ct. at 610. Although the HAC did not consider the Trust Group's environmental impact-related expert opinions and evidence on the issue of SLV's prima facie case, the HAC thoroughly considered the evidence in its ruling. Afterall, as the Trust Group points out in their motion, their three

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[13] The lawyers for the Trust and Group filed a post-hearing brief and reply brief on their behalf. See App. pp 3792-3823, 3934-3939.

[14] "Such [interested] persons shall be entitled to receive all notices . . . and all other documents . . . , but shall be permitted to participate further in the hearing only to the extent and under the terms determined in the discretion of the presiding officer." 760 Code Mass. Regs. § 56.06(2)(c).

[15] See City of Cambridge v. Commonwealth of Massachusetts Hous. Appeals Comm., 2025 WL 1884330 (June 10, 2025, Mass. Super.) ("Cambridge" or "Cambridge Decision").

environmental impact experts testified at the HAC hearing and the experts' 250 pages of supporting documentation were admitted into the administrative record.

C. <u>The HAC Did Not Commit An Error Of Law Or Abuse Its Discretion By Purportedly Failing To Consider The Trust Group's Expert Environmental Evidence</u>

The Group next argues that the HAC failed to consider expert opinions and voluminous supporting evidence presented by their expert engineer, hydrologist, and wetland scientist during the HAC hearing about the Project's impact on wetlands, vernal pools, and a cold water fishery. It contends that this expert evidence showed that the Project fails to comply with several environmental regulatory statutes and rules: the Massachusetts Wetlands Protection Act, G.L. c. 131, § 40 – 40A ("WPA"), the Town's Wetlands Bylaws; the Town's Wetlands Regulations; the Massachusetts Surface Water Quality Standards regulations, 314 Code Mass. Regs. §§ 4.00 – 4.07 ("MSWQS"); and, the Massachusetts DEP Stormwater Handbook ("Stormwater Handbook").

The Group makes three arguments along this line. First, the Group argues, without citation to any specific legal authority, that the HAC failed to consider their expert evidence that showed that the Project's stormwater system would cause harm to vernal pools. Second, the Group asserts that the HAC ignored evidence of: (i) "thermal impacts" to Sawmill Brook, a cold water fishery for wild brook trout, in violation of 321 Code Mass. Regs. §§ 5.01 – 5.04, which regulates Coldwater Fish Resources ("CFR") where certain species of fish that are sensitive to increases in water temperature live or breed; (ii) the setback requirements of the Stormwater Handbook; and, (iii) the MSWQS.

The Court has little difficulty rejecting these two arguments because the HAC most certainly considered the Group's expert evidence on these issues, but ultimately ruled that SLV's experts were more credible.

The third contention made by the Group is that the Town's Wetlands Bylaw and Wetlands Regulations protect Sawmill Brook as a CFR and that the HAC erred by ordering the ZBA to grant the Project a waiver without requiring SLV to conduct an "alternatives analysis."[16] The Group did not cite any legal authority for this proposition, but they seem to be arguing, unpersuasively, that the Town's wetlands protection regulations are somehow more restrictive than state and federal protection regulations.

D. The HAC Did Not Commit An Error Of Law By "Disregarding" Aspects Of The Town's Planning Documents As Valid "Local Concerns"

In the Trust Group Motion, the Group next argues that the HAC committed an error of law by disregarding aspects of the Town's Master Plan and the OSR Plan. More specifically, the Group contends that the HAC erred by: (a) ruling that the Town's planning documents "do not have the force of law" in violation of 760 Code Mass. Regs. § 56.07(3)(g) and G.L. c. 41, § 81D; and, (b) failing to determine that the Town's planning objections are valid "Local Concerns," under 760 Code Mass. Regs. § 56.02.

The Court will address each of these arguments, in turn. However, before doing so, the following legal principle is worth repeating: "Once the developer establishe[s] its prima facie case, the burden shift[s] to the [ZBA and the Trust Group] to prove 'first, that there is a valid health, safety, environmental, design, open space, or other Local Concern which supports such denial, and [second], that such Local Concern outweighs

[16] According to the Town's Wetlands Regulations, an "alternatives analysis" is an evaluation of alternatives that are reasonably available to minimize adverse environmental impact.

the Housing Need.'" Eisai, Inc., 89 Mass. App. Ct. at 611 (quoting 760 Code Mass. Regs. § 56.07(2)(b)(2)).

Here, the Group (and the ZBA, to some extent) asserts that "'Local Concerns' are defined in the HAC regulations to include the need to 'protect . . . municipal and regional planning"[17] and that the specific Local Concerns at issue in the planning documents "include the need to protect the municipal planning directives of the Master Plan, by increasing commercial tax revenue while protecting sensitive environmental resources." Trust Group Memorandum, p. 19.

1. The HAC Did Not Err When Weighing The Legal Significance Of The Town's Planning Documents

The Group argues that the HAC erred in ruling that the Town's planning documents "do not have the force of law," Decision, p. 47, and misconstrued the significance ("prominence") of the Town's Master Plan, in violation of G.L. c. 41, § 81D, and 760 Code Mass. Reg. § 56.07(3)(g).

Citing the case of Lakeside Builders v. Planning Bd., 56 Mass. App. Ct. 842 (2002), the Group asserts that this ruling somehow violates G.L. c. 41, § 81D. However, this argument is misplaced. Leaving aside that the Appeals Court in Lakeside Builders neither ruled that the town's master plan had the force of law nor expressed the primacy of the town's master plan, at issue in that case was the developer's appeal, under G.L. c. 41, § 81BB, of the town's disapproval of a definitive subdivision plan, not a comprehensive permit. Moreover, the Group overstates the significance of § 81D. There

[17] The Court notes that the Trust Group misquotes the regulatory definition of "Local Concerns." As pertinent here, the regulation defines "Local Concern" to include "the need . . . to **promote** better site and building design in relation to the surroundings and municipal and regional planning," 760 Code Mass. Regs. § 56.02, and not the need to "protect" municipal planning.

is nothing in the plain language of § 81D that establishes the primacy of a municipality's master plan for any purpose, never mind in the context of the importance of creating affordable housing, which is clearly expressed by the Legislature in c. 40B.[18]

The Group also asserts that the HAC's ruling violated 760 Code Mass. Regs. § 56.07(3)(g), which the Group contends required the HAC to consider, *inter alia*, "a municipality's master plan." Id. However, the Group ignores that the HAC did, in fact, thoroughly consider the Town's planning concerns and documents, in general, and the Master Plan, in particular. See Decision, pp. 46 – 57.

2. The HAC Did Not Err By Failing To Determine That The Town's Planning Objections Are Valid "Local Concerns"

The Group next argues that the HAC erred by failing to determine that the Town's planning objections are valid "Local Concerns," under 760 Code Mass. Regs. § 56.02, by "disregarding" that residential use is not permitted in the LCD and that a purpose of the LCD is to preserve and protect the environment. They contend that the "mandates" (i.e., the Local Concerns) of the Master Plan and the OSR Plan at issue here are to preserve natural environmental resources and increase the commercial tax base by limiting growth and residential use in the LCD, a use prohibited by the Bylaw. However, the HAC methodically reviewed and considered the Master Plan and the OSR Plan, and the Local Concerns that the ZBA and the Trust Group argued were derived from the planning documents.

The HAC ultimately rejected the arguments of the ZBA and the Trust Group because they "presented little evidence for [its] consideration," and instead, "relie[d]

[18] "A planning board established in any city or town . . . shall make a master plan of such city or town or such part or parts thereof as said board may deem advisable and from time to time may extend or perfect such plan." G.L. c. 41, § 81D.

nearly entirely on the text of the Master Plan in the OSR Plan, making general arguments, but providing virtually no testimony or documentary evidence to support them." Decision, p. 49. Nevertheless, the HAC ignored this otherwise fatal weakness and "analyze[d] what evidence they ha[d] identified or [that] appear[ed] in the record." Id. In doing so, the HAC determined that the evidence regarding whether the planning documents support affordable housing, such as housing reports or plans, was "thin" and there was no evidence presented that the Town had made any effort to implement housing-related recommendations in the Master Plan.

In sum, the HAC did not err in ruling that the Town's planning concerns are not valid Local Concerns and/or that such concerns do not outweigh the local need for affordable housing. Eisai, Inc., 89 Mass. App. Ct. at 611.

D. The HAC Did Not Commit An Error Of Law By Disregarding State Law That Prohibits Use Variances Except Where Authorized By A Municipal Bylaw

In the Trust Group Motion, the Group argues that the HAC committed an error of law by waiving a Zoning Bylaw that prohibits the ZBA from granting use variances. They contend that under G.L. c. 40A, § 10, use variances are prohibited except when authorized by a municipal bylaw, and that no provision of the Town Zoning Bylaw allows use variances.[19] In fact, the Group points to § 12.3.3.2 of the Zoning Bylaw, which states that "[t]he Zoning Board of Appeals shall not have the power to grant use variances."

[19] "Except where local ordinances or by-laws shall expressly permit variances for use, no variance may authorize a use or activity not otherwise permitted in the district in which the land or structure is located." G.L. c. 40A, § 10.

On its face, this argument has some merit. After all, "the comprehensive permit scheme was designed to override local ordinances, bylaws, and regulations that impeded the development of affordable housing, **not Statewide requirements set by the Legislature and State agencies**." Dennis Hous. Corp. v. Zoning Bd. of Appeals of Dennis, 439 Mass. 71, 80 (2003) (emphasis added). Accordingly, "G.L. c. 40B permits the waiver only of **local** requirements, not State laws." Jepson v. Zoning Bd. of Appeals of Ipswich, 450 Mass. 81, 90 (2007) (original emphasis).[20]

Nevertheless, the Court agrees with the HAC and SLV that to rule that a municipality can bar use variances in its zoning bylaws and then point to G.L. c. 40A, § 10, as a means to prevent the construction of affordable housing would entirely swallow the Legislature's "long recognized . . . intent in enacting [the Act which] is 'to provide relief from exclusionary zoning practices which prevented the construction of badly needed low and moderate income housing' in the Commonwealth.'" Zoning Bd. of Appeals of Milton, 490 Mass. at 259 (citations omitted).

E. Conclusion

For the reasons explained above, the Trust Group Motion (Paper No. 15) must be **DENIED** and the Cross-Motions (Paper Nos. 15.2 and 15.3) must be **ALLOWED**.

[20] The Court observes that G.L. c. 40A, § 10, was enacted in 1975, well after the enactment of the Act in 1969. Thus, the Legislature arguably could have excepted the latter Act when enacting the former statute if it intended to do so.

ORDER

For the above reasons, it is **HEREBY ORDERED** that:

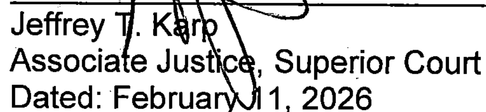
1. Motion For Judgment On The Pleadings Of Plaintiff Manchester By-The-Sea Zoning Board Of Appeals (Paper No. 14) is **DENIED**.

2. Plaintiffs' Motion For Judgment On The Pleadings (Paper No. 15) is **DENIED**.

3. Defendant SLV School Street, LLC's Cross-Motions For Judgment On The Pleadings (Paper Nos. 14.2 and 15.3) are **ALLOWED**.

4. Defendant Massachusetts Housing Appeals Committee's Cross-Motions For Judgment On The Pleadings (Paper Nos. 14.3 and 15.2) are **ALLOWED**.

5. The Decision of the Massachusetts Housing Appeals Committee, dated December 3, 2024, is **AFFIRMED**.



Jeffrey T. Karp
Associate Justice, Superior Court
Dated: February 11, 2026