STATEMENT OF ISSUES PRESENTED

I. Whether the Superior Court erred in dismissing the case, where the 2008 changes in the applicable Chapter 40B regulations conferred jurisdiction to review the Defendant subsidizing agency's determination of project eligibility upon the Court.

II. Whether the Superior Court erred in dismissing the case, where recent Appeals Court decisions establish that a certain 1946 Agreement operates as an enforceable restriction against the proposed development of the property.

STATEMENT OF THE CASE

This appeal revisits the question of whether a government subsidizing agency's determination of Project Eligibility under the so-called Anti-Snob Zoning Act ("Chapter 40B") is reviewable in the Superior Court under G.L. c. 231A (Declaratory Judgment)or G.L. c. 249, s. 4 and 5 (Certiorari and Mandamus) in light of the substantial revisions that were made to the Chapter 40B regulatory framework in 2008, after this Court's decision in Town of Marion v. Massachusetts Housing Finance Agency, 68 Mass. App. Ct. 208 (2007); and whether a 1946 Agreement reached

between the Town of Brookline and the entity proposing to develop certain real estate in the Town should operate as an enforceable restriction against further development of the property. On September 16, 2014, the Superior Court granted Defendants' Motions to Dismiss the Plaintiffs' claims regarding the foregoing.

STATEMENT OF FACTS

By their Verified Complaint filed on November 19, 2013, the Plaintiff Appellants, the Town of Brookline and certain abutters to the proposed Chapter 40B Project (collectively, the "Town" or "Plaintiffs"), sought a judgment from the Superior Court, along with other relief: (1) declaring that the Defendant Appellee MassDevelopment Finance Agency ("MassDevelopment") failed to issue its October 2013 Project Eligibility Letter to the Defendant Appellee The Residences of South Brookline LLC (the "Developer") in compliance with Chapter 40B and its implementing regulations, rendering MassDevelopment's determination of Project Eligibility invalid; and (2) declaring that a 1946 Agreement reached between the Town of Brookline and the Developer's predecessor in

title contains binding restrictions that impact the proposed Chapter 40B development. (RA at 1-19.)

In January 2014, MassDevelopment and the Developer moved to dismiss Plaintiffs' Verified Complaint, MassDevelopment on the ground that the Plaintiffs' challenge to the Project Eligibility determination was "[p]remature because, as the Appeals Court has held, the issuance of a project eligibility letter is not appealable in Superior Court because it is merely a preliminary step in an administrative process that allows for substantial review of subsidized housing opponents' challenges to a proposed project." (RA at 204-5.) MassDevelopment and the Developer rely upon this Court's decisions in Marion, *supra,* and Board of Appeals of Gloucester v. Housing Appeals Committee, 79 Mass.App.Ct. 1111 (2011), an unpublished Rule 1:28 decision, in support of this position. The Developer moved to dismiss on similar grounds, adding that the 1946 Agreement between the Town of Brookline and its predecessor in title had been extinguished by the provisions of G.L. c. 184, s. 23. (RA at 201-2.)

The Superior Court granted both Motions to Dismiss, finding in summary fashion that this Court's decision in Marion "applies and mandates dismissal," and that the restrictions imposed in the 1946 Agreement "expired in 1976 under G.L. c. 184, s. 23." (RA at 203, 206.) In dismissing Plaintiffs' Complaint, the Superior Court did not offer a written memorandum but, rather, issued a single paragraph. (RA at 203.) Judgment was entered on September 23, 2014. (RA at 216.)

Under the Chapter 40B regulatory scheme adopted by the Department of Housing and Community Development ("DHCD"), eligibility to apply for a comprehensive permit is established by the developer's receipt of a written determination of Project Eligibility in the form of a so-called Project Eligibility Letter, or "PEL". 760 CMR 56.04 (Add. At 61). Under the revised regulations, Project Eligibility means "a determination by a Subsidizing Agency that a Project satisfies the jurisdictional requirements of 760 CMR 56.04(1)." 760 CMR 56.02 (Add. at 54). Under the regulations that were in place when Marion was decided, the regulations did not define Project Eligibility in this manner; instead, the regulations

stated only that "fundability" of a project was established by submission of a written determination of Project Eligibility (Site Approval) by a subsidizing agency in accordance with the regulation. 760 CMR 31.01(2) (Add. at 40).

Hancock Village, upon which the Developer seeks to build its 40B project, is a quaint, "garden-style" residential Village in the Town of Brookline that was developed by the Hancock Insurance Company in the mid-1940s to provide affordable housing for post-war veterans. (RA at 8, 55.) Designed by Olmsted, the Massachusetts Historic Commission has determined that the site meets eligibility criteria for listing in the National Register of Historic Places. (RA at 8, 58.) The site of Hancock Village, which is located in a Neighborhood Conservation District, is abutted by the Town's D. Blakely Hoar Sanctuary, a public elementary school, and multiple private, residential homes. (RA at 8.) Ahead of its time, Brookline's Town Meeting voted to re-zone the site to accommodate multi-family units to permit the development to go forward, in exchange for, and conditioned upon the original developer's explicit written Agreement (the "1946

Agreement"), in part, to develop a garden-style village and limit the height of the buildings to 2 ½ stories. (RA at 8, 175-6.)

A 125-foot wide landscaped greenbelt surrounds a significant portion of Hancock Village, which, to this day, functions as a visual and recreational respite for the residents and neighbors of Hancock Village. (RA at 9, 55, 75.) The greenbelt is a character defining feature of the Village that contributes greatly to the quality of life of these residents and neighbors by providing open space, significant mature shade trees, a sense of privacy and a communal feel. (RA at 9, 55-58, 75.) The terrain is further enhanced by a large, centrally located puddingstone outcropping that offers residents visual relief from the surrounding buildings and impervious paved parking areas. (RA at 9, 55-58.)

As aforesaid, the limitations and restrictions on the development of the subject Property are contained within the 1946 Agreement. (RA at 63, 177-79.) Count V of the Plaintiffs' Complaint seeks a Declaratory Judgment regarding the enforceability of the 1946 Agreement. (RA at 17.)

The development of the 1946 Agreement is chronicled in the Complaint, at Exhibits A and B thereto. (RA at 144-176.) To wit, beginning in 1945, the Brookline Planning Board began negotiations with the John Hancock Mutual Life Insurance Company for a potential rezoning of the property which comprises both the existing Hancock Village and the presently proposed c. 40B project. Minutes of the Planning Board's meeting of September 26, 1945, which was also attended by the Chairman of the Board of Selectmen, indicate that the parties were not only discussing a broad-based zoning amendment but an actual plan for the development of the subject property. (RA at 144.) At the Planning Board's meeting of December 21, 1945, which was also attended by Town Counsel, John Hancock presented refined plans and discussion ensued regarding the conditions that may be imposed on the proposed development of Hancock Village. (RA at 145-6.) On January 4, 1946, the Planning Board commenced a hearing on the proposed zoning amendment for Hancock Village. (RA at 147-8.) The Project details and conditions and restrictions were again discussed. (RA at 147-8.) The Planning Board continued its discussion of Hancock Village on January 11, 1946, at which time,

the framework of the 1946 Agreement was set forth. (RA at 149-153.) On March 11, 1946, the 1946 Agreement was duly executed by John Hancock. (RA at 177-9.) Further correspondence was exchanged between the Town and John Hancock on March 14, 1946. (RA at 157.) Then, on March 19, 1946, Brookline Town Meeting voted upon and approved the underlying Zoning Change by a vote of 192-3. (RA 175-6.) The minutes of the vote of Town Meeting on the zoning amendment expressly incorporate the entire text of the 1946 Agreement. (RA 175-6.)

The Brookline Planning Board's role was integral because of its statutory (G.L. c. 40A, §5)(Add. at 9) responsibility for making recommendations to Town Meeting on zoning changes. With the solicitation of the Planning Board's recommendation, John Hancock entered into the 1946 Agreement, which codified the terms of the restrictions that would be exchanged for the proposed zoning change. The 1946 Agreement makes clear that, in exchange for the rezoning of the subject property for multi-family purposes, John Hancock would purchase the property and agree to the imposition of several restrictions on the future use

of the Property. These restrictions included, without limitation: (1) that horizontally divided units will not exceed 25% of the total number of units on the property; (2) that building coverage will not exceed 20% of the area of the subject property; and (3) that buildings in excess of two and half stories would be prohibited. The Agreement is expressly binding not only on John Hancock, but also its "successors and assigns." (RA at 177-9.) The 1946 Agreement, therefore was plainly a vital component of the regulatory actions of Town Meeting in the amendment of its Zoning Bylaws. With the Town Meeting's zoning amendment, the Agreement was ratified and the development - aptly named Hancock Village - was constructed.

The Developer's c.40B proposal violates several of the restrictions contained within the 1946 Agreement, including, without limitation, the construction of a massive building well in excess of two and one half stories and limitations on the amount of allowable lot coverage. (RA at 177-9.)

The Defendant Appellee MassDevelopment is a public instrumentality conferred with powers deemed by

the enabling legislation to be the performance of an essential governmental function. G.L. c. 23G, s. 2 (Add. at 4). It is also a "Subsidizing Agency," conferred with the obligation to enforce compliance with the provisions of 760 CMR 56.00 and the applicable DHCD guidelines relating to matters including Project Eligibility. 760 CMR 56.02 (Add. at 55).

In or about December 2012, the Developer applied to MassDevelopment for a determination of Project Eligibility, more particularly for approval of a proposed Chapter 40B Project at Hancock Village. (RA at 10.) By its application, the Developer proposed to build eleven new residential buildings within the greenbelt bordering the site, along with a massive, five story apartment building. (RA at 10, 44.)

After MassDevelopment's review of the application, a MassDevelopment Land Entitlement Director wrote, in a memorandum addressed to MassDevelopment's Vice President and Counsel, that the proposed Project was not appropriate for the site, largely because of the displacement of the greenbelt and massing of the proposed five story building. In

his memorandum, the Director observed that the conceptual site plan [of the Project] was not generally appropriate for the site; that the apartment building would be "far and away" the largest structure in the area and the visual impact of its bulk would not be mitigated; that the project was not appropriate for the site in terms of topography; and that the proposed buildings [in the greenbelt] were not generally appropriate for the site because they did not integrate well into the existing development pattern. (RA at 190-2.)

In or about mid-February 2013, MassDevelopment prepared a draft denial letter addressed to the Developer, which stated that it was unable to approve the Developer's request for a determination of Project Eligibility because the conceptual project design was inconsistent with the design requirements of 760 CMR 56.04(4)(c), again largely because of the elimination of the greenbelt and massing of the proposed five-story apartment building. (RA at 193-5.)

Upon learning of MassDevelopment's intention to deny the application, the Developer hastily withdrew its application for the PEL. (RA at 11.)

In or about June 2013, the Developer submitted a new application for determination of Project Eligibility to MassDevelopment, that was, in all pertinent respects, substantially similar to its earlier application. (RA at 11-12, 44.) Despite an insubstantial reduction of overall units, the June 2013 application proposed the construction of thirteen new buildings, along with seven new garages in the greenbelt, and a still massive, four-story apartment building. Just like the earlier proposal, the newer proposal largely eliminated the greenbelt and proposed the construction of a massive, disproportionate apartment building on the site. (RA at 12, 44.)

Despite the striking similarities between the two applications, in October 2013, MassDevelopment issued a PEL to the Developer. RA at 12, 196-200. Although the October 2013 PEL reflects a purported finding that the Project's "conceptual project design is generally appropriate for the site," the finding lacks any reasonably detailed supporting reasoning, as required by 760 CMR 56.04(4)(Add. at 62). Instead, the finding simply states: "The foregoing finding is made hereunder." (RA at 199.)

ARGUMENT

I. Standard of Review

In considering an appeal from a trial court's decision, an appellate court is not bound by the trial court's conclusions of law, and examines without deference, the legal standard applied by the trial court to the facts. Kendall v. Selvaggio, 413 Mass. 619, 620-21 (1992); Simon v. Weymouth Agric. & Indus. Soc., 389 Mass. 146, 148-48 (1983). The appellate court may draw its own inferences and reach its own ultimate conclusions from a trial court's factual findings, and may set aside the trial court's ultimate ruling where it is inconsistent with those factual findings. VMark Software, Inc. v. EMC Corp., 37 Mass. App. Ct. 610, 617 n. 8 (1994); Simon, 389 Mass. at 148-49, 151-52.

This matter concerns the Superior Court's grant of the Defendants' Motions to Dismiss. In ruling on a motion to dismiss, the Court must look to whether the plaintiff has "alleged such facts, adequately detailed, so as to plausibly suggest an entitlement to relief." Iannachino v. Ford Motor Co., 451 Mass. 623, 636 (2008). In doing so, the Court must

construe the complaint in favor of the plaintiff for purposes of deciding the motion. See, Richards v. Arteva Specialties S.A.R.L., 666 Mass.App.Ct. 726, 730 (2006). Thus, if the factual allegations set forth in the complaint are construed as true and the Complaint suggests a plausible entitlement to relief, the motion to dismiss must be denied.

II. The Court Erred in Dismissing the Plaintiffs' Claim regarding the 1946 Agreement

The Defendants' Motion to Dismiss argued that the agreement pledged by the Developer's predecessor is non-binding because it expired by virtue of the limitations of G.L. c 184, §23 (Add. at 35). Under said statute, formal restrictions on land imposed under c. 184 are limited to thirty years. However, such statute is inapplicable to this matter.

As aforesaid, beginning in 1945, the Brookline Planning Board began negotiations with the John Hancock Mutual Life Insurance Company for a potential rezoning of the property which comprises both the existing Hancock Village and the presently proposed c. 40B project. The Planning Board's role was integral because of its statutory (G.L. c. 40A, §5)(Add. at 9). responsibility for making recommendations to Town

Meeting on zoning changes. During the negotiations, the Planning Board and John Hancock did more than simply discuss a broad-based zoning amendment. Rather, the details of – and restrictions on - the Hancock Village were deliberated upon by the Planning Board. Such actions are entirely consistent with the Planning Board's regulatory functions and indeed, the Planning Board later issued a permit which echoed those negotiations and incorporated the terms of the 1946 Agreement.

With the Planning Board's recommendation, John Hancock entered into an agreement with the Town which codified the terms of the restrictions that would be exchanged for the proposed zoning change. The 1946 Agreement makes clear that, in exchange for the rezoning of the subject property for multi-family purposes, John Hancock would purchase the property and agree to the imposition of several restrictions for the future use of the Property. It cannot be ignored or understated that the Agreement is expressly binding not only on John Hancock but also its "successors and assigns." With the 1946 Agreement in place, the Brookline Town Meeting voted to approve the rezoning.

In fact, the vote to rezone expressly included a complete recitation of the terms and conditions of the Agreement. The Agreement therefore was plainly a vital component of the regulatory actions of Town Meeting in the amendment of its Zoning Bylaws. With the Town Meeting's zoning amendment, the Agreement was ratified and the now historic development by the Developer's predecessor was constructed.

The Developer premised their Motion to Dismiss on an argument that, under G.L. c 184, §23, the agreement and its attendant restrictions have expired and are not enforceable. However, in 2011[1], the Massachusetts Appeals Court decided Killorin v. Zoning Board of Appeals of Andover (80 Mass.App.Ct. 665 (2011)), which endorses the enforceability of a wide variety of restrictions that are components of municipal zoning processes. Stated differently, the Killorin Court distinguished such restrictions from more garden variety restrictions that are adopted under the provisions of G.L. c 184. In Killorin, the Court was faced with the question of whether a restriction

[1] The Killorin case was decided after the date of former Town Counsel's memo which is attached to RSB's Motion. The memo is, of course, non-binding and evidence of nothing.

imposed by a zoning special permit should be treated the same as a restriction under G.L. c. 184, which may be imposed via a deed or other similar instrument. The question was significant in that the latter generally may only be enforced for a period of thirty years under c. 184. Ultimately, the Appeals Court concluded that a restriction that is not created under G.L. c 184 is not subject to the limitations contained therein; and that the restrictions created pursuant to municipal zoning bylaws are not bound by the limitations of restrictions created pursuant to G.L. c 184. In examining the applicable sections of G.L. c 184, the Court "observe[d] that [they] appear[] in a chapter dedicated to the formal requirements and effects of deeds or other instruments of conveyance of real property and not to the effect of municipal regulations on the use of property." Id. at 658. In concluding that restrictions created as part of the zoning process are not bound by a term of thirty years, the Court stated that "restrictions or conditions contemplated by c. 184, § 23, are not those created pursuant to regulations under c. 40A or municipal zoning by-laws." Id. In justifying its conclusion, the Court determined that restrictions

imposed as part of a zoning process are "in the public interest" and, as such, must be immune from the limitations of c. 184. Id., at 658, 660. Subsequent to the briefing of the underlying Motions to Dismiss (and Oppositions thereto) but prior to the Superior Court's decision thereon, the Appeals Court issued the decision in Samuelson v. Planning Bd. of Orleans, which both reaffirmed and expanded upon the holding of Killorin. 86 Mass.App.Ct. 901 (2014).[2] In Samuelson, the Court expanded the reach of the Killorin beyond zoning and into the realm of subdivision law. Id. at 901. Indeed, the Samuelson court did not express any definitive limitation on the nature of the municipal restrictions that can be imposed outside of the reach of the limitations set forth in G.L. c. 184, §23:

> … Killorin involved a condition imposed by a zoning board of appeals in a special permit issued pursuant to G.L. c 40A, §9, while the condition here was imposed by a planning board as part of a subdivision approval issued pursuant to G.L. c. 41, §81U. However, we disagree with the [Interveners] that this distinction matters for present purposes. The holding of Killorin does not turn on the identity of the local board or the particular nature of the regulatory decision at issue. Rather, the key distinction we drew there was between land

[2] The Superior Court's decision makes no reference to Samuelson.

> use restrictions "created by deed, other instrument, or a will," and land use restrictions imposed as a condition of regulatory approval under the police power.

Id. at 901-902, *emphasis supplied*.

Based upon the conclusions of the Samuelson court, the focus should not be on the narrow *exemptions* to the statutory limitations under G.L. c. 184, §23, but rather on the narrow *applications* of such statute. Stated differently, Killorin and Samuelson stand for the proposition that G.L.c 184, §23 does not apply to any restrictive instruments that arise under the regulatory and police powers of a municipality, and therefore, such restrictions are beyond the reach of the thirty (30) year statute of limitations under the Statute.

Here, there can be no dispute that the 1946 Agreement, and the restrictions contained therein are components of the regulatory and police powers of the Town of Brookline. As described above, acceptance of the 1946 Agreement was vital and explicit condition of the amendment to the Brookline Zoning Bylaws. As stated by the Supreme Judicial Court in Durand v. IDC Bellingham, LLC:

> The enactment of a zoning bylaw by the voters at town meeting is not only an exercise of an independent police power; it is a legislative act carrying a strong presumption of validity. It will not normally be undone unless the plaintiff can demonstrate by a preponderance of the evidence that that the zoning regulation is arbitrary and unreasonable, or substantially unrelated to the public health, safety or general welfare.

440 Mass. 45, 50-51 (2003)(*citations omitted*). Furthermore, agreements such as the 1946 Agreement, which are also known as *contract zoning*, are accepted within the regulatory framework of the adoption of zoning bylaws under the Zoning Act – G.L. c. 40A. *See* Id., at 57-58.

The 1946 Agreement was clearly adopted as a component of the Town's police powers arising under the Massachusetts zoning statutes. It is also plainly evident that the 1946 Agreement was adopted in the public interest and not as some sort of restriction purely benefiting private parties. Accordingly, under Killorin and Samuelson, the 1946 Agreement remains enforceable and cannot be construed as the type of restriction arising under a deed, will or other instrument that is limited by the provisions of G.L. c. 184, §23.

Notwithstanding the breadth of Killorin and Samuelson, the Superior Court took an extremely narrow and unwarranted view, limiting the reasoning of Killorin only to those situations where a Special Permit has been issued. This myopic review of Killorin cannot be reconciled with the broad reasoning of either that case or the even more expansive reading by the court in Samuelson, the latter of which is not even mentioned or acknowledged in the Superior Court's decision.

Based upon the foregoing, there should be no doubt that the 1946 agreement by the Developer's predecessor, John Hancock, imposed legitimate restrictions on the property which survive to this day. These restrictions are an inexorable component of the underlying zoning on the property. Accordingly, the Court erred in dismissing the Plaintiff's Complaint in this regard.

III. The Superior Court Erred in Dismissing Plaintiffs' Claims regarding MassDevelopment's Determination of Project Eligibility.

Under G.L. c. 231A, the Superior Court has specific and exclusive authority to determine "the 'legality of the administrative practices and procedures of any … state agency.'" Naranjo v.

Department of Revenue, 63 Mass.App.Ct. 260, 266 (2005) (quoting G.L. c. 231A, s. 2)(Add at. 39). To pursue an action for declaratory relief in a case involving administrative action, a plaintiff must show that (1) there is an actual controversy; (2) he has standing; (3) necessary parties have been joined; and (4) all available administrative remedies have been exhausted. Naranjo, 63 Mass.App.Ct. at 267, citing Villages Dev. Co. v. Sec'y of Exec. Office of Envt'l Affairs, 410 Mass. 100, 106 (1991). For the purposes of this appeal, MassDevelopment and the Developer do not dispute that the first three of these required elements have been satisfied; instead, they moved to dismiss solely on their theory, which was adopted by the Superior Court below, that the Town's challenge to MassDevelopment's Project Eligibility Determination is premature, because "[a]s the Appeals Court has held, the issuance of a project eligibility letter is not appealable in Superior Court because it is merely a preliminary step in an administrative process that allows for substantial review of subsidized housing opponents' challenges to a proposed project." (RA at 204-5.) In support of this theory, MassDevelopment and the Developer rely solely upon this Court's decisions

in Marion, *supra*, and Gloucester, *supra*, an unpublished Rule 1:28 decision.

However, the substantial changes that were made to the Chapter 40B regulations in 2008 after this Court's ruling in Marion, and which appear to have been left unconsidered in Gloucester, invalidates this theory. Thus, dismissal of this case was error.

A. Where the Chapter 40B regulations adopted in 2008 after this Court's ruling in Town of Marion v. Massachusetts Housing Finance Agency, 68 Mass. App. Ct. 208 (2007) substantially enlarged the role of Subsidizing Agencies in determining Project Eligibility and at the same time extinguished any meaningful review of that role, Marion does not apply and therefore, Plaintiffs' requests for relief must stand.

Chapter 40B, s. 21 provides, in relevant part, that "[a]ny public agency or limited dividend or nonprofit organization proposing to build low or moderate income housing may submit to the board of appeals … a single application to build such housing in lieu of separate applications to the applicable local boards." G.L. c. 40B, s. 21 (Add. at 24). Thus, a developer who proposes to include a limited percentage of affordable housing units in a proposed Chapter 40B Project is entitled to circumvent the ordinary permitting process that a garden-variety

developer proceeding under Chapter 40A must follow, and thus receive instead a single, expedited "comprehensive permit" for the proposed Project. Although Chapter 40B itself requires only that the developer be either a public agency, limited dividend, or non-profit organization in order to apply for a comprehensive permit, under the regulatory scheme devised by the Department of Housing and Community Development ("DHCD"), both the developer and the project must be determined "eligible" by the subsidizing agency that is selected by the developer in order to enter the Chapter 40B domain. 760 CMR 56.04 (Add. at 61).

The stated purpose of DHCD's regulations is to "implement the [Chapter 40B] statutory scheme." 760 CMR 56.01 (Add. at 52). These regulations were substantially revised in 2008. The regulations that were in effect when Marion was decided were codified at 760 CMR 31.00 (2004)(the "Marion Regulations" (Add. at 40); post Marion, at 760 CMR 56.00 (2008)(the "revised" or "existing regulations")(Add. at 52). Under these regulations, "Project Eligibility" is established by the satisfaction of three

"jurisdictional" requirements: First, the Applicant must be "a public agency, a non-profit organization, or a Limited Dividend Organization," second, the Project must be "fundable by a Subsidizing Agency under a low or moderate Income Housing subsidy program;" and third, the Applicant must "control the site." 760 CMR 31.01 (Add. at 40); 760 CMR 56.04(1)(Add. at 61). However, in several other respects that are pertinent to the issues raised in this case, the Chapter 40B regulations were otherwise substantially revised, in particular with regard to the role of the Subsidizing Agency in determining Project Eligibility.

1. The Subsidizing Agency's Expanded Role Under the Revised Regulations

Under the Marion regulations, the so-called "fundability" of a proposed project was established by the "submission of a written determination of Project Eligibility (Site Approval) by a subsidizing agency" that included, with respect to the appropriateness and conceptual design of the proposed Project, only a singular finding "that the proposed housing design is generally appropriate for the site on which it is located." 760 CMR 31.01 (2)(b) (Add. at 40). Thus,

the standard for design review by the subsidizing agency was limited to whether the design was "generally appropriate" for the site. Under the existing regulations, Project Eligibility is now established by the "[i]ssuance of a written determination of Project Eligibility by the Subsidizing Agency, that contains all of the findings required under 740 CMR 56.04, based upon [the subsidizing agency's] initial review of the Project and the Applicant's qualifications in accordance with 760 CMR 56.04." 760 CMR 56.04(1)(Add. at 61). The Subsidizing Agency is now required to make seven discrete findings, including, significantly broadened findings pertaining to the appropriateness and conceptual design of the Project, and the Applicant's control of the site:

> That the site of the proposed Project is generally appropriate for residential development, taking into consideration information provided by the municipality or other parties regarding municipal actions previously taken to meet affordable housing needs, such as inclusionary zoning, multifamily districts adopted under c. 40A, and overlay districts adopted under M.G.L. c. 40R (such finding, with supporting reasoning, to be set forth in reasonable detail)[emphasis added](760 CMR 56.04(4)(b)) (Add. at 62);
>
> That the conceptual project design is generally appropriate for the site on which it is located,

> taking into consideration factors that may include proposed use, conceptual site plan and building massing, topography, environmental resources, and integration into existing development patterns (such finding, with supporting reasoning, to be set forth in reasonable detail)[emphasis added] (760 CMR 56.04(4)(c)) (Add. at 62); and
>
> That the Applicant controls the site, based on evidence that the Applicant or a related entity owns the site, or holds an option or contract to acquire such interest in the site, or has such other interest in the site as is deemed by the Subsidizing Agency to be sufficient to control the site (760 CMR 56.04(4)(g))(Add. at 62).

Thus, the existing regulations significantly enlarge the Subsidizing Agency's role in determining Project Eligibility, in particular with regard to determining site appropriateness and conceptual design.

The existing regulations also enlarge the "review and comment process" that permits Local Boards and other "interested parties" to contribute comments to the subsidizing agency prior to a determination of Project Eligibility. Whereas before, the Marion regulations did not identify the source of comments to be reviewed, the existing regulations now compel the Subsidizing Agency to "accept [and consider] written comments from Local Boards and other interested

parties." 760 CMR 31.01(2)(d) (Add. at 41); 760 CMR 56.04(3)(Add. at 62). The Plaintiffs provided MassDevelopment with substantial written commentary for its consideration. (RA at 42-143.) Finally, and perhaps most importantly for this appellate review, where under the Marion regulations matters pertaining to determinations of Project Eligibility were considered to be both rebuttable and subject to further administrative review, under the revised regulations they are now considered to be solely within the authority of the subsidizing agency, irrebuttable, and, most strikingly, conclusive. 760 CMR 56.04(6) (Add. at 63).

Thus, under the DHCD's revised regulatory scheme, the existing regulations have morphed what was previously described in Marion as a "preliminary step to obtaining a comprehensive permit", into an independent, irrebuttable, and conclusive eligibility determination, that hinges, in part, upon very particularized, discrete findings that a proposed Chapter 40B Project is not only appropriate for residential development, but is also appropriate for the particular site upon which it is to be built.

Because the Subsidizing Agency's determination of eligibility is now considered to be both irrebuttable and conclusive under the current regulatory scheme, and, as more fully discussed below, there is no longer any meaningful opportunity for administrative review of such determinations, this Court's ruling in Marion cannot be applied to the underlying matter and Plaintiffs' action for declaratory relief must be maintained.

2. The Plaintiffs' Challenge to MassDevelopment's Determination of Project Eligibility

The Town's challenge to MassDevelopment's determination of Project Eligibility is grounded upon the Subsidizing Agency's overt failure to issue its October 2013 Project Eligibility Letter to the Developer in strict compliance with the regulations that it is now mandated to enforce pursuant to 760 CMR 56.02. (Add. at 55) As discussed above, the existing regulations very clearly expanded the role that is required of the Subsidizing Agency in determining Chapter 40B Project Eligibility, including requiring particularized findings with supporting reasoning[3]

[3] In the world of Chapter 40A, the requirement to make specific findings with supporting reasoning not met by a "mere repetition of the statutory words." Wolfson

pertaining to the appropriateness and conceptual design of the proposed Project at the site. In view of the historical and other unique characteristics of the Hancock Village site, the need for appropriate site review by the Subsidizing Agency is particularly meaningful in this case and to these Plaintiffs. At present, it is inexplicable to the Town how MassDevelopment could at first anticipate denying the Developer's application and then, in a complete turnaround, approve a substantially similar Project. The Town vigorously asserts that it is entitled to and should be granted an opportunity to review this decision. Space Building Corp. v. Commissioner of Revenue, 413 Mass. 445 (1992).

3. The Lack of Meaningful Review

In Marion, this Court agreed with the decision of the Superior Court under appeal, which found that the "eligibility determination [is] "only one step in the permitting process … [and] the appropriate avenue for challenging the validity of the eligibility letter was through the HAC, and subsequently by review pursuant

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v. Sun Oil Co., 357 Mass. 87, 89 (1970), citing Brackett v. Board of Appeals of Boston, 311 Mass. 52, 54 (1942)

to G.L. c. 30A. Marion, *supra*, at 210-11. However, for these Plaintiffs, who challenge the failure of MassDevelopment to comply with the very regulations it is mandated to enforce, that opportunity no longer exists under the revised regulatory scheme.

At the same time DHCD significantly enlarged the subsidizing agency's role in determining Project Eligibility, it also extinguished any opportunity for meaningful review of that role. Where the Marion regulations established that the jurisdictional requirements for eligibility to proceed under Chapter 40B – the developer's continued status as a public agency, non-profit organization, or Limited Dividend Organization, along with the subsidizing agency's determination of the Project's "fundability" - were considered "rebuttable presumptions" that could be raised and addressed by the board of appeals and the Housing Appeals Committee ["HAC"] per 760 CMR 31.01(2) and (5), the revised regulations now prohibit both the board of appeals and the HAC from reviewing determinations of Project Eligibility unless there is a "substantial change" in the Project. 760 CMR 56.04(6); 760 CMR 56.05(4)(a); 760 CMR 56.07(2)(a).

Thus, when Marion was decided, a party seeking to challenge a determination of Project Eligibility could raise her challenge in the proceedings before the board of appeals, the HAC, or both, and subsequently with the reviewing Superior Court under G.L. c. 30A or, in the case of a comprehensive permit approval, under G.L. c. 40B, s. 21.

Under the existing regulatory scheme, if the local board of appeals should deny the comprehensive permit, or grant the permit with conditions that render the Project uneconomic, only the developer may appeal that decision to the HAC, and the Town is foreclosed from challenging the validity of the PEL at either the HAC or subsequently under Chapter 30A review. Zoning Board of Appeals of Amesbury v. Housing Appeals Committee, 457 Mass. 748 (2010).

On the other hand, should the local board of appeals grant the comprehensive permit, and the Town or other abutters disagree with that decision, Plaintiffs are similarly foreclosed from raising their challenge to the issuance of the PEL because an "aggrieved person's" appeal of the issuance of a comprehensive permit is limited to the question of

whether the board exceeded its authority, and under the existing regulations the board forbidden from entertaining a Project Eligibility challenge. G.L. c. 40B s. 21; 760 CMR 56.04(6); 56.05(4). Thus, MassDevelopment's failure to act in accordance with the regulations cannot be challenged in that forum either.

This Court's unpublished Rule 1:28 decision in Gloucester does not improve the Defendants' position. In Marion, this Court observed that the Town could challenge the PEL in proceedings before the HAC; but Gloucester appears to have overlooked the fact that challenges to the issuance of a PEL only lie when there has been a "substantial change" in the project. 760 CMR 56.04(6).

Consequently, under the existing Chapter 40B regulatory scheme, the Plaintiffs are foreclosed from challenging MassDevelopment's flawed determination of Project Eligibility in any forum, and therefore, they simply have no available administrative remedy to exhaust. For these reasons, Plaintiffs' claims regarding the issuance of the PEL should not have been dismissed.

Despite the acute unavailability of developable land in the Town of Brookline, the Town has a long and particularly laudable history of promoting affordable housing within its limits. (RA at 8, 47-53.) This dispute does not arise from the Town's unwillingness to continue to embrace affordable housing as the Defendants would have this Court believe; instead, it is, in part, about holding a state agency accountable for its actions. In order to maintain the integrity of Chapter 40B's purpose of encouraging the growth of affordable housing stock in Massachusetts, government subsidizing agencies like MassDevelopment must be held to the standards that they are charged with enforcing. If not, *Quis Custodiet Ipsos Custodes*?

CONCLUSION

For the foregoing reasons, the Plaintiffs-Appellants respectfully state that the Judgment of the Superior Court should be vacated, and the matter remanded to the Superior Court for further proceedings.

THE TOWN OF BROOKLINE,

By: _____

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