COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

WORCESTER, SS. CIVIL ACTION NO. 16-1359B

YAN HUANG, et al, Plaintiffs v. LEO F. BARTOLINI, JR., DAVID EAGLE, AND PAUL DREPANOS, as members of the TOWN OF SOUTHBOROUGH BOARD OF APPEALS, and PARK CENTRAL, LLC AND WILLIAM A. DEPIETRI, Defendants	)

DEFENDANTS' TRIAL MEMORANDUM OF LAW REGARDING PLAINTIFFS' LACK OF STANDING AND FAILURE TO PLEAD SUFFICIENT FACTS

Preliminary Statement

This memorandum of law is offered by Defendants Park Central, LLC ("Park Central") and William A. Depietri ("Depietri") and the Southborough Board of Appeals (the "Board"), in support of their consistent position, now *post-trial* (after the close of the evidence), that none of the Plaintiffs has demonstrated they are a "person aggrieved" by the August 24, 2016 decision of the co-defendant Southborough Zoning Board of Appeals so as to have standing to maintain the within appeal. Plaintiffs' trial testimony, cross-examination, expert testimony and documents added little or anything to elevate Plaintiffs' speculation and conclusory opinion that increased traffic would cause any of them particularized injury. The Defendants also maintain that in the event this Court determines that standing has been quantitatively and qualitatively proven, the Decision of the Board cannot be disturbed unless it is based on legally untenable ground or is

unreasonable, whimsical or arbitrary. See *Jepson v. Zoning Bd. of Appeals of Ipswich,* 450 Mass. 81 (2007).

I. STATEMENT OF THE CASE

In this M. G. L. c. 40A §17 appeal of the granting of a M. G. L. c. 40B Comprehensive Permit by the Southborough Board of Appeals, five remaining Plaintiffs assert both that they were harmed by the Board's Decision, and that the Decision was arbitrary, capricious and not based on legally tenable grounds. The Defendant Permit Holder and the Defendant Board have consistently disputed and challenged these allegations. Summary Judgment resolved certain of the factual and legal issues, but also determined that there were sufficient disputes of material facts involving Plaintiffs' allegations of safety caused by increased traffic to warrant a trial even in light of Defendants' claim that standing had been thoroughly rebutted by the voluminous expert reports and analysis prepared and vetted by Permit Holder and Town Consultant traffic and safety experts.

Eleven days of trial, although replete with marginally relevant information and argument, has now presented this Court with ample information and opportunity to resolve all factual disagreements and render a decision, as to standing or on the merits as required by statute. Not surprisingly, the evidence at trial actually demonstrated very little disagreement *over facts*. The condition and layout of the neighborhood roads are what they are. Proximity to Route 9 and I-495 is obvious. The building and road layout within the Project and the access and egress to and from the proposed residential, and potential full build project is limited by MassDOT and is clear. The traffic volumes recorded and the increased volumes forecasted by Defendants' experts were actually *accepted* by the Plaintiffs, who then utilized this same data as the very basis of their claimed injury. Indeed, the Plaintiffs offered no evidence refuting these facts.

Rather, Plaintiffs, during trial, and as they had in summary judgment, continued to contend that Defendants' *interpretation* of this data, in forecasting trip distribution and roadway impact, and in evaluating roadway conditions, was incorrect and unreliable because Defendants' experts failed to apply accepted industry and scientific standards in conducting their studies and review, in analyzing this data and in forming their opinions. Plaintiffs supported this contention by often resorting to hyperbole and exaggeration of increased traffic distribution patterns, by speculating on current use and future traffic disbursement, by espousing that isolated photograph of roadways demonstrate that neighborhood roads are unsafe and cannot accept additional traffic while ignoring crash summaries prepared by both state and local authorities. Most significantly Plaintiffs firmly embraced the opinion of their traffic expert, Kenneth Cram, who quite significantly, engaged in no data collection, did not prepare a traffic impact and access study, and did not have his work or opinions vetted or confirmed by any independent expert. Cram simply viewed the area, accepted the data assembled and analyzed by Defendants, took certain observations of Plaintiffs about traffic flow as fact, and concluded that Defendants' experts were simply wrong in their approach and conclusions and that he would have proceeded differently.

Given Plaintiffs' claim of harm due to increased traffic and the jurisdictional mandate of c. 40A §17 when a c. 40B comprehensive permit is at issue, the threshold determination that this Court must make boils down to whether the opinions of Defendants' experts, as to the impact of project traffic on neighborhood roads, should be discarded because the Plaintiffs have demonstrated, with fact, and not speculation, that those opinions are not factually supported, are professionally defective and will definitively result in measurable harm to the individual property or legal rights of one or more of the five Plaintiffs. Based *on the record* before this Court, in order to reach such a conclusion, the Court must either find that the facts employed by

Defendants experts in their extensive studies, analysis and reviews, and upon which their opinions that the increased traffic will not exacerbate or create an unsafe condition that will imperil the Plaintiffs are predicated, are somehow untrue and unreliable and/or that the analysis applied to those facts found reliable, is contrary to accepted traffic and safety engineer standards and protocol and therefore should be rejected. In order to do so the Court must also credit Mr. Cram's conclusions as more reliable than Defendants.

This threshold determination of standing is critical to a proper final decision by this Court, because unless the Court *first finds* that the Project that was approved by the Board would cause any one of them specific, particularized injury to person or property, this Court does not have the authority to entertain or adjudicate the merits of the § 17 claim, namely whether the Decision of the Board was arbitrary, capricious or based on legally untenable grounds, or any of the underlying facts which the Plaintiffs maintain would support that conclusion. Without standing, based on actual injury, adjudication of any other issue is beyond the Court's jurisdiction. C. 40A §17 does not provide for a community referendum of any project approved or denied by a Board of Appeals. Indeed, such a plebiscite is expressly excluded from the Court's purview. Section 17 is a limited mechanism, available only to persons, who meet the judicially established standard of aggrievement (personal injury different from the concerns of the rest of the community), to invoke the jurisdiction of the Court to review the *facts* upon which the Decision was predicated, so as to determine if the Decision was pretextual. And in exercising this jurisdiction on the merits, the Court is constrained by both the acknowledged deference given to the Board, and the purposes of the underlying statute upon which the Decision was proffered. Unless the Court concludes that no reasonable interpretation of the facts found by the Court supports the Board's Decision, even if standing is found, annulment is inappropriate.

As hereinafter set forth and argued, Defendants submit that at Bar the Plaintiffs at trial have failed to satisfy that judicially established standard of aggrievement and that the Complaint must be dismissed for want of subject matter jurisdiction. In the event this Court determines otherwise, Defendants submit that the Court's review of the merits is properly limited to a determination, based on those material facts found by the Court regarding Plaintiffs' alleged injury, as to whether the Decision departed from reality and was entered for an unlawful purpose. Defendants strongly assert that the evidence does not support such a conclusion. Rather, when the Decision is viewed in light of those material facts it is clear that (1) the Board was presented with an abundance of information from the Applicant, the State, other Town Boards and the public; (2) the Board encouraged discussion with abutters; (3) the Board fashioned the Decision so as to both protect the Town from multiple future 40B projects and, as required by c. 40 B, to successfully advance the availability of affordable housing through the approval of a *rental* housing project, *without* allowing the project to imperil the health and safety of residents; (4) the Board relied on its professional engineers and consultants; and (5) the Board carefully conditioned the project on future state and local approvals and permits without which the project can be built. Moreover, unless collateral matters such as residency, conflict of interest, and other arguments advanced by Plaintiffs, affect *the substance of the Decision* (and not the *process* through which the Decision was made) such facts and arguments are immaterial to adjudication of the merits under §17. Claims regarding procedure, process or conduct were not only not factually articulated in the Complaint, they are not legally cognizable under §17 which ambit reaches only to the Decision. Such collateral claims and are only properly raised by distinct counts setting forth causes of action free of the jurisdictional limitations imposed by §17.

II. STATEMENT OF FACTS

Defendants incorporate by reference the Agreed Facts and Defendants Request for Findings of Fact as if fully set forth herein.

III. ARGUMENT

A. Each Plaintiff Failed to Establish Standing to Maintain This Appeal under MGL c. 40A, §17.

Only "persons aggrieved" by a local board's decision may seek judicial review of that determination under G.L. c. 40A, § 17. *See Marashlian v. Zoning Bd. of Appeals of Newburyport,* 421 Mass. 719, 721 (1996). In the absence of such aggrievement, a court is without the requisite subject matter jurisdiction and cannot therefore reach the substantive issues presented in a plaintiff's complaint. *See Marrotta v. Bd. of Appeals of Revere,* 336 Mass. 199, 202–203 (1957) ("the Superior Court had no jurisdiction to consider the case unless an appeal ... was taken by an aggrieved person."). Ultimately, "standing to challenge a zoning decision is conferred only upon those who can plausibly demonstrate that a proposed project will injure their own personal legal interests *and* that the injury is to a specific interest that the applicable zoning statute, ordinance, or bylaw at issue is intended to protect." (emphasis in original) *Standerwick,* 447 Mass. 20, 30 (2006).

"Parties in interest" entitled to notice of proceedings under G.L. c. 40, § 11, enjoy a rebuttable presumption of standing. *Marrotta,* 336 Mass. at 204. Once the presumption has been successfully rebutted "the point of jurisdiction will be determined on all the evidence with no benefit to the plaintiffs from the presumption as such." *Marrotta,* 336 Mass. at 204. At that juncture, plaintiff bears the burden to "demonstrate, not merely speculate, that there has been

some infringement of [her] legal rights," *Denneny v. Zoning Bd. of Appeals of Seekonk,* 59 Mass.App.Ct. 208, 211 (2003), and "that [her] injury is special and different from the concerns of the rest of the community." *Standerwick,* 447 Mass. at 33, quoting *Barvenik,* 33 Mass.App.Ct. at 132 (internal quotations omitted).

To rebut plaintiffs' presumptive standing, the court may deem sufficient, evidence adduced in the course of discovery, including depositions, answers to interrogatories and at the trial stage, based upon testimony at trial and exhibits introduced into evidence. *See Bell v. Zoning Bd. F Appeals of Gloucester,* 429 Mass. 551, 554 (1999); *See also Cohen v. Zoning Bd. of Appeals of Plymouth,* 35 Mass.App.Ct. 619, 622 (1993) ("we treat these submissions [of plaintiffs' depositions] as effectively challenging the plaintiff's standing ... causing the presumption benefiting the owners of [the parcel in question] to recede."). Plaintiff's presumptive standing will have receded once the defendant has either proffered evidence showing that a claimed basis for standing is not well founded, or alternatively, if the defendant can rely on plaintiff's lack of factual foundation for asserting a claim of "aggrievement." *See Standerwick,* 447 Mass. at 35–36.

Once the presumption has been rebutted, the burden is on the plaintiff to demonstrate the requisite standing. *See Barvenik v. Alderman of* Newton, 33 Mass.App.Ct. 129, 132 (1992). Satisfaction of this burden requires both that the plaintiff "*demonstrate,* not merely speculate, that there has been some infringement of [her] legal rights," (emphasis added) *Denneny v. Zoning Bd. of Appeals of Seekonk,* 59 Mass.App.Ct. 208, 211 (2003) and "that [her] injury is special and different from the concerns of the rest of the community." *Standerwick,* 447 Mass. at 33, quoting *Barvenik,* 33 Mass.App.Ct. at 132 (internal quotations omitted). Additionally, in order for such an injury to suffice as "aggrievement" under § 17, the harm must have been to "an

interest the zoning scheme [sought] to protect." See *Twardowski v. Ukstins*, No. 09 MISC 412041 HMG (Mass. Land Ct. Aug. 15, 2011).

As property owners abutting the Park Central property, all five plaintiffs are presumed to have standing to appeal the Board's decision under to G.L. c. 40, §11. Nevertheless, defendants contend that this presumptive standing has been successfully rebutted through evidence produced by the defendants in the form of the exhibits and testimony presented to this Court, initially in summary judgment, and ultimately at trial. Plaintiffs failed to provide credible evidence that they will suffer an injury that is not speculative. Plaintiffs' reliance on private traffic consultant, Kenneth Cram, as their sole expert in support of the claim of personal harm from the forecasted increased traffic fails the mission. Indeed, it was Mr. Cram's work product that was remiss and deficient, not the Applicant's or Town's consultants. Mr. Cram candidly admitted that he did not collect independent data, he did not perform his own traffic study or seek peer review of his conclusions and opinion from a third-party traffic consultant. Mr. Cram confirmed he relied on the trip generation data provided by defendants' traffic consultant and confirmed that the traffic counts collected in 2013 and utilized by TEC and the 2016 traffic counts utilized by the town's traffic consultant were consistent. Despite being retained by plaintiffs in mid-2017, Mr. Cram did not provide the Plaintiffs or the Court with any data, facts or studies to support his assumption, based only on the assertions of the Plaintiffs, that Lovers Lane and Lynbrook Road, served as a high-volume cut-through for motorists travelling between Route 9 and Main Street, as an alternate route to I-495 north. Mr. Cram failed to provide any reasonable explanation or facts to support his bald opinion, contrary to that of the Town's consultants and MassDOT, that TEC's failure to include Lovers Lane, Deerfoot Road and Lynbrook Road in its scope of study was somehow a deviation from sound traffic and safety engineering standards. Simply put, Mr.

Cram's testimony failed to provide a sufficient factual showing that plaintiffs will suffer true and measurable personal harm from the Board's decision, due to increased traffic. In the absence of any definitive evidence of particularized harm that will create a situation by which the plaintiffs will be imperiled the allegations of injury by surviving Plaintiffs are, at best, mere impacts, which do not confer jurisdiction in this Court.

B. *Assuming Arguendo* that Plaintiffs had Standing, the Detailed Decision of the Board was Based on Sufficient Facts and Reasoning

Evidence at trial showed that defendants' permitting process lasted over two and one-half years involving multiple hearings in which the Board received information from the Applicant, experts, consultants, the State the Planning Board and Conservation Commission. Opportunity to comment was routinely part of every public hearing. The Board is not obligated to fully embrace or agree with any presented information as it must exercise independent judgment. Over this period of time, the defendants actively engaged neighbors to the Park Central property and were responsive to feedback from the area residents, town employees, other Boards and the Board itself as evidenced by, *inter alia*, modifying the 40B component from five, three-story buildings to three, four-story buildings and re-locating the buildings to the opposite side of the lot closer to Interstate 495 and further away from Tara, Bantry, and Blackthorn Drive.

The materials provided by the defendants' consultants was thoroughly vetted by the Board's own traffic consultant, engineering consultant and 40B consultant during the peer review process well in advance of the Board's Decision. In rendering its Decision, the Board included certain conditions, 105 conditions in total, on, *inter alia* MEPA, MassDOT, Conservation, Waste Water Discharge, and final MassHousing Approval and Regulatory

Agreement and other permits etc. and recognized that future development would also need to be permitted through local process with ability to condition off site issues. Even assuming standing, review of the information provided to the Board, as well as the conditions imposed by the Board, and the further requirements placed on the development from other governmental agencies, it cannot be gainsaid that the Decision was arbitrary or capricious just because the Plaintiffs disagree with it. See *Jepson v. Zoning Bd. of Appeals of Ipswich*, 450 Mass. 81 (2007). (Although flooding to abutter's real estate conferred standing on an abutter to challenge of the grant of comprehensive permit to neighboring landowner for construction of affordable housing on landowner's property, zoning board of appeals imposed various conditions on the project in addition to the court's conclusion that a superseding order of conditions from the Department of Environmental Protection would adequately protect the interest of the Wetlands Protection Act, and Board's decision was not unreasonable capricious or arbitrary. M.G.L.A. c. 40B, § 21).

At Bar the Board was also mindful the criteria and constraints of c. 40B and the Regulations promulgated thereunder, regrading scope of permissible impact on surrounding local roads (not imperil) and the limitation to requiring offsite improvements. The Decision was thoughtful and well-reasoned.

C. Summary Judgment Decision framed the facts in dispute on standing.

1. Validity of Variance and all of its conditions are final and not subject to review.

In plaintiffs' complaint, plaintiffs challenged the validity of the Use Variance, arguing that it expired by operation of law. See Complaint at ¶34. In rendering its Decision on Summary Judgment concerning the Use Variance, this Honorable Court found that, similar to the related case *Green v. Southborough Zoning Board of Appeals, et al.* WOCV1685-1827 (Mass.

Super Ct. June 25, 2018), then under appeal to the Appeals Court, that the plaintiffs at bar lacked standing for failing to appeal to the Board, within the time limitations set out in G.L. c. 40A, § 15, the decision of the building inspector who determined that the use variance was effective upon approval of the Comprehensive Permit. The Court accordingly and appropriately entered summary judgment against plaintiffs on this claim. Since this Court's Summary Judgment Decision, which made reference to the then pending, *Green v. Zoning Board of Appeal of Southborough, et al.* appeal, the Appeals Court entered its decision in *Jonathan Green v. Zoning Board of Appeals of Southborough*, 96 Mass. App.Ct. 126 (2019) and affirmatively determining that the Use Variance (which Plaintiffs alleged had lapsed and was a primary reason that the Comprehensive Permit could not stand), *had not lapsed* and was a proper exercise of the Board's authority. In light of the final adjudication of the Use Variance issue in the *Green* matter, the issue of whether the Use Variance lapsed is now barred by proper application of the doctrines of *res judicata* and collateral *estoppel. Jarosz v. Palmer,* 436 Mass. 526, 530–531 n. 3, (2002) (citations omitted). See *Kobrin v. Board of Registration in Med.,* 444 Mass. 837, 843–844(2005); *Green v. Town of Brookline,* 53 Mass. App.Ct. 120, 123 n. 5(2001). Any and all of Plaintiffs' claims of injury from the Variance Decision and the integration of the townhouse project with the affordable housing component could have been the subject of a timely appeal. That it was not ends the discussion. The Decision that is on review in this appeal necessarily had to incorporate the townhouse project because it was a final permitted project. Plaintiffs' arguments to the contrary were properly rejected by this and other Courts.

2. The Court's Decision on Summary Judgment Rejecting Plaintiffs' Claim of Lack of Quorum and is Now Resolved

The Court's Decision recognized that the 1974 version of Section 249-3(B) of the Town Code requiring a four-member quorum was rendered null and void by the 2007 Amendment to the Board of Appeals-Town of Southborough-Rules and Regulations which superseded all prior rules and regulations of the board and effectively abolished any requirement of a four person quorum, thereby acknowledging that a three person quorum is all that was required on approving defendants' Application for Comprehensive Permit. This Court's decision on Summary Judgment constitutes the "law of the case", a recognized legal doctrine precluding re-litigation of the legal issues presented in successive stages of a single case once those issues have been decided. *Ms. M. v. Falmouth School Department*, 875 F.3d 75(1st Cir. 2017).

D. This Court Conducts a *de novo* Review of the Facts to Determine Whether the Decision was Arbitrary, Capricious or Unreasonable and nothing more.

Review of a board's decision in the Superior Court pursuant to G.L. c. 40A, § 17, involves a "peculiar" combination of de novo and deferential analyses. *Wendy's Old Fashioned Hamburgers of N.Y., Inc. v. Board of Appeal of Billerica*, 454 Mass. 374, 381(2009), quoting *Pendergast v. Board of Appeals of Barnstable*, 331 Mass. 555, 558 (1954). Although fact finding in the Superior Court is *de novo,* a judge must review with deference legal conclusions within the authority of the board. *Mellendick v. Zoning Bd. of Appeals of Edgartown,* 69 Mass.App.Ct. 852, 857 (2007), quoting *Cameron v. DiVirgilio,* 55 Mass.App.Ct. 24, 29 (2002) ("reasonable construction that a zoning board of appeals gives to the by-laws it is charged with implementing is entitled to deference"). Among the purposes of the act is to achieve "greater implementation of the powers granted to municipalities," including "restricting, prohibiting, permitting or regulating" the uses of land. St.1975, c. 808, § 2A. These powers are not to be "narrowly" construed. *Collura v. Arlington,* 367 Mass. 881, 885 (1975),

citing *Decoulos v. Peabody,* 360 Mass. 428, 429 (1971). Deference is also owed to a local zoning board because of its special knowledge of "the history and purpose of its town's zoning by-law." *Duteau v. Zoning Bd. of Appeals of Webster,* 47 Mass.App.Ct. 664, 669 (1999). Accordingly, a judge must give "substantial deference" to a board's interpretation of its zoning bylaws and ordinances. *Manning v. Boston Redevelopment Auth.,* 400 Mass. 444, 453 (1987). While a judge is to give "no evidentiary weight" to the board's factual findings, the decision of a board "cannot be disturbed **unless** it is based on a legally untenable ground" or is based on an "unreasonable, whimsical, capricious or arbitrary" exercise **of its judgment** in applying land use regulation to the facts as found by the judge. *Roberts v. Southwestern Bell Mobile Sys., Inc.,* 429 Mass. 478, 487 (1999), quoting *MacGibbon v. Board of Appeals of Duxbury,* 356 Mass. 635, 639 (1970); *Zaltman v. Board of Appeals of Stoneham,* 357 Mass. 482, 485 (1970). Although the judge determines the facts, it is "the board's evaluation of the seriousness of the problem, not the judge's, which is controlling." *Subaru of New England, Inc. v. Board of Appeals of Canton,* 8 Mass.App.Ct. 483, 488 (1979), quoting *Copley v. Board of Appeals of Canton,* 1 Mass.App.Ct. 821, 821 (1973).

At Bar the Decision of the Board recognized that the Town's failure to attain an acceptable affordable housing inventory outweighed the articulated local concern that offsite infrastructure conditions would be impacted. The Board was required to balance these interests. The Decision was also sensitive to the requirement that the Applicant should not be compelled to address existing off-site conditions which are under the authority of the Town. Unless the Court can find, on the facts determined, that the project conditionally approved by the Decision will in fact imperil the Plaintiffs or other residents, a conclusion that the Decision is whimsical or arbitrary would be misplaced.

E. Plaintiffs Failed to Properly Plead Claims of Bias or Conflict of Interest

1. The Complaint must state factual basis of claim.

In appraising the sufficiency of a plaintiff's complaint, the court will accept the relevant facts alleged in the complaint, as well as such inferences as may be drawn therefrom in the plaintiff's favor, as true. *Flomenbaum v. Com.,* 451 Mass. 740, 751 (2008). C.40A §17 *requires* that a Plaintiff include all facts in support of its appeal in the Complaint sufficient to place the defendant on notice of all claims. In plaintiffs' unamended complaint filed in September 2017 plaintiffs attack the Board's decision on succinct narrow grounds related to the Use Variance and that and the Decision "fails to protect the health and safety of the prospective occupants...and other residents of the Town of Southborough." See Complaint at §39. Notwithstanding, and despite Defendants protests, Plaintiffs have belatedly asserted a claim that two of the three Board members were disqualified due to alleged bias and conflicts of interest, and that a member may have violated residency requirements on the date of the vote, claims that were never identified in plaintiffs' complaint. Plaintiffs' opportunity to timely raise such claims by timely pleading counts for Declaratory Relief or Certiorari has long passed and now bars them from alleging any facts of bias or conflict of interest.

2. Collateral claims of open meeting law violation, defective administrative process, conflict of interest are not cognizable under MGL c. 40A, § 17

It is well established that a public officer's right and title to office cannot be attacked collaterally, but only in a direct proceeding brought to determine the validity of his or her title to the office. See, e. g., *Hill v. Trustees of Glenwood Cemetery*, 323 Mass. 388, 393 (1948); *Brierley v. Walsh*, 299 Mass. 292, 295, 12 N.E.2d 827 (1938); *Commonwealth v. DiStasio*, 297 Mass. 347, 350-352cert. denied, 302 U.S. 683, and 302 U.S. 759, (1937); *Sevigny v. Lizotte*, 260

Mass. 296(1927). The purpose of this rule is to ensure that public officials have a full opportunity to defend against a challenge in a proceeding where the merits of a particular public matter are not also at issue. Sheehan's Case, 122 Mass. 445, 446 (1877). See *Commonwealth v. DiStasio*, supra 297 Mass. at 350-351.

Moreover, the Legislature placed the authority to institute proceedings against persons allegedly holding public office without proper credentials largely within the discretion of the Attorney General. See *Brierley v. Walsh*, supra 299 Mass. at 295, *Haupt v. Rogers*, 170 Mass. 71, 72-76 (1898); *Attorney Gen. v. Sullivan*, 163 Mass. 446, 448 (1895); G.L. c. 249, s 9, as appearing in St.1973, c. 1114, s 292. "By requiring the Attorney General to institute direct proceedings, the Legislature has sought to protect the rights of members of the public who, by necessity, are compelled to do business with an officer who is exercising the duties and privileges of an office under color of right, and at the same time protect public officials from a multiplicity of lawsuits based on individual interests rather than on the public interest. We think this legislative scheme sound. Further, we have recently reiterated the principle that in this Commonwealth actions on behalf of the public interest are committed to the Attorney General." See *Secretary of Administration & Fin. v. Attorney Gen*., 367 Mass. 154 (1975). See *also Feeney v. Commonwealth*, 373 Mass. 359 (1977); G.L. c. 249, s 9, as appearing in St.1973, c. 1114, s 292. *Bos. Edison Co. v. Bos. Redevelopment Auth.*, 374 Mass. 37 (1977)

In 1962, the Massachusetts Legislature enacted G. L. c. 268A, the conflict-of-interest law, which seeks to combat secret dealings, influence peddling, inequality of treatment of citizens, and other activities where a public official or employee is confronted with a conflict of interest. See *Leder v. Superintendent of Sch. of Concord & Concord-Carlyle Regional Sch. Dist.,* 465 Mass. 305, 308 (2013); *Sciuto v. Lawrence*, 389 Mass. 939, 946

(1983); *Everett Town Taxi, Inc. v. Aldermen of Everett*, 366 Mass. 534, 536(1974). The commission is the agency with the primary civil enforcement responsibility to investigate and to adjudicate alleged violations of G. L. c. 268A and c. 268B. *McGovern v. State Ethics Comm'n*, 96 Mass. App. Ct. 221, 228, *review denied,* 483 Mass. 1108 (2019).

The purpose of the conflict-of-interest statute is to prevent giving the appearance of a conflict of interest as much as to suppress all tendency to wrongdoing. See, *Starr v. Board of Health of Clinton,* 356 Mass. 426 (1969), the holding of the position of town plumbing inspector and ownership of a plumbing supply business would present a conflict of interest since it would give the appearance of a conflict. *Board of Selectmen of Avon v. Linder*, 352 Mass. 581 (1967). Service of a person as a paid newspaper correspondent reporting meetings and deliberations of board of selectmen is incompatible with service as a member of such board.

At Bar although both member Bartolini and member Eagle had a commercial relationship with an entity controlled by Applicant, Bartolini was exonerated by the State Ethics Commission during the public hearing process on Park Central's application. His station as a Board member was likewise validated by the Board of Selectmen. Member Eagle was never complained of to the State Ethic Commission. Moreover, he carefully did not finalize the sale of his residence until after the vote of the Board. Plaintiffs have utterly failed to establish that the conduct of either member affected the substance of the Decision which they have appealed. The allegations of bias, conflict and favoritism are red herrings and should play no part in this Court's Decision.

III. CONCLUSION

For the reasons set forth herein, Defendants respectfully request this Honorable Court to Dismiss the Complaint based on lack of standing. Alternatively, Defendants pray this Honorable Court to rule and find that the Decision of the Board was reasonable, was supported by the facts was not arbitrary, capricious or based on legally untenable grounds.

Date: June 4, 2021

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above document was **served via email** upon counsel for all parties on June 4, 2021.

/s/ David M. Click