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Preliminary Statement.

This appeal raises questions fundamental to the comprehensive permitting process for affordable housing under the Comprehensive Permit Law.¹ In recent years, local boards of appeals have attempted to discourage affordable housing projects by imposing conditions beyond the scope of their permitting authority (non-zoning conditions). But this flatly conflicts with the law's explicit limitation of the authority of local boards to granting "building permits and other approvals typically given on application to . . . separate local agencies, boards, or commissions whose approval would otherwise be required for a housing development to go forward."²

Because plaintiff Board of Appeals of the City of Amesbury (the board) went beyond this limited, albeit important, role by imposing non-zoning conditions on a comprehensive permit for an affordable housing project proposed by the developer, Attitash Views, LLC, those conditions cannot stand. The board urges that the committee's own authority to strike such illegally

¹ G. L. c. 40B, §§ 20-23.

² *Zoning Bd. of App. of Groton v. Housing App. Comm.*, 451 Mass. 35, 40 (2008).

imposed conditions is undermined by *Board of Appeals of Woburn v. Housing Appeals Comm.*, 451 Mass. 581 (2008) (*Woburn*).³ But, as will be explained below, *Woburn* does not govern this case. Rather, *Woburn* addresses the limits of the committee's authority in reviewing conditions on the merits; the case does **not** address the committee's authority to decide the separate, antecedent issue of what merits its consideration in the first instance.⁴

Question presented.

In considering a comprehensive permit application under Chapter 40B, the board has the same power as the local authorities from which a developer otherwise would have to seek separate permits and approvals. The Legislature designated the committee as the sole administrative forum for review of a board decision regarding a comprehensive permit. Did the committee rightly strike permit conditions imposed by the board that no local authority was authorized to impose?

³ *Board of App. of Woburn v. Housing App. Comm.*, 451 Mass. 581 (2008) (*Woburn*).

⁴ Limiting its own discussion to the basic legal issues presented by this appeal, the committee **also** endorses the discussion of the individual conditions contained in the developer's brief. See Mass. R. App. P. 16(j).

Nature of the case.

This is an administrative appeal by the board under the Comprehensive Permit Law from a final judgment of the Suffolk Superior Court affirming the committee's decision to strike, as beyond the power of the board, certain non-zoning conditions imposed by the board on a comprehensive permit enabling the developer to build affordable housing units.

Statutory background.

"The primary purpose of the [Comprehensive Permit Law] is 'to provide relief from exclusionary zoning practices which prevent the construction of badly needed low and moderate income housing.'"⁵ The Legislature's intent was "to streamline and accelerate the permitting process for developers of low or moderate income housing in order to meet the pressing need for affordable housing[.]"⁶

As a general matter, "[a] developer who wishes to build such housing may file with a local zoning board

⁵ *Taylor v. Housing App. Comm.*, 451 Mass. 149, 151 (2008) (*Taylor*) (brackets by the Court omitted), quoting *Board of App. of Hanover v. Housing App. Comm.*, 363 Mass. 339, 354 (1973) (*Hanover*).

⁶ *Middleborough v. Housing App. Comm.*, 449 Mass. 514, 521 (2007) (*Middleborough*).

an application for a comprehensive permit[,] rather than seek[] separate approval from each local board having jurisdiction over the project."⁷ If the project is "consistent with local needs" as defined in the Comprehensive Permit Law,⁸ the zoning board has the authority both to allow the project to proceed "and, in some circumstances, . . . to override requirements or restrictions that would normally be imposed by . . . [other] local boards."⁹

Even more importantly, if the local board either denies the application or approves it with conditions,

⁷ *Zoning Bd. of App. of Wellesley v. Ardmore Apartments Ltd. P'ship*, 436 Mass. 811, 854 (2002), citing G. L. c. 40B, § 21.

⁸ The Comprehensive Permit Law's general standard for "consistent with local needs" is "reasonable in view of the regional need for low and moderate income housing considered with the number of low income persons in the city or town affected and the need to protect the health or safety of the occupants of the proposed housing or the residents of the city or town, to promote better site and building design in relation to the surroundings, or to preserve open space." G. L. c. 40B, § 20, ¶ 3. The same statutory provision also describes three situations where local requirements being appealed to the committee shall be deemed "consistent with local needs" as a matter of law, for example, when affordable housing units already constitute more than 10 % of a town's housing stock. *Id.*; see generally *Boothroyd v. Zoning Bd. of App. of Amherst*, 449 Mass. 333 (2007).

⁹ *Dennis Hous. Corp. v. Zoning Bd. of App. of Dennis*, 439 Mass. 71, 77 (2003); see G. L. c. 40B, § 21.

the developer may appeal to the committee, which can override the local decision and direct the issuance of a comprehensive permit, using the same "consistent with local needs" standard.¹⁰ The committee's authority to "override" a local board is a sharp, purposeful departure from the usual presumption of local control in zoning.¹¹

When specifying how the committee should handle appeals, Section 23 of the Comprehensive Permit Law distinguishes between denials and approvals with conditions. "[I]n the case of a denial," the sole issue is "whether . . . the decision was reasonable and consistent with local needs[.]"¹² "[I]n the case of an approval . . . with conditions and requirements imposed," on the other hand, the board must determine both consistency with local needs and "whether such conditions and requirements make the construction or operation of such housing uneconomic[.]"¹³

Despite these terms' centrality to the statutory scheme, the statute does not explicitly define either

¹⁰ G. L. c. 40B, §§ 22-23.

¹¹ *Hanover*, 363 Mass. at 353-54, 384-85.

¹² G. L. c. 40B, § 23.

¹³ *Id.*

"denial" or "condition."¹⁴ In contrast, the statutory provision that empowers local boards of appeals to consider comprehensive permit applications in the first instance, and to do so "in lieu of separate applications to the applicable local boards," expressly provides that "[t]he board of appeals . . . shall have the **same power** to issue permits or approvals as any local board or official who would otherwise act with respect to such application[.]"¹⁵ As examples, the Legislature mentions "the power to attach to said permit or approval conditions and requirements with respect to height, site plan, size or shape, or building materials as are consistent with the terms of this section."¹⁶

Course of proceedings and facts.

In June 2005, the developer applied to the board for a comprehensive permit to build mixed-income affordable housing under the Commonwealth's Housing

¹⁴ See *Town of Middleborough v. Housing App. Comm.*, 449 Mass. 514, 523 (2007) (*Middleborough*) (Act's "language is not without ambiguity").

¹⁵ G. L. c. 40B, § 21 (emphasis added).

¹⁶ *Id.*

Starts Program.¹⁷ In September 2006, the board granted a permit for 40 units of condominium housing, of which 10 are to be affordable, subject to a number of non-zoning conditions.¹⁸

In October 2006, the developer appealed the board's decision to the committee.¹⁹ In January 2007, the developer moved the committee for a summary decision, arguing, quite understandably, that many of the conditions imposed by the board were beyond the board's authority.²⁰ In August 2007, the board requested a hearing on the developer's motion.²¹ The presiding officer was not persuaded, however, concluding that "the record is sufficiently clear so that this matter can be decided on Summary Decision without oral hearing."²²

¹⁷ Board Decision on Application for Comprehensive Permit (Board Decision), I A. 15. (In this brief, "A." denotes the record appendix, "I" is the volume number, and "15" is the page number.)

¹⁸ *Id.*, at 15-40. For examples, see below in main text at 8-9.

¹⁹ Developer's Initial Pleading (to the committee), I A. 2-40.

²⁰ Motion for Summary Decision, I A. 59-61.

²¹ Request for a Hearing, I A. 453-55.

²² *Id.* (marginal notation).

On October 15, 2007, the committee issued a 15-page decision granting the developer's motion.²³ The committee concluded that many of the permit comprehensive conditions imposed by the board went "beyond its traditional role of reviewing the siting and design of the housing development[.]"²⁴ The non-zoning conditions identified by the committee included, board attempts to:

- "limit how the housing may be subsidized";
- "involve [the board] in the drafting of the documents that ensure long-term affordability";
- "shape the group of people who will be eligible to rent the housing";
- "influence how the housing will be marketed";
- "dictate how parts of the calculation of the profit limitation will be conducted";
- "restrict the choice of the agent that will monitor development"; and
- "otherwise insert itself into programmatic aspects of the development."²⁵

²³ Summary Decision, I A. 457-71 (also reproduced in II A. 1-15).

²⁴ *Id.*, at I A. 457-58, II A. 1-2.

²⁵ *Id.*, at I A. 458, II A. 2.

The committee recognized "that all of these areas are important and that effective administrative oversight in each individual area is essential."²⁶ The defect in the board's action, however, was "that for the most part the functions that the Board would undertake are functions that, under the statutory scheme, have been reserved for state government," namely, the "state housing agencies," such as MassHousing.²⁷

In November 2007, the board timely appealed the committee's decision to the Superior Court.²⁸ In July 2008, the board filed its motion for judgment on the pleadings together with oppositions by the committee and the developer.²⁹ On January 7, 2009, immediately following a hearing on the motion, the Superior Court (Brassard, J.) gave an oral decision for the committee and the developer.³⁰ Judgment affirming the

²⁶ *Id.*

²⁷ *Id.*

²⁸ Complaint, II A. 17-28.

²⁹ Docket entry for July 10, 2008 (in the addendum to the board's brief at 7); see also II A. 29-101.

³⁰ Transcript, II A. 165, ln. 23 - 71, ln. 2.

committee's decision entered two days later.³¹ The board filed a timely appeal.³²

Argument.

- I. The Comprehensive Permit Law should be construed in light of the Legislature's primary intent to circumvent exclusionary zoning practices, with substantial deference being given to the committee and the department.

As a general rule, Massachusetts courts "will not substitute [their] judgment for that of an administrative agency if its interpretation of a statute is reasonable."³³ Indeed, an administrative agency "has considerable leeway in interpreting a statute it is charged with enforcing, unless a statute unambiguously bars the agency's approach."³⁴ Hence, "if there is ambiguity or a gap in the statute, [Massachusetts courts] determine whether the agency's

³¹ Judgment (in the addendum to the board's brief at 1).

³² Notice of appeal (in the addendum to the board's brief at 2).

³³ *Alves's Case*, 451 Mass. 171, 177 (2008).

³⁴ *Goldberg v. Board of Health of Granby*, 444 Mass. 627, 33 (2005) (*Goldberg*) (reflecting the Court's increasing reliance on the mode of judicial review of agency action set out by the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and its progeny).

resolution of [the pertinent] issue may be reconciled with the governing legislation."³⁵

Massachusetts courts adhere to these principles with particular strength in Comprehensive Permit Law cases, recognizing that "[t]he primary purpose of the [Comprehensive Permit Law] is 'to provide relief from exclusionary zoning practices which prevent the construction of badly needed low and moderate income housing.'"³⁶ "[I]n considering regulations promulgated under [the] act, [the Court gives] great weight to a reasonable construction of a regulatory statute adopted by the agency charged with its enforcement. . . . Where the statutory language is not without ambiguity, . . . deference to the agency's interpretation of the governing statute is highest."³⁷ "Moreover, . . . where the focus of a statutory enactment is reform, as is true of the act, . . . the administrative agency charged with its implementation should construe it broadly so as to further the goals

³⁵ *Taylor*, 451 Mass. at 154.

³⁶ *Taylor*, 451 Mass. at 151 (emphasis added) (brackets by the Court omitted), quoting *Hanover*, 363 Mass. at 354.

³⁷ *Middleborough*, 449 Mass. at 523 (internal quotation marks, citations, and brackets by the court omitted).

of such reform. . . . Agency action will not be overturned unless it be proven arbitrary, unreasonable, or inconsistent with the agency's own rules. . . . Lastly, the burden of proving the invalidity of administrative action rests with the party challenging that action."³⁸

The upshot is that a court's "role [in reviewing an administrative agency's construction of its statute] is constrained considerably by the choice of the agency."³⁹ As a result, "it is unimportant whether [the court] would have come to the same interpretation of the statute as the agency."⁴⁰ Where there is no express direction from the Legislature, whether as the result of silence or ambiguity, the agency is left to "give clarity to an issue necessarily implicated by the statute but either not addressed by the Legislature or delegated to the superior expertise of agency administrators."⁴¹

³⁸ *Id.*, 449 Mass. at 524 (internal quotation marks, citations, and brackets by the court omitted).

³⁹ *Falmouth v. Civil Serv. Comm'n*, 447 Mass. 814, 822 (2006).

⁴⁰ *Goldberg*, 444 Mass. at 633.

⁴¹ *Id.* at 634.

II. The committee rightly struck non-zoning conditions unlawfully imposed by the board.

A. The Comprehensive Permit Law limits the board's power to impose conditions to that of the local boards and officials from which the board's own power derives.

The board, without citing any authority under the statute supporting its own authority to impose the conditions in dispute here, simply contends that Comprehensive Permit Law does not allow either a developer to challenge, or the committee to determine, the board's power to impose whatever conditions it chooses in issuing a comprehensive permit.⁴² But the board's contention ignores the statutory limitations on its authority, the purpose and structure of the Comprehensive Permit Law, and the committee's just-discussed interpretive "leeway."

In considering an application for a comprehensive permit, the board's authority is expressly derivative. By statute, it has "the **same power** to issue permits or approvals as any local board or official who would otherwise act with respect to" an application to build housing.⁴³ Because the board has only "the same power"

⁴² Board Brief at 16-17 ("no provision . . . to challenge"; committee "neither authorized nor tasked")

⁴³ G. L. c. 40B, § 21 (emphasis added).

as these local boards and officials, and nothing more, to know the board's power to impose conditions one must know the power of these authorities.⁴⁴

Both before the committee and in seeking judicial review, the board failed to offer any authority or to make any affirmative argument supporting a claim that it was empowered to impose non-zoning conditions.⁴⁵ This Court, therefore, should take it as conceded that the board had no power to impose the conditions at issue. "Objections, issues, or claims—however meritorious—that have not been raised below are waived on appeal. This rule applies to arguments that could have been raised, but were not raised, before an administrative agency."⁴⁶

⁴⁴ The board's unsupported contention that § 21 "quite explicitly places **no** limitations on the scope of issues that the Board may address through appropriate conditions" (Board Brief at 22 (board's emphasis)), overlooks the statute's express "same power" limiting language.

⁴⁵ The non-zoning conditions are discussed in detail in the developer's brief to this Court.

⁴⁶ *Green v. Brookline*, 53 Mass. App. Ct. 120, 128 (2001), rev. denied, 435 Mass. 1102 (2002) (internal quotation marks and citation omitted).

B. The Supreme Judicial Court consistently has recognized the committee's authority to decide questions preliminary to its review of a local board's decisions for consistency with local needs and economic impact on a project.

The board's case depends entirely on its contention that the committee had no right to consider the board's lack of authority to impose non-zoning conditions, no matter how clear and egregious that lack of authority was. The board's point seems to be that, because a lack of authority to impose non-zoning conditions does not by itself make a proposal uneconomic or the conditions not consistent with local needs, the committee is powerless to do anything about the board's unlawful action.⁴⁷ Under this claim, the committee would be powerless to address a board condition prohibiting blacks or Jews or married same-sex couples from living in a particular development and instead would have no alternative but to allow that facially discriminatory condition to stand unchallenged. This cannot be the law and it is not.⁴⁸

⁴⁷ See Board Brief at 17.

⁴⁸ The committee does not suggest that the non-zoning conditions actually imposed by the board approximate the discriminatory conditions cited in main text. But the principle involved is the same: the committee

(footnote continued)

The reality is that the committee is far from powerless. As the Supreme Judicial Court made clear in *Middleborough*: "The Legislature has designated the committee hearing process as the sole administrative avenue to hear a developer's challenge to a local board's denial of a comprehensive permit."⁴⁹ The situation regarding the grant of a permit with conditions is no different.

The point is that the Legislature's aim "to streamline and accelerate the permitting process for developers of low or moderate income housing"⁵⁰ would be subverted were a developer required to pursue separate actions (1) before a court, to challenge the lawfulness of a local board's non-zoning conditions, and (2) before the committee, to challenge their economic impact and consistency with local needs. Indeed, construing the Comprehensive Permit Law so as to require a developer to bring multiple legal actions also would contradict the Legislature's intent to

(footnote continued)

either is or is not authorized to strike conditions a local board lacks authority to impose.

⁴⁹ *Middleborough.*, 449 Mass. at 520.

⁵⁰ *Id.* (internal citation omitted).

"minimize[e] lengthy and expensive delays occasioned by court battles[.]"⁵¹

The Supreme Judicial Court adhered to these principles in *Middleborough*, for example. Although the Comprehensive Permit Law is silent regarding the committee's authority to determine a developer's "entitlement to . . . a comprehensive permit," the Court there held that the committee and the department may treat the developer's entitlement "as a substantive aspect of the successful applicant's prima facie case[.]"⁵² Likewise, here, the committee may consider substantively the lawfulness of non-zoning conditions imposed by a local board. The Legislature's intent and the public interest are served by streamlining the process through the means of a single administrative appeal from the board's decision, rather than subjecting the developer to multiple challenges in multiple forums. The board is itself protected because it has the right to judicial review of the committee's decision.

⁵¹ *Standerwick v. Zoning Bd. of Appeals of Andover*, 447 Mass. 20, 29 (2006) (speaking of "court battles commenced by those seeking to exclude affordable housing from their own neighborhoods").

⁵² *Middleborough.*, 449 Mass. at 521.

Hanover, too, illustrates the Supreme Judicial Court's understanding that the Comprehensive Permit Law contemplates the committee doing more than simply considering consistency with local needs and, where applicable, the economic impact of conditions. For example, although Chapter 40B does not expressly authorize the committee to hold a separate, new evidentiary hearing, the Court inferred the necessity of such a hearing from "the statute's requirement that the committee must find the facts, draw conclusions and state its own reasons for its decision[.]"⁵³ Indeed, *Hanover* approved the committee's making a number of findings not expressly authorized or called for by the Comprehensive Permit Law. The Court concluded that the committee was (1) "warranted in finding that the Hanover applicant had sufficient property interest in the site [to qualify as an applicant under the Comprehensive Permit Law]";⁵⁴ (2) "justified in finding that the applicant was a limited dividend corporation within the meaning of [the Comprehensive Permit Law]";⁵⁵ and (3) "warranted

⁵³ *Hanover*, 363 Mass. at 370.

⁵⁴ *Id.*, at 378.

⁵⁵ *Id.*, at 380.

in concluding that the Hanover applicant was 'proposing to build low or moderate income housing' within the meaning of [the Comprehensive Permit Law]."⁵⁶ Likewise, in *Zoning Board of Appeals of Wellesley v. Housing Appeals Committee*, the Supreme Judicial Court upheld the action of the committee in deciding, preliminary to reaching the merits of the local board's decision, that the proposed development "was within its jurisdiction."⁵⁷

C. Woburn does not undermine the committee's authority.

The Supreme Judicial Court's recent opinion in *Woburn* does not lead to a different result. In *Woburn*, the committee had evaluated permit conditions to determine whether they "were supported by legitimate local concerns that outweighed the regional need for low and moderate income housing," even though it also had found that the conditions did not render the development uneconomic.⁵⁸ On review, the Superior Court "concluded that the committee's review was appropriate, because the condition substantially

⁵⁶ *Id.*

⁵⁷ *Zoning Bd. of App. of Wellesley v. Housing App. Comm.*, 385 Mass. 651, 656 (1982).

⁵⁸ *Woburn*, 451 Mass. at 586.

reducing the number of units was the 'functional equivalent of a denial,' rather than an approval with conditions."⁵⁹ The Supreme Judicial Court disapproved of this procedure, however, first, because the Comprehensive Permit Law does not authorize the committee to "recast[] an approval with conditions as a denial,"⁶⁰ and, second, and more relevant to the present case, because "[a]bsent a showing that conditions placed on an approval render the project uneconomic, the committee is not empowered to review them under the denial standard."⁶¹

Woburn does not control the present case because, here, the committee neither reviewed the substance of permit conditions that the board was authorized to impose (as it did in *Woburn*) nor reviewed the non-zoning conditions "under the denial standard." Rather, the committee asked a different question: did the board have the authority to impose the non-zoning conditions in the first instance? This inquiry is similar to the preliminary inquiry into the developer's qualifications that the Supreme Judicial

⁵⁹ *Id.*, at 587 (fn. omitted).

⁶⁰ *Id.*, at 593-94.

⁶¹ *Id.*, at 594 (emphasis added).

Court approved in *Middleborough*, in that neither inquiry concerns the statutory standards for committee review of an approval with conditions. Rather, the committee's inquiries, both here and in *Middleborough*, go to the antecedent question of what, if anything, is properly before the committee for review under the appropriate statutory standard (whether a denial or approval with conditions).

Indeed, *Woburn* neither addressed nor limited the committee's authority to decide questions preliminary to, or perhaps obviating, review of a local board decision. Just as a developer that fails to establish its entitlement to a comprehensive permit has no right to have the committee review the sufficiency of conditions imposed by a local board, so, too, a board that imposes conditions beyond its authority has no right to have the committee review their economic impact or consistency with local needs. Nothing in *Woburn*, properly understood, forecloses the committee's action, which is consistent with similar actions consistently approved by the Supreme Judicial Court beginning with *Hanover*.

- D. The committee did not violate its own regulations in allowing the developer's motion for a summary decision.

The board additionally contends that the committee "overlooked" a regulation that required it to deny the developer's motion for a summary decision.⁶² But the board misunderstands the regulation that it invokes.

According to the board, to prove that the conditions it imposed rendered the project uneconomic, the developer "was . . . required to offer proof that it made a request to MassHousing [the subsidizing agency] that the agency waive those requirements with which the Board's Decision is inconsistent and[,] further, offer proof that MassHousing denied any such request for a waiver."⁶³ But the regulation does **not** impose any such requirement. It merely provides that offering such proof, if the developer chooses to do so, "shall create a rebuttable presumption that the condition of the Board makes the project uneconomic."⁶⁴

⁶² Board Brief at 16. The regulation at issue is 760 Code Mass. Regs. § 31.07(1)(f) (2004) (the regulation).

⁶³ Board Brief at 14 (glossing the regulation).

⁶⁴ 760 Code Mass. Regs. § 31.07(1)(f) (2004).

Here, the committee reasonably concluded that the non-zoning conditions imposed by the board made the project unfundable by a subsidizing agency. As the project could not be built, the committee did not need to reach the question whether a project operating under those conditions would be rendered uneconomic. For evidence of unfundability, the committee relied on a letter from MassHousing, the subsidizing agency, stating that certain board-imposed conditions "were in conflict or inconsistent with" "core" elements of the two potentially applicable subsidy programs and that, "[i]f these conditions are not deleted or modified," MassHousing would be unable to provide funding.⁶⁵ The regulation neither explicitly requires an applicant to use a particular mode of proof nor expressly prohibits an applicant from proving unfundability in a way not mentioned in the regulation. Hence, the committee did

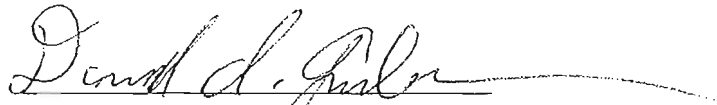
⁶⁵ Letter from Phyllis A. Zincola, Manager, MassHousing Comprehensive Permit Program, dated January 16, 2007 (also noting that "to facilitate the development," MassHousing "strictly construed our oversight obligations and made no objection to matters appropriately conditioned by the zoning board of appeals relating to traditional matters of local concern"); I A. 68.

not exceed its statutory authority in accepting the MassHousing letter as proof.⁶⁶

Conclusion.

For the reasons presented and on the authorities cited here and in the developer's brief, this Court should affirm the judgment of the Superior Court denying the board's motion for judgment on the pleadings and affirming the decision of the Housing Appeals Committee.

MARTHA COAKLEY
Attorney General



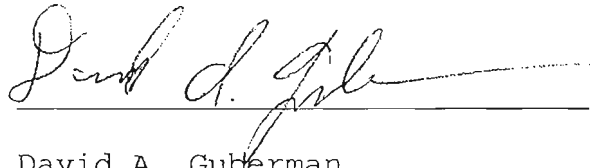
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⁶⁶ See *Hull v. Massachusetts Commission Against Discrimination*, 72 Mass. App. Ct. 525, 527, 530, rev. denied, 452 Mass. 1107 (2008) (using this reasoning to approve delegation by the commission of public hearings to a hearing officer, even though the commission's governing statute spoke only of the conduct of public hearings by "either the full commission or a single commissioner").

Rule 16(K) Certification.

I certify that this brief complies with the rules pertaining to the filing of briefs, including, but not limited to, the requirements imposed by Rules 16 and 20 of the Massachusetts Rules of Appellate Procedure.

A handwritten signature in cursive script, reading "David A. Guberman", is written over a horizontal line. The signature is fluid and extends slightly beyond the line on the right side.

David A. Guberman