COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPARTMENT

Plymouth, ss. Civil Action No. 2283CV00033C

DEBORAH JENNESS, Plaintiff, v. CARVER CONSERVATION COMMISSION, the TOWN OF CARVER, and PINEGATE RENEWABLES, LLC, Defendants.	)))))))))

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Defendants Carver Conservation Commission ("Commission") and Pine Gate Renewables, LLC ("Pine Gate"; collectively "Defendants"), have sought to dismiss the Plaintiff, Deborah Jenness ("Jenness") action by arguing that the Court lacks jurisdiction and that Jenness lacks standing. Both arguments are flawed. For the reasons described in more detail below, it is simply not true that an abutter cannot bring a certiorari action. Moreover, Jenness has sufficiently articulated a harm specific to her that is well within the interests protected under the bylaw. As such, dismissing this matter is unnecessary and would be improper.

FACTS

Jenness primarily relies on her statement of Facts included in her accompanying Motion for Judgment on the Pleadings. In addition to her property being located 53.9 feet from Pine Gate's Rochester Road project, Solar Carver 3 ("SC3"), Jenness' well is located on her property and served by the same aquifer as SC3. SC3 is located at 62 Rochester Road and located within an EPA sole source aquifer that is considered to be "high-yield" or "medium-yield" aquifer. A.R. 281. "High-yield" and "medium yield" aquifers are likely to yield 100 gallons per minute or more to individual wells. A.R. 281-282. Noteably, Jenness' well is located much closer to SC3

than the four supply wells, and is one of several private wells located on residential properties to the north and west of SC3. A.R. 282. Sole source aquifers are defined as aquifers supplying at least 50% of the drinking water for its service area when there are no reasonably available alternative drinking water sources should the aquifer become contaminated. A.R. 281. Because the Town of Carver does not have a municipal public water supply, water is supplied by small community public wells or by private wells, which is the primary source of drinking water for residents. A.R. 287.

STANDARD OF REVIEW

When reviewing a motion to dismiss, the Court accepts the facts alleged in the complaint as true and draws all reasonable inferences in the plaintiff's favor. *Revere v. Massachusetts Gaming Commission*, 476 Mass. 591, 595 (2017). Certiorari is an ancient writ, now enshrined by statute, that has as its overriding purpose the correction of "substantial errors of law apparent on the record and adversely affecting material rights." *Highby/Fulton Vineyard, LLC v. Board of Health of Tisbury*, 70 Mass. App. Ct., 848, 852 (2007), quoting from *Police Comm'r of Boston v. Robinson*, 47 Mass. App. Ct. 767, 770 (1999) Generally, a plaintiff is entitled to certiorari review if they demonstrate the appeal is from "(1) a judicial or quasi-judicial proceeding, (2) from which there is no other reasonably adequate remedy, and (3) a substantial injury or injustice arising from the proceeding under review." *Indeck v. Clients' Sec. Bd.*, 450 Mass. 379, 385 (2008). The alleged substantial injury must be personal to the Plaintiff's, and must fall within the area of concern of the statute of regulatory scheme under which the injurious action has occurred. *Ginther v. Commissioner of Ins.*, 427 Mass. 319, 322-323 (1998); *Friedman v. Conservation Comm'n of Edgartown*, 62 Mass. App. Ct. 539, 545 (2004). Certiorari review is available to

persons, including abutters, who can establish "injury to a protected legal interest." *Walpole Country Club v. Board of Health*, 72 Mass. App. Ct. 913, 914 (2008).

ARGUMENT

A. **Jenness, as an abutter, may seek review of the Commission's enforcement order**

Defendants wrongly conclude that abutters are barred from ever seeking certiorari review when the administrative action concerns enforcement. To the contrary, G.L. c. 249, § 4 requires only that a plaintiff establish "a substantial injury or injustice arising from the proceeding under review." *Indeck*, supra.

In making their argument, Defendants assert both that enforcement actions are not reviewable under c. 249, § 4, because they are not judicial or quasi-judicial proceedings, and that only an applicant can appeal from such an enforcement action. See Defendants Memorandum of Law In Support of Motion to Dismiss ("Def. Memo"), pp. 1,16. This is illogical. Moreover, there are numerous cases that address the ability of applicants to seek certiorari review of enforcement orders, thereby establishing definitively that enforcement proceedings certainly are judicial or quasi-judicial, including cases cited in Defendants memorandum. *Dubee v. Conservation Commission of Bridgewater*, 91 Mass. App. Ct. 1116 (2017) (order pursuant to Rule 1:28); *Carney v. Town of Framingham*, No. 10-P-1676, 2011 Mass. App. Unpub. LEXIS 875 (App. Ct. July 11, 2011) (dismissed on other grounds); *Garrity v. Conservation Comm'n of Hingham*, 462 Mass. 779, 791-792 (2012) (where the commission's decisions and orders are not subject to judicial review under G. L. c. 30A, review of its enforcement order is available only through an action in the nature of certiorari pursuant to G. L. c. 249, § 4); *Higby/Fulton Vineyard, LLC v. Board of Health*, 70 Mass. App. Ct. 848, 850 (2007) (certiorari review may be available to

abutter upon the requisite showing of a reasonable likelihood that plaintiff has suffered injury to a protected legal right).

Only where an “order constitutes discretionary action by the commission pursuant to its undisputed authority to enforce the act within the town” is the standard of review under c. 249, § 4 limited to the arbitrary and capricious standard. *Garrity v. Conservation Comm'n of Hingham*, 462 Mass. 779, 792 (2012). It would make zero sense to conclude on this basis that abutters cannot make out a claim for certiorari review because an enforcement order is not reviewable. Quite the opposite, this appears to be precisely the area in which certiorari review should be applied, because there is no other adequate remedy.

Defendants suggest a reading of the cases cited for preventing “judicial intrusion into agency discretion in enforcement matters” much broader than it actually is. *DiCicco v. Dept. of Envt'l Protection*, 64 Mass. App. Ct. 423 (2005) involved a ten-resident appeal from an administrative consent order by the Department of Environmental Protection. The Plaintiffs objected to DEP's approval of compensatory wetlands that involved restoration and replication of 24,000 square feet of wetlands, rather than restoration of previously filled wetlands. Noteably, *DiCicco* did not address subject matter jurisdiction in spite being raised in the pleadings, because plaintiffs did have standing. Instead, in addressing the merits, the Court found the DEP crafted an appropriate remedy, one that was well within their broad authority that commanded judicial deference. Viewed this way, *DiCicco* stands for deference to agency discretion, and that matters properly left to the discretion of the agency (here DEP), “is especially appropriate where the Legislature ‘has seen fit to delegate broad rule making authority…’” *DiCicco*, citing *Citizens for Responsible Envtl. Mgmt. v. Attleboro Mall, Inc.*, 400 Mass. 658, 668-669 (1987), quoting *Natural Resources Defense Council, Inc. v. SEC*, 196 U.S. App. D.C. 124 (D.C.Cir. 1979). This

accords with the courts view of enforcement matters. In *Commonwealth v. Boston Edison Co.*, 444 Mass. 324, 334 (2005) a suit against the Commonwealth could not be sustained on the basis of failing to exercising its enforcement powers. The appropriate level, and how and when to enforce, are properly within an agency's broad discretion, and "not ordinarily reviewable".

Similarly, *In the Matter of Sullivan*, 2011 MA ENV Lexis 69 (2011), the presiding officer found broad discretion delegated to DEP to effectuate the Wetlands Act (G.L. c. 131, § 40), and that such discretion should not be intruded upon by a reviewing court. *Sullivan*, at 13-14. *Sullivan* is not a case analyzing c. 249, § 4. However, it cites liberally to *DiCicco* to support its analysis. In that vein, the case is more about deference to agency decision making than about the appeal rights of abutters. This is especially apparent where the plaintiff was dissatisfied with the agency's determination of appropriate restoration and sought full restoration of the affected area. *Sullivan*, at 6. More to the point, *Sullivan* does not support the Defendants actions here, which amount to authorizing the amendment of an existing order of conditions through an enforcement order rather than pursuing further permitting. The ACOP being challenged in *Sullivan* required the applicant to "pursue and obtain a 'permit…for post construction approval of the stairway'. *Sullivan*, at 5. Beyond being only suggestive authority, and not addressing certiorari review, *Sullivan* simply does not stand for the proposition that abutters can never seek review of enforcement orders. To apply these cases to bar abutters from seeking certiorari review is unsupported.

It also is apparent from the complaint that the present issue is whether the Commission abused its discretion in using an enforcement order to effectively amend an order of conditions. Putting aside the strained reading put forward by the Defendants, Plaintiff would certainly have a right to review from an order of conditions, which is unquestionably a quasi-judicial proceeding.

See Def. Memo, p. 3. It was improper for the Commission to circumvent its own regulatory process and amend the order of conditions through an (allegedly unappealable) enforcement order.[1] Far from intruding on the Commission's ability to enforce its regulations, Jenness is concerned with its attempt to permit activities without proper review.

The question here is not whether or not the Commission should have enforced the wetlands bylaw. It did. The question is also not what action the Commission should have taken in enforcing the bylaw, see *DiCicco*, because Jenness is not challenging the Commission's authority to require removal of the offending pilings. Rather, Jenness is challenging the Commission's authority to amend the order of conditions to allow a new and different piling, i.e. concrete pilings being substituted for steel pilings, without holding a public hearing. This is precisely a situation where the Commission abused its discretion (if it had any) by not requiring a formal amendment to the OOC to account for the change in pilings. *SEC* v. *Chenery Corp.*, 332 U.S. 194, 208 (1947). This is even more appropriate where there was no urgent need to order new pilings. In fact, the old pilings have come out during this appeal, leaving ample opportunity for review as an amendment to the OOC. Because there was no pressing need to address the change in pilings in the enforcement order, and in fact, the change could be (and ordinarily would be) permitted in the normal course of amending the OOC, the Commission abused its discretion in using the enforcement order to amend the OOC.

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[1] *Sullivan* is not analgous, because the plaintiff there objected to the discretionary function of what level of restoration DEP could require, as well as that it did so without his input. The fact that Defendants here also circumvent the regulatory process is distinguished by the fact, raised above, that in *Sullivan* the agency **did** require additional filings, as well as the fact that amending the order of conditions is not a discretionary function or necessary for enforcement. Unlike *Sullivan*, the changes made in the enforcement order could have been permitted. Additionally, in its decision on reconsideration, the presiding officer notes that the plaintiff "is not without legal recourse to redress what he perceives as MassDEP's failure to sufficiently enforce the Act and the Wetlands Regulations." *In the Matter of Sullivan*, 2011 MA ENV Lexis 83, fn 4 (Aug. 10, 2011). As certiorari review is available only where no adequate alternative remedy is available, *Sullivan* has less application to this case based on the local bylaw and where no adequate alternative exists.

Finally, there is no reason to draw such a hard line as Defendants propose. The certiorari statute itself provides enough safeguard of judicial resources by requiring a "substantial injury". Fitting into this analysis, and contrary to Defendants claims, Jenness falls well within the area of concern under the regulatory scheme. Viewed in the light most favorable to the Plaintiff, as an abutter she may seek review under c. 249, § 4 of the Commission's enforcement order if she can claim a substantial injury to an interest protected by the regulatory scheme. Jenness can do so.

B. Jenness has standing based on harm that is within the zone of interest protected by the Carver Wetlands Bylaw and distinct and special to her

As a separate matter, although really part of the analysis above, Jenness has standing because she has properly claimed injury to a protected interest under the Carver Wetlands Bylaw. "To demonstrate standing to bring a certiorari action…[plaintiffs] must 'make[ ] a requisite showing of a reasonable likelihood that [they have] suffered injury to a protected legal right.'" *Hickey v. Conservation Comm'n of Dennis*, 93 Mass. App. Ct. 655 (2018), citing *Higby/Fulton Vineyard LLC v. Board of Health of Tisbury*, 70 Mass. App. Ct. 848, 850 (2007). Her status as an abutter makes no difference.

As noted throughout their application and even their materials submitted in response to the Commission's enforcement orders, Defendant Pine Gate acknowledges that groundwater is an area of concern under the regulatory framework. Private water supply and groundwater quality appear as the first two wetland values under protection of the Carver Wetlands Bylaw. A.R. 001. The Bylaw also expressly defines "alter" to include "driving of piles", "placing objects in water", "changing water temperature, biochemical oxygen demand, or other physical or chemical characteristics of water", and "any activities, changes or work which may cause or tend to contribute to pollution of any body of water or groundwater". A.R. 11.

Jenness' water supply well draws from the Plymouth Carver Sole Source Aquifer. This well supplies her drinking water, and she has no other publicly available source of water. Her water comes from the same aquifer as the SC3, and her well is within 200 feet of the piles shown on the applicant's plans. The issue of drinking water distinguishes *Higby/Fulton*, supra, which dealt with nitrogen impacts to a neighboring pond. Accepting the plaintiff fell within the area of concern, *Higby/Fulton* ultimately found the plaintiff's concerns over nitrogen loading leading to increased growth of phragmities, an invasive species, were too speculative and indefinite. Here, Jenness is specially affected by what goes into the water that she will then drink. It is hard to imagine a more clear case of a "reasonable likelihood" to grant standing.

Similarly, *Hickey*, supra, involved abutters who did not fall within the wetlands bylaw defined areas of concern. *Hickey* abutters objected to the appearance and use of a walkway, without alleging any harm to interests actually protected by the wetlands bylaw. Here, Jenness has alleged harm to an interest specifically protected by the bylaw and specific to her.

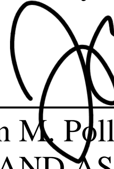
Rather than straining judicial interpretation, the application of the reasonable standards as stated in *Revere* and others is the appropriate applicable framework in which to decide whether an abutter has sufficiently alleged a justiciable injury. Jenness has put forth sufficient credible evidence, already in the record, showing a reasonable likelihood that she will be substantially injured by impacts to the groundwater. She is not required to definitely prove that she has been harmed by Defendants conduct, only that it is reasonably likely to occur. Both the pilings and Jenness well sit in the same aquifer. Defendants previously changed plans without following the procedure for amending an order of conditions. CCA treated pilings were installed in place of the approved steel pilings. The Commission knew about those changes and only held Pine Gate accountable <u>after</u> public reaction. Defendants are now demanding that Jenness again accept their

statements of no significant impact, despite the fact that the Commission has now completely banned CCA treated poles in Carver wetlands. A.R. 341. Jenness has sufficiently supported her claimed injury. Whether the Commission's action amounts to an abuse of discretion is a matter to be decided on the merits, and is a separate inquiry from the justiciability issue raised here in Defendant's motion.

Respectfully submitted,

DEBORAH JENNESS

By her attorney



Dated: September 6, 2022

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CERTIFICATE OF SERVICE

I, Jonathan M. Polloni, Counsel for the Plaintiffs, hereby certified that on this date, September 6, 2022, I have served a copy of this document on Defendants' Counsel by regular mail and email at the address and email address indicated below.

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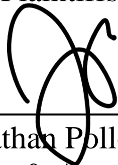

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