COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss. **SUPERIOR COURT**
2283CV00033C

DEBORAH JENNESS

vs.

TOWN OF CARVER CONSERVATION COMMISSION & others[1]

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADING, DEFENDANTS' CROSS MOTION FOR JUDGMENT ON THE PLEADINGS AND DEFENDANTS' MOTION TO DISMISS

Plaintiff Deborah Jenness filed this action seeking judicial review of the Carver Conservation Commission's November 17, 2021 Amended Enforcement Order. For the reasons discussed below, Jenness's Motion for Judgment on the Pleadings is **DENIED**, the Defendants' Cross-Motion for Judgment on the Pleadings is **ALLOWED** and the Defendants' Motion to Dismiss for lack of jurisdiction is **ALLOWED**.

BACKGROUND

The following facts are taken from the Complaint, the certified Administrative Record ("A.R.") and the Supplement to Administrative Record (S.A.R."). On June 10, 2019, NextSun Energy LLC ("NextSun"), predecessor to Pine Gate Renewables, LLC ("PGR"), filed a Notice of Intent ("NOI") with the Carver Conservation Commission ("Commission") under both the Wetlands Protection Act, G.L. c. 131, § 40 ("WPA"), and the Carver Wetlands Protection Bylaw ("Bylaw") to build a dual-use solar energy project over cranberry bogs located at Tremont Street in Carver ("the Tremont Street Project"). On June 12, 2019, NextSun filed another NOI with the Commission under the WPA and the Bylaw to build a dual-use solar energy project over

[1] The Town of Carver and Pine Gate Renewables, LLC.

cranberry bogs located at Rochester Road in Carver ("the Rochester Road Project"). The NOIs were submitted under the Solar Massachusetts Renewable Target (SMART) Program and contain the following description of work:

> To preserve the ongoing cranberry operation, proposed construction techniques are designed to minimize impacts on the bogs. This includes using driven piles or helical piers to support the array racking system and limited narrow trenching for subsurface conduits that minimizes vegetation disturbance. Disturbed areas of the cranberry bogs will be replanted as necessary following construction, and will continue to function as productive cranberry bogs. Soil erosion will be minimal, if any, within the essentially level topographic area of the solar arrays, and the existing water control structures within the cranberry bog will be utilized to preclude sediments from discharging outside the area of work. The pile/pier base to support the solar panels will be either augured into place or hydraulically advanced into the ground to reduce the excavation and exposure of soil.

The final sheet of set plans submitted with each NOI indicated that steel-columned helical piles would be used to construct the solar arrays. In accordance with the WPA and the Bylaw, NextSun provided written notice to all abutters to each proposed project with information regarding when the public hearing concerning each NOI would take place. The Commission issued an Order of Conditions to NextSun on July 31, 2019 approving the Tremont Street Project, and on Order of Conditions approving the Rochester Road Project on August 28, 2019. The special conditions attached to both Orders included the following language: "Any changes to the proposed and approved Plan shall require the Applicant to contact the Conservation Commission of those changes to determine if those changes require a new or amended filing."

The Plaintiff in this action, Deborah Jenness, ("Jenness") is an abutter to the Rochester project and was given notice of the Commission's hearings. Jenness did not appeal the Orders of Conditions to the Department of Environmental Protection under 310 Code Mass. Regs. § 10.05(7)(a)(4), nor did she petition the superior court for certiorari review of that Order under G.L. c. 249, § 4. After the Orders of Conditions were issued, NextSun transferred the projects to PGR.

On September 10, 2021, PGR's engineers informed the Commission that a ground-penetrating radar study of the earth underneath the project sites indicated significant peat deposits in several areas. Because steel foundation posts do not meet the site criteria for depth and stability due to those peat deposits, the engineers decided to use timber poles in place of steel foundation posts. PGR informed the Carver Building Department that it intended to substitute timber poles for steel piles in the cover letters submitted with its building permit requests. The Carver Building Department issued a Building Permit on January 29, 2021 (S.A.R. p. 318).

In late September 2021, after PGR began installing the timber poles on the project sites, several abutters raised concerns about the potential impact on area groundwater from the Chromium Copper Arsenate ("CCA") chemical treatment used on the timber poles to prevent deterioration and insect infestation. The Commission held public hearings regarding these concerns on September 15, 2021, and October 6, 2021. On October 6, 2021, the Commission issued an Enforcement Order requiring PGR to cease activity on the projects. As a basis for the Order, the Commission reported that "[t]he timber piles were not approved in the Orders of Conditions issued by the Carver Conservation Commission for either Project. The piles are larger in diameter than the original approved piles, creating more square footage of impact and the timber piles are treated/preserved with a potentially carcinogenic contaminant." (A.R. p. 258) That Enforcement Order did not demand removal of the timber poles already installed.

On October 20, 2021, the Commission held another public hearing regarding the safety of installing timber poles treated with CCA in the cranberry bogs. During the course of that hearing, the Commission moved to continue the matters until November 17, 2021. At the November 17, 2021 hearing, PGR maintained that there was no threat of pollution from the CCA-treated timber poles, but nevertheless offered an alternative plan of replacing the timber

poles with pre-cast concrete piles that would be created offsite and brought to the cranberry bogs. PGR stated that it would use the same pile driver to remove the timber piles and to install the concrete piles and that the concrete piles would match the existing footprint of the timber piles. PGR observed that the plan would minimize the impact on the bogs and also address the concerns of the community. Commission member Alan Germain ("Germain") indicated that he was thrilled with the plan for using the concrete piles, indicating it was a "win-win-win" for everyone. A discussion then ensued about how to amend the stop work order. Germain made a motion to amend the Orders of Conditions and lift the Enforcement Order. The Commission unanimously approved the motion. The Commission then issued an Amended Enforcement Order on November 17, 2021 specifying the following:

1) Removal of the CCA treated timber poles that were installed for the solar arrays at the Tremont Street and Rochester Road properties; The timber poles will be replaced with the precast concrete poles as shown on the Replacement Plan that was part of the handout submitted on November 17, 2021.
2) Until the poles are removed from the sites, they may be temporarily stored in such a manner as to prevent any leaching of the potential contaminants into the ground/aquifer. The poles shall be securely covered and/or stored in a waterproof container or similar device to minimize exposure to weather conditions that would result in said leaching;
3) The dismantling of any hardware related to the solar array; ancillary work off the bogs and/or any work preparing the sites for the installation of the new concrete poles is permitted under this Amended EO. If additional work on the sites is required, the Conservation Commission shall be notified of said work;
4) Following the completion of the removal of the timber poles, one additional sampling round shall be conducted. The sampling shall be conducted in a similar manner as the previous sampling rounds and the samples will be analyzed for copper, chromium and arsenic. The results of the final sampling round shall be submitted to the Conservation Commission for their review. NOTE: It is estimated that the installation of the concrete poles will commence within approximately 90 days from the issuance of all Town approvals. The timber poles that are removed from the sites shall be disposed of at an approved facility or will be sold to another party for their use.

(A.R. pp. 270, 271)

After the Commission issued its Amended Enforcement Order, Jenness filed a Complaint for judicial review on January 14, 2022. Jenness resides at 52 Rochester Road in Carver,

which abuts the Rochester Road Project. Jenness's property line is reportedly 53.9 feet away from the project's closest solar array, although her residence is located about 300 feet away. Jenness also derives her drinking water from a well located on her property. Jenness contends that the Commission did not follow the correct procedure when it amended the Orders of Conditions for the projects following the November 17, 2021 hearing. Specifically, she argues that as an abutter she was entitled to receive notice of the hearing at which the Orders of Conditions would be amended, and an opportunity to be heard at that time. She also argues that the decision to amend the Order of Conditions was not supported by substantial evidence. She alleges that she has standing to bring this action because, as an abutter who relies on water from her private well, she is impacted in a way that differs from the public. She now moves for judgment on the pleadings in accordance with Mass. R. Civ. P. 12(c).

The Commission, the Town of Carver, and PGR (collectively "defendants") contend that Jenness lacks standing to file a certiorari claim as an abutter because she has not alleged any prejudice or specific harm resulting from the Commission's actions. They also contend that judicial review of an enforcement order is limited to determining whether or not the Commission's action was arbitrary or capricious, and therefore any review by the court in this case should be so limited. The defendants oppose the Motion for Judgment on the Pleadings, urge adoption of their own Cross-Motion For Judgment on the Pleadings, and move to dismiss the Complaint pursuant to Mass. R. Civ. P. 12(b)(1).

DISCUSSION

Jenness requests the court to quash the Commission's November 17, 2021 Amended Enforcement Order, reinstate the October 6, 2021 Enforcement Order, and remand the matter to the Commission to hold a new hearing to amend the existing Orders of Conditions. Jenness's requested relief is in the nature of certiorari review under G.L. c. 249, § 4. See *Lovequist v. Conservation Commission of Dennis*, 379 Mass. 7, 16 (1979) (a person aggrieved by a conservation commission's decision based on its bylaw has a remedy available in the nature of certiorari); see also *Delapa* v. *Conservation Comm'n of Falmouth*, 93 Mass. App. Ct. 733, 734 (2018); *Fafard* v. *Conservation Comm'n of Reading*, 41 Mass. App. Ct. 565, 567 (1996) ("[w]hen considering a case in the nature of certiorari, the standard of review may vary according to the nature of the action for which review is sought.")

Jenness' Motion for Judgment on the Pleadings requires the court to determine from the record whether the Commission's decision is supported by substantial evidence and whether the Commission's action was arbitrary and capricious or based on an error of law. *Delapa* v. *Conservation Comm'n of Falmouth*, 93 Mass. App. Ct. at 734. Substantial evidence must take into account whatever in the record fairly detracts from its weight, and a conservation commission's decision is not supported by substantial evidence if the record points to no appreciable probability of the conclusion or to an overwhelming probability to the contrary. *Rodgers* v. *Conservation Comm'n of Barnstable*, 67 Mass. App. Ct. 200, 205-206 (2006). A decision is arbitrary and capricious if there is no ground which reasonable persons might deem proper to support it. *Garrity* v. *Conservation Comm'n of Hingham*, 462 Mass. 779,792 (2012); *Fafard* v. *Conservation Comm'n of Reading*, 41 Mass. App. Ct. at 568 (court examines whether decision was authorized by governing law in light of the facts). In addition, a decision is

arbitrary and capricious if the commission acts for reasons that are extraneous to the prescriptions of the regulatory scheme, or devised for the occasion rather than of uniform applicability. *Fieldstone Meadows Develop. Corp.* v. *Conservation Comm'n of Andover*, 62 Mass. App. Ct. 265, 268 (2004); see also *City of Boston* v. *Conservation Commission of Quincy*, 490 Mass. 342, 346 (2022) (conservation commission's general reference to its by-law as a justification for its decision, without elaboration, is improper since it would insulate its actions from judicial scrutiny). The applicant appealing the decision bears the burden of proving that the commission acted arbitrarily. *Garrity* v. *Conservation Comm'n of Hingham*, 462 Mass. at 792.

a) Standing

The threshold issue presented in this case is whether Jenness has standing to challenge the Commission's actions. Typically, when a defendant challenges the plaintiff's claims in a motion for judgment on the pleadings, the court accepts the factual allegations in the complaint and any reasonable inferences drawn therefrom as true. *Marchese* v. *Boston Redevelop. Auth.*, 483 Mass. 149, 156 (2019). However, in filing their Motion to Dismiss under 12(b)(1), and providing the court with numerous exhibits to review, the Defendants present what is considered a "factual attack" on Jenness's Complaint for judicial review. See *Hiles v. Episcopal Diocese of Massachusetts*, 437 Mass. 505, 515-516 (2002). Such an attack differs from a 12(b)(6) motion, where the court would apply "the familiar standard of reviewing the allowance of a motion to dismiss, accepting the allegations of the complaint, and all inferences as may be drawn therefrom in the plaintiff's favor as true." *Hiles v. Episcopal Diocese of Massachusetts*, 437 Mass., at 515, citing *Schaer v. Brandeis Univ.*, 432 Mass. 474, 486 (2000). In this case, the defendants' Motion to Dismiss for lack of standing requires Jenness to actually prove jurisdictional facts. As the Hiles court noted, a "factual challenge" to jurisdiction means that the plaintiff's jurisdictional

averments in the complaint are not entitled to presumptive weight like they would be in a "facial attack." *Hiles v. Episcopal Diocese of Massachusetts*, 437 Mass. at n. 13. As a consequence, the court is required to address the merits of the jurisdictional claim by resolving the relevant factual disputes between the parties.

Jenness asserts her standing based on her status as an abutter, as well as "the specific affects on her from the changes to this project."[2] The Defendants argue in response that (1) there is no "statute, regulation, bylaw or binding judicial authority" that recognizes an abutter's right to bring a certiorari action to review a wetlands proceeding; (2) Jenness does not fall within the zone of interests allowing her to petition for review; and (3) Jenness has not shown that she will suffer injury in fact.[3] The defendants' last point is the most compelling and the court finds it dispositive. That is because a "factual" review of the record confirms that Jenness suffered no substantial injury or manifest injustice from the Amended Enforcement Order, or from the Rochester Road Project itself, and she therefore lacks standing to challenge the Commission's actions.

Certiorari review is unavailable unless the action of the tribunal of which a review is sought has resulted in "substantial injury or manifest injustice to the petitioner." *Fiske* v. *Board of Selectmen of Hopkinton,* 354 Mass. 269, 271 (1968) (citation omitted). As an abutter, Jenness may only file an action for certiorari review if she establishes injury to a protected legal interest that is different in nature or magnitude from the general public. *Friedman* v. *Conservation Comm'n of Edgartown*, 62 Mass. App. Ct. 539, 543 (2004). It is well-settled that the party asserting jurisdiction bears the burden of proving jurisdictional facts. *Miller* v. *Miller*, 448 Mass. 320, 325 (2007). Here, Jenness has shown that her property abuts the Rochester Road Project

[2] Plaintiff's Memorandum in support of Motion for Judgment on the Pleadings, p. 5.
[3] Defendants' memorandum in support of Motion to Dismiss, pp. 1-2.

and that there is a drinking well on her property which supplies water to her residence. As such, she has demonstrated a legally protected interest in the quality of her drinking water that is different from the general public. However, she has not alleged, nor is there anything in the record to show, that her legal interest would be adversely impacted either by the Project itself or the issuance of the Amended Enforcement Order. She raises issues about the safety of her drinking water, but presents no facts to support those subjective concerns. Instead, the unrebutted evidence in the record shows that the Project poses no threat to the integrity of her well, and the Amended Enforcement Order operates only to further eliminate any potential toxins, like CCA, from entering the groundwater. The evidence also confirms that historic and current manipulation of the cranberry bogs' hydrology has been significant. The area has been continuously operated as a commercial cranberry farm requiring ongoing cultivation, flooding and harvesting, and there is no evidence that the installation of a solar array with precast concrete piles will interrupt those functions or present any adverse impacts to the private or public groundwater supply. Moreover, the conclusions of the scientists and engineers involved reveal that the "directional flow" of the local aquifer makes it impossible for any pollutants which may enter the groundwater to travel upwards toward Jenness's property.

To the extent that Jenness complains that the concrete piles, like the timber ones, are larger in diameter than the steel poles originally authorized by the Commission, she likewise fails to show how that difference would affect her legally protected interest. In essence, she has presented no evidence of a substantial injury or manifest injustice. *Fiske*, 354 Mass. at 271 (denying certiorari review when allegations were speculative and the damage alleged was generalized and it did not appear from the petition how petitioners were substantially injured); *Higby/Fulton Vineyard, LLC* v. *Bd. of Health of Tisbury*, 70 Mass. App. Ct. 848, 850-851 (2007)

(certiorari review may only be available if the plaintiff makes a requisite showing of a reasonable likelihood that it has suffered injury to a protected legal right and abutters needed "to put forward evidence to show actual, substantial injury" to quality of water in their pond rather than put forward allegations that rest on speculation). In the absence of any evidence of substantial injury or manifest injustice, the Complaint must be dismissed.

b) Motions For Judgment on the Pleadings

Although Jenness lacks standing to request judicial review, the court will nevertheless consider the merits of the parties' Motions for Judgment on the Pleadings for the sake of completeness. Jenness challenges the Commission's authority to amend its existing Order of Conditions through an Enforcement Order, and calls upon the court to annul the Commission's decision. She takes no issue with the Commission's rights to order removal of the timber piles, but argues that in order to allow for installation of concrete piles, the Commission was required to hold another public hearing to consider amending its original Order of Conditions. The argument is unavailing for two reasons:

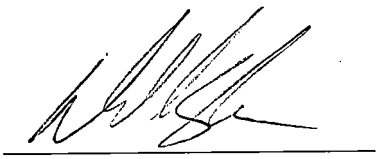
First, the original Order of Conditions, which Jenness did not appeal, contains 19 general conditions and 7 special conditions, and has language empowering the Commission to determine whether any changes to the Project would require new filings, amended filings, or none at all. The Commission's authority to make the Project applicant inquire whether any change to plans would, in its determination, be significant enough to require a new or amended NOI is reflected in the DEP's standard WPA Order form, as well as the Commission's own special conditions. (See A.R pp. 233, 240) Under the facts presented, the Commission properly utilized its discretion to decide that the environmental impacts of the changes were not significant enough to require a new or amended NOI, especially given PGR's common-sense approach to use the same

equipment to install the pre-cast concrete piles in the same holes once the timber ones were removed.

Second, during the course of the enforcement proceedings, the Commission held four hearings and retained its own expert. The Commission received analyses from multiple experts showing that there was no threat to public health or area groundwater by virtue of the timber poles. However, in response to the public comments it received, the Commission acted rationally in accepting the proposal to use pre-cast concrete as a more reasonable and unquestionably safe alternative. Jenness raises no substantive objection to the concrete piles, other than that they are somewhat larger in diameter than the originally specified steel poles. She raises only a procedural objection. Upon review of all the facts in the record, the court concludes that Jenness has not shown that the Commission acted arbitrarily, capriciously or beyond its authority. As such, the defendants' Motion for Judgment on the Pleadings must be allowed.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that Jennes's Motion for Judgment on the Pleadings be **DENIED** , that the Defendants' Cross-Motion for Judgment on the Pleadings be **ALLOWED**, and that the defendants' Motion to Dismiss be **ALLOWED**.



Daniel J. O'Shea
Justice of the Superior Court

DATED: January 11, 2023