COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH COUNTY, ss.

SUPERIOR COURT DEPT.
OF THE TRIAL COURT
C.A. NO. 2383CV00304

JOSEPHINE BEADLING and KEITH BEADLING,

Plaintiffs,

v.

ROBERT IERONIMO, MICHAEL C. HARRISON, RICHARD WARD, JOHN MASON and WILLIAM GARNETT as they are the members of the EARTH REMOVAL COMMITTEE of the TOWN of CARVER, BETTE MAKI and THE LOPES COMPANIES, LLC,

Defendants.

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION, SHORT ORDER OF NOTICE AND WAIVER OF SECURITY

INTRODUCTION

Plaintiffs Josephine Beadling and Keith Beadling ("Plaintiffs") submit this memorandum in support of their *Motion for Preliminary Injunction* pursuant to Mass. R. Civ. P 65(b) to enjoin Defendants Bette Maki ("Maki") and The Lopes Companies, LLC ("Lopes") and those acting in concert with them from continuing twelve-year commercial mining operation on Maki's land abutting Plaintiffs' home on Meadow Street in Carver ("the Site"). Defendant Lopes acting together with its affiliate(s)[1] directs and controls the excavation and trucking of the earth materials providing Maki with a share of the proceeds from Lopes' sale of the material. The mining is prohibited by the Carver Earth Removal Bylaw, Chapter 9.1 ("Bylaw")[2], the Carver Zoning Bylaw ("ZBL") and well-established Massachusetts case law holding that such operations are not protected agriculture as claimed here, but a *de facto* quarry prohibited in the Residential-Agricultural ("RA") district. *Henry v. Board of Appeals of Dunstable*, 418 Mass. 841 (1994).

Defendant Carver Earth Removal Committee ("ERC") purported to issue Defendant Maki and/or Lopes an earth removal permit in 2021 for the removal of 545,000 cubic yards for the claimed purpose of building a 10.99 acre cranberry pond and then March 29, 2023[3] issued a second permit to continue the mining even though the pond is already built and exceeds the volume of water needed for the bogs. For twelve years, the ERC has continued to ignore credible

[1]Defendant Lopes Construction Inc. specializes in the sale of "Sand & Gravel, Specialty Materials." www.glopes.com Website Accessed 5/22/2023.

[2] A copy of the Earth Removal Bylaw and relevant portions of the Zoning Bylaw are **Exhibit 1** to this Memorandum.

[3] Plaintiffs filed the Verified Complaint on April 13, 2023 for Certiorari Review of the 2023 Permit and in their First Amended Verified Complaint on May 3, 2023 ("VC") added counts for Declaratory Judgment, Negligence, Private Nuisance and Negligent Trespass.

evidence of violations and allowed the mining to continue for six years with an expired permit. Plaintiffs' expert, Professional Engineer Gary James, testifies the operation is not agriculture at all but a commercial "Construction Sand and Gravel Processing" facility to extract $8 million in sand and gravel. **Exhibit 2**, Affidavit of Gary James, P.E. ("James") ¶¶ 53, 71, 92, 93. The ERC is window dressing, fails to function, is riddled with conflicts of interest and is complicit in the scheme to portray the mining operation as "agriculture" in order to evade local land use laws. It fails to carry out its duties under the Bylaw to protect the public health, safety and welfare of residents and the environment. The ERC is under investigation by the Office of Inspector General. **Exhibit 5**, Affidavit of Margaret E. Sheehan ("Sheehan") ¶ 1.

The ERC granted permits to excavate a pond that was designed to hold three times the volume of water needed for Defendant Maki's cranberry bogs. James ¶ 61; Figures 1-2f. Now, the pond has the ability to supply even more water than it was designed for -- it "has the potential to deliver **twice the annual volume**" of water needed for the bogs. Id. ("Emphasis supplied). Yet, on March 29, 2023, the ERC granted a permit to continue the mining.

The Site now consists of an open pit mine of about 18 acres with no vegetative cover. **Exhibit 3** Affidavit of Josephine Beadling ("J.Beadling") ¶¶ 23-53. The 10.99-acre pond is still being excavated to unknown depths into the Plymouth Carver Sole Source Aquifer, the sole source of drinking water for 200,000 people including the Plaintiffs. James ¶¶ 29-33, 62. The mining is in the water protection zone for two public water supply wells serving the adjacent Meadow Woods Mobile Home Park. Id. State drinking water laws prohibit "the removal of soil, loam, sand gravel or any other mineral substances within four feet of the historical high groundwater table elevation" in order to protect drinking water from contamination. Id. at ¶ 31. Trees, vegetation and sand and gravel provide a critical natural filtration and protection function

for the Aquifer. The mining is permanently removing the protection for the drinking water Aquifer and exposing it to increased nitrogen pollution, algae blooms and cyanobacteria that harms human and environmental health. Id. at ¶¶ 62.

The Plaintiffs are suffering irreparable harm from the mining operation. Wind regularly carries carcinogenic silica dust from the Site onto Plaintiffs' property and surrounding areas. James ¶¶ 84-91; J. Beadling Aff .¶¶ 14-20; **Exhibit 4**, Affidavit of Keith Beadling ("K. Beadling") ¶¶ 6,10-13. The mining operation causes Plaintiffs to experience ground-shaking vibrations, concussive noise, and excessive truck traffic from the operations and unreasonably interferes with Plaintiffs' right to the use and enjoy their home. J. Beadling ¶¶ 17, 19-20; K. Beadling ¶¶ 6-7.

The Plaintiffs' evidence submitted here with Plaintiffs shows they are entitled to an injunction. Court must step in and exercise its injunctive powers to prevent irreparable harm to the Plaintiffs and to protect drinking water.

APPLICABLE LAW AND RELEVANT FACTS

Carver Zoning and General Bylaws Prohibiting Stand Alone Mining Operations in the RA District

The ZBL and the Earth Removal Bylaw prohibit Commercial Mining in an RA district unless the landowner establishes that the removal qualifies for an earth removal permit under one of the categories established by the Bylaw. Here, the relevant category is "Agricultural Excavation" defined as,

> The process of removing earth or other materials that is **necessary and incidental to prepare a site for specific agricultural use.** Bylaw, Section 9.1.2. Agricultural excavation may include the creation of wetland resource areas such as ponds, canals, cranberry bogs, and land subject to flooding as defined under the M.G.L. Ch. 131, § 40

and as defined in Massachusetts Wetlands regulations 310 CMR 10.00. (Emphasis supplied)

Bylaw, 9.1.2; James ¶s 16-19. The ERC may grant an earth removal permit only if it finds the eventual land use, after the mining, is the "correct land use" for the zoning district and that in the meantime, the mining does not constitute the primary use of the land – in which case it would be an unlawful commercial use of RA land. Bylaw, Section 9.1.7. [4] Defendants Maki and Lopes claim removing of 545,000 cubic yards qualifies for a permit for "Agricultural Excavation" that is "necessary and incidental" to prepare the land for use as a cranberry bog pond.

Case Law on Mining Operations Claiming to be "Agriculture"

Longstanding Massachusetts case law precedent holds that when a mining operation is of such a scope, scale and duration that it is not an "incidental" land use to prepare the land for a future use but is the primary use of the land constituting a *de facto* quarry. Unless allowed by the underlying zoning it is prohibited. In *Henry,* supra, the landowner proposed to "prepare" for an allowed agricultural use, a "cut your own" Christmas tree farm, by removing 100,000 cubic yards per year for three to four years, selling the earth at market rate and sharing profits with the landowner. The Supreme Judicial Court found this was not an "incidental" use but a primary use of the land for a quarrying operation. See also, *Old Colony Council-Boy Scouts of Am. v. Zoning Bd. of Appeals of Plymouth*, 31 Mass. App. Ct. 46 (1991) (where landowner proposed to first excavate 460,000 cubic yards of gravel over two and one half years before converting the land to an allowed agricultural use (a cranberry bog) it was a *de facto* quarry, not cranberry agriculture. See also *Ward v. Rand*, 2017 WL 2951639 (Mass. Land Court 2017) (Piper, J.) (emphasis added)

[4] The Bylaw prohibits earth removal without a permit: "Except as otherwise provided by this By-law (see Section 9.1.8) no earth shall be removed from any lot in the Town of Carver without the issuance of a permit from the E.R.C." Section 9.1.4.

(where landowner imported, dumped and graded over 100,000 yards of soil and earth material allegedly to prepare land for raising livestock, court "[could] not conclude that there [wa]s an adequate, acceptable, reasonable relationship between [the two activities], and [found] that those activities [we]re not reasonably related to each other"); *Coggins v. Westfield*, 17 LCR 592 (Land Court 2009) (Sands, J.) (owners of allowed horse farm use sought to remove 145,000 cubic yards of material over the course of two seasons, such removal was not allowed by right because "the excavation's only relation to the horse farm [wa]s to prepare an otherwise unacceptable site for agricultural use"). Where a land use is not "incidental" it is the primary use and must be one allowed in the applicable zoning district.

Earth Removal Bylaw and 2011 and 2023 Permits

To shoehorn the mining operation into the Carver ZBL and Bylaw, in 2010 Defendant Maki applied for and obtained an earth removal permit from the ERC by portraying the proposed mining operation as "necessary and incidental" "Agricultural Excavation". ("2011 Permit"). Maki claimed because the 66-acre Site has twelve acres of cranberry bogs it is in "agricultural use" and eligible for an earth removal permit to create a 10.99 acre pond for water to irrigate the bogs. Defendant Maki submitted a permit application to the ERC with a "DRAFT Plan of Proposed Reservoir Carver Massachusetts". Defendant Maki submitted the application under the name of a defunct cranberry company "Alex Johnson Co." Sheehan ¶¶ 3-5. The permit application showed the reservoir sited at the height of land – the "high point of elevation 102', compared to the grade of the area around the existing bog at 80'." James ¶¶ 41. The permit application claimed it was necessary to level the hill by 22 feet and excavate into the Aquifer 20 feet deep for the cranberry pond. The "Proposed Reservoir" was designed to fill with water from the groundwater below and to hold a volume of 220 acre-feet of water (220-acres covered by one

foot of water). Id. at ¶ 46. As such, the reservoir was designed to **hold three times the volume needed for the 12 acres of bogs**, according to MassDEP in a 2022 ruling. James ¶¶ 38-39, 61.

At the February 9 and 23, 2011 public hearings on Maki's earth removal permit Maki claimed the proposed reservoir would become, at some unspecified future time, the "principal supply for their bogs and will take pressure off the Weweantic River" James ¶ 45. Maki promised the ERC and the public that sometime in the future they would stop using water withdrawals from the River for the bogs and would replace the irrigation with water from the proposed reservoir, portraying the mining operation as providing a public environmental benefit. Today, Defendants have built the reservoir but there is no evidence they are using the pond for the bogs but rather, evidence shows Maki is still withdrawing water from the River. They continue to mine in the drinking water aquifer and to sell the sand and gravel. James ¶¶ 52-55; J. Beadling ¶ 9. Today, the reservoir **in one day** "has the potential to deliver **twice the annual volume**" needed for Maki's twelve acres of bogs. James ¶¶ 61, 93.

Even though the reservoir is completed and overbuilt, in November 2022, Defendants Bette Maki and Lopes used the same 2010 draft Gilmore Plan for the proposed reservoir under the name of same defunct cranberry company, Alex Johnson Co., to apply for and obtain the second earth removal permit to continue to mine indefinitely and extract an additional 99, 160 cubic yards. James ¶ 74-81, 92-94; J. Beadling ¶¶ 6, 7. The 2023 permit allows Defendants Maki and Lopes to increase the intensity of the operation by going from 27 to 50 truck trips daily.[5]

Impacts of the Mining Operation

Impacts to Plaintiffs

[5] Defendant Lopes' Attorney John Zajac and site supervisor Danny Noons (Nunes) an employee of G. Lopes Construction that excavates and trucks the sand and gravel at the Site, appeared at the hearing and provided information to the ERC. Sheehan¶ 6; J. Beadling ¶¶ 59-62.

Plaintiffs have lived at 277 Meadow Street abutting the Site since January 2004. K. Beadling ¶ 2; J. Beadling ¶ 2. Meadow Street is a "quiet residential street that is narrow and has no sidewalks." J. Beadling ¶ 7. Their home is 52 feet from Meadow Street, the route used by the tractor trailer trucks and heavy equipment servicing the Site. Id. About 330 feet of Plaintiffs' property abuts the Site and it directly abuts the entrance. Id.

The mining has denuded 18 acres of the Site creating an open pit mine with no vegetative cover. James ¶¶ 63, 84; J. Beadling ¶¶ 8, 9. "The Site has been exposed for over twelve years without any vegetative cover. This means the Site is exposed to both wind and runoff erosion which can transport sand from the Site to surrounding areas." James ¶ 86. "There are regular ongoing emissions of dust and sand that come from the Maki Site and land on my property" testifies Plaintiff Keith Beadling. Sand from the Site covers Plaintiffs' skin and body when they are outside. Plaintiffs testifies they "can feel sand on my lips". K. Beadling ¶11; J. Beadling ¶17. The sand is carcinogenic silica sand. James ¶¶ 87-89. Sand fills up the gutters on Plaintiffs' home requiring them to clean the gutters several times yearly. J. Beadling ¶ 18. According to Plaintiff Keith Beadling, "I routinely get my vehicles washed to limit the damage…[but].. there are days the sand migrating on to my property is so bad that it can take approximately ½ an hour from the time I wash them to when they are covered in sand again." Id. at 13. Plaintiff Josephine Beadling's Affidavit includes Exhibits 1 and 2, photographs she took between March 2022 and on April 7, 2023 after the 2023 Permit was issued, showing her car and property covered with sand - the "typical conditions I have experienced for years."

Since 2011, Plaintiffs have continuously observed the truck and equipment traffic entering and exiting the Site. J. Beadling ¶ 11. They see the vehicles from their kitchen and living room windows at the front of their house. K. Beadling ¶ 7; J. Beadling ¶ 10. They testify

that most of the trucks are labeled "G. Lopes Const. Inc., Taunton, Mass." Id. at ¶ 8. The mining operations create incessant and concussive noise from truck traffic, crushing of rock and stone, sand and gravel processing and sorting and the operation of a dewatering pump in the pond. J. Beadling ¶¶ 19-21. When trucks are passing by and/or the mining operation is happening at the Site, Plaintiffs feel the earth vibrating below their feet. K. Beadling ¶12; J. Beadling ¶ 20. Their home shakes and their home foundation has developed cracks. K. Beadling ¶12; J. Beadling ¶ 20.

The 2011 and 2023 Permits set limits on the hours of operation. James ¶ 79 and Exhibit 8 thereto. For years and as recently as May, 2023, Plaintiffs have observed violations of the hours of operation. K, Beadling Aff. ¶ 24; J. Beadling ¶¶ 45-49 and Exhibits 4 and 5 thereto. The Plaintiffs have reported the violations to Defendant Lopes and the affiliate G. Lopes Construction, the ERC, the Carver Police, Carver Selectboard and Carver Town Administrator but the violations continue. K. Beadling ¶¶ 24 -26; J. Beading Aff. ¶¶ 25-38. Recently, Plaintiffs have been subject to retaliation apparently by Defendants Lopes and/or Maki or persons acting on their behalf for seeking to protect their rights from the impacts of Defendants' mining. K. Beadling ¶¶ 27-28.

The commercial mining operation prevents Plaintiffs from using and enjoying their property and the quiet residential character of their neighborhood. K. Beadling ¶7; J. Beadling ¶¶ 13-22. They cannot enjoy being outside in their yard or inside their home due to Defendant Maki and Lopes' excessive and concussive noise, vibration and truck traffic. Id.

Impacts to drinking water

The Site overlays the Plymouth Carver Sole Source Aquifer designated by the United States Environmental Protection Agency ("EPA") in 1990 under the federal Safe Drinking Water Act. James¶29-31. EPA's designation recognizes that the seven towns in the Aquifer are solely

dependent upon it for drinking water. James ¶ 32. The designation documents the sensitivity of the aquifer system to contamination by land uses. The Aquifer is highly vulnerable to contamination due to the high permeability of the native soils (surficial geologic deposits.) Id. ¶ 31. The entire Town of Carver, including the Site, is a Water Resource Protection District. Id. ¶ 32. Sand and gravel filters and protects the drinking water in the underground Aquifer. Plaintiffs' well, other private residences in the neighborhood, and two public water supply wells are adjacent to the Site. James ¶33; J. Beadling ¶¶ 54-58. The two public water systems supply Meadow Woods Mobile Home Park and the mining is within the Interim Wellhead Protection of these systems. James ¶ 34.

The Site is bordered by the Weweantic River to the west. Bates Pond lies about 800 feet to the east. The River and Bates Pond, a Natural Heritage and Endangered Species Program area, is located 800 feet to the east of the mining operation. James ¶ 28.

Preliminary Injunction Standard

> The standard for a preliminary injunction requires the Court to consider:
>
> whether the plaintiff has demonstrated that without the relief he would suffer irreparable harm, not capable of remediation by a final judgment in law or equity. The plaintiff also must show that there is a likelihood that he would prevail on the merits of the case at trial. The judge then must balance these two factors against the showing of irreparable harm which would ensue from the issuance, or the denial, of an injunction and the "chance of success on the merits" presented by the defendant. An injunction may issue properly only if the judge concludes that the risk of irreparable harm to a plaintiff, in light of his chances of success on his claim, outweigh the defendant's probable harm and likelihood of prevailing on the merits of the case.

Commonwealth v. Mass. Crinc, 392 Mass. 79, 87 (Mass. 1984*); Doe v. Worcester Pub. Sch., 484 Mass. 598* (Mass. 2020)

ARGUMENT

I. PLAINTIFFS SHOW A LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR UNDERLYING CLAIMS FOR CERTORARI REVIEW, DECLARATORY JUDGMENT, NEGLIGENCE, PRIVATE NUISANCE, AND NEGLIGENT TRESSPASS (VC COUNTS 1-V)

Plaintiffs' evidence establishes that they are likely to succeed on the merits of the underlying Count I seeking Certiorari Review of the 2023 Permit. With a likelihood of success on Count I, which will nullify the 2023 Permit, Plaintiffs meet the prong of the test for injunctive relief requiring them to show a likelihood of success on the merits: without the 2023 Permit Defendants Maki and Lopes cannot continue mining. Below Plaintiffs also show they are likely to succeed on Counts II-V for Declaratory Judgment, Negligence, Private Nuisance and Negligent Trespass.

A. Plaintiffs show a likelihood of success on the merits of the claim for Certiorari review to nullify the 2023 earth removal permit (Count I).

Plaintiffs show a likelihood of success on the merits of Count I for Certiorari Review to nullify the 2023 Permit with evidence of the following errors of law and process: (1) fundamental failures of due process and errors of law in the permit application; (2) failure of the 2023 Permit to meet the standard for "Agricultural Excavation"; and (3) even if the permit could be issued, it fails include mandatory permit conditions. VC ¶¶ 100-103.

A cause of action "in the nature of certiorari [is] to correct claimed errors of law *apparent on the record* made in proceedings…not otherwise reviewable….The relief sought in an action in the nature of certiorari is 'to correct substantial errors of law apparent on the record adversely affecting material rights [of the parties]." *Durbin v. Board of Selectmen of Kingston*, 62 Mass. App. Ct. 1, 4 (2004)(citations omitted). Certiorari review under G.L. c. 249, § 4 is the appeal avenue for earth removal permits issued by the Carver ERC. *Cyndy Beard et al v. SLT Construction Corporation,* 2022CV0032 (2022), **Exhibit 6** to this Memorandum**.**

First, the James Affidavit establishes errors of law apparent in the record due to the ERC's treatment of the application as an agricultural project. The ERC's failure to require a complete permit application that meets sound engineering practices was also a clear error. James. ¶¶ 76, 94.

Second, the James Affidavit shows that the ERC failed to find, nor could it find, that the mining is "necessary and incidental" "Agricultural Excavation" within the meaning of the Bylaw. James ¶ 61. James, a Professional Engineer, Massachusetts Certified Soil Evaluator and Certified System Inspector, with over 45 years' experience in site design, hydrology residential and commercial developments and other aspects of project permitting and construction, James ¶ 61, states,

> "It is my opinion that the excavation of 545,500 from the Site for construction of the Proposed Reservoir was not necessary to maintain and operate the approximately 12 acres of cranberry bogs on the Site. I base this on the following:
>
> - Based upon the depth of the Proposed Reservoir below the groundwater elevation and area of the Proposed Reservoir, as depicted on the "Gilmore Plan", as well as the permeability of the soils on Site, the water supply capabilities of the Proposed Reservoir far exceeds the storage capacity provided by the soil removal alone. NRCS WSS Soil Maps show the type of soil on Site to be classified primarily as a Carver Loamy Sand A, with a permeability of approximately eight inches an hour (Rawls Rate from Massachusetts Stormwater Handbook). Based upon the permeability of the soils on Site, the Proposed Reservoir has the potential to sustain a withdrawal rate of 170+ acre feet per day with a one-day recovery rate. Thus, in one day the Reservoir has the potential to deliver twice the annual volume of needed 72-acre feet to sustain the 12 acres of bogs on the Site as determined by DEP standards under the WMA.
>
> - The Proposed Reservoir shown on the Gilmore Plans was designed to hold three times the annual volume and with the soil conditions can supply the volume of more than two times that in just one day.

- MassDEP concluded that the water requirement to maintain and operate the adjacent cranberry bogs did not justify the reservoir size, which they indicated in the July 20, 2022 was three times larger than needed. This explanation is provided under **Paragraph 38** above. MassDEP SDA also confirmed that the construction of this Reservoir does not meet the criteria of "Agriculture" under 310 CMR 10.04.

During the hearings on the 2023 Permit, the ERC was presented with the information that MassDEP ruled the reservoir was three times the size needed for twelve acres of the bogs and that the construction of the reservoir is not "Agriculture". The ERC disregarded that information. ("ERC chairman Robert Ieronimo indicated that the MassDEP agriculture requirement of 10-acre feet of water per acre is only a minimum and that there was no reason for the applicant nor the ERC not to consider additional volume."). James ¶ 77.

There is no evidence from the ERC hearing that Defendant Maki is using the reservoir as promised to replace the water withdrawals from the Weweantic River. Maki renewed a state Water Management Act registration so that she could continue to withdraw water from the River for an additional 10 years, through December 31, 2031. James ¶¶ 21, 47.

Like the landowners in *Ward, Henry, Old Colony* and *Coggins*, Maki is simply "attempt[ing] to shoehorn in an impermissible use, by tying it to an eventual use that would be permitted …." *Ward*, supra. VC ¶¶ 102(d)-(f). Based on the duration alone, Defendants continuous twelve-year mining operation does not meet the "necessary and incidental standard of *Henry*. Here, the volume of earth being removed – 545,000 cubic yards, and the profits generated far exceed the criteria for a "necessary and incidental" earth removal operation. In *Boy Scouts*, the Appeals Court ruled that the excavation of 460,000 cubic yards over two and a half years that would "provide substantial funds in excess of the cost of constructing the proposed cranberry bog" was not incidental. Here, Defendant Maki will generate about $8 million in revenue from the mining operation. Defendant Lopes is in the business of excavating aggregate materials for

commercial sale, a business that has nothing to do with growing cranberries. Its involvement in the project is another factor that reveals the true purpose of the 2023 Permit and the operation itself is to operate a commercial construction sand and gravel processing facility.

Like in *Henry*, "The magnitude [of Defendants'] mining operation, if permitted, would be a de facto quarry operation carried out in violation of the[] zoning [by-law]." *Henry* at 847. To find that the Carver ZBL and the Earth Removal Bylaw allow a commercial mining operation of this scale, duration and scope to be conducted in the RA district renders the Town's land use zoning scheme meaningless. "[T]o hold otherwise would be to allow the statutory exemption [for agricultural uses] to be manipulated and twisted into a protection for virtually any use of the land as long as some agricultural activity was maintained on the property. The [town's] zoning power would thus be rendered meaningless. The Legislature cannot have intended such a result when it created a protected status for agricultural purposes." *Harvard*, supra.

Third, Plaintiffs show a likelihood of success on Count I because Defendants Maki and Lopes' 2023 Application was incomplete, lacked information required by the Bylaw for an application and the 2023 Permit fails to contain mandatory terms and conditions. VC ¶¶ 102(g); James ¶¶ 55, 78, 94 ("It is my expert opinion that the DRAFT 2010 Gilmore Plan did not generally conform to the principles of good engineering and sound planning for a project of this type, duration and magnitude.").

An earth removal permit must require the permittee to post a bond or performance guarantees, to pay for monitoring fees, and review by a registered professional engineer, submittal of annual reports. Bylaw, Section 9.1.7a, b, d and e. The ERC has never required these in the 2011 or 2023 permits. Sheehan ¶ 7. Defendant ERC's blatant disregard for its mandatory duties to administer and enforce the Bylaw is also demonstrated by the fact that it allowed

Defendants Maki and Lopes to continue the mining for over twelve years, even though the 2011 permit expired. Under the Bylaw, the 2011 Permit was limited to one year, except on a finding that the work complied with the Bylaw. Bylaw Section 9.1.7h. The ERC never made this finding. Sheehan ¶7. The Bylaw prohibits any permit from extending beyond 5 years without a "full public hearing". Id. None was ever held. Sheehan ¶ 7. The 2011 Permit expired in 2016. James ¶ 72. Defendants Maki and Lopes kept mining with the ERC's knowledge and sanction. The ERC has ignored Plaintiffs detailed and specific complaints and evidence of violations including of a September 2022 temporary cease and desist. James ¶¶ 72-73; J. Beadling ¶¶ 45-49.

Plaintiffs clearly have standing to bring a certiorari claim because they "make [] a requisite showing of a reasonable likelihood that [they have] suffered legal injury to a protected legal right." *Higby/Fulton Vineyard LLC v. Board of Health of Tisbury*, 70 Mass. App. Ct. 848, 850 (2007). The purpose of the Bylaw is "clearly intended to protect citizens of Carver, such as the plaintiffs, from detrimental effects of earth removal operations." *Cynthia Beard,* supra at 4. Plaintiffs' affidavits and exhibits show they are suffering concrete, specific harm from Defendant Maki and Lopes' Commercial Mining and the ERC's issuance of the 2023 Permit. The substantial errors of law and process that are apparent on the record adversely affect material rights of the Plaintiffs and are sufficient to establish standing. *Durbin v. Board of Selectmen of Kingston*, 62 Mass. App. Ct. 1, 4 (2004).

B. Plaintiffs show a likelihood of success on the merits of the claim for declaratory judgment (Count II)

Plaintiffs show a likelihood of success on the merits of Count II, the claim for declaratory judgment under G.L. c. 231A that Defendants Maki and Lopes have no right to continue earth removal at the Site, that the 2023 Permit is void and of no effect, that a judgment should enter as

to the volume of earth removed and that the ERC is defunct and fails to perform its duties. Sheehan Aff. ¶¶ 1-2; J. Beadling; VC ¶¶ 105-108. Defendants Lopes and Maki provide no explanation of how they have calculated the volume of Earth removed from the Site. James ¶ 80 Plaintiffs meet the threshold requirements for a declaratory judgment because there is an actual controversy between the parties as to the Defendants' right to the 2023 permit and there can be no dispute that Plaintiffs have standing to seek declaratory judgment. *Alliance, AFSCME/SEIU, AFL-CIO v. Commonwealth*, 425 Mass. 534 (Mass. 1997).

C. Plaintiffs show a likelihood of success on the merits of the claim for negligence against Defendants Maki and Lopes (Count III)

Plaintiffs show a likelihood of success on the merits of the Count III, a claim for negligence for breach of the duty of care owed by Defendants Maki and Lopes to Plaintiffs to prevent emissions of dust, sediment, particulates, noise, and vibrations. VC ¶¶ 109-113. "This liability stems from the general rule that every person has a duty to exercise reasonable care for the safety of others*." Lyon v. Morphew*, 424 Mass. 828, 832 (Mass. 1997)(citation omitted). Defendants Maki and Lopes have maintained an open pit mine for over twelve years allowing sand and runoff erosion to transport dust from the site into surrounding areas. James ¶ 86. They have failed to use reasonable measures to control the dust emissions. James ¶¶ 87-91. They have operated beyond the hours of operation of the permits and exceeded the number of truck trips. Plaintiffs show a likelihood of success on the merits of their claim for negligence.

D. Plaintiffs show a likelihood of success on the merits of a claim for private nuisance against Defendants Maki and Lopes (Count IV)

Plaintiffs show a likelihood of success on the merits of the Count IV against Defendants Maki and Lopes for private for private nuisance because they have improperly caused and allowed emissions of dust, sediment, particulates, noise, and vibrations that unreasonably

interfere with Plaintiffs' use and enjoyment of their property. *Francisco Cranberries LLC v. Gibney (1999 Mass.App.Div*. 223 (Mass. Dist. Ct. App. 1999); VC ¶¶ 114-116; James ¶¶ 87-91. A private nuisance is actionable when *a property owner* creates, permits, or maintains a condition or activity on his property that causes a substantial and unreasonable interference with the use and enjoyment of the *property of another."* (emphasis supplied). *Asiala* v. *Fitchburg* 24 Mass. App. Ct. 13, 17 (1987). (citations omitted). Plaintiffs' evidence establishes a likelihood of success on the merits of a claim for private nuisance because Defendants' Maki and Lopes have permitted and maintained a condition and activity on their property that has caused and continues to cause a substantial and unreasonable interference with Plaintiffs' use and enjoyment of their property.

E. Plaintiffs show a likelihood of success on the merits of a claim for negligent trespass (Count V)

For the reasons stated in Sections II(B)-(D) above, Plaintiffs show a likelihood of success on the merits of the Count V, a claim against Defendants Maki and Lopes for negligent trespass by improperly causing and continuously allowing emissions of dust, sediment, particulates, noise, and vibrations that improperly and unreasonably interfere with Plaintiffs' use and enjoyment of their property. VC ¶¶ 117-120.

II. IRREPARABLE HARM TO PLAINTIFFS AND THE PUBLIC INTEREST IN PROTECTING DRINKING WATER OUTWEIGHS THE POTENTIAL HARM TO DEFENDANTS

Plaintiffs' Affidavits and Exhibits submitted herewith show irreparable harm that has been occurring, is continuing and will continue unless an injunction is granted. This harm outweighs any potential harm to Defendants which is speculative and remote at best: Defendants Maki and Lopes have no right to continue the unlawful mining operation in the RA zoning district and therefore no legal rights that can be protected.

A. Irreparable harm to Plaintiffs

Without an injunction to stop Defendants' mining activity, Plaintiffs will suffer irreparable harm, not capable of remediation by a final judgment in law or equity. *CRINC*, supra. Plaintiffs will suffer a continuation of the harm they detail in their affidavits and photographs and as described by Plaintiffs' expert Gary James, P.E. The mining operation is impacting groundwater quality, flow direction and recharge rates and increasing levels of nitrogen that causes negative environmental and health effects. James ¶62 This impacts Plaintiffs' drinking water well and the two public water supply wells for Meadow Woods Mobile Home Park. James ¶33. The groundwater at the Site flows toward the Meadow Woods Mobile Home Park wells and private wells in the neighborhood. James ¶¶ 63, 64.Since the mining began, Plaintiffs have experienced brown silt in their water and problems with their water pressure. J. Beadling ¶ 54-58. Plaintiffs' well has already tested positive for PFAS, the "forever" family of toxic chemicals. Id. at ¶ 56. The mining will exacerbate this irreparable harm.

In considering a motion for preliminary injunction, when a statutory violation is alleged, the court should consider how such violations affect the public interest, keeping in mind the express purposes of the violated statute. *LeClair v. Town of Norwell*, 430 Mass. 328, 332, 227 (1999). The mining operations violate the Carver ZBL and Bylaw the purposes of which are to protect residents of Carver. Defendants are mining in the drinking water aquifer in violation of the MassDEP's Wellhead Protection Guidance, in the Sole Source Aquifer and in the well protection district of two public water supplies. James ¶ 31. The public has a legitimate interest in protecting drinking water from the detrimental effects of Defendant Maki and Lopes' earth removal. The Defendants' clearcutting and mining has eliminated the ability of the naturally forested lands to assimilate nitrogen pollution. Id. ¶ 82. Adding more nitrogen to the water

supply "increases public and environmental health risks." Id. "The removal of forested areas on the Site including at the location of the Proposed Reservoir and the excavation of sand and gravel has eliminated all potential nitrogen assimilation by eliminating all the soil and natural vegetation above the aquifer. The Reservoir directly exposes 20'of depth of the Sole Source Aquifer across an area of about 10 acres and significantly increases the vulnerability of groundwater resources to a variety of contamination sources including the nitrate-nitrogen noted above." Id. ¶ 84. Nitrogen loading in drinking water is linked to various public health issues including "the increase prevalence of regulated drinking water contaminants including Volatile Organic Compounds (VOCs)…that can lead to the development of methemoglobinemia in infants…" and cause "cultural eutrophication and algae blooms [that]pose risks to both environmental and human health." Id. at ¶ 62.

Plaintiffs' harm is irreparable: they show they will "suffer a loss of rights that cannot be vindicated should it prevail after a full hearing on the merits." *Planned Parenthood League of Mass. v. Operation Rescue*, 406 Mass. 701, 710 (Mass. 1990). Plaintiffs cannot regain the loss of their right to peaceful enjoyment of their property such as years of not being able to open their windows, enjoy their back yard or be free from exposure to carcinogenic silica sand. The harm to the drinking water aquifer and water quality cannot be reversed: the sand and gravel cannot be put back to perform its function to protect the drinking water.

III. DEFENDANTS HAVE NO LEGAL RIGHT TO CONTINUE THE UNLAWFUL OPERATION AND CAN SUFFER NO HARM

The risk of irreparable harm to a Plaintiffs, in light of their chances of success, far outweighs any possible harm to Defendants and their likelihood of their prevailing on the merits. *CRINC,* supra. Plaintiffs' Affidavit of Gary James, P.E. and the case law establish beyond doubt that the 2023 Permit was unlawfully issued and that the mining operation for a cranberry pond

was a blatant ruse in the first instance. Today, the pond is vastly overbuilt and far exceeds the necessary capacity. The mining is not now and never was a legitimate agricultural project, as confirmed by MassDEP and Plaintiffs' expert. James ¶¶ 39. The project is a stand-alone "Construction Sand and Gravel Processing" operation for the purposes of generating at least $8 million in revenues. Id. ¶¶ 53-55, 71. The Carver ZBL and Earth Removal Bylaw prohibit this activity. Part I, above.

Maki has no legal right to continue mining. Any harm to Maki from an injunction would be a fiction: the alleged purpose for which the 2023 Permit was issued -- construction of a reservoir – has been accomplished. As a contractor for the landowner, Maki, Lopes has no legal right to conduct a standalone commercial mining operation in an RA district.

When the irreparable harm to Plaintiffs is weighed against the complete absence of harm to Defendants and their inability to succeed on the merits it is clear the injunction should issue.

CONCLUSION

For these reasons, the Court should grant the Plaintiffs' Motion for a Preliminary Injunction. Plaintiffs respectfully request that the Court waive security because the injunction also serves the public interest.

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