COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss. SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. 2383CV00259

PAMELA MAGNARELLI, JOHN MAGNARELLI, JUDITH BERNIER, PAUL BERNIER, SUSAN CINA, and ROBERT CINA

V.

MICHAEL MAIN, DAVID PECK, EDWARD CONROY, MICHAEL LEARY, KEVIN O'REILLY, PETER CONNER and PHILIP RICARDI, as they are members of the Zoning Board of Appeals of the Town of Plymouth, Massachusetts, and CLAREMONT PLYMOUTH LLC

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' JOINT MOTION TO REQUIRE POSTING OF BOND PURSUANT TO G.L. c. 40A, § 17

Plaintiffs respectfully request that the Court deny *Defendants' Joint Motion to Require Posting of Bond Pursuant to G.L. c. 40A, § 17* ("Def. Motion"). Defendants do not and cannot meet the exceptionally high standards to require that a bond or surety be posted by Plaintiffs John Magnarelli, Pamela Magnarelli, Robert Cina and Susan Cina ("Plaintiffs"), four elderly residents of Plymouth, to cover potential costs incurred by the Defendant Claremont Plymouth, LLC ("Claremont"), an international commercial and residential property developer, in defending this zoning appeal. This lawsuit is an appeal of the March 9, 2023 Amended Decision ("Amended Decision") of the Plymouth Zoning Board of Appeals ("ZBA") granting a Special Permit to Claremont for construction of a dense, inappropriately sited market rate apartment complex ("the Project") that violates the Plymouth Zoning By-Law in numerous ways. The Project is not affordable housing, but market rate apartments.

In addition to the substantive zoning violations, the Special Permit is conditioned on an illegally negotiated "Development Agreement" between Claremont and the Town. Complaint, ¶ Condition, 8(i). On August 4, 2023, the Attorney General's Office ruled that the ZBA (and the Selectboard) violated the Open Meeting Law ("OML") by negotiating the agreement in an illegal executive session. Exhibit 1 hereto, OML 2023-128.[1] The Agreement is thus subject to nullification under the OML. The Special Permit collapses without the Development Agreement. Complaint ¶s 93-96. Further, as shown below, the Amended Decision is invalid on its face because the ZBA failed to make specific findings required by the Zoning Act and the Bylaw. *Warren v. Zoning Board of Appeals of Amherst*, 383 Mass. 1, 10 (1981) (A board's decision is "invalid on its face" if its findings are no more than a bare recital of the statutory conditions.")

[1] https://massago.hylandcloud.com/203NGPublicAccess2/OML.html

Defendants do not and cannot meet the standard of G.L. c. 40A, § 17 to show that the appeal "so devoid of merit that it may be reasonably inferred to have been brought in bad faith." Instead, it is the ZBA's Amended Decision that is devoid of merit. Defendants Claremont and the ZBA have failed to show harm to Claremont or the Town resulting from alleged delays of this litigation. Claremont only cites attorney's fees to support its claim of harm. Affidavit of Valerie Moore, ¶ 14. Attorney's fees are not recoverable under G.L. c. 40A, § 17. Alternatively, Defendants may show harm to the public interest. They have not done this, either. The purported harm to the public interest they claim is to the "badly needed elderly housing" in Plymouth. This is a fiction: there is no available evidence of a need for elderly housing in Plymouth. Plymouth currently has a glut of approximately 1,847 residential units available to elderly persons and others. Affidavit of Pamela Magnarelli ("P. Magnarelli Aff.") ¶s 16-19. The true need for housing in Plymouth is for the children and adults under 65 with the highest levels of poverty in Plymouth.[2] The Claremont Project is not affordable housing. Thus, Plymouth's most needy residents, children and adults under 65, are excluded from Claremont's residences both by age and by financial means.

Absent any showing of harm to Defendants, the Court need not conduct the balancing test under G.L. c. 40A, § 17 to determine whether any harm to the Defendants outweighs the financial burden on the four individual Plaintiffs. Even if Defendants did show harm, the harm does not outweigh the financial burden of the surety or bond on Plaintiffs, as shown below and

---

[2] *See* Housing Production Plan (Jan. 2019) https://www.plymouth- ma.gov/DocumentCenter/View/1440/2019-Housing-Production-Plan-PDF ("Housing Production Plan")

by Plaintiffs affidavits. Plaintiffs show that they will succeed on the merits of the case, that they have standing and that the financial burden on them outweighs any potential harm to Defendants.

Finally, Defendants' motion also should be denied because they failed to comply with Superior Court Rule 9C.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs appeal the March 9, 2023 Amended Decision of the ZBA to grant a Special Permit under G.L. c. 40A, § 9 to Claremont for phase 1 of a residential housing development of a minimum of a 348 units on 16.39 acres ("the Project Site"). P. Magnarelli Aff. ¶s 10-13. The Complaint alleges the ZBA improperly granted the Special Permit because (1) the Project is a prohibited residential use in the Mixed Commerce (MC) district; (2) the ZBA failed to make findings for a height variance (Bylaw § 205-5); (3) the ZBA's finding that the Project is entitled to a height waiver under the Dimensional Table are arbitrary and capricious; (4) the Special Permit hinges on an unlawful Development Agreement; (5) the Project violates the Floor to Area Ration (FAR) under the Bylaw Dimensional Table; (6) the Special Permit failed to grant waivers for Natural Features and failed to require compliance with Bylaw § 203-3; (7) the Project violates the Aquifer Protection District; (8) the Project has improper stormwater controls, and (9) the Special Permit unlawfully delegates the ZBA's duties to town staff. The Complaint seeks to annul the Amended Decision.

On August 4, 2023, the Attorney General ruled that the ZBA violated the OML when it met in an improper executive session with the Selectboard to negotiate the terms and conditions of the ZBA's proposed decision to grant Claremont a special permit under the By-law. Agreement. The Attorney General found that the ZBA and the Board conducted "negotiations

[regarding its discussions] with Claremont relating to its proposed development project and affordable housing requirements, as well as issues concerning the Town's water supply." The AG ruled that "in light of the number and breadth of the Open Meeting Law violations found here" the ZBA and Board were required to attend OML training and provide certification that they had done so. OML Decision p. 8. The Development Agreement is subject to nullification under the OML because it was made in an illegal executive session.

All Plaintiffs are direct abutters to the Project Site. P. Magnarelli Aff. ¶ 20; Affidavit of John Maganrelli ("J. Magnarelli Aff.") ¶ 7, Affidavit of Robert Cina ("R. Cina Aff.") ¶ 6; and Susan Cina ("S.Cina Aff.") ¶ 6. The Plaintiffs are four elderly residents, taxpayers and voters in the Town of Plymouth. Id. They include a Vietnam Veteran, a grandmother and retired human services worker, a semi-retired tradesman and small business owner and human services professional who devotes her life to helping the underserved.

All Plaintiffs will each suffer a particularized harm to an interest within the zone of protection of the Bylaw. P. Magnarelli Aff. ¶ 23-28; J. Magnarelli ¶s 7-12; S. Cina Aff. ¶6-8; R. Cina Aff. ¶s 10-11. They do not bring this lawsuit as a frivolity as Defendants claim. Each testifies the lawsuit is "any but frivolous to me." See, e.g, J. Magnarelli ¶s 17; P. Magnarelli Aff. ¶ 30; S. Cina Aff. ¶s 10-11; R. Cina Aff. ¶ 15. They will suffer harm to their property values, aesthetics and health and well-being, increased noise, traffic, and light pollution. *Id*. Tge Town's expert Environmental Partners reports that the Town lacks the capacity to supply water to the Project. P. Magnarelli Aff. ¶s 8-9. The Development Agreement purported to provide a short-term remedy in the form of a new booster pump to extract more water from existing wells. It does not address the water supply need in the Report. The Site overlies the Plymouth Carver Sole Source Aquifer and is in the wellhead protection zone for the area's Town well. Complaint

¶s 47-49. The Special Permit fails to address the impaired environmental condition of the Site resulting from the ZBA's issuance of permits for industrial mining at the Site that removed drinking water and stormwater protections. Complaint ¶s 50-53.

The Amended Decision is a revision of a Special Permit issued by the ZBA on January 3, 2022 for the Project. Complaint, Exhibit 1 (Amended Decision) On January 3, 2023, aggrieved parties including the Plaintiffs appealed that Decision under G.L. c. 40A, § 14 to Superior Court. The ZBA admitted that the January 3, 2023 permit was fatally flawed, defective and unlawful when, on March 6, 2023, the ZBA "reopened" the public hearing on the permit and added missing "findings" about the density and dimensional requirements. *Id.* The Project will have a density of 21 units per acre compared to the single family homes nearby and the Sawyer's Reach townhouses at 8 units per acre. P. Magnarelli Aff. ¶ 29. The ZBA voted 4-1 to approve the Amended Decision.

The Project is not affordable housing but will be rented at market rates. P. Magnarelli Aff. ¶ 15. The Town's Housing Production Plan identifies people under 65 as most in need of affordable housing. The apartment complex has none of the features of "Elderly Housing" or an elderly facility. *Id.* ¶ 20. Plaintiffs filed the Complaint on March 28, 2023 to appeal the Amended Decision.

II. ARGUMENT

A. APPLICABLE LAW

G.L. c. 40A, § 17

In 2020, the Legislature amended the Zoning Act, G.L. 40A, § 17, to include circumstances in which the court may exercise its discretion to require a surety or bond in a zoning case:

> The court, in its discretion, may require a plaintiff in an action under this section appealing a decision to approve a special permit, variance or site plan to post a surety or cash bond in an amount of not more than $50,000 to secure the payment of costs if the court finds that the harm to the defendant or to the public interest resulting from delays caused by the appeal outweighs the financial burden of the surety or cash bond on the plaintiffs. The court shall consider the relative merits of the appeal and the relative financial means of the plaintiff and the defendant.
>
> Costs shall not be allowed against the party appealing from the decision of the board or special permit granting authority unless it shall appear to the court that said appellant or appellants acted in bad faith or with malice in making the appeal to the court."

This provision was contained in the so-called "Housing Choice Act", Chapter 558 of the Acts of 2020 which, is "built upon a history of encouraging the construction of affordable housing throughout the Commonwealth.…" *Marengi v. 6 Forest Rd. LLC*, 491 Mass. 19, 28 (Mass. 2022)

G.L. c. 40A, § 17 provides for costs against a special permit granting authority such as the ZBA where there is gross negligence, bad faith or malice and it states,

> Costs shall not be allowed against the board or special permit granting authority unless it shall appear to the court that the board or special permit granting authority in making the decision appealed from acted with gross negligence, in bad faith or with malice.

Anti-SLAPP Statute

Massachusetts "Anti SLAPP" statute, G.L. c. 231 § 59H, "provides broad protections for individuals who exercise their right to petition from harassing litigation and the costs and burdens of defending against retaliatory lawsuits." *Fabre v. Walton*, 436 Mass. 517, 520 (2002). The acronym stands for "Strategic Lawsuit Against Public Participation", *Fuscolo v. Hollander*, 445 Mass. 861 (2010) n.1. The statute states in pertinent part,

> In any case, except a case brought pursuant to section 11I1/2 of chapter 12, in which a party asserts that the civil claims, counterclaims, or cross claims against said party are **based on said party's exercise of its right of petition under the constitution of the**

> **United States or of the commonwealth**, said party may bring a special motion to dismiss.
>
> ……
>
> As used in this section, **the words "a party's exercise of its right of petition" shall mean any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding; any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding; any statement reasonably likely to enlist public participation in an effort to effect such** consideration; or any other statement falling within constitutional protection of the right to petition government.

G.L. c. 231, § 59H (Emphasis supplied)

Open Meeting Law, G.L. c. 30A, §§ 19-25

Section 20(a) of the Open Meeting Law, G.L. 30A provides,

> Except as provided in section 21, all meetings of a public body shall be open to the public.

A vote by a municipal body taken in violation of the Open Meeting Law is considered a nullity. *Puglisi v. School Committee of Whitman*, 11 Mass. App. Ct. 142, 145 (1981) ("So, for example, if, while in violation of the open meeting law, a board of appeals were to grant a special permit or a school committee were to adopt a policy of closing and consolidating schools, that action could be a nullity." (Citations omitted)).

Superior Court Rule 9

Superior Court Rule 9C states,

> Counsel for each of the parties shall confer in advance of filing any motion, except motions governed by Rule 9A(d) and Standing Order 1-96, and make a good faith effort to narrow areas of disagreement to the fullest extent. Counsel for the party who intends to serve the motion shall be responsible for initiating the conference, which conference shall be by telephone or in person.

> All such motions shall include a certificate stating that the conference required by this Rule was held, together with the date and time of the conference and the names of all participating parties, or that the conference was not held despite reasonable efforts by the moving party to initiate the conference, setting forth the efforts made to speak by telephone or in person with opposing counsel. **Motions unaccompanied by such certificate will be denied without prejudice to renew when accompanied by the required certificate.** (Emphasis supplied)

B. DEFENDANTS ARE NOT ENTITLED TO A BOND OR SURETY BECAUSE DEFENDANTS HAVE NOT SHOWN ANY HARM TO THEMSELVES OR PUBLIC INTEREST FROM THIS APPEAL

Defendants do not meet the legal standard of establishing harm from any delay caused by this appeal. Further, Defendants improperly invoke the bond provision of G.L. c. 40A, § 17. That provision is intended primarily to promote affordable housing, as Defendants' themselves state. Its application here is contrary to the statute's intent: Claremont's project is not affordable housing. It is market rate apartments that excludes the largest segment of Plymouth's population living in poverty: children and adults under age 65. Claremont's Project is promoted as "Elderly Housing" for people over age 65.[3]

(1) Defendants establish no evidence of harm to Claremont for purposes of G.L. c. 40A, § 17

The Court may require a bond or surety under G.L. c. 40A, § 17 only if it finds that the delay caused by Plaintiffs' appeal of the Special Permit harms the Defendants or the public interest. Defendant Claremont asserts harm from "substantial litigation costs (including attorney's fees and expert witnesses), increased construction costs, and costs from increased interest rates." Def. Mem. p. 9. The only evidence of financial harm to Claremont is the Moore Affidavit and footnote 2 on page 9 of the Memorandum citing to a Reuters article about potential interest rate hikes. Def. Mem. p. 9. Moore's Affidavit contains only a generalized statement about "the costs

[3] Housing Production Plan, p. 11 (Jan. 2019) https://www.plymouth- ma.gov/DocumentCenter/View/1440/2019-Housing-Production-Plan-PDF

of responding to discovery, preparing for trial and trying this case [that are] very likely to exceed $50,000.00 unless the case settles promptly." I*d.* ¶ 12. The only costs Moore cites are attorney's fees. G.L. c. 40A, § 17 does not authorize a bond to secure attorney's fees: "It does not authorize a bond to secure attorney's fees, delay damages, or even "all costs."" *Marengi* at 33, 35. Claremont's citation to the Reuter's news article is speculative hearsay evidence. Thus, Claremont provides no credible evidence of financial harm from any delay caused by this appeal.

(2) Defendants establish no evidence of harm to the ZBA for purposes of G.L. c. 40A, § 17

Defendant ZBA makes no attempt to show harm to itself from the delay caused by this appeal, nor could it. Defendant ZBA joining with the developer, Claremont in seeking the Town's own elderly residents to post a surety or bond is a reflection of what reasonable can be considered malice and retaliation for Plaintiffs' participation in the zoning process.

(3) Defendants establish no evidence of harm to the public interest

Since they cannot show harm to themselves from the delay caused by this appeal, Defendants loudly proclaim there is harm to the public interest because Claremont will provide "badly needed elderly housing" for the Town's residents. Six times Defendants' shouts there is "badly needed elderly housing". This is a complete fiction unsupported by evidence. Plaintiffs' October 2023 survey establishes a glut of about 1,847 unrented housing unit available to the elderly –or anyone else -- at five housing developments in Plymouth and one in a nearby section of Kingston. These are all apartments comparable to Claremont's apartments. P. Magnarelli Aff. ¶s 16-19. All approximately 1,847 units have been constructed within the past one to three years. *Id.* A similar number were available in January 2023 when the ZBA issued the Amended Decision, ignoring evidence presented by the Plaintiffs. *Id.* All are currently offering either free

rent for 1 to 1.5 months or other incentives to get renters to sign a lease to rent a unit. All are available to the elderly. *Id.* at ¶ 18.

Defendants misleadingly imply that Claremont's Project is "affordable housing". They make statements such as the purpose of the bond requirement is to remove barriers to "promote the availability and affordability of housing development." Def. Mem. p. 6. This is miselading because Plymouth has a glut of vacant housing, there is no "availability" issue and Claremon'ts Project does not provide "affordable housing" but will be rented at market rates. P. Magnarelli Aff. ¶ 15. The Project has no typical elderly services such as access to onsite medical services, communal dining, housekeeping services or other services that would typically be provided in elderly housing. *Id.* ¶ 20. The Project excludes children and adults under 65 living in poverty. Typically, developers agree to build over 55 housing to ensure that the municipality does not have to educate children. *Id.*

Defendants cherry pick from an outdated Housing Production Plan from 2019 to attempt to support their claim that the Project is necessary to provide elderly housing. Def. Mem. pp. 10-11. The Plan uses census data from 2000 and 2010 and housing data that is at least five years old. Plaintiffs' current evidence shows there are about 1,870 units available for elderly people in the area. P. Magnarelli Aff. ¶s 16-18. For every citation by Claremont to the "elderly" in the Plan there is a countervailing citation about another type of housing need. In fact, the top finding under "Housing Affordability" is that "Children (under age 18) and Adults 35-64 have the highest levels of poverty in Plymouth." Housing Production Plan, p. 11-13. This implies children and adults under 65, **not the elderly**, have the greatest need for housing in Plymouth. Claremont's Project excludes children and adults under 65 from renting their apartments. *Id*.

Further, the Defendants claim the Project will meet a housing need "for Plymouth residents." This is unfounded: anyone from anywhere can rent Claremont's apartments.

Defendants attempt to portray the Colony Place development where the Project is located as a visionary plan resulting from "significant cooperative efforts between the Town **and several developers** since the early 2000s…." Def. Mem. p. 1. The unlawful "Development Agreement" upon which the Special Permit hinges is only the latest example of "cooperative efforts" between the ZBA and developers at the expense of the public and residents such as the Plaintiffs. Colony Place is anything but a model of appropriate land use planning that benefits the community. Starting in the 2000s, the ZBA issued approvals for developers to conduct industrial scale sand mining operations on the Site, irreversibly altering surface and groundwater flows, exposing the groundwater to in this Aquifer Protection Zone to contamination and never required site restoration or revegetation. Complaint ¶s 47-53. Now that Plaintiffs seek to protect the drinking water supply and the community, Defendant ZBA joins with Claremont to seek to stifle their right to petition their government by moving to impose a bond or surety.

The Housing Protection Plan cited by the Defendants states the Town should "Insure that housing creation is harmonious with the suburban character of Plymouth." Strategy 5.2, page 12. This suburban character is such that 72.1% of all housing units that are single family detached. Claremont's dense apartment complex in a suburban-like settings is the opposite of what is called for in the Plan. P. Magnarelli Aff. ¶s 26-29.

The Plan also calls for protection of watershed, water supply and sewer and groundwater drinking aquifer protection important parts of housing development. Housing Production Plan, p. 61. Plaintiffs seek to advance these goals by ensuring appropriate development of housing, not projects that undermine these goals. *Id.*

The public interest is helped, not harmed, by any delay from this appeal and Plaintiffs success in this litigation. The unlawful Development Agreement harms the taxpayers by waiving hundreds of thousands of dollars in Town fees for Claremont at taxpayer's expense. P. Magnarelli Aff. ¶ 9. The Town has overbuilt to the extent that its expert consultant report from October 2022 for the Project recommends that the Town restrict development in the West Plymouth Pressure Zone where the Project is located until supply capacity can be improved. P. Magnarelli Aff. ¶ 7-8. The Report does not address the ZBA's misguided proposal to put a short term fix on the water shortage by having Claremont pay for a pump so that it can build its development.

In short, the claim that delay from this appeal harms the public interest is a fiction. In fact, the delay and the resolution of this case at trial will promote the public interest.

C. Defendants have shown no harm to themselves or the public interest, so the Court need not balance harm against the financial burden on Plaintiffs but if it does, that harm does not outweigh the financial burden on Plaintiffs

Defendants have established no harm from any alleged delay from this appeal so the Court need not balance harm against the financial burden of a surety or bond on Plaintiffs as required by G.L. c. 40A, § 17. Even if the Defendants had shown harm, any such harm does not outweigh the financial burden on Plaintiffs. Defendants seek to impose the maximum bond amount of $50,000.00 on Plaintiffs. A surety bond typically requires a non-refundable premium which Plaintiffs would have to pay even if they are not required to pay costs. Such a non-refundable premium could be up to 3% or more with rising high interest rates for up to $1,500 or more. Plaintiff John Magnrelli is a Vietnam Veteran, retired public servant and living on a fixed income who would suffer significant financial harm from a bond. J. Magnarelli Aff. ¶s 5, 6, 12, 13. Plaintiff Pamela Magnarelli is a retired public servant living on a fixed income who will

suffer significant financial harm from a bond. P. Magnarelli Aff. ¶ 33. Plaintiff Robert Cina is a semi-retired plastering contractor who will suffer significant financial harm from a bond. R. Cina Aff. ¶s 10-11. Plaintiff Susan Cina works at a non-profit social services organization. S. Cina Aff. ¶s 10-11; All are elderly residents of Plymouth.

To support their motion, Defendants cite to the combined market value of Plaintiffs' real estate and makes the assumption that posting a surety or bond in the maximum of $50,000.00 will pose no financial burden. This is generalized, unsupported conclusion that ignores the fact that Plaintiffs have living expenses that include medical expenses and financial support for family members. See, e.g. S. Cina Aff. ¶s 10-11; R. Cina Aff. ¶s 10-11.

Claremont protests about the cost of this lawsuit while ignoring the fact that Plaintiffs are incurring expenses that are disproportionate to their financial means compared to Claremont's business. Plaintiffs are incurring costs of this litigation, including filing fees, deposition transcripts, travel, printing and mailing and experts. P. Magnarelli Aff. ¶ 35; J. Magnarelli ¶s 11-12; S. Cina Aff. ¶s 10-11; R. Cina Aff. ¶s 10-11. These are coming out of their fixed income and living expense. In contrast, Claremont is an international real estate conglomerate according to its own website. It owns in excess of 60 real estate assets consisting of hotels, apartments, office, residential estates and vacant and leased land. In the U.S. and Europe. P. Magnarelli Aff. ¶s 31-33. Claremont's developments fall within the $10 Million to $100 million per development. *Id.* ¶ 32.

Its own website shows Claremont is a sophisticated commercial and residential real estate developer. Obtaining permits to build projects is part of any developer's project requirement, budget and timetable. Any alleged delay in Claremont's construction schedule from this appeal is a predictable risk that Claremont should have taken into account in its project planning and

development. Claremont should not be able to frighten off Plaintiffs from exercising their rights under the zoning law and the Constitution to petition their government by imposing a surety or bond for a legitimate appeal.

D. The appeal is not so devoid of merits that bad faith can be inferred

The Court cannot order a surety or bond unless it finds, following an overview of the merits, that it appears the appeal is so devoid of merit that it can reasonably be inferred that Plaintiffs acted in back faith or with malice in bringing this appeal. G.L. c. 40A, § 17. *Marengi* supra at 31. The Defendants make no showing to support such a finding. Plaintiffs testify in their Affidavits they did not bring this action with bad faith or malice. P. Magnarelli Aff. ¶ 24; J. Magnarelli Aff. ¶ 14; R. Cina Aff. ¶ 13; S. Cina Aff. ¶ 15. Nor can it be inferred. The Attorney General's ruling that the ZBA violated the OML is prima facie evidence that the Special Permit is arbitrary and capricious, and the appeal has merit. Further, Defendants claim Plaintiffs lack standing but this fails because Plaintiffs are direct abutters to the Project. Finally, Defendants' "unclean hands" argument gains them nothing.

(i) The Open Meeting Law violation is a basis for nullifying the Special Permit

The Complaint alleges Amended Decision exceeds the authority of the Board, is contrary to the facts, arbitrary and capricious and not in accordance with law. The arbitrary nature of the Amended Decision is established in the Attorney General's OML Decision. Complaint, Cause of Action, ¶s 139-158; Exhibit 1. The ZBA is a quasi-judicial body established under the Zoning Act, G.L. c. 40A. The ZBA has a statutory duty to take evidence in a public hearing, conduct public deliberations and render a decision in public. Instead, the Attorney General describes the "negotiations the ZBA was engaged in with Claremont about the possibility of making a payment in lieu of building affordable housing units." Exhibit 1 OML 2023-128, p. 3. The

Attorney General found that the ZBA and the Select board held an unlawful executive session where they were "discussing negotiations with Claremont related to its proposed development project and affordable housing requirements, as well as issues concerning the Town's water supply" and that this was not a lawful topic for an executive session. Id. at p. 5. The ZBA then boldly and in blatant disregard of its statutory duties to conduct fair, open and objective proceedings, incorporated the secretly negotiated "Development Agreement" as a Condition of the Amended Decision. Clearly, an appeal that challenges this abusive derogation of duty and flouting of the law by the ZBA is meritorious.

ii. Plaintiffs are abutters with standing

All Plaintiffs are direct abutters to the Project Site. P. Magnarelli Aff. ¶ 20; J. Magnarelli Aff. ¶ 7, R. Cina Aff. ¶ 6; S.Cina Aff. ¶ 6. As such, all are parties in interest, with a presumption of standing. G.L. c. 40A, § 11. Plaintiffs are also persons aggrieved under the Zoning Act. General Laws c. 40A, § 17 provides that "any person aggrieved by a decision of the board of appeals" may seek judicial review. A "person aggrieved" is one who "suffers some infringement of his legal rights." *Marashlian v. Zoning Board of Appeals,* 421 Mass. 719, 721 (1996). The term "persons aggrieved" should not be read narrowly. Id. If a plaintiff's legal or property rights will (or likely will) be infringed by a board's action, then he qualifies as a "person aggrieved." Id.; *Circle Lounge & Grill, Inc. v. Bd. of Appeal of Boston*, 324 Mass. 427, 430 (1949). Whether an individual is aggrieved is "a question of fact for the trial judge." *Marashlian*, 421 Mass. at 721. The determination is a matter of degree calling for discretion rather than inflexible rule. Id.

A party in interest (within 300 feet) is presumed to have standing[4]. Plaintiffs enjoy a rebuttable presumption that they are "persons aggrieved". Mere allegations or legal arguments by Defendants are not sufficient to rebut the presumption of standing. *Standerwick v. Zoning Board of Appeals of Andover,* 447 Mass. 20, 33 (2006).

Defendants claim Plaintiffs lack standing. Def. Mem. 11-14. This argument is relies solely on an self-serving portrayal of the Project Site limited to only part of the Site, the phase 1 area. The Project Site is the entire 16-acre parcel that all Plaintiffs abut. The Special Permit is contingent on Claremont using the entire 16-acre lot which includes Lot "5C" where a pond and wetland will be altered to provide drainage for phase 1 and phase 2. The Special Permit states Claremont "is proposing to utilize an existing drainage infiltration basin which is currently being modified…." Complaint, Exhibit 1, Finding 20; Special Permit Condition 8(e). Defendants cannot have it both ways: they cannot segment the project for purposes of attempting to defeat Plaintiffs' standing and then represent to the ZBA that the entirely of the 16 acres will be used to satisfy the Zoning Bylaw requirements for a special permit, which include having proper drainage. Even if only Lot 5A is considered for purposes of standing, Defendants admit that Plaintiffs Cina are parties in interest because they are within 300 feet of Lot 5A.

Plaintiffs describe in their affidavits the particularized harm to interests protected by the Bylaw, including aesthetic views, loss of air and light, access to open space, and property values. Plaintiffs' Affidavits. This evidence is "quantitatively and qualitatively sufficient" to establish the merits of Plaintiffs standing at this juncture. *Michaels v. Zoning Board of Appeals of Wakefield,* 71 Mass. App. Ct. 449, 451 (2008). Plaintiffs' evidence provides "specific factual

[4]G.L. c. 40A § 11 defines "Parties in interest" as the "petitioner, **abutters**, owners of land directly opposite on any public or private street or way, and abutters to the abutters within three hundred feet of the property line of the petitioner..."

support for each of the claims of particularized injury" and is "of a type on which a reasonable person could rely to conclude that the claimed injury likely will flow from the board's action." *Id.*

Whether Plaintiffs are aggrieved is a question of fact for the trial judge and here, where they are entitled to a presumption of standing, that establishes the merits of their claim to standing for purposes of imposing a surety or bond. The Court should not look beyond the presumption of standing for purposes of this motion, but if it does, it should conclude Defendants have not met their burden to rebut the presumption of standing to which Plaintiffs are entitled. *Standerwick*, supra. Defendants make only legal arguments and mere allegations. Their claims of lack of standing are conclusory and not supported by any expert testimony or evidence. They cite only the Plaintiffs' Complaint, page 3, which states that Plaintiffs Magnarelli and Cina reside at 5 and 7 Mariners' Way respectively. Def. Mem. p. 12. In contrast, Plaintiffs establish their particularized aggrievement through their Affidavits. They are entitled to pursue this litigation, free of the imposition of a bond, to develop their own expert testimony introduced to further establish aggrievement.

iii. Plaintiffs do not have "unclean hands" as Defendants allege

Plaintiffs' appeal is based on specific allegations of violations of the Bylaw. Defendants rely on a red herring – that the Plaintiffs have "unclean hands" because Plaintiffs live in Sawyer's Reach, a residential development in the MC zoning district. This argument has no merit. The Claremont Project bears no resemblance to Sawyers Reach in terms of density and height of the Project. P. Magnarelli Aff. ¶s 7, 10, 29. Whether the ZBA properly approved Sawyers Reach years ago is an inquiry beyond the scope of this appeal and completely irrelevant

to whether, in this specific case, the ZBA violated the Bylaw by acting in an arbitrary, capricious, and unlawful manner, which it did.

Further, for the Defendants, particularly the ZBA, to accuse elderly residents seeking to exercise their rights to protect their homes and lives by bringing this appeal, of unclean hands, when the ZBA's actions raise plausible allegations of gross negligence, bad faith and malice, as described above is inequitable. Defendants motion is so riddled with inaccuracies and misrepresentations – such as the implication that the Project is "affordable" housing and that elderly housing is "badly needed" when the Project excludes the large portion of the community living in poverty – children and adults **under** age 65 – reveals the spurious nature of their "unclean hands" argument.

The shoe is on the other foot here: ZBA has acted with bad faith both in bringing this motion and in granting the Special Permit. It acted with gross negligence in failing to make mandatory findings required to grant variances to Claremont and issued the Special Permit anyway. Even after reopening the public hearing in March 6, 2023 to fix the gross errors in its December 2022 Decision, the ZBA still ignored its statutory obligations. It issued a decision whose key condition was negotiated behind closed doors with the developer in a meeting the Attorney General found violated the OML. The ZBA's Open Meeting Law violations were of such a "depth and breadth" that the Attorney General ordered specific sanctions and an admonishment that future violations "may be considered evidence of intent to violate the Law." Id. at p. 7. The Zoning Act authorizes Plaintiffs to seek costs against the ZBA for such a permit based on actions of gross negligence, bad faith and malice. G.L. c. 40A, § 17. G.L. c. 231 § 59H. It is the Defendants who have unclean hands.

iv. The appeal has merit and no reasonable inference can be made that it does not

The Plaintiffs will succeed in showing the zoning violations alleged in the Complaint. Some, such as the violation of the density and Floor to Area Ratio are established by simple math. See, e.g. P. Magnarelli Aff. ¶ 27. The flawed Amended Decision contains none of the required findings for granting variances and the ones it purports to concluded are concocted after the fact justifications that bear no logical link to the criteria of the Bylaw. The Special Permit collapses because it is based on an illegal "Development Agreement." The Town's own consultant concludes the Town lacks an adequate water supply for the Project. Plaintiffs have standing. The Complaint is clearly meritorious and there can be no reasonable inference that it does not.

E. Defendants' Motion is an attempt to sidestepping Anti SLAPP statute

Defendants motion is an attempt to sidestep the anti-SLAPP statute and to punish the Plaintiffs for bringing this appeal and frighten them from proceeding with this litigation. The Court should reject this motion in its entirety.

F. Defendants motion should be denied because they failed to comply with Superior Court Rule 9

Superior Court Rule 9C states required Defendants to confer with Plaintiffs' counsel and make a good faith effort to narrow areas of disagreement to the fullest extent before serving the Motion on Plaintiffs' counsel. They failed to do so. Should Defendants file the Motion with the Court, it must be denied. "Motions unaccompanied by such certificate will be denied without prejudice to renew when accompanied by the required certificate." Mass. R. Civ. P. 9C.

CONCLUSION

The Court should deny Defendants' motion to impose a bond or surety on Plaintiffs under G.L. c. 40A, § 17 because Defendants to not meet the legal standard that would entitle them to such a surety. Plaintiffs appeal of the ZBA's Amended Decision granting Claremont a Special

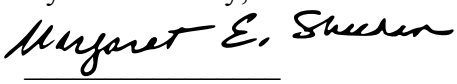
Permit is meritorious – if for no other reason than it is conditioned on the "Development Agreement" negotiated by the ZBA in an unlawful executive session in violation of the Open Meeting Law. The Development Agreement is subject to nullification and without it the Special Permit collapses. Plaintiffs are direct abutters entitled to a presumption of standing that Defendants have put forth no evidence to rebut.

Defendant ZBA's actions in issuing the Special Permit are so grossly negligent and erroneous that it gives rise to an implication that the ZBA itself acted with bad faith or malice entitling Plaintiffs to bring a motion for costs against the Town.

Respectfully submitted

Plaintiffs,

By their attorney,



Margaret E. Sheehan
P.O. Box 1699
Plymouth MA 02362
BBO # 456915
ecolawdefenders@protonmail.com
508-259-9154

CERTIFICATE OF SERVICE

I, Margaret E. Sheehan, counsel for Plaintiffs in the above referenced action hereby certify that on this 30th day of October 2023 I served the foregoing memorandum on counsel for Defendants by electronic mail as follows:

Claremont Plymouth LLC

Valerie A. Moore (BBO# 684849)
vmoore@nutter.com
Matthew Connolly
mconnolly@nutter.com
Nutter, McClennen & Fish, LLP
Seaport West, 155 Seaport Blvd.
Boston, Massachusetts 02210

Defendants Michael Main *et. al* as
members of the Zoning Board of Appeals of Plymouth
Amy E. Kwesell, Esq.

KP | LAW 101 Arch Street, 12th Floor
Boston, MA 02110

akwesell@k-plaw.com

Margaret E. Sheehan

Margaret E. Sheehan
P.O. Box 1699
Plymouth MA 02362
BBO # 456915
ecolawdefenders@protonmail.com
508-259-9154