COMMONWEALTH OF MASSACHUSETTS

FRANKLIN, ss. **SUPERIOR COURT**
CIVIL ACTION NO. 2178CV00054

CHRISTOPHER KALINOWSKI & another[1]

vs.

BWC PINE MEADOW BROOK, LLC & others[2]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION TO DISMISS

In their amended complaint, the plaintiffs, Christopher Kalinowski and RESTORE: The North Woods, Inc. ("RESTORE"), seek a judgment (1) declaring that the Northfield Planning Board (the "Planning Board") lacked the authority to issue special permits for three solar power installations on three non-contiguous tracts of land, Array A, Array B, and Array C, and enjoining the Planning Board from hearing or acting on any requests for special permits related to proposed solar energy facilities (Count One); and (2) annulling those permits (Count Two). Before me is the motion to dismiss of defendants BWC Pine Meadow Brook, LLC; Bluewave Project Development, LLC; BWC Otter Run, LLC; Bonnie Tucker Etoile; Eugene L'Etoile; Hopping Ahead, LLC; Jacob A. L'Etoile; Robin C. L'Etoile; and Steve Seredynski, Margaret Riordan, Homer Stavely, Tammy Pelletier, and Joe Graveline in their capacity as Members of the Planning Board. The motion seeks dismissal of Count One of the Amended Complaint as to both plaintiffs; dismissal of both counts as to plaintiff RESTORE; and dismissal of Count Two as to plaintiff Christopher Kalinowski with respect to Arrays B and C. For the reasons set forth

[1] RESTORE: The North Woods, Inc.
[2] Bluewave Project Development, LLC; BWC Otter Run, LLC; Bonnie Tucker Etoile; Eugene L'Etoile; Hopping Ahead, LLC; Jacob A. L'Etoile; Robin C. L'Etoile; and Steve Seredynski, Margaret Riordan, Homer Stavely, Tammy Pelletier, and Joe Graveline in their capacity as Members of the Planning Board of the Town of Northfield.

below, the defendants' motion to dismiss will be **DENIED**.

I. BACKGROUND[3]

On or about January 11, 2021, BWC Pine Meadow Brook LLC submitted applications to the Planning Board for special permits and site plan approval for proposed solar facilities on Array A and Array B, and BWC Otter Run, LLC submitted an application for a special permit and site plan approval for a solar facility on Array C. On July 21, 2021, the Planning Board voted to grant special permits and site plan approval with conditions for each application. On or about August 19, 2021, the Planning Board filed the three decisions with the Town Clerk. The plaintiffs filed a complaint in this court on or about September 8, 2021, and an amended complaint on or about December 3, 2021. In Count One of the Amended Complaint, assertedly brought pursuant to G.L. c. 231A, the plaintiffs contend that the Zoning Board of Appeals, not the Planning Board, is the entity given authority under the zoning bylaw to issue special permits for solar facilities and that, therefore, the special permits are legal nullities. In Count Two of the Amended Complaint, brought pursuant to G.L. c. 40A, § 17, the plaintiffs contend that the Planning Board exceeded its authority, and acted in an arbitrary, capricious, and legally untenable manner by (1) failing to make findings as required by the zoning bylaw; (2) issuing the permits "in direct contradiction of the findings made"; and (3) issuing the permits where the special permit criteria of the zoning bylaw were not satisfied.

II. DISCUSSION

The defendants seek the dismissal of Count One in its entirety because it is an impermissible attempt to seek relief pursuant to G.L. c. 231A, where G.L. c. 40A, § 17A, is the exclusive avenue for challenging the special permits. As to Counts One and Two, the defendants

[3] These facts are taken from the Amended Complaint and documents referenced in and relied upon in the Amended Complaint. See *Ryan* v. *Mary Ann Morse Healthcare Corp.*, 483 Mass. 612, 614, 614 n. 5 (2019).

argue that RESTORE has not sufficiently alleged standing where it is not a "party in interest," as that term is defined in G.L. c. 40A, § 11, and does not allege any injury to itself from the issuance of the special permits. Finally, the defendants contend that Kalinowski has not made allegations sufficient to show he is a "person aggrieved" under G.L. c. 40A, § 17, by the issuance of special permits for Arrays B and C. The defendants do not contend that Kalinowski, as a "party in interest" with regard to Array A, has failed to meet his burden of alleging standing as to Array A.

A. Motion to Dismiss Standard

In considering a motion to dismiss, this court limits its consideration to the factual allegations in the complaint, taking them as true and drawing all reasonable inferences in the plaintiffs' favor. See *Porter* v. *Board of Appeals of Boston*, 99 Mass. App. Ct. 240, 243 (2021). *Id.* at 243-244, citing *Galiastro* v. *Mortgage Elec. Registration Sys., Inc.*, 467 Mass. 160, 165 n.11 (2014). Factual allegations are sufficient to survive a motion to dismiss if they "plausibly suggest [and are] (not merely consistent with)" an entitlement to relief. See *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623, 636 (2008), quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 557 (2007). The factual allegations must "raise a right to relief above the speculative level ... [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact). . . ." *Id.*, quoting *Bell Atl. Corp.*, 550 U.S. at 557.

B. Count One

At oral argument, the defendants contended that Count One should be dismissed in its entirety because it is an impermissible attempt to seek relief pursuant to G.L. c. 231A, where G.L. c. 40A, § 17, is the exclusive avenue for challenging the special permits. The defendants' argument as submitted in their Memorandum of Law in Support of Motion to Dismiss for Failure to State a Claim and Lack of Standing ("Memorandum") is somewhat different. In their

Memorandum, the defendants argue that Count One must be dismissed because it is an attempt to recast a barred G.L. c. 40A, § 17 claim as a G.L. c. 231A claim where G.L. c. 40A, § 17, is the exclusive remedy to challenge a special permit and the G.L. c. 40A, § 17 claim is barred in its entirety as to RESTORE and as to Kalinowski with regard to Arrays B and C because of lack of standing.

1. Declaratory Relief Is Not Barred by G.L. c. 40A, § 17.

Section 17 is the exclusive avenue for challenging a special permit. See G.L. c. 40A, § 17. Section 17 does not bar declaratory relief, however. See *Leonard* v. *Zoning Board of Appeals of Hanover*, 96 Mass. App. Ct. 490, 499-500 (2019) (noting that "ancillary declaratory relief is available through G.L. c. 40A, § 17"; holding that "declaratory relief afforded in the Superior Court judgment is a proper remedy for claims pursuant to G.L. c. 40A, § 17"). See, e.g., *Goldlust* v. *Board of Appeals of North Andover*, 27 Mass. App. Ct. 1183, 1184 (1989); *DeMello* v. *Board of Appeals of Acushnet*, 21 Mass. App. Ct. 974, 975 (1986). Rather, where a plaintiff challenges the issuance of a special permit and requests declaratory relief, the action is a G.L. c. 40A, § 17 action, even if it is described by the plaintiff as a G.L. c. 231A action. See *Iodice* v. *City of Newton*, 397 Mass. 329, 333 (1986) (action "no less an appeal under c. 40, § 17, because it takes the form of a G.L. c. 231A declaratory judgment action"). See also *Wood* v. *Board of Appeals of Lexington*, 49 Mass. App. Ct. 1114, * 1 (2000) (Rule 1:28 Unpublished Decision) ("While the plaintiff in this case denominates the count as a request for declaratory relief under G.L. c. 231A, it is an appeal under G.L. c. 40A, § 17, and it is timely. The judge, therefore, should have reached the question"). Further, the issue raised in Count One, whether the Planning Board or the Zoning Board of Appeals had the authority to decide the applications for special permits, may be decided in a G.L. c. 40A, § 17 action. See, e.g., *Walker* v. *Board of*

Appeals of Harwich, 388 Mass. 42, 50-52 (1983) (deciding whether the zoning board of appeals or the planning board had authority to issue type of special permit at issue).

2. To the extent the plaintiffs sufficiently allege standing under G.L. c. 40, § 17, they sufficiently allege standing to seek declaratory relief.

Because Count One, although denominated as a G.L. c. 231A action, is a G.L. c. 40A, § 17 action, the requirements for maintaining a G.L. c. 40A, § 17 action apply. See, e.g., *Iodice*, 397 Mass. at 334 (plaintiff's G.L. c. 40A, § 17 appeal, though in the form of a G.L. c. 231A action, failed because not brought within time period required for G.L. c. 40A, § 17 actions). Therefore, to the extent RESTORE and Kalinowski sufficiently allege standing for a G. L. c. 40A, § 17 claim, they sufficiently allege standing for Count One. The sufficiency of the allegations pertaining to the standing of each is discussed below.

C. Standing

"Section 17 vests the right to judicial review in '[a]ny person aggrieved' by certain zoning decisions. The requirement that the challenger must be a 'person aggrieved' is jurisdictional." *Denneny* v. *Zoning Board of Appeals of Seekonk*, 59 Mass. App. Ct. 208, 211 (2003). "A plaintiff is considered a 'person aggrieved' if it asserts 'a plausible claim of a definite violation of a private right, a private property interest, or a private legal interest.'" *Central Street, LLC* v. *Zoning Bd. of Appeals of Hudson*, 69 Mass. App. Ct. 487, 491 (2007), quoting *Harvard Square Defense Fund, Inc.* v. *Planning Bd. of Cambridge*, 27 Mass. App. Ct. 491, 492-493 (1989).

"A plaintiff is entitled to a rebuttable presumption of aggrievement if she is a 'party in interest' under [G.L. c. 40A,] § 11." *Murrow* v. *Esh Circus Arts LLC*, 93 Mass. App. Ct. 233, 235 (2018). "As defined there, 'party in interest' refers to 'the petitioner, abutters, owners of land directly opposite on any public or private street or way, and abutters to abutters within three

hundred feet . . . ." *Id.* Because "the presumption may be rebutted only by 'offering evidence warranting a finding contrary to the presumed fact,' *81 Spooner Rd., LLC* v. *Zoning Bd. of Appeals of Brookline*, 461 Mass. 692, 700-701 . . . (2012) . . ., where the facts alleged in the complaint and any other materials properly considered in evaluating a motion to dismiss suffice to demonstrate a plaintiff is a party in interest, a claim cannot be disposed of on the ground of lack of standing at the motion to dismiss stage" (quotation and citation omitted). *Porter*, 99 Mass. App. Ct. at 242. "If a plaintiff 'fails to meet the party in interest designation, [the plaintiff] may nevertheless have standing if [the plaintiff] is a person aggrieved, in other words, if the permit causes, or threatens with reasonable likelihood, a tangible and particularized injury to a private property or legal interest protected by zoning law'" (quotation omitted). *Id.*, quoting *Murrow*, 93 Mass. App. Ct. at 238. "The plaintiff ultimately bears the burden of proving aggrievement." *Id.* "[I]f the facts alleged suffice to demonstrate that the plaintiff is a person aggrieved, the case cannot be disposed of at the motion to dismiss stage for lack of standing." *Id.*

"The claimed injury or loss must be personal to the plaintiff, not merely reflective of the concerns of the community." *Denneny*, 59 Mass. App. Ct. at 211. "The 'right or interest' asserted by the person claiming to be aggrieved must be one that the governing zoning scheme is intended to protect.'" *Montgomery* v. *Board of Selectmen of Nantucket*, 95 Mass. App. Ct. 65, 71 (2019), quoting *81 Spooner Rd., LLC*, 461 Mass. at 700. "[W]here a municipality's zoning bylaw specifically provides that the zoning board of appeals should take into consideration [a particular type of impact], this 'defined protected interest may impart standing to a person whose impaired interest falls within that definition.'" *Kenner*, 459 Mass. at 120, quoting *Martin v.*

Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints, 434 Mass. 141, 146-147 (2001).

1. Kalinowski's Standing with Respect to Arrays B and C.

Kalinowski is not entitled to the presumptive standing accorded to "parties in interest" with regard to Arrays B and C. The plaintiffs contend, however, that the special permits issued for Arrays B and C violate specific property rights or interests of Kalinowski's which are within the scope of concern and protection of the by-law at issue. The Amended Complaint alleges that Kalinowski owns property in the same zoning area, the Residential Agricultural District, as Arrays B and C. Amended Complaint, ¶ 4. It further alleges that:

- if Array A is constructed, Kalinowski "will suffer a loss of the rural and agricultural values and aesthetics of the scenic country setting...." Amended Complaint, ¶ 7;
- All of the land where Arrays A, B, and C are proposed to be built is designated by the USDA's Natural Resources Conservation Service as prime farmland and is currently in active agricultural use. AD, ¶ 16; and
- The proposed uses would be detrimental to the neighborhood in which they are proposed to be located; and would significantly alter the character of the Residential-Agricultural District. AD, ¶ 61.b.

Reading these allegations in the light most favorable to Kalinowski, they assert that if the solar facilities are built, they will significantly alter the character of the zoning district by diminishing its rural, agricultural and scenic aesthetics.

Normally, the aesthetic impact of a proposed use is insufficient to confer standing. See, e.g., *Choate* v. *Zoning Bd. of Appeals of Mashpee*, 67 Mass. App. Ct. 376, 383 (2006) (plaintiffs' allegations of general aesthetic concerns in respect to the impairment of the natural and undeveloped environs were insufficient to confer standing). But where, as here, the zoning bylaw forbids uses that "would be detrimental to the neighborhood" and "would significantly alter the character," of the district, see Zoning Bylaw, § 3.4(3), such aesthetic impacts may

impart standing. See, e.g., *Sheehan* v. *Zoning Bd. of Appeals of Plymouth*, 65 Mass. App. Ct. 52, 55 (2005) (plaintiff had standing based on loss of environmental and aesthetic benefits of nearby wooded hill where zoning bylaw created additional protected environmental and conservation interests); *Monks* v. *Zoning Bd. of Appeals of Plymouth*, 37 Mass. App. Ct. 685, 688 (1994) (requirement in zoning bylaw that proposed structure not "detract from the visual character or quality of the neighborhood" created a protected interest imparting standing to homeowner who contended that proposed structure would significantly impact visual character and quality of neighborhood). The plaintiffs have adequately alleged Kalinowski's status as an aggrieved person in connection with Arrays B and C.[4]

2. RESTORE's Standing.

RESTORE is a nonprofit membership corporation with a stated purpose of "restoring, preserving, and defending the long-term ecological health of the entire North Woods Ecoregion of the United States and Canada by restoring fundamental values, ecological awareness and accountability, and governmental leadership." RESTORE does not allege that it owns any property in Northfield or that it will suffer any injury from the proposed solar facilities. Rather, it contends that allegations in the Amended Complaint concerning prospective injury to two of its members, Kalinowski and Melissa Gamache, are sufficient to allege its standing.

In determining whether a membership corporation has associational standing, Massachusetts courts apply the three-part test described in *Hunt* v. *Washington State Apple Advertising Com'n*, 432 U.S. 333, 343 (1977). See *Modified Motorcycle Ass'n of Massachusetts,*

[4] Averments contained in the Affidavit of Christopher Kalinowski submitted in support of the plaintiffs' opposition to the defendants' motion to dismiss, while not necessary, strengthen the plaintiffs' allegations pertinent to Kalinowski's standing. See *Massachusetts State Auto. Dealers Ass'n, Inc.* v. *Tesla Motors MA, Inc.*, 469 Mass. 675, 677 n. 8 (2014) (on motion to dismiss for lack of standing, court may consider affidavits and other exhibits submitted by parties without converting motion to one for summary judgment).

Inc. v. *Commonwealth*, 60 Mass. App. Ct. 83, 85 (2003). Such a corporation has standing if "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires participation of individual members in the lawsuit." *Massachusetts Ass'n of Cosmetology Schools, Inc.* v. *Board of Registration in Cosmetology*, 40 Mass. App. Ct. 706, 708 (1996), quoting *Hunt*, 432 U.S. at 343. "The key in deciding whether the plaintiffs have standing . . . is to determine whether any individual member of the [corporation] . . . could demonstrate that he or she has suffered a legally cognizable injury." *Animal Legal Defense Fund, Inc.* v. *Fisheries & Wildlife Bd.*, 416 Mass. 635, 638 (1993).

As set forth above, the amended complaint sufficiently alleges the standing of Kalinowski, a member of RESTORE. The interests RESTORE seeks to protect in this action are germane to its purpose and neither the claims asserted nor the relief requested requires participation of individual members in the lawsuit. See *Modified Motorcycle Ass'n of Massachusetts, Inc.*, 60 Mass. App. Ct. at 85-86. While proof of Kalinowski's standing will require his participation, proof necessary to establish the merits of the claims asserted or to determine the relief to be provided will not. The amended complaint sufficiently alleges RESTORE's standing. The defendants' argument that associational standing does not exist for the purposes of a G.L. c. 40A, § 17 action, based on the contention that standing for purposes of § 17, unlike standing generally, requires individual injury is without merit.

ORDER

For the reasons set forth above, it is **ORDERED** that the Defendants' Motion to Dismiss is **DENIED.**

Dated: April 12, 2022

Francis E. Flannery
Justice of the Superior Court