

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2022-0032

CYNTHIA BEARD & others¹

vs.

S L T CONSTRUCTION CORPORATION & others²

**MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS
S L T CONSTRUCTION CORPORATION AND MAROB TRUST'S
MOTION TO DISMISS**

The plaintiffs – Cynthia and Joshua Beard (collectively, “Beards”); Madeline Joyce; Helen, Jacqueline, and Kevin Littig (collectively, “Littigs”); Angela and Chad Moore (collectively, “Moore’s”); Dorothy and Thomas Pollitt (collectively, “Pollitts”); Deborah and James Rooney (collectively, “Rooneys”); and Lisa Simmons – brought this action in the nature of certiorari seeking judicial review of an earth removal permit issued by the Town of Carver Earth Removal Committee (“ERC”). Two of the defendants – S L T Construction Corporation (“SLT”) and Marob Trust c/o Mary McGrath (the “Trust”) – have moved to dismiss. A hearing on the motion took place on July 21, 2022, and the court took the matter under advisement. For the following reasons, SLT and the Trust’s motion to dismiss is **DENIED**.

BACKGROUND

On October 20, 2021, SLT filed an application for an earth removal permit for property off of Spring Street and owned by the Trust, identified as Assessors’ Map 32, Lot 4 (“Property”), with the Carver Town Clerk. The application included two pages of a site plan and sought a two-

¹ Joshua Beard, Madeline Joyce, Helen Littig, Jacqueline Littig, Kevin Littig, Angela Moore, Chad Moore, Dorothy Pollitt, Thomas Pollitt, Deborah Rooney, James Rooney, and Lisa Simmons.

² James Nauen, Michael C. Harrison, Robert J. Ieronimo, Richard Ward, Darlene Whittemore, and William Garnett, as members of the Town of Carver Earth Removal Committee; and Marob Trust c/o Mary McGrath

year permit to remove 207,485 cubic yards of earth. The Property is located in the Residential/Agricultural (“RA”) Zoning District. The application does not represent that the Property will be used for agricultural purposes after earth removal.

The Property is located in the Plymouth-Carver Aquifer, designated by the United States Environmental Protection Agency as a sole source aquifer. The aquifer is the sole source of drinking water in Carver. The Property is part of the Atlantic Coast Pine Barrens, a globally rare ecosystem home to hundreds of species of plants and animals protected under the Massachusetts Endangered Species Act. The plaintiffs live nearby or across the street from and within viewing distance of the Property. The plaintiffs allege that they are aggrieved by the decision to grant the earth removal permit for the Property due to potential contamination of private wells; the airborne release of medically harmful silica; deposit on their properties of sand, gravel, and trash transferred from the Property; infestation of predatory animals threatening pets and humans; concussive noise and vibration from the earth removal operations and trucks travelling to and from the Property; increased noise from Route 44 as a result of clearcutting, loss of trees and vegetation, and flattened topography; ruination of natural vista; and decreased property values.

The Beards claim that their home at 168 High Street in Carver shakes intermittently from the earth removal operations. Additionally, they claim that trash from the work site blows onto their property. They also state that there is increased noise and concussions from the operations and that coyotes have been displaced from the work site and frequently appear in the Beards’ yard. The Littigs claim that they experience “horrendous noise” from the trucks servicing the work site and the operations at their residence at 170 High Street in Carver. The Littigs also describe increased highway noise due to clear cutting done by SLT in connection with the earth removal operations. The Moores, who reside at 162 High Street in Carver, also allege that there

is “horrendous noise” from the trucks servicing the work site and the operations, noise which has prevented, from sleeping. Additionally, the Moores’ claim that their home shakes and that trash from the work site blows onto their property and that the home is coated in dust from the earth removal operations. The Pollitts, who reside at 158 High Street in Carver, claim to have experienced constant loud noise from the operations and that trash blows from the work site onto the Pollitts’ property, into Rickett’s Pond, which their house abuts, into a nearby vernal pool, and into the wetland and that sand from the work site coats Dorothy’s car. The Pollitts’ also claim that their house shakes from the concussive noise from the earth removal operations. The Rooneys live at 160 High Street in Carver. They claim that constant loud noise from the earth removal operations interferes with their use and enjoyment of their property. They describe vibrations from the operations that shake their home, and that trash from the work site has blown onto their property, into a nearby vernal pool, and into the wetlands.

DISCUSSION

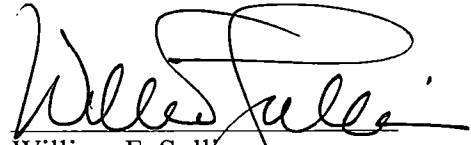
SLT and the Trust argue that the action should be dismissed because the plaintiffs lack standing. To demonstrate standing to bring a certiorari action to challenge the decision of the ERC, the plaintiffs must “make [] a requisite showing of a reasonable likelihood that [they have] suffered injury to a protected legal right.” *Higby/Fulton Vineyard, LLC v. Board of Health of Tisbury*, 70 Mass. App. Ct. 848, 850 (2007). “A party has standing when it can allege an injury within the area of concern of the statute or regulatory scheme under which the injurious action has occurred.” *School Comm’n of Hudson v. Board of Educ.*, 448 Mass. 565, 579 (2007), quoting *Massachusetts Ass’n of Indep. Ins. Agents & Brokers, Inc. v. Commissioner of Ins.*, 373 Mass. 290, 293 (1977). “Whether a plaintiff’s injury falls within the so-called ‘zone of interests’ of a statute or regulatory scheme depends upon a number of factors, including ‘[1] the language of

the statute in issue; [2] the Legislature's intent and purpose in enacting the statute; [3] the nature of the administrative scheme; [4] decisions on standing; [5] any adverse effects that might occur, if standing is recognized; and [6] the availability of other, more definite, remedies to the plaintiffs." *Revere v. Massachusetts Gaming Comm'n*, 476 Mass. 591, 607 (2017), quoting *Enos v. Secretary of Env'tl. Affairs*, 432 Mass. 132, 135-136 (2000). "[S]tanding usually is not present unless the governmental official or agency can be found to owe a duty directly to the plaintiffs." *Enos*, 432 Mass. at 136.

Chapter 9 of the General Carver Bylaws ("Bylaws") sets forth requirements for earth removal operations, except those exempt under section 9.1.8. The purpose of Chapter 9 is "to promote the health, safety and general welfare of the residents of the Town of Carver, and to ensure that permanent changes in the surface contours of land resulting from the removal and regrading of earth materials will leave the land in a safe and convenient condition for appropriate reuse without requiring excessive and unreasonable maintenance or creating danger of damage to public and private property, as well as to provide that earth removal activities shall be conducted in a safe manner and with minimal detrimental effect upon the district in which the activities are located." Bylaws § 9.1.1. Chapter 9 is clearly intended to protect citizens of Carver, such as the plaintiffs, from detrimental effects of earth removal operations. The plaintiffs' concerns regarding SLT's operations, therefore, clearly fall within the area of concern of the regulatory scheme. The plaintiffs have raised concerns regarding their safety and general welfare. The concerns raised are not speculative, as the plaintiffs allege that they have been experiencing the detrimental effects of the earth removal operations since it began, which the plaintiffs have established by way of affidavits.

ORDER

For the foregoing reasons, SLT and the Trust's motion to dismiss is **DENIED**.


William F. Sullivan
Justice of the Superior Court

Dated: August 12, 2022