

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH COUNTY, ss.

SUPERIOR COURT DEPT.  
OF THE TRIAL COURT  
C.A. NO. 2283CV00032

CYNTHIA BEARD, 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,

Plaintiffs,

v.

JAMES NAUEN, MICHAEL C. HARRISON, ROBERT  
J. IERONIMO, RICHARD WARD, DARLENE  
WHITTEMORE, and WILLIAM GARNETT as they are  
the members of the EARTH REMOVAL COMMITTEE  
of the TOWN of CARVER, SLT CONSTRUCTION  
CORPORATION, and MAROB TRUST c/o MARY  
McGRATH,

Defendants.

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION  
FOR JUDGMENT ON THE PLEADINGS**

The Plaintiffs, Cynthia Beard, 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, respectfully submit this Memorandum in Support of Their Motion for Judgment on the Pleadings. The Plaintiffs are entitled to judgment in their favor as a matter of law because Defendants James Nauen, Michael C. Harrison, Robert J. Ieronimo, Richard Ward, Darlene Whittemore, and William Garnett as they are the members of the Town of Carver Earth Removal Committee (the "Committee") issued an earth removal permit in

contravention of the Town of Carver Earth Removal Bylaw and the administrative process was riddled with errors. As such, the earth removal permit granted to defendant Marob Trust c/o Mary McGrath (“Marob Trust”) for work done by defendant SLT Construction Corporation (“SLT”) should be invalidated and all earth removal be enjoined.

### **STATEMENT OF THE CASE**

The Plaintiffs brought this action in the nature of *certiorari*, requesting that this Court declare the decision of the Committee in issuing an earth removal permit to the Marob Trust to be null and void and earth removal operations be enjoined. Second Amended Complaint, Introductory Paragraph. The Plaintiffs allege that the Committee was improperly constituted and further allege that there are fundamental errors in both the administrative process and the content of the Committee’s decision, in violation of the Town of Carver Earth Removal Bylaw. *Id.*

SLT and Marob Trust filed a motion to dismiss on the grounds that the Plaintiffs lack standing. The Committee joined that motion. The motion was denied by Memorandum of Decision and Order dated August 12, 2022. The defendants’ motion for reconsideration was denied on September 20, 2022.

### **STATEMENT OF MATERIAL FACTS**

#### **I. Provisions of the Earth Removal Bylaw**

The Town of Carver Earth Removal Bylaw (the “Bylaw”) provides that its purpose 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.”

Section 9.1.1., AR 03<sup>1</sup>. Section 9.1.3a of the Bylaw establishes the Committee as a seven-member committee. AR 03. Section 9.1.3b prohibits the appointment of more than two members who represent the same trade, profession, occupation, or business interest. AR 04-05.

The Bylaw has detailed requirements for both the application and the permit itself. The application for an earth removal permit requires that a detailed site plan include the following: lot boundaries, names of abutting owners and other parties in interest, streets contiguous to the site, vegetation, existing and proposed roadways, existing and proposed buildings, location of sources of water, wetlands, primary recharge areas, the Natural Heritage & Endangered Species Program Priority Habitat of Rare and Endangered Species, sewage disposal, parking, loading areas, easements and rights-of-way, walls, fences, ditches, streams, ponds, and known permanent monuments, and other cross-sections, profiles, and contour maps needed to describe the proposal, existing intermediate and final ground levels with those of adjacent properties, natural surface water flows, drainage ditches, groundwater elevations before and after removal, and a fully complete restoration plan “which complies with sound engineering practices and either the Natural Resources Conservation Service Conservation Practice Standard ‘Land Reclamation, Currently Mined Land’, Code 544 or the Natural Resources Conservation Service Conservation Practice Standard ‘Critical Area Planting’ Code 342.” Bylaw Section 9.1.5c, AR 06. The site plan must be prepared by a registered professional Engineer. Bylaw Section 9.1.5b, AR 05.

The Committee must hold a public hearing on an application for an earth removal permit and is required to give written notice of the public hearing to the Board of Health, Board of Selectmen, Board of Assessors, Agricultural Commission, Conservation Commission, Planning Board, Police, and Department of Public Works. Bylaw Section 9.1.6a, AR 06.

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<sup>1</sup> Reference to AR \_\_ is to the Certified Administrative Record.

When granting an earth removal permit, Section 9.1.7a of the Bylaw provides that the Committee “shall determine that the proposal generally conforms to the principles of good engineering, sound planning, correct land use, and provides for the proper and reasonable reuse of available topsoil if appropriate.” AR 07. Section 9.1.7d further requires the Committee to “set hours of operation, specify special truck routes, require bonds for restoration, road repair or other purposes, require monitoring fees, and impose safety-related conditions” and “establish provisions for monitoring the permitted earth removal activity on a regular basis, and may, to the extent permitted by law, enter the premises at any time to inspect for compliance with the conditions set forth in the permit.” AR 07. Section 9.1.7e of the Bylaw requires that “[a] bond or other performance guarantee acceptable to the E.R.C. [Earth Removal Committee] shall be established by the E.R.C. based on the estimated cost of restoration for the project as may be deemed appropriate and shall be held by the Town of Carver until all work has been completed and conditions of the special permit have been met.” AR 07. Section 9.1.7e also provides that the Committee “shall require the applicant to submit status reports every 90 days to the E.R.C. on an appropriate form as outlined in the E.R.C. rules and regulations and shall require the site to be inspected by the E.R.C. authorized agent and a report filed to the E.R.C. at the end of every 12 month period.” AR 07.

“The conditions of the permit, including the expiration date, shall be clearly set forth on the permit.” Bylaw Section 9.1.7g, AR 07. Further, “[n]o permit shall be issued for a period in excess of 12 months. However, permits shall be extended beyond 12 months if the E.R.C. is satisfied with all quarterly reports regarding the project and that the work is carried out under the plans, specifications, and conditions previously approved after public hearing, and does not entail earth removal of a larger quantity or from a larger land area than allowed in the original

permit. No project may be extended beyond a five (5) year period without a full hearing of the E.R.C.” Bylaw Section 9.1.7h, AR 08.

## **II. The Permit**

On or about October 1, 2021, SLT, on behalf of the Marob Trust, filed an earth removal permit application (the “Application”) with the Carver Town Clerk for property located off Spring Street in Carver and owned by Marob Trust, identified as Assessor’s Map 32, Lot 4 (32-4-0) (the “Property”). Plaintiffs’ Second Amended Complaint, ¶43; AR 11.<sup>2</sup> The Application sought a two-year earth removal permit to remove 207,485 cubic yards from the Property. AR-11. The entire Application package consisted of the following: a one-page earth removal application, one sheet from an unsigned, unstamped definitive plan set on 8.5 x 11 inch paper, a one-page document entitled Subgrade Cut and Fill Report, and one unsigned, unstamped oversized plan entitled “Earth Removal Plan.” Supplemental Administrative Record (“SAR”) 02-05. The site plan omitted much information that the Bylaw requires be submitted by the applicant, including: vegetation, location of sources of water, wetlands, primary recharge areas, existing intermediate and final ground levels, natural surface water flows, groundwater elevations before and after removal, and a full and complete restoration plan which complies with sound engineering practices and either the Natural Resources Conservation Service Conservation Practice Standard “Land Reclamation, Currently Mined Land,” Code 544 or the Natural Resources Conservation Service Conservation Practice Standard “Critical Area Planting” Code 342, as determined by the E.R.C. *Cf.* SAR 02-05.

On November 17, 2021, the Committee held a public hearing on the Application. AR 22-23. The agenda for the Committee’s November 17, 2021 meeting included the item “Marob

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<sup>2</sup> The Administrative Record does not reflect the date the Application was filed with the Town Clerk.

Trust c/o Mary McGrath Public Hearing *Map 22 Lot 4* for an earth removal permit.” AR 22 (emphasis supplied). This identification was an error, as the Property is Map 32, Lot 4. AR 11. There is no indication in the Administrative Record or Supplemental Administrative Record that the Committee gave written notice of the public hearing to Town boards and departments as required by Section 9.1.6a of the Bylaw. Four members of the Committee were present at the public hearing: Chair Robert Ieronimo, William Garnett, Michael Harrison, and Richard Ward. AR 23. Committee member James Nauen was absent. *Id.*

Peter Opachinski of SLT informed the Committee that the estimated time for completing the proposed earth removal was two years. AR 24. Shockingly, although the Bylaw requires a public hearing, the Committee proceeded to vote on the Application after SLT made its presentation but without allowing public comment. The meeting minutes state:

Ms. Sheehan interrupted the vote and stated a vote would be made before public comments. Chairman Ieronimo inquired about the vote; unanimous. VOTE 4 to 0. Chairman Ieronimo inquired to Ms. Sheehan and she stated she wanted to speak during the public hearing. AR 24-25.

The Committee voted 4-0 to “approve the expansion of the project Map 22 Lot 4” again misidentifying the Property. AR 25. The Committee’s minutes from the public hearing are devoid of any of the findings required by Section 9.1.7a of the Bylaw—“that the proposal generally conforms to the principles of good engineering, sound planning, correct land use, and provides for the proper and reasonable reuse of available topsoil if appropriate.” AR 24-25.

On December 6, 2021, the Committee’s written decision approving the Application and issuing an earth removal permit (the “Permit”) was filed with the Town Clerk. AR 27, 29. The Permit contains five signatures, including that of James Nauen, who was absent from the public hearing and did not vote on the Application. AR 28. An Earth Removal Monthly Cubic Yardage Tally Sheet for the Permit contains a stamp that states the permit number (104), the approved

yardage (207,485), and an issuance date of November 17, 2021. AR 30. The Permit lacks the following findings, conditions and requirements specified in the Bylaw: the finding as to good engineering practice, the requirement of bonds for restoration, road repair, or other purposes, the requirement that applicant submit status reports every 90 days, provision for inspections by the Committee's authorized agent, the submission of a report to the Committee at the end of 12 months, and the provision for the Committee's regular monitoring of the earth removal activity. AR 27-28. The Permit also lacks an expiration date, as required by the Bylaw. *Id.*

## **ARGUMENT**

### **I. Standard of Review**

Plaintiffs brought this action under the *certiorari* statute, G.L. c. 249, § 4. Superior Court Standing Order 1-96 provides that for cases brought under this statute, the matter is to be addressed through judgment on the pleadings based on the certified administrative record. The standard of review varies based on the nature of the action for which review is sought, but in the case of an adjudicatory proceeding with evidence presented and due process protections, the administrative decision will be upheld unless there is substantial evidence that the decision was arbitrary and capricious. *Mederi, Inc. v. City of Salem*, 488 Mass. 60, 67 (2021).

### **II. Judgment on the Pleadings Should Enter for the Plaintiffs Because the Administrative Record Establishes Numerous Procedural Errors in Violation of the Bylaw**

The Earth Removal Bylaw sets forth specific requirements for the regulation of earth removal, the application process for earth removal permits and the expectation of what materials must be provided, the public hearing process, and the conditions and information that must be included in an earth removal permit, among other things. AR 03-10. In virtually every step of the way, the Committee's actions were in violation of the Bylaw.

#### **A. The Application and Site Plan**

SLT's Application lacked information required by the Bylaw. The site plan included as part of the Application was deficient in many respects, lacking important information that should have been taken into consideration. The Property is located in the Plymouth-Carver Aquifer, which is designated by the U.S. Environmental Protection Agency as a sole source aquifer. Plaintiffs' Second Amended Complaint, ¶70. This aquifer is the sole source of drinking water for residents of the Town of Carver. *Id.* However, despite the Bylaw's requirement that the site plan **shall** include the location of sources of water, the site plan provided with the Application is missing this critical information. Other critical information absent from the Application includes information on wetlands, vegetation, natural surface water flows, the Natural Heritage & Endangered Species Program Priority Habitat of Rare and Endangered Species, primary recharge areas, groundwater elevations before and after earth removal, and cross-sections, profiles, and contour maps needed to describe the proposal. Additionally, the site plan did not include a restoration plan meeting the requirements of the Bylaw. Section 9.1.5c specifically details the type of restoration plan that is acceptable and even provides that that the requirements "are on file at the Board of Selectmen's Office and the Town Clerk's Office." AR 06. Finally, while the site plan bears the printed name of McKenzie Engineering, neither plan sheet included in the Administrative Record contains a signature or stamp of a registered professional Engineer. AR 12, SAR 05.

### **B. The Public Hearing**

The Committee failed to provide written notice of the public hearing to a number of Town boards and departments, as required by the Bylaw, misidentified the Property in the posted agenda, and did not provide an opportunity for the public to comment. The purpose of a public hearing is to provide an opportunity for the public to comment on an application. See School



*Committee of Hudson v. Board of Educ.*, 448 Mass. 565, 574 (2007) (explaining purpose of public hearing requirement relative to applications to establish a charter school); *Kramer v. Zoning Bd. of Appeals of Somerville*, 65 Mass. App. Ct. 186, 190 (2005) (public hearing requirement for special permits “provides an opportunity for interested persons to appear and express their views pro and con” (citations omitted)); *Conservation Law Foundation v. Natick Conservation Comm’n*, 2001 WL 1334724, \*5 (Super. Ct. July 27, 2001) (revisions to a project were made during public hearing “and thus, received public scrutiny and comment”).

The Commission violated fundamental due process by refusing to allow the public to provide comments prior to taking a vote on the application. The Committee only engaged in a discussion with SLT and voted to approve the Application. The Chairman refused to permit Ms. Sheehan to comment; instead, he called for a vote to approve the application. AR 24. Only after the vote was taken did the Chairman allow Ms. Sheehan to speak. She attempted to bring to the Committee’s attention the deficiencies in its action, but her concerns were summarily dismissed. In fact, when Ms. Sheehan informed the Committee that the Bylaw required a bond, the Chairman erroneously responded that a bond was not required and within the Committee’s discretion. AR 25. The Chairman was incorrect. Bylaw Sections 9.1.7d and 9.1.7e, AR 07. The Chairman also stated that “the information of her request as included in the presented plan.” AR 25. While the meaning of this sentence is not clear, what is clear is that much required information was in fact not included in the presented plan.

The Committee’s hearing on the Marob Trust/SLT Application is in stark contrast to its public hearing process immediately preceding, as shown in the meeting minutes. In the public hearing on the application of Paul and Kailin Foley for an earth removal permit, Chairman Ieronimo asked if any abutters were present and, in fact, an abutter was allowed to ask questions

and voice concerns prior to a vote being taken. AR 23-24. Ms. Sheehan was among the members of the public who were permitted to speak on the Foley’s application before the vote was taken. It is inexcusable for the Committee to allow public comment for the Foley public hearing but deny public comment on the Marob Trust/SLT public hearing. It is not only inexcusable, but it is also a violation of fundamental due process and alone justifies nullifying the permit.

The error in the posted agenda served to curtail public comment. The Committee’s posted agenda for the November 17, 2021, meeting that identified that there was to be a public hearing on the Application erroneously identified the Property as Map 22, Lot 4. AR 22. The agenda item did not include a street address or a nearby cross street, leaving the map and lot designation as the only identification of the location of the parcel in question. A savvy individual taking the extra steps to locate Map 22, Lot 4 on an Assessors Map—nearly 3 miles away from the Property—might conclude that the proposed earth removal would not be occurring anywhere near his or her neighborhood. Finally, there is absolutely no indication anywhere in the Administrative Record that the Committee fulfilled its obligation to provide written notice of the public hearing to the Board of Health, Board of Selectmen, Board of Assessors, Agricultural Commission, Conservations Commission, Planning Board, Police, and Department of Public Works. To the extent any of those boards or departments had any interest or input to give on the Application, it cannot be determined from the Administrative Record whether they were given that opportunity.

### **C. The Permit**

The Bylaw requires the Committee to issue a comprehensive written decision when issuing an earth removal permit. AR 07. Most of the “Earth Removal Permit Conditions” are not

discretionary. The Permit the Committee issued to SLT is grossly deficient in many areas as it fails to contain many of the required conditions under the Bylaw.

First, and quite glaring, is that the Committee never determined that SLT's proposal "generally conforms to the principles of good engineering, sound planning, correct land use, and provides for the proper and reasonable reuse of available topsoil if appropriate." Bylaw Section 9.1.7a, AR 07. The minutes of the public hearing do not contain any such determination, nor does the Permit itself contain any such finding. The lack of this important finding is particularly troublesome given that no professional Engineer attested to the appropriateness of the engineering by signing and attaching an engineer's professional stamp to the sheets submitted to the Committee.

Second, the Permit lacks several conditions related to the overall conduct of the earth removal activity, reporting requirements, and monitoring. SLT proposed to remove over 200,000 cubic yards of earth material from the Property, yet the Permit did not require any bond for restoration of the land or repairs to the roads bearing the truck traffic associated with the project. Both Sections 9.1.7d and 9.1.7e require a bond or some other form of performance guarantee. If SLT does not complete the earth removal or restore the Property, the Town does not have a bond or any other manner of restoring the Property, due to the failure of the Committee to protect the Town's interests as required by the Bylaw.

The Permit failed to require SLT to submit status reports every 90 days, in violation of Section 9.1.7e. Key conditions on inspection and monitoring are absent from the Permit. The Committee must include in an earth removal permit provision for inspections by the Committee's authorized agent, the filing of a report the Committee at the end of every twelve-month period, and provisions for regular monitoring of the earth removal activity, but did not do

so. *Id.*, Section 9.1.7d, AR 07. It cannot be that the Permit is in compliance with the purpose of the Bylaw where several components that bear on the earth removal's impact on the public and the land are missing. See Section 9.1.1 "Purpose", AR 03.

Third, the Permit lacks an expiration date. Section 9.1.7g of the Bylaw requires that the expiration date "**be clearly set forth on the permit.**" (emphasis supplied). There is simply no expiration date anywhere on the face of the Permit. AR 27-28. SLT's representation at the public hearing that the earth removal would take two years and the lack of an expiration date in the Permit implies that the Committee issued a two-year Permit. This is in direct violation of Section 9.1.7h of the Bylaw which prohibits the issuance of earth removal permits for a period exceeding twelve months. AR 08. While an earth removal permit can be extended beyond the initial twelve months, there is a condition precedent that requires the Committee's satisfaction "with all quarterly reports regarding the project and that the work is carried out under the plans, specifications, and conditions previously approved after public hearing," among other things. *Id.* The record contains no evidence that the conditions precedent for extending work beyond December 6, 2022, (the one year anniversary of the filing of the Permit with the Town Clerk) were met.

As this Court found in denying the Defendants' Motion to Dismiss, the Plaintiffs are directly aggrieved by the Committee's violations of the Town Bylaw. The flawed process caused the Committee to issue an invalid permit. SLT's earth removal operations are only permissible if approved under a process and Permit conditions that comply with the Town Bylaw. As the process was fundamentally unfair as a matter of due process and the Permit in question does not comply with the Bylaw, it should be annulled and the earth removal operations should cease.

**CONCLUSION**

For the reasons set forth above, the Plaintiffs request that judgment on the pleadings enter in their favor and the Court order the immediate cessation of earth removal operations by SLT.

Respectfully submitted,

PLAINTIFFS CYNTHIA BEARD,  
JOSHUA BEARD, MADELINE JOYCE,  
HELEN LITTIG, JACQUELINE LITTIG,  
KEVIN LITTIG, ANGELA MOORE,  
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By their attorneys,



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**CERTIFICATE OF SERVICE**

I hereby certify that on May 11, 2023, I served a copy of the foregoing Plaintiffs' Memorandum in Support of Their Motion for Judgment on the Pleadings on all counsel of record by email.



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Maurica D. Miller