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COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 21-00862

WILLIAM M. HAMILTON

vs.

HOUSING APPEALS COMMITTEE & others[1]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT WALPOLE ZONING BOARD OF APPEALS' AND DEFENDANT 55 SS, LLC'S JOINT MOTION TO DISMISS AMENDED COMPLAINT

This case arises out of a comprehensive permit granted by the defendant town of Walpole zoning board of appeals ("Board") to the defendant 55 SS LLC ("Developer"). The plaintiff, William M. Hamilton, brought claims for judicial review of decisions by the Board and the defendant Housing Appeals Committee ("Committee") regarding the comprehensive permit, contending that they employed illegal procedures in connection with the permitting process. The amended complaint contains claims for judicial review pursuant to G. L. c. 40B, § 22 and G. L. c. 30A, § 14 of the Committee's decision (Count I), for judicial review pursuant to G. L. c. 40B, § 23 and G. L. c. 40A, § 17 of the Board's decision (Count II), and for mandamus pursuant to G. L. c. 249, § 5 (Count III).

The case is before the court on the Board's and the Developer's (together, the "Moving Defendants") joint motion to dismiss the amended complaint pursuant to Mass. R. Civ. P. 12(b)(1) and (6).[2] For the reasons set forth below, the motion is **ALLOWED**.

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[1] 55 SS LLC and Walpole Zoning Board of Appeals

[2] Before the court is also the Moving Defendants' emergency motion to dismiss the plaintiff's original complaint and the plaintiff's oral motion to amend the original complaint. The plaintiff is permitted to amend the original complaint as of right because no responsive pleading within the meaning of Mass. R. Civ. P. 15(a) has been served and no order of dismissal has been entered. See Mass. R. Civ. P. (15)(a); Reporter's Notes to Mass. R. Civ. P. 15; *National Equity Properties, Inc.* v. *Hanover Ins. Co.*, 74 Mass. App. Ct. 917, 918 (2009). Therefore, the motion to amend shall be **ALLOWED** and the emergency motion to dismiss the complaint shall be **DENIED** as moot.

BACKGROUND

The following background is taken from the amended complaint and is assumed to be true for purposes of the motion to dismiss.

The plaintiff resides at 45 Eldor Drive in South Walpole.

On January 15, 2020, the Developer submitted to the Board an application for a comprehensive permit for an affordable housing project located at 51, 53, and 55 Summer Street in Walpole ("Project"). As originally proposed, the Project consisted of four four-story apartment buildings with forty-eight units each, forty-eight townhomes, and sixty single-family homes. During the public hearing process, the Developer modified the Project to consist of two six-story apartment buildings with 192 units, sixty-eight townhomes, and forty single-family homes. Members of the public gave input on neighborhood concerns including the density of the Project, wetlands, water supply, increased traffic, and fire safety. The Project will nearly double the size of the South Walpole community.

The Board issued a decision granting a comprehensive permit for the Project ("Original Comprehensive Permit") that was filed with the town clerk on April 27, 2021. The Original Comprehensive Permit included a condition reducing the height of each apartment building from six to four stories based on concerns by the fire department.

The Developer appealed the Original Comprehensive Permit to the Committee. At the direction of the Committee, the Developer and the Board participated in private mediation on July 12, 2021. On July 14, 2021, the Board met in executive session and voted to approve a revised decision ("Revised Comprehensive Permit") increasing the height of the apartment buildings from four to five stories each.

On July 30, 2021, the Developer and the Board submitted to the Committee a joint motion to strike the Original Comprehensive Permit and replace it with the Revised Comprehensive Permit. On August 20, 2021, the Committee issued a decision ("Committee Decision") granting the motion.[3] The Committee Decision incorporated the Revised Comprehensive Permit and directed the Board to file the Committee Decision with the town clerk. The Committee Decision was filed with the clerk's office on August 20, 2021.

The Revised Comprehensive Permit was not published for public review or addressed at a public hearing prior to the Committee Decision.

The plaintiff claims that the Committee Decision and the Revised Comprehensive Permit are unlawful because public hearing and notice requirements were not followed. The plaintiff also claims that the Committee violated the Massachusetts Environmental Policy Act ("MEPA") because the Developer did not file an environmental notification form ("ENF"), and the Committee did not make required findings in the Committee Decision.[4]

DISCUSSION

When ruling on a motion to dismiss under Mass. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction or Mass. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted, the court must accept as true the factual allegations in the complaint and draw any reasonable inferences in the plaintiff's favor. See *Buffalo-Water 1, LLC* v. *Fidelity Real Estate Co.*, 481 Mass. 13, 17 (2018); *Ginther* v. *Commissioner of Ins.*, 427 Mass. 319, 322 (1998). The court's review under Rule 12(b)(1) may include affidavits and other matters outside the

[3] The amended complaint alleges that the Committee Decision was dated and stamped by the town clerk on August 21, 2021. That date was apparently listed in error because the Committee Decision, which is attached to the amended complaint as Exhibit A, is clearly dated, and stamped as received by the town clerk on, August 20, 2021.

[4] In support of their motion, the Moving Defendants submitted an affidavit of the Developer's manager, David E. Hale ("Hale"), in which he asserts that the Developer gave notice to the Committee that it had filed an ENF. See Second Affidavit of David E. Hale, Manager of 55 SS LLC, para. 3 (Paper No. 12.1). Because this affidavit is outside the pleadings, the court does not consider it with respect to the Mass. R. Civ. P. 12(b)(6) motion.

complaint. See *Ginther*, 427 Mass. at 322 n.6. The court's review under Rule 12(b)(6) is limited to the factual allegations in the complaint and facts within any attached exhibits, see *Eigerman* v. *Putnam Invs., Inc.*, 450 Mass. 281, 285 n.6 (2007), in addition to matters of public record and documents relied upon in the complaint. See *Marram* v. *Kobrick Offshore Fund, Ltd.*, 442 Mass. 43, 45 n.4 (2004); *Schaer* v. *Brandeis Univ.*, 432 Mass. 474, 477 (2000).

To survive dismissal under Rule 12(b)(6), a complaint must contain "factual 'allegations plausibly suggesting (not merely consistent with)' an entitlement to relief . . . ." *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623, 636 (2008), quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 557 (2007). "The allegations must be more than 'mere labels and conclusions,' and must 'raise a right to relief above the speculative level.'" *Buffalo-Water 1, LLC*, 481 Mass. at 17, quoting *Galiastro* v. *Mortgage Elec. Registration Sys., Inc.*, 467 Mass. 160, 165 (2014).

I. The G. L. c. 30A, § 14 Claim

The Moving Defendants contend that the court lacks jurisdiction over the claim for judicial review pursuant to G. L. c. 30A, § 14 of the Committee Decision because the claim was not timely filed. Under § 14, an action for judicial review of an agency decision must be commenced within thirty days after receipt of notice of the agency's final decision. See G. L. c. 30A, § 14. This requirement is jurisdictional. See *Herrick* v. *Essex Reg'l Ret. Bd.*, 68 Mass. App. Ct. 187, 189–190 (2007). Here, the plaintiff first asserted his § 14 claim in the amended complaint, which was filed more than thirty days after the Committee Decision. The § 14 claim is therefore untimely and outside the court's jurisdiction.

The relation back principles in Mass. R. Civ. P. 15(c) do not compel a different result. Under Rule 15(c), a claim asserted in an amended pleading relates back to the original pleading if the claim "arose out of the conduct, transaction, or occurrence set forth or attempted to be set

forth in the original pleading . . . ." The relation back rules are "liberal" when a party seeks to amend after the expiration of a statute of limitations, but they "are not so broad as to encompass any claim that was known to the complainant that could have been brought in a timely fashion." *Weber* v. *Community Teamwork, Inc.*, 434 Mass. 761, 785–786 (2001), quoting *Wynn & Wynn, P.C.* v. *Massachusetts Comm'n Against Discrimination*, 431 Mass. 655, 673 (2000). The § 14 claim asserted in the amended complaint seeks judicial review of the Committee Decision issued by the Committee. The original complaint, in contrast, clearly asserts only a claim for judicial review pursuant to G. L. c. 40A, § 17 of the Revised Comprehensive Permit issued by the Board.[5] The claims involve distinct action by different governmental bodies and thus do not arise out of the same "conduct, transaction, or occurrence" for relation back purposes. Mass. R. Civ. P. 15(c).

The decision on which the plaintiff relies, *Herrick* v. *Essex Reg'l Ret. Bd.*, 68 Mass. App. Ct. 187 (2007), is distinguishable from this case. In *Herrick*, the plaintiff filed a complaint for review under § 14 that failed to name the proper party as a defendant but referred to that party multiple times. 68 Mass. App. Ct. at 187-188. When he moved to amend his complaint to add the proper party, the statute's time limit for filing a complaint had expired. See *id.* at 187. The Appeals Court concluded that the filing of the complaint within the statute's thirty-day limitations period complied with the statute even though the proper defendant was not named, that the judge had discretion to permit the plaintiff to amend the complaint, and that relation back rules would cure the plaintiff's error. See *id.* at 192-193. Here, the plaintiff does not seek to add

[5] The plaintiff contends that the original complaint asserted, or was intended to assert, a § 14 claim for review of the Committee Decision. The court disagrees. The original complaint consists of one count against the Board. It states that it "is brought pursuant to M. G. L. c. 40A, § 17" and that the plaintiff is aggrieved by the Board's decision. Complaint, Introduction. The sole count is described as an appeal for judicial review pursuant to M. G. L. c. 40A, § 17. Furthermore, the prayer for relief requests that the court annul the Board's decision pursuant to M. G. L. c. 40A, § 17. Nothing in the original complaint itself suggests that the plaintiff was attempting to seek judicial review of the Committee Decision.

a defendant to timely filed § 14 claim. Rather, he has asserted an untimely § 14 claim and seeks to have it relate back to a different claim based on different conduct by a different governmental body. In these circumstances, the § 14 claim does not relate back to the original complaint.

Therefore, the § 14 claim shall be dismissed.

II. The G. L. c. 40A, § 17 Claim

The Moving Defendants contend that the court lacks jurisdiction over the claim for judicial review pursuant to G. L. c. 40A, § 17 of the Revised Comprehensive Permit because the claim was not timely filed. Under G. L. c. 40B, § 21, a person aggrieved by a comprehensive permit may bring an appeal pursuant to G. L. c. 40A, § 17. See *Taylor* v. *Board of Appeals of Lexington*, 451 Mass. 270, 276–277 (2008). General Laws c. 40A, § 17 provides different statutes of limitations for two types of challenges to a decision by a board of appeals. See *Allegaert* v. *Harbor View Hotel Owner LLC*, 100 Mass. App. Ct. 483, 487-488 (2021). Challenges on the merits must be brought "within twenty days after the decision has been filed in the office of the city or town clerk." G. L. c. 40A, § 17. See *Allegaert*, 100 Mass. App. Ct. at 487. Challenges based on a defect in notice for public hearings must be brought within ninety days of the filing of the decision. See G. L. c. 40A, § 17; *Allegaert*, 100 Mass. App. Ct. at 487-488.

The § 17 claim in this case was first asserted in the original complaint, which was filed more than twenty, but less than ninety, days after the Revised Comprehensive Permit was filed with the town clerk. To the extent that the § 17 claim challenges the merits of the Revised Comprehensive Permit, the claim is untimely and the court lacks jurisdiction to entertain it.[6] See

[6] A challenge on the merits also fails because the plaintiff did not give the town clerk "[n]otice of the action with a copy of the complaint" within twenty days after the filing of the Revised Comprehensive Permit, a jurisdictional prerequisite for a § 17 claim. G. L. c. 40A, § 17. See *Hickey* v. *Zoning Bd. of Appeals of Dennis*, 93 Mass. App. Ct.

Allegaert, 100 Mass. App. Ct. at 487; *Bonfatti* v. *Zoning Bd. of Appeals of Holliston*, 48 Mass. App. Ct. 46, 50 (1999). To the extent that the claim is premised on defective notice, the claim is governed by § 17's ninety-day limitations period and was timely filed. See *Allegaert*, 100 Mass. App. Ct. at 487-488.

Nevertheless, the § 17 claim must be dismissed because the plaintiff has failed to demonstrate that he has standing to bring it. Standing is a "jurisdictional prerequisite" to an appeal under § 17. *Talmo* v. *Zoning Bd. of Appeals of Framingham*, 93 Mass. App. Ct. 626, 629 (2018) (quotations omitted). To have standing in this context, the plaintiff must be a "person aggrieved." *81 Spooner Rd., LLC* v. *Zoning Bd. of Appeals of Brookline*, 461 Mass. 692, 700 (2012), quoting G. L. c. 40A, § 17. To be aggrieved, the plaintiff "must assert 'a plausible claim of a definite violation of a private right, a private property interest, or a private legal interest.'" *Kenner* v. *Zoning Bd. of Appeals of Chatham*, 459 Mass. 115, 120 (2011), quoting *Harvard Sq. Defense Fund, Inc.* v. *Planning Bd. of Cambridge*, 27 Mass. App. Ct. 491, 493 (1989). The plaintiff's aggrievement must be "particularized[,]" *Murrow* v. *Esh Circus Arts, LLC*, 93 Mass. App. Ct. 233, 237-238 (2018); that is, "special and different from the injury the action will cause the community at large." *Butler* v. *Waltham*, 63 Mass. App. Ct. 435, 440 (2005). If the facts alleged by the plaintiff suffice to demonstrate that he is a person aggrieved, the § 17 claim cannot be disposed of on a motion to dismiss for lack of standing. See *Porter* v. *Board of Appeal of Boston*, 99 Mass. App. Ct. 240, 241–242 (2021).

Nothing alleged in the amended complaint suggests that the plaintiff was aggrieved by the Revised Comprehensive Permit. There is no explicit allegation of aggrievement in the amended complaint. Instead, the plaintiff alleges that the Revised Comprehensive Permit was

390, 392 (2018); Affidavit of Elizabeth Gaffey, Town Clerk of the Town of Walpole (Paper No. 10.2), para. 5; Second Affidavit of Elizabeth Gaffey, Town Clerk of the Town of Walpole, para. 1 (Paper No. 12.2).

not "published for public review or subject to a public hearing for input from the public, including Plaintiff[,]" Amended Complaint, para. 21; that the defendants "skirt[ed] the normal public vetting process[,]" *id.*, para. 35; that the Revised Comprehensive Permit was filed "without any notice to any of the 'parties in interest' who were entitled to notice of the original hearing on the Chapter 40B application[,]"[7] *id.*; and that "the alternative procedures followed . . . deprived the public from participating, or at least observing in an open meeting, discussions and deliberations on the proposed substantial changes to the Project" and the "opportunity to provide comment, learn what the outcome was, and comprehend that a new comprehensive permit had issued . . . ." *Id.*, para. 36. These concerns are not "special and different from the concerns of the rest of the community" and are thus insufficient to demonstrate a "tangible and particularized" injury to the plaintiff. *Murrow*, 93 Mass. App. Ct. at 237-238.

The affidavit submitted by the plaintiff in support of his opposition likewise fails to demonstrate particularized harm. In the affidavit, the plaintiff avers that the Developer's traffic study predicts that the Project will increase traffic at an intersection near the plaintiff's children's school. See Affidavit of William M. Hamilton (Paper No. 13.1), para. 3. The plaintiff routinely drives past the Project site and through the intersection and will continue to do so in the future. See *id.*, paras. 4-5, 7. Also, his son and other children often walk through the intersection after school. See *id.*, para. 6. These averments fail to demonstrate any harm to the plaintiff that is special and different from the concerns of the community at large. See *Nickerson* v. *Zoning Bd. of Appeals of Raynham*, 53 Mass. App. Ct. 680, 683–684 (2002) (where a project would increase traffic at an intersection used regularly by the plaintiff who resided about one mile away, the

[7] The plaintiff concedes that he was not a "party in interest" under G. L. c. 40A, § 11. Therefore, to the extent that the required notice to parties in interest was defective, it was not a harm specific to the plaintiff. Additionally, the plaintiff does not benefit from the rebuttable presumption of aggrievement applicable to parties in interest. See *Murrow*, 93 Mass. App. Ct. at 235.

plaintiff was not aggrieved because his interest was "not substantially different from that of all of the other members of the community who [were] frustrated and inconvenienced by heavy traffic" there).

Having failed to demonstrate that he was aggrieved by the Revised Comprehensive Permit, the plaintiff lacks standing to bring the § 17 claim. Therefore, the claim shall be dismissed.

III. The Mandamus Claim

"A complaint in the nature of mandamus is 'a call to a government official to perform a clear cut duty,' and the remedy is limited to requiring action on the part of the government official." *Boston Med. Ctr. Corp.* v. *Secretary of Exec. Office of Health & Human Servs.*, 463 Mass. 447, 469-470 (2012), quoting *Simmons* v. *Clerk–Magistrate of the Boston Div. of the Hous. Court Dep't*, 448 Mass. 57, 59–60 (2006). Mandamus action "is extraordinary" and is available "only to prevent a failure of justice in instances where there is no alternative remedy." *Callahan* v. *Superior Court*, 410 Mass. 1001, 1004 (1991). Relief in the nature of mandamus is not available "to obtain a review of the decision of public officers who have acted and to command them to act in a new and different manner." *Boston Med. Ctr. Corp*, 463 Mass. at 470, quoting *Harding* v. *Commissioner of Ins.*, 352 Mass. 478, 480 (1967).

The plaintiff claims that the Committee Decision violated MEPA and seeks mandamus relief ordering the Committee and the Developer to comply with MEPA's requirements in any further proceedings. Such relief is unavailable here because alternative remedies are available, namely judicial review pursuant to G. L. c. 30A, § 14 of the Committee Decision and judicial review pursuant to G. L. c. 40A, § 17 of the Revised Comprehensive Permit. See *Callahan*, 410 Mass. at 1004. Additionally, mandamus relief is not available to compel a different decision

from the Committee or the Board. See *Boston Med. Ctr. Corp*, 463 Mass. at 470. Therefore, the mandamus claim shall be dismissed.

ORDER

For the foregoing reasons, the plaintiff's oral motion to amend is **ALLOWED**. The Moving Defendants' joint emergency motion to dismiss the complaint is **DENIED** as it is moot. The Moving Defendants' joint motion to dismiss the amended complaint is **ALLOWED**.

SO ORDERED.

Maynard M. Kirpalani
Justice of the Superior Court

Dated: January 26, 2022