18

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2081CV01447

LISE REVERS & others[1]

vs.

DEPARTMENT OF ENVIRONMENTAL PROTECTION & others[2]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT 518 SOUTH AVE, LLC'S MOTION TO DISMISS

Plaintiffs, certain residents of the Town of Weston, commenced this action against the Department of Environmental Protection ("DEP"), the Weston Conservation Commission ("Commission"), and a developer, 518 South Ave, LLC ("Developer"). The Developer seeks to construct an affordable housing complex adjacent to a wetland in Weston. The matter is presently before the court on the Developer's motion to dismiss certain counts of Plaintiffs' amended complaint pursuant to Mass. R. Civ. P. 12(b)(6). After a hearing on January 11, 2021, and consideration of the submitted materials, the motion is **ALLOWED** in part and **DENIED** in part.

BACKGROUND

The amended complaint, and certain attachments to the original complaint, set forth the following facts.

The Developer seeks to build a 200-unit apartment building on property located at 518 South Avenue in Weston (the "Site"). The Site contains a bordering vegetated wetland, through which an unnamed stream flows. Pursuant to the Wetlands Protection Act, G.L. c. 131, § 40

[1] Louis Mercuri, Rebecca Mercuri, Richard Gilman, Barbara Gilman, Fernanda Bourlot, Martin Bourlot, Warren Heilbronner, Joan Heilbronner, John Gifford, Victoria Gifford, and Julie Hyde.
[2] Weston Conservation Commission and 518 South Ave, LLC.

("Act"), the Northeast Regional Office of the DEP issued to the Developer a Superseding Order of Resource Area Delineation ("SORAD"), classifying the unnamed stream as "intermittent" as opposed to "perennial." Because this distinction implicates how restrictive the Developer's construction must be in relation to the wetland, Plaintiffs appealed the issue to the DEP's Office of Appeals and Dispute Resolution. It issued a Recommended Final Decision dated May 8, 2020, ("DEP Decision"), affirming the stream's identification as intermittent, which the DEP commissioner adopted on May 11, 2020. On June 22, 2020, Plaintiffs filed their complaint in this action, appealing the DEP Decision under G.L. c. 30A, § 14, and seeking declaratory relief.

During the pendency of Plaintiffs' appeal of the stream determination, the Developer applied to the Weston Zoning Board of Appeals for a comprehensive permit for the project under G.L. c. 40B, §§ 20-23. Before having received a decision on its c. 40B application, the Developer also filed a Notice of Intent ("NOI") with the Commission seeking an Order of Conditions, which is a requirement for construction under the Act. On August 18, 2020, the Commission held a public hearing on the NOI.

On September 2, 2020, Plaintiffs filed their amended complaint. Therein, in addition to appealing the stream determination, Plaintiffs seek enforcement of a procedural regulation that they allege prohibits the Developer from filing its NOI before the Zoning Board of Appeals has rendered its decision on the Developer's c. 40B application. The amended complaint thus adds claims for declaratory relief and mandamus on the enforcement issue (Counts III and IV), and an action to prevent damage to the environment under G.L. c. 214, § 7A (Count V). The Developer moves to dismiss these three additional counts.

STANDARD OF REVIEW

To withstand a motion to dismiss pursuant to Mass. R. Civ. P. 12(b)(6), the factual allegations in the complaint must be sufficient, as a matter of law, to state a recognized cause of action or claim, and plausibly suggest an entitlement to relief. *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008). When considering a claim, the court accepts as true the allegations set forth in the complaint and draws any reasonable inferences in the plaintiff's favor. *Sisson v. Lhowe*, 460 Mass. 705, 707 (2011).

DISCUSSION

I. Enforcement of Regulations Concerning Notice of Intent (Counts III and IV)

Plaintiffs allege that, under the Act and its associated regulations, the Developer prematurely filed its NOI because it had not yet received a decision on its c. 40B application. Where the resolution of this question involves statutory and regulatory interpretation, the court begins by setting forth the relevant legal framework.

General Laws c. 131, § 40 provides, in relevant part:

> No such notice [of intent] shall be sent before all permits, variances, and approvals required by local by-law with respect to the proposed activity, which are obtainable at the time of such notice, have been obtained, except that such notice may be sent, at the option of the applicant, after the filing of an application or applications for said permits, variances, and approvals; provided, that such notice shall include any information submitted in connection with such permits, variances, and approvals which is necessary to describe the effect of the proposed activity on the environment.

The associated agency regulation, 310 Mass. Code Regs. 10.05(4)(e), expounds on this language, providing:

> The requirement under M.G.L. c.131, § 40 to obtain or apply for all obtainable permits, variances and approvals required by local by-law with respect to the proposed activity shall mean only those which are feasible to obtain at the time the Notice of Intent is filed. Permits, variances, and approvals required by local by-law may include, among others, zoning variances, permits from boards of appeals, permits required under floodplain or wetland zoning by-laws and gravel removal permits. They do not include, among others,

> building permits under the State Building Code, M.G.L. c. 23B, § 16, or subdivision control approvals under the State Subdivision Control Law, M.G.L. c. 41, §§ 81K through 81GG, which are issued by local authorities. When an applicant for a comprehensive permit (under M.G.L. c. 40B, §§ 20 through 23) from a board of appeals has received a determination from the board granting or denying the permit and, in the case of a denial, has appealed to the Housing Appeals Committee (established under M.G.L. c. 23B, § 5A), said applicant shall be deemed to have applied for all permits obtainable at the time of filing.

In answering the legal question at issue, the court applies the usual principles of statutory interpretation. When construing a statute, the court looks "first and foremost to the language of the statute as a whole. . . . [A] statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." *Commonwealth v. B & M Fitzgerald Builders, Inc.*, 71 Mass. App. Ct. 486, 491-492 (2008) (citations and quotation marks omitted). The same principles apply to the interpretation of regulations, which have the force of law. *Commonwealth v. Aldana*, 477 Mass. 790, 801 n.22 (2017).

Upon review of the language, *supra*, the court agrees with Plaintiffs that the Developer filed its NOI too soon. The plain language of G.L. c. 131. § 40 provides an exception to the general rule that all permits must be obtained before filing an NOI (specifically that, "at the option of the applicant," it may file its NOI "after the filing of" its permit applications). The regulation affirms that an NOI applicant must first "obtain *or apply*" for all feasible permits. 310 Mass. Code Regs. 10.05(4)(e) (emphasis supplied). Thus, in some instances permit approval and NOI processes may be simultaneous. However, the regulation also expressly defines and limits the "applied" status of c. 40B applicants to mean those that have "received a determination from the board granting or denying the permit and, in the case of a denial, ha[ve] appealed to the

Housing Appeals Committee." *Id.* In other words, a c. 40B comprehensive permit applicant must wait until a determination is received from the local zoning board of appeals before it can proceed with its NOI.

Looking more closely at c. 40B, this limitation is logical. The § 40 exception requires NOI applicants "to include any information submitted in connection with such permits, variances, and approvals which is necessary to describe the effect of the proposed activity on the environment." G.L. c. 131. § 40. Meeting this requirement with an associated c. 40B application may not be possible. The purpose of c. 40B is to encourage the expedited construction of affordable housing. *See* Healy, *Massachusetts Zoning Manual* § 5.5.3, at 5-21 (MCLE, 2019). The statute and its associated regulations accordingly provide for streamlined hearings, procedures, and timelines. *Id.* Under c. 40B, rather than proceed before multiple local boards, an applicant files a single application before the local zoning authority, which is authorized to place restrictions on the project, and override local ordinances, bylaws, and regulations that impede the development of affordable housing. *Id.* at §§ 5.5.4-5.5.5, at 5-22-5-24; *Zoning Bd. of Appeals of Holliston v. Housing Appeals Comm.*, 80 Mass. App. Ct. 406, 413 (2011). Under these circumstances, where the projects are large, complex, and highly-regulated, and subject to significant change during the permitting phase, the extent of any environmental impacts may not be ascertainable at the time of the application. That c. 40B approval timelines are tightly controlled also may erode any efficiencies gained by a simultaneous review process. Requiring sequential c. 40B and NOI applications is reasonable and logical.

The amended complaint alleges (and it is undisputed) that the Developer has yet to receive a decision on its c. 40B application from the Zoning Board of Appeals. Thus, under the regulation, its NOI was premature. Where the Developer does not challenge the regulation's

validity or otherwise question its force of law in relation to the statute, *Molly A. v. Comm'r of Dep't of Mental Retardation*, 69 Mass. App. Ct. 267, 277 n.17 (2007), its motion to dismiss Counts III and IV must be **DENIED**.[3]

II. Action to Prevent Damage to the Environment (Count V)

Count V of the amended complaint alleges a claim under G.L. c. 214, § 7A, to prevent damage to the environment (Count V). To state a claim under this section, Plaintiffs must allege: 1) that damage to the environment "is occurring or is about to occur"; and 2) that such damage is in violation of a statute or regulation, the major purpose of which is to prevent or minimize damage to the environment.[4] *Boston v. Massachusetts Port Auth.*, 364 Mass. 639, 645-646 (1974) (quoting former G.L. c. 214, § 10A, now at G.L. c. 214, §7A); *Nantucket Land Council, Inc. v. Planning Bd. of Nantucket*, 5 Mass. App. Ct. 206, 215 (1977). Plaintiffs may state a claim under § 7A for procedural violations of relevant environmental laws, as well as substantive violations. *Ten Persons of Com. v. Fellsway Dev. LLC*, 460 Mass. 366, 378 (2011).

The amended complaint here states simply that "Plaintiffs are aggrieved by the Commission's failure to comply with 310 CMR 10.05(4)(e), and have standing to enforce the procedural requirements of laws that are intended to protect the environment." Thus, Plaintiffs' claim boils down to an assertion that premature public hearings on the NOI are going to cause

---

[3] The court disagrees with the Developer that Plaintiffs have failed to exhaust their administrative remedies. The issue here is the early acceptance of an NOI and a premature public hearing — not a decision on a substantive matter, or the failure to hold a hearing or issue a timely decision, for which the DEP regulations provide an appeals process. See 310 Code Mass. Regs. 10.05(7). Thus, Plaintiffs' appeal in this instance to the Superior Court is appropriate. *See Ellis v. Comm'r Of Dep't Of Indus. Accidents*, 61 Mass. App. Ct. 902, 903 (2004) (declaratory relief and mandamus action in Superior Court appropriate where no administrative remedy available).

[4] General Laws c. 214, § 7A provides, in relevant part: "The superior court for the county in which damage to the environment is occurring or is about to occur may, upon a civil action in which equitable or declaratory relief is sought in which not less than ten persons domiciled within the commonwealth are joined as plaintiffs, . . . determine whether such damage is occurring or is about to occur and may, before the final determination of the action, restrain the person causing or about to cause such damage; provided, however, that the damage caused or about to be caused by such person constitutes a violation of a statute, ordinance, by-law or regulation the major purpose of which is to prevent or minimize damage to the environment."

imminent damage to the environment. Although, as noted, plaintiffs may state a claim under § 7A for procedural violations, the link to damage to the environment here is too remote on the facts alleged to state a claim. The Developer's c. 40B project is still in its planning stages as no permits have issued, and any construction, at this point, appears to be well in the future. Moreover, Plaintiffs' appeal on the stream classification is still pending, as are their claims in Counts III and IV. Therefore, because no damage to the environment presently "is occurring or is about to occur," the Developer's motion to dismiss Count V is **ALLOWED**, without prejudice.[5] *See Town of Walpole v. Secretary of the Exec. Off. of Env't Affs.*, 405 Mass. 67, 71 (1989) (affirming dismissal of § 7A claim where complaint failed to sufficiently allege damage to environment was occurring or was about to occur). If the situation changes, Plaintiffs may seek to further amend their complaint at that time.

ORDER

For the reasons stated, the Developer's motion to dismiss Counts III and IV is **DENIED**. Its motion to dismiss Count V is **ALLOWED**, without prejudice.

Hélène Kazanjian
Justice of the Superior Court

Dated: 3/11/2021

[5] For this reason, the court need not address the notice issue.