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COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

BARNSTABLE, ss.

MISCELLANEOUS  
CASE NO. 281704

ADAM EREMBERG,  
RICHARD J. MURRAY,  
WILLIAM P. DOUGAL,  
CROWN & ANCHOR, INC. and  
CROWN & ANCHOR, LLC,

Plaintiffs,

v.

TOWN OF PROVINCETOWN,  
WARREN ALEXANDER, as he is  
Building Commissioner of Provincetown,  
GRETA HOMAN, as she is  
Licensing Agent of Provincetown, and  
ROBERT RUSSELL, as he is  
Prosecutor of Provincetown,

Defendants.

**DECISION  
GRANTING THE DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT**

This case is before the court on the defendants' motion for summary judgment. I decide that there are no genuine issues of material fact requiring trial, and that the defendants are entitled as matter of law to a judgment dismissing the case.

The procedural history and facts of this case (at least as they stood in the spring of 2003)

are fully set forth in the Order Granting Plaintiffs' Request for Preliminary Injunction, which the court (Piper, J.) issued on June 12, 2003. Below, I detail only what has transpired since that Order issued.

On August 23, 2004, the court (Piper, J.) held a status conference. (Counsel agreed, as a preliminary matter, that any prior stay imposed by the Supreme Judicial Court based on the lack of solvency of the Town's insurer, was no longer in force.) Counsel for the defendants informed the court that the Town of Provincetown (the "Town") had amended its zoning by-law at the April 7, 2004 annual town meeting. Specifically, the Town deleted footnote 17 from section 2240(B4)(f) ("footnote 17")<sup>1</sup> of the zoning by-law and added a new provision allowing adult entertainment in the Town Center Commercial ("TCC") district, provided that any such use was not located within 300 feet of a library, school or playground.

On October 4, 2004, the defendants filed the instant motion for summary judgment, a supporting memorandum of law, and an affidavit from defendant Warren Alexander, Building Commissioner of Provincetown. On October 25, 2004, the plaintiffs filed their opposition to the defendants' motion for summary judgment. The defendants submitted a reply to the plaintiffs' opposition on December 14, 2004. The court (Piper, J.) held a hearing on the motion and took the matter under advisement on December 22, 2004.

#### Counts I and II: The Declaratory Judgment Claims.

The Town is entitled to summary judgment on Counts I and II, which were rendered moot

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<sup>1</sup>The Town Building Commissioner issued an order, dated June 29, 2001, in which he stated that the plaintiffs were presenting "adult entertainment" in violation of footnote 17. It is this order, and the Building Commissioner's underlying interpretation of footnote 17, which prompted the plaintiffs to file the complaint in this action seeking, among other things, a declaratory judgment concerning footnote 17, the regulation of adult entertainment under the zoning by-law, and the nature and scope of plaintiffs' permissible uses of the Crown and Anchor location.

once the Town deleted footnote 17 from the zoning by-law. Count I of the plaintiffs' complaint seeks a declaratory judgment, pursuant to G.L. c. 240, § 14A, that footnote 17 of the Provincetown Zoning By-Law does not apply to the plaintiffs or their property, or is invalid under Massachusetts law. Count II of the plaintiffs' complaint seeks a declaratory judgment concerning the same subject matter pursuant to G.L. c. 231A.

Footnote 17 of the Provincetown Zoning By-Law no longer exists. The Town voted to delete the disputed footnote at the April 2004 annual town meeting. The Town also voted to add a new adult entertainment provision to the zoning by-law under which the plaintiffs' use is allowed as of right.<sup>2</sup> It is now undisputed that the uses conducted by plaintiffs and any of their successors at the Crown and Anchor site (formerly at least arguably not permitted under the Town's construction of the zoning by-law prior to its amendment) are, under the revised zoning by-law, permitted as of right. In light of these zoning by-law amendments, there is no longer an "actual controversy" pursuant to G.L. c. 231A, § 1, nor is there any remaining zoning provision which "purports to restrict or limit the present or future use, enjoyment, improvement or

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<sup>2</sup> The affidavit of Warren Alexander, Building Commissioner of Provincetown, reads, in relevant part:

4. Former footnote 17 contained various setback requirements that, if applicable, would operate to prohibit adult entertainment at the plaintiffs' property at 243-247 Commercial Street, known as the Crown & Anchor Inn ("Property"), which Property is the subject of this litigation.
5. However, at its April 7, 2004 Town Meeting, the Town amended its Zoning By-laws to delete the former footnote 17 in its entirety, and to replace it with new regulations regarding adult entertainment...
6. Pursuant to the new adult entertainment provisions of the Zoning By-laws, found in Section 2440 (B9), live adult entertainment is allowed by right in the Town Center Commercial (TCC) zoning district, in which the plaintiffs' Property is located, subject to a 300-foot setback from libraries, schools and playgrounds.
7. The plaintiffs' Property is not located within 300 feet of any library, school or playground.
8. Accordingly, under the Town's Zoning By-laws, as amended, the plaintiffs are allowed by right to conduct adult entertainment uses on their property.

These portions of Alexander's affidavit stand uncontradicted in the summary judgment record.

development” of the plaintiffs’ land pursuant to G.L. c. 240, § 14A. Plaintiffs’ declaratory judgment claims are moot, and as neither G.L. c. 231A nor G.L. c. 240, § 14A allow the court to render purely hypothetical declaratory judgments, the defendants must be granted summary judgment.

The plaintiffs argue that I must issue a declaratory judgment to protect them from possible future criminal prosecution arising from their presentation of a show titled “Naked Boys Singing” at their establishment in the summer of 2001. This is not a tangible threat or controversy requiring a declaratory judgment, as the Town has stipulated that “it has no intention of initiating any criminal, civil, or administrative proceedings against the plaintiffs arising out of the 2001 presentation of ‘Naked Boys Singing’ or any other possible or alleged violation of the Town’s Zoning By-laws as they existed prior to the amendment that deleted footnote 17.”

Plaintiffs also say that they are entitled to a declaration about the specific categorizations of use under which their activities at the Crown and Anchor site fall, pursuant to the zoning by-law as it now stands. Despite the breadth of a party’s right to declaration under G.L. c. 240, §14A, however, plaintiffs have not articulated any plausible reason why any of the current by-law’s provisions might restrict or limit plaintiffs’ use, enjoyment, or improvement of the Crown and Anchor site, present or future. On this record, even the forgiving standards of G.L. c. 240, §14A do not entitle plaintiffs to such a hypothetical, advisory opinion from this court.

Count III: The Massachusetts Civil Rights Act Claim.

The Town is entitled to summary judgment on Count III of the complaint because claims under the Massachusetts Civil Rights Act (“MCRA”), G.L. c. 12, §§ 11H-11I, must be brought in the superior court. See G.L. c. 12, § 11I (person aggrieved may bring suit as provided in G.L. c.

12, § 11H); see also G.L. c. 12, § 11H (MCRA claims “shall be instituted either in the superior court for the county in which the conduct complained of occurred or in the superior court for the county in which the person whose conduct complained of resides or has his principal place of business”); See also Barbour v. Zoning Bd. of Appeals of the Town of Freetown, Land Court Misc. No. 269382 (March 23, 2004) (Lombardi, J.).

Assuming, *arguendo*, that this court possessed subject matter jurisdiction to hear a claim under the MCRA, the Town would remain entitled to summary judgment on Count III of the plaintiffs’ complaint. A municipality is not a “person” pursuant to the MCRA and may not be sued thereunder. Howcroft v. City of Peabody, 51 Mass. App. Ct. 573 (2000); Kelley v. LaForce, 288 F.3d 1, 22 n. 9 (1<sup>st</sup> Cir. 2002) (“under Massachusetts law a municipality cannot be sued under the MCRA”); Romano v. Boston Zoning Commission, Land Court Misc Nos. 295879, 295933 and Suffolk Superior Court No. 04-3135-H (November 16, 2004) (Long, J.); Barbour v. Zoning Bd. of Appeals of the Town of Freetown, Land Court Misc. No. 269382 (March 23, 2004) (Lombardi, J.).

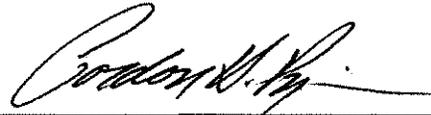
Municipal officials named as defendants in their official capacities are also immune from suit under the MCRA. Howcroft, 51 Mass. App. Ct. at 593, citing O’Malley v. Sheriff of Worcester County, 415 Mass. 132, 141 n. 13 (1993) (“[T]o avoid a State’s sovereign immunity to a damages suit, a plaintiff must sue the State official in his individual and not his official capacity.”) The caption of the complaint, and subsequent proceedings in this case, clearly indicate that the plaintiffs have sued the municipal defendants in their official capacity. In response to the instant summary judgment motion, plaintiffs have brought forth no competent evidence on the basis of which they might be entitled to prove at trial that those persons who are

defendants have any liability other than, if at all, in their official capacities. The defendants may not be found liable under the MCRA, and must be granted summary judgment as to Count III of the complaint.

It is

**ORDERED** that the Defendants' Motion for Summary Judgment is **GRANTED**.

Judgment accordingly.



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Gordon H. Piper  
Justice

Dated: January 6, 2005

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

BARNSTABLE, ss.

MISCELLANEOUS  
CASE NO. 281704

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RICHARD J. MURRAY,	)
WILLIAM P. DOUGAL,	)
CROWN & ANCHOR, INC. and	)
CROWN & ANCHOR, LLC,	)
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Plaintiffs,	)
	)
v.	)
	)
TOWN OF PROVINCETOWN,	)
WARREN ALEXANDER, as he is	)
Building Commissioner of Provincetown,	)
GRETA HOMAN, as she is	)
Licensing Agent of Provincetown, and	)
ROBERT RUSSELL, as he is	)
Prosecutor of Provincetown,	)
	)
Defendants.	)

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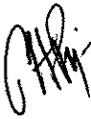
**J U D G M E N T**

This action commenced on June 14, 2002. The complaint contains counts for declaratory judgment, under G.L. c. 240 §14A, G.L. c. 231A, and under the Massachusetts Civil Rights Act, G.L. c. 12, §§ 11H-11I. The site at issue in this case is at 243-247 Commercial Street, Provincetown, Barnstable County, Massachusetts.

The case came on for hearing before the court on the defendants' motion for summary judgment. In a decision of even date, the court (Piper, J.) has granted that motion. In accordance with that decision, it is

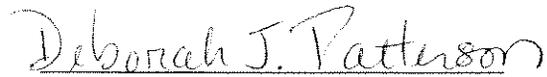
**ORDERED AND ADJUDGED** that this action is in its entirety **DISMISSED**. It is further

**ORDERED** that all prior orders of injunction entered by this court in this case, including the court's Order Granting Plaintiffs' Request for Preliminary Injunction, issued June 12, 2003, are no longer in force and effect.



By the Court. (Piper, J.)

Attest:



Deborah J. Patterson  
Recorder

Dated: January 6, 2005

Westlaw.

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(Cite as: 2001 WL 1334189 (Mass.Super.))

**H**

Superior Court of Massachusetts.  
 Rita CHRISTENSEN et al.,  
 v.  
 BOSTON REDEVELOPMENT AUTHORITY et  
 al. [FN1], [FN2]

FN1. Kevin Powers, Jack H. Langworthy,  
 Elliot Ring, Julia Winkleman, James  
 Winkleman, Andrew Samataro, Patricia  
 Edwards, Bruce Edwards, Peggy Davis  
 Mullen, and James Thompson.

FN2. Sandwell LLC and Rose Associates,  
 Inc.

Sara E. FJESETH et al., [FN3]

FN3. G. Glenn Wiebe.

v.  
 BOSTON REDEVELOPMENT AUTHORITY  
 et al.  
 No. 002314F.

Feb. 13, 2001.

MEMORANDUM OF DECISION AND ORDER  
 ON DEFENDANTS' MOTIONS TO DISMISS  
 FOR LACK OF  
 SUBJECT MATTER JURISDICTION

ELIZABETH M. FAHEY, Justice of the Superior  
 Court.

\*1 These consolidated cases are actions in the nature of certiorari, under St.1960, c. 652, § 13. See G.L.c. 249, § 4. The plaintiffs challenge the approvals and vote of the Boston Redevelopment Authority under G.L.c. 121A with respect to a project to be located in the Leather District of Boston (the "Project"). The matter is now before the court on the defendants' motions to dismiss for lack

of subject matter jurisdiction under Mass.R.Civ.P. 12(b)(1). [FN4] A hearing was held before the undersigned on January 8, 2001 and on the renewed motions to dismiss the amended complaints on February 9, 2001. For the reasons discussed below, the motions are *DENIED*.

FN4. The plaintiffs advance no argument that a motion under Rule 12(b)(1) is an inappropriate vehicle to challenge standing. Rule 12(b)(1) does not require that I consider material outside the pleadings. *Bell v. Zoning Bd. of Appeals of Gloucester*, 429 Mass. 551, 555 (1999); *Watros v. Greater Lynn Mental Health & Retardation Ass'n*, 421 Mass. 106, 109 (1995). I look only at the pleadings in deciding this motion.

BACKGROUND

The following facts are taken from the second amended complaints in 00-2334 and 00-2314. [FN5]

FN5. I allow the plaintiffs' motion for leave to amend the complaint in 00-2334.

The defendants in these actions are the Boston Redevelopment Authority (the "BRA"), the urban renewal agency for Boston having authority to approve applications under G.L.c. 121A; Rose Associates, Inc. ("Rose"), a real estate developer; and Sandwell, LLC, owner of the Project area.

Rose seeks to develop property located at 201 Essex Street, which is at the corner of South and Essex Streets in Boston (the "Property"). This Property is currently used as a commercial surface parking lot for 83 vehicles. In connection with its proposal to erect a retail and office building on the Property, Rose asked the BRA to find that the Property is a "blighted open area," a term defined in G.L.c. 121A, § 1. The application also seeks an exemption from City of Boston taxes and a request

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that the Project be allowed to deviate from certain zoning requirements.

On April 26, 2000, the BRA approved a structure that differed in some important respects from the structure originally proposed. The BRA found that the Property was a "blighted open area" and conducted a "Large Project Review."

There are 13 plaintiffs in these actions. Ten plaintiffs [FN6] reside at 86 South St., a residential building located across South St. from the Property. One plaintiff, G. Glenn Wiebe, resides at 107 South St., approximately 100 feet from the Property and, according to the map attached as Ex. 2 to the complaint in Civil No. 00-2334, is across the street from 86 South St. One plaintiff, Thompson, resides in Cambridge and owns property at 210 Lincoln Street. Finally, one plaintiff, Peggy Davis Mullen is a member of the Boston City Council and a resident of Boston.

FN6. These are: Christensen, Powers, Langworthy, Ring, Julia and James Winkleman, Samataro, Patricia and Bruce Edwards, and Fjeseth.

The plaintiffs allege that they will suffer harm, including the following, as a result of the Project.

The plaintiffs who reside at 86 South St. (the "South St. plaintiffs") allege that the Project would result in a building that is 91 percent larger and 66 percent taller than permitted by as-of-right zoning, which would cause additional traffic congestion from vehicles bringing goods, services and people to the building and would create an immediate and lasting adverse impact on the quality of their lives, their enjoyment of their properties, and their properties' values. The Project would result in the construction of a five-level, 250-car parking garage which is not permitted under as-of-right zoning, which would cause increased carbon monoxide emissions, deep excavation threatening ground movements for which there is no adequate mitigation plan, additional traffic congestion, and irritant noise from the garage's exiting siren. Additional shadows would be cast on their

residences and on Gateway Park and their community and they would lose a skyline view from their residences. The Project would result in increased noise, vibrations, pollution, and litter during its construction. The Project would also result in increased noise, pollution, and litter caused by the large amount of automobile and pedestrian traffic to the Project. The Project would detract from, and damage the coherence and historic character of, the Leather District, resulting in an immediate and lasting adverse impact on their quality of life. The tax exemption granted harms them by being an illegal use of public funds, reducing funds available for public services, and increasing their tax burden.

\*2 Plaintiffs Christensen, Powers, Langworthy, and both Winklemans allege the Project would lead directly to diminished ambient daylight in their residences. Christensen and Powers also allege that, because they participated in the development of Article 44, their right to security in their contributions as citizens in a participatory democracy has been abrogated.

Plaintiff Thompson, who resides at 107 South St., alleges many of the same harms as do the 86 South St. plaintiffs.

Plaintiff Davis-Mullen alleges she has standing because of her duties and responsibilities as a municipal officer, which relate to municipal matters directly impacted by the grant of c. 121A benefits to the Project. Davis-Mullen also alleges, in part, that she has standing to "act as a check against the powers of the executive branch; protecting her residential, commercial and institutional constituents from legally unwarranted actions by the executive branch which effect [sic] tax receipts, the provision of city services, important and unique City [sic] assets and the quality of life for city residents is in keeping with this responsibility."

#### DISCUSSION

The sole issue now before the court is whether the plaintiffs have standing to challenge the BRA's decision. The parties agree that the relevant statute is St.1960, c. 652, § 13 ("c.652"). Chapter 652, §

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13 states in relevant part:

[A]ny person, whether previously a party to the proceeding or not, who is aggrieved by such vote [by the BRA], or any municipal officer or board, may file a petition in the supreme judicial or superior court sitting in Suffolk County for a writ of certiorari against the [BRA] to correct errors of law therein; and the provisions of [G.L.c. 249, § 4] shall apply to said petition except as herein provided with respect to the time for the filing thereof. The remedy provided by this paragraph shall be exclusive.

The issue thus turns on whether the plaintiffs are "persons ... aggrieved" or whether any of the plaintiffs is a "municipal officer" within the meaning of the statute.

Under c. 652, § 13, the "words 'persons aggrieved' are to be given a comprehensive meaning." *Boston Edison Co. v. Boston Redev. Auth.*, 374 Mass. 37, 44 (1977), quoting *Dodge v. Prudential Ins. Co. of America*, 343 Mass. 375, 381 (1961). That statute thus "allow[s] for review by a person who alleges a substantial injury as a direct result of the BRA's action." [FN7] *Id.* at 46.

FN7. The defendants argue that this court is limited to the record before the BRA to determine whether the plaintiffs have standing. The defendants are not correct. While it is true that c. 652 states that persons aggrieved may file for a writ of certiorari (now a civil action in the nature of certiorari) under G.L.c. 249, § 4, it also states that a person may be aggrieved "whether previously a party to the proceeding or not." If a person not previously a party to the proceedings before the BRA may file a petition, it follows that the standing issue must be decided regardless of what is in the BRA record.

In this case, the defendants argue that the plaintiffs are not entitled to the presumption of standing given to abutters under G.L.c. 40A, § 17. This issue need not be decided, because I conclude that the plaintiffs have demonstrated standing under other established principles.

Among the harm that the 86 South St. plaintiffs allege, they claim they will suffer from increased noise, vibrations, pollution, and litter during construction. They claim that they will suffer from increased noise, vehicular and pedestrian traffic, pollution, and litter after construction is complete. They say they will suffer from shadows being cast on their residences as well as lack of daylight, and they would lose a skyplane. I conclude that this harm is sufficient to demonstrate standing at this stage because it is similar to, or greater than, harm alleged or proven in other cases.

\*3 In *Boston Edison*, the Supreme Judicial Court concluded that Boston Edison alleged a sufficiently substantial injury that would be a direct result of the BRA's decision. In that case, the BRA approved a project which, among other things, allowed the operation and maintenance of an energy plant that would provide electricity, steam, and other services to certain medical institutions and a publicly assisted housing project. *Boston Edison*, 374 Mass. at 40. Boston Edison opposed the project, because construction of the energy plant would cause Boston Edison to lose for at least 35 years business that yielded about \$3 million in gross revenues. *Id.* at 41. While the SJC considered the issue a close one, it concluded that "[t]he loss which Edison will undoubtedly suffer as a result of the BRA's approval of the project is direct, substantial, and ascertainable" and thus Boston Edison was a "person aggrieved." *Id.* at 44, 46. The SJC also noted, however, that "in many, if not most, circumstances, the injury complained of may be too remote to make the party seeking review a 'person aggrieved.'" *Id.* at 46.

The harm the 86 South St. plaintiffs allege is similar to harm alleged in other cases where standing has been upheld. See *Fabiano v. Boston Redev. Auth.*, 49 Mass.App.Ct. 66, 70 n. 8 (2000) (allegations of noise, traffic, safety, and loss of property value sufficient); *Shriners' Hosp. for Children v. Boston Redev. Auth.*, 4 Mass.App.Ct. 551, 555 (1976) (shadows would fall upon hospital, environmental impact likely directly to affect hospital, direct injury to hospital's property interests). While it is true that in these cases the

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plaintiffs were abutters and the 86 South St. plaintiffs reside across the street from the Property and thus are not strictly abutters, this difference is not dispositive. General Laws c. 40A, § 11 defines "parties in interest" as including not only abutters, but also owners of land directly opposite on any public or private street or way and abutters to abutters. While such persons perhaps do not enjoy a presumption of standing under c. 652, such a status is still a factor and c. 40A, § 11 establishes that abutters to abutters and some owners are viewed on the same level as abutters. Thus, that the 86 South St. plaintiffs are not, strictly speaking, "abutters" does not convince me that their status differs in any material way from the plaintiffs in *Fabiano* and *Shriners' Hospital*.

In short, I conclude that the 86 South St. plaintiffs have standing because they have alleged harm that is sufficiently like that in *Boston Edison*, *Fabiano*, and *Shriners' Hospital* to show that they have alleged a "substantial injury" will occur to them as a direct result of the BRA's decision. [FN8]

FN8. The defendants also argue in their brief that the harm the plaintiffs claim they will suffer is not materially different from the harm they would suffer if the Project proceeds in compliance with the current zoning requirements. In a related context, the SJC has held that the magnitude of the threat of harm to a potential plaintiff in relation to the threat of harm from a use permissible as of right is a *factor* that may be considered but is not dispositive of the standing issue. *Marashlian v. Zoning Bd. of Appeals of Newburyport*, 421 Mass. 719, 724 (1996). I have considered this relative threat of harm as a factor in my determination that the 86 South St. plaintiffs have alleged sufficient facts to establish standing. See *Fabiano*, 49 Mass.App.Ct. at 70 n. 8.

Because I find that the 86 South St. plaintiffs have sufficiently demonstrated standing, I need not decide whether any of the other plaintiffs have done the same. Cf. *Cohen v. Zoning Bd. of Appeals of*

*Plymouth*, 35 Mass.App.Ct. 619, 620-21 (1993) (in context of appeal of decision of zoning board, where there is a multi-party appeal it is only necessary to determine whether any one plaintiff is aggrieved in order to decide standing issue); *Murray v. Board of Appeals of Barnstable*, 22 Mass.App.Ct. 473, 476 n. 7 (1986). I articulate no opinion as to whether the other alleged harm establishes standing.

## ORDER

\*4 For the foregoing reasons, it is hereby *ORDERED* that the defendants' motions to dismiss for lack of subject matter jurisdiction be *DENIED*. It is further *ORDERED* that, after hearing and agreement of the parties on February 9, 2001, the plaintiffs' motions for judgment on the pleadings will be filed by March 16, 2001; the defendants' oppositions will be filed by April 9, 2001 and any reply will be filed by April 23, 2001; the hearing on the motions will be on April 30, 2001 at 9:00 AM.

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