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COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2077CV01303

PATRICIA C. AMARAL & others[1]

vs.

CITY OF GLOUCESTER & others[2]

MEMORANDUM OF DECISION AND ORDER ON: (1) DEFENDANTS CITY OF GLOUCESTER, GLOUCESTER CITY COUNCIL, AND MAYOR OF GLOUCESTER'S MOTION FOR SUMMARY JUDGMENT; (2) DEFENDANT MASSACHUSETTS EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS' MOTION TO DISMISS; AND (3) DEFENDANT MASSACHUSETTS SCHOOL BUILDING AUTHORITY'S MOTION FOR SUMMARY JUDGMENT

The plaintiffs, fourteen Gloucester residents and taxpayers, have brought this lawsuit against the City of Gloucester (the "City"), as well as its City Council and Mayor (collectively, the "City Defendants"), challenging the plan to transfer the property known as Mattos Field in Gloucester for purposes of building a new combined elementary school at that location. The plaintiffs have also named as defendants the Massachusetts Executive Office of Energy and Environmental Affairs ("EEA") and the Massachusetts School Building Authority ("MSBA"), two governmental entities involved in the process of transferring Mattos Field and building the new school. The plaintiffs' Complaint for Declaratory and Injunctive Relief (the "Complaint")

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[1] Howard P. Amaral, Denise Pascucci, Steven Pascucci, Pamela Steele, Joy D. Lander, Peter Wright, Cory Frost, Wayne Moultan, Jane Montenaro, Susan Muise, Patrick Donovan, Barbara Anderson, and Linda Bourke

[2] City Council for the City of Gloucester, Melissa Cox, Jennifer Holmgren, John J. McCarthy, James W. O'Hara, Jr., Scott Memhard, Barrett S. Pett, Steven G. LeBlanc, Jr., Valerie H. Gilman, and Sean P. Nolan, named herein solely in their official capacity; Sefatia Romeo Theken, Mayor, named herein solely in her official capacity; Massachusetts Executive Office of Energy and Environmental Affairs, and Massachusetts School Building Authority.

alleges the following three counts: (1) violation of Chapter 152 of the Acts of 2020; (2) violation of G. L. c. 30, § 61, 301 Code Mass. Regs. § 11.00, and 963 Code Mass. Regs. § 2.03(2)(h); and (3) violation of G. L. c. 43, § 31, G. L. c. 45, § 2, G. L. c. 40, § 15A, and Gloucester Ordinance 15-35.[3] The case is now before the court on the City Defendants' motion for summary judgment, EEA's motion to dismiss, and MSBA's motion for summary judgment. For the reasons stated below, all three motions will be **ALLOWED**.

BACKGROUND

The following undisputed facts, and the disputed facts in the light most favorable to the plaintiffs as the non-moving party, are taken from the parties' Consolidated Superior Court Rule 9A(b)(5) Statement of Material Facts ("SOF") and the Joint Appendix ("J.A.") exhibits referenced therein. The court reserves discussion of additional relevant facts to the discussion section, below.

A. The Land Transfer

The City seeks to build a new combined elementary school in Gloucester. (SOF, para. 1.) In October 2019, the East Gloucester School Building Committee recommended that the Gloucester School Committee proceed with plans to build such a school at the site of the current Veterans Memorial School and Mattos Field. (SOF, para. 2.) The School Committee approved that recommendation and voted that the City take steps to ensure the availability of the site. (SOF, para. 2.)

Mattos Field is a softball field that abuts the Veterans Memorial School. (SOF, para. 3.) It comprises 2.7 acres and is located at 11 Webster Street in Gloucester. (SOF, para. 3.) The parties

[3] At the motion hearing held on July 22, 2021, the plaintiffs conceded that dismissal of Count 3 of the Complaint is appropriate.

dispute whether Mattos Field is land protected by Article 97 of the Amendments to the Massachusetts Constitution ("Article 97"), which provides that "'[l]ands and easements taken or acquired' for conservation purposes 'shall not be used for other purposes or otherwise disposed of' without the approval of a two-thirds roll call vote of each branch of the Legislature." Smith v. Westfield, 478 Mass. 49, 50 (2017) (despite absence of use restriction recorded in registry of deeds, playground was protected by Article 97 where city had clear and unequivocal intent to dedicate land permanently as public park and where public accepted such use by actually using land as public park). While the City Defendants contend that Mattos Field is not protected and that there are no deed restrictions limiting its use, the plaintiffs contend that the City previously dedicated Mattos Field as a public playground, thus rendering it land protected by Article 97 pursuant to Smith v. Westfield, 478 Mass. 49 (2017). For purposes of this decision, the court construes the facts in the light most favorable to the plaintiff and assumes that Mattos Field was, at the inception of the facts relevant to this case, land protected by Article 97.

On October 21, 2019, Chip Payson, the City's general counsel, contacted the EEA to discuss the process for the inter-departmental transfer of Mattos Field. (SOF, para. 5.) On November 5, 2019, a phone conference was held between the City and the EEA, and on December 12, 2019, the City sent the EEA a draft proposal. (SOF, para. 5.)

Attorney Payson outlined the process for transferring the property for the Gloucester City Council on February 24 and 25, 2020, and on February 25, 2020, the City Council voted to approve the filing of an Article 97 petition with the Legislature for permission to use Mattos Field as the site of the new school.[4] (SOF, para. 6.) Draft language for the Article 97 legislation

[4] According to the City Defendants, even though it is their position that Mattos Field is not protected by Article 97, they chose to pursue Article 97 legislation out of an abundance of caution, following the recent decision of Smith v. Westfield, 478 Mass. 49 (2017).

was sent to the EEA in March 2020. The EEA made comments and edits on the legislation and sent it back to the City. (SOF, para. 7.) The City incorporated the EEA's edits and the legislation was filed with the Legislature. (SOF, para. 7.)

On August 7, 2020, Chapter 152 of the Acts of 2020 ("Chapter 152") was enacted. (SOF, para. 8.) It provides, in pertinent part, as follows:

> SECTION 1. Notwithstanding any general or special law to the contrary, the city of Gloucester may transfer the care, custody and control of certain city-owned land comprising approximately 2.7 acres, more or less, located at 11 Webster street, which includes Mattos field, and is described in deeds recorded in the Essex southern district registry of deeds in book 2599, page 151 and book 2867, page 34 to the school committee of the city of Gloucester for school purposes.
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> SECTION 2. In consideration for the transfer authorized in section 1, the school committee of the city of Gloucester shall transfer the care, custody and control of certain school land comprising approximately 2.8 acres, more or less, located at 8 Davis street, which includes East Gloucester elementary school comprised of lots 1, 2, 3, 4, 5, A, B, C, D and the lot labeled "Portion of Maxwell Parsons Playground" and the layouts of Davis street extension and Parsons street as shown on a plan of land entitled "Plan of Land comprising New School House Site at East Gloucester – Gloucester, Mass." Dated September 22, 1947 and that is recorded in the Essex Southern district registry of deeds in plan book 76, page 45 to the department of public works of the city to be used for municipal park and open space purposes with the grant of a deed restriction placing the land under the protection of Article 97 of the Amendments to the Constitution of the commonwealth in perpetuity.
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> SECTION 3. In addition to the transfer pursuant to in section 2, the department of public works of the city of Gloucester shall upgrade softball field facilities and accommodations at another city-owned open space located at 6 Green street and 18A Beckford street prior to the discontinuance of use of Mattos Field associated with the commencement of school construction.
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> SECTION 4. The transfer of land in section 1 shall be contingent upon the transfer of land in section 2 and the transfer of land in section 2 shall be contingent upon the recording of a deed

> restriction on the land placing it under the protection of Article 97 of the Amendments to the Constitution of the commonwealth to be preserved for municipal park and open space purposes.

On August 26, 2020, the MSBA voted to approve the City's plan to build a combined school on the site. (SOF, para. 9.) Thereafter, the City's Department of Public Works ("DPW") Director and Land Disposition Committee each recommended that Mattos Field be transferred to the School Committee. (SOF, paras. 10-11.) The City Council voted to approve the transfer on September 29, 2020. (SOF, para. 11.) On November 3, 2020, a referendum question went before the voters, who approved a Proposition 2½ debt exclusion to fund the City's portion of the cost of the combined school construction project. (SOF, para. 12.) The plaintiffs filed the above-captioned civil action on December 24, 2020.

On January 7, 2021, Chapter 284 of the Acts of 2020 ("Chapter 284") was enacted to amend Chapter 152. (SOF, para. 13.) It struck out section 4 and inserted in its place, "[t]he transfer of land in section 1 shall be contingent upon the transfer of land in section 2 once the land in said section 2 is no longer being utilized for school purposes and the transfer of land in said section 2 shall be contingent upon the recording of a deed restriction on the land as soon as is reasonably practicable placing it under the protection of Article 97. . . ." This amendment changed the order of events, allowing the City to use the East Gloucester Elementary School site until the new school opens. It also re-wrote section 3 of Chapter 152 to state that the City DPW shall upgrade the softball field and the accommodations at 6 Green Street and 18A Beckford Street "as soon as is reasonably practicable after the discontinuance of use of Mattos Field associated with the commencement of school construction."

B. MEPA Review

On February 16, 2021, the City Defendants filed an Environmental Notification Form ("ENF") with the EEA, which formally began the review process for the combined school project under the Massachusetts Environmental Policy Act, G. L. c. 30, §§ 61-62I ("MEPA"). (SOF, para. 14.) The MEPA unit of the EEA held a remote MEPA consultation session on March 3, 2021. (SOF, para. 15.) On March 26, 2021, the Secretary of the EEA issued a Certificate on the ENF pursuant to Section 11.06 of the MEPA regulations determining that the project "**does not require** the preparation of an Environmental Impact Report" (emphasis in original). (SOF, para. 15.) The Secretary further stated, "[t]he ENF has sufficiently defined the nature and general elements of the project for the purposes of MEPA review and demonstrated that the project's environmental impacts will be avoided, minimized and/or mitigated to the extend practicable. Based on review of the ENF and comments received, and in consultation with State Agencies, I have determined that no further review is required." (SOF, para. 17.)

C. The MSBA

The MSBA is a quasi-independent government authority established by the Legislature in 2004 to reform the process of funding capital improvement projects in the Commonwealth's public schools. The MSBA's Board of Directors approves grants for school building construction and renovation projects based on need and urgency as expressed by the school district and validated by the MSBA. (SOF, para. 20.) Once the MSBA Board of Directors invites a district to participate in the MSBA's grant program, the district and the MSBA work together in a collaborative process to process the district's application. (SOF, para. 21.) The MSBA's processing of an application proceeds through multiple stages (referred to as "modules") in which the district's needs and capabilities are assessed, and the project parameters are developed

and vetted. (SOF, para. 22.) Prior to obtaining approval, districts must conduct a comprehensive evaluation of alternatives to initially consider multiple possible solutions, including but not limited to: upgrading to meet code, new construction, renovation, and additions of varying degrees to the existing building.[5] (SOF, para. 23.) Subsequently, districts will select a preferred solution to develop a schematic design of sufficient detail to establish the scope, budget, and schedule to recommend to the MSBA Board of Directors for approval to proceed to the next stage. (SOF, para. 23.) The processing of a district's application often proceeds through multiple modules before an environmental review is completed. (SOF, para. 24.) Districts will typically file ENFs, if applicable, once the schematic design is further developed during the detailed design phase, which includes updating information and documentation with the technical expertise of the designer and that is necessary for a district to file basic zoning and environmental permits. (SOF, para. 24.) The ENF for the project proposed by the City in this case was filed during the detailed design phase of the MSBA's processing of the application. (SOF, para. 25.)

The MSBA enters into a project funding agreement ("PFA") with districts whose school projects have met numerous requirements and been approved by the MSBA's Board of Directors to receive a school building grant from the MSBA. (SOF, para. 27.) The PFA with the MSBA

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[5] Massachusetts Superior Court Rule 9A(b)(5)(iii)(A) provides that the opposing party's responses to the moving party's statement of facts "shall be limited to stating whether a given fact is disputed and, if so, cite to the specific evidence, if any, in the Joint Appendix that demonstrates the dispute." The opposing party's responses "shall not . . . [m]ake legal arguments or advocacy-oriented characterizations concerning the sufficiency, relevance or materiality of the moving party's factual proffers." Mass. Super. Ct. Rule 9A(b)(5)(iii)(A)(e). Several of the plaintiffs' responses to the MSBA's statement of material facts violate these provisions, either by not citing to specific evidence in the Joint Appendix or by making inappropriate legal arguments. For those responses that fail to comply with the rule, "each fact set forth in the moving party's statement of facts is deemed to have been admitted unless properly controverted in the manner forth in this Paragraph (b)(5)(iii)(A)."

requires that the project be reviewed by the Secretary of Environmental Affairs prior to solicitation of construction bids and prior to receiving the grant from the MSBA. (SOF, para. 16.) An applicant does not become a grantee and cannot draw and expend funds for detailed design and construction from the MSBA until project funding is approved by the MSBA Board of Directors and a PFA is executed. (SOF, para. 28.) The PFA for the project proposed by the City has not yet been executed. (SOF, para. 29.)

DISCUSSION

A. Standard of Review

The familiar standard governing motions for summary judgment provides that summary judgment is to be granted where there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); Barrows v. Wareham Fire Dist., 82 Mass. App. Ct. 623, 625 (2012), citing Cassesso v. Commissioner of Corr., 390 Mass. 419, 422 (1983). A party moving for summary judgment is entitled to summary judgment if he affirmatively presents a set of undisputed facts that entitle him to judgment as a matter of law, or if the moving party demonstrates that the party opposing the motion has no reasonable expectation of proving an essential element of that party's case. Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991). The moving party "need not prove that no factual disputes exist, only that there is no genuine dispute of material fact." Norwood v. Adams-Russell Co., 401 Mass. 677, 683 (1988). In assessing the record on a motion for summary judgment, all reasonable inferences are drawn in favor of the nonmoving party. Terra Nova Ins. Co. v. Fray-Witzer, 449 Mass. 406, 411 (2007). The court does not "resolve issues of material fact, assess credibility or weigh evidence." Kelly v. Brigham & Women's Hosp., 51 Mass. App. Ct. 297, 299 n.4 (2001).

The EEA's motion is made pursuant to Mass. R. Civ. P. 12(b)(1) and (6), and is, thus, based on a review of the allegations of the Complaint under the standard articulated in Iannacchino v. Ford Motor Co., 451 Mass. 623 (2008), rather than upon the review of a summary judgment record. At the hearing, however, both the EEA and the plaintiffs waived any objection to the court treating the EEA's motion to dismiss as a motion for summary judgment, if the court deemed it necessary.

B. Standing

The City Defendants do not challenge the plaintiffs' standing to bring suit against them. The Complaint does not specify the source of the plaintiffs' standing to sue, but G. L. c. 40, § 53, furnishes standing and a private right of action for "ten taxable inhabitants" of a town where the town is "about to raise or expend money or incur obligations purporting to bind said town . . . for any purpose or object or in any manner other than that for and in which such town . . . has the legal and constitutional right and power to raise or expend money or incur obligations. . . ." G. L. c. 40, § 53. While the City Defendants are proper defendants in a so-called "ten taxpayer action," other government agencies such as the EEA and the MSBA are not.

Only Count 2 raises claims against the EEA and the MSBA. That count alleges violations of G. L. c. 30, § 61, 301 Code Mass. Regs. § 11.00, and 963 Code Mass. Regs. § 2.03(2)(h), none of which provide a private right of action against the EEA or the MSBA. The fact that the first paragraph of Count 2 refers to the plaintiffs as "not less than ten (10) persons domiciled within this Commonwealth" suggests that they rely upon G. L. c. 214, § 7A,[6] under which the

[6] The plaintiffs' memorandum in opposition to the MSBA's motion for summary judgment (Paper No 12.2, p. 11) confirms that they allege "G. L. c. 214, § 7A, is the basis for standing. . . ." The plaintiffs' memorandum in opposition to the EEA's motion to dismiss likewise confirms that they rely on G. L. c. 214, § 7A, as the basis for standing to sue the EEA.

Superior Court generally has jurisdiction "to hear claims for declaratory and injunctive relief where (1) 'ten persons domiciled within the commonwealth are joined as plaintiffs'; (2) a person is causing or about to cause 'damage to the environment'; and (3) '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.'" Ten Persons of Commonwealth v. Fellsway Dev. LLC, 460 Mass. 366, 375 (2011), citing Cummings v. Secretary of the Executive Office of Envtl. Affairs, 402 Mass. 611, 614 (1988). The Supreme Judicial Court has made clear, however, that G. L. c. 214, § 7A, does not confer jurisdiction for suits against agencies, like the EEA and the MSBA here, who are not themselves project proponents and whose connection to a project is limited to performing statutory functions that are only ancillary to another person's project. In Cummings v. Secretary of the Executive Office of Environmental Affairs, 402 Mass. 611 (1988), the SJC affirmed the dismissal of a suit against the EEA for failing to require an EIR under MEPA, explaining that "the provision in G. L. c. 214, § 7A, that the Superior Court may 'before the final determination of the action, restrain the person causing or about to cause such damage,' suggests in the [MEPA] context that the Legislature contemplated only the agency or authority or private person proposing a project, and not the public official who administers the statutory scheme, as 'the person causing or about to cause' environmental damage." Cummings, 402 Mass. at 616. The SJC reaffirmed this holding in Ten Persons of Commonwealth v. Fellsway Development LLC, 460 Mass. 366 (2011), rejecting a claim against the Secretary of the EEA for lack of subject matter jurisdiction because "the project proponents, and not the Secretary, were the 'person[s]' causing environmental damage as the term was used in § 7A." 460 Mass. at 377. As neither the EEA nor the MSBA is a person "causing or about to cause" environmental damage within the scope of Section 7A, the

plaintiffs cannot rely upon that statute as providing standing for their claims against the EEA and the MSBA in Count 2.

In their opposition to the MSBA's motion for summary judgment, the plaintiffs reference several other authorities as conferring standing, none of which apply. The ten-taxpayer statute, G. L. c. 40, § 53, applies only to a town, a regional school district, or certain regional special purpose districts. The plaintiffs fail to meet either the numerosity or the county distribution requirements of G. L. c. 29, § 63, which authorizes certain types of suits brought by "not less than 24 taxable inhabitants of the commonwealth, not more than 6 of whom shall be from any 1 county. . . ." The public right doctrine, which "allows a citizen to bring an action for relief in the nature of mandamus to 'procure the enforcement of a public duty,'" Tax Equity Alliance for Massachusetts v. Commissioner of Revenue, 423 Mass. 708, 714 (1996), quoting Sears v. Treasurer & Receiver Gen., 327 Mass. 310, 315 (1951), does not confer standing, as that doctrine "has always been limited to the enforcement of clear and unequivocal duties," Perella v. Massachusetts Turnpike Auth., 55 Mass. App. Ct. 537, 540 (2002). Here, nothing in G. L. c. 70B (the MSBA's enabling legislation) or in the MSBA regulations creates an unequivocal duty to the general public that is enforceable by the plaintiffs. Moreover, the Complaint does not plead a claim for mandamus.

For all these reasons, the plaintiffs lack standing to bring suit against the EEA and the MSBA, and the claims against those defendants must be dismissed.

C. Count 1: Violation of Chapter 152 of the Acts of 2020

Count 1 of the Complaint alleges that the City Defendants violated Chapter 152 because the transfer of Mattos Field did not occur at the same time or prior to the transfer of the East Gloucester Elementary School site. The court concludes that dismissal of Count 1 is warranted

because the alleged violation of Chapter 152 was remedied by the enactment of Chapter 284 two weeks after the plaintiffs filed their Complaint.

Even if the court assumes that Mattos Field is land protected by Article 97, Article 97 provides that protected land "'shall not be used for other purposes or otherwise disposed of' without the approval of a two-thirds roll call vote of each branch of the Legislature." Smith, 478 Mass. at 50. The City followed the procedure required under Article 97, and obtained the approval of the Legislature to use Mattos Field for other purposes. The fact that the transfer of the two properties at issue will not be simultaneous is not inconsistent with Article 97 or Smith v. Westfield, 478 Mass. 49 (2017).

D. Count 2: Violations of G. L. c. 30, § 61, 301 Code Mass. Regs. § 11.00, and 963 Code Mass. Regs. § 2.03(2)(h)

What remains of Count 2 of the Complaint alleges that the City Defendants failed to file an ENF pursuant to G. L. c. 30, § 61, 301 Code Mass. Regs. § 11.00, and 963 Code Mass. Regs. § 2.03(2)(h). Paragraph 40 of the Complaint misleadingly asserts that "M.G.L. c. 30, § 62 requires any person to file within ten (10) days of making application for a project that includes financial assistance, file for determination from the EEA for environmental impact." At the motion hearing, plaintiffs' counsel admitted that Count 2's reference to G. L. c. 30, § 62, in paragraph 40 is an error, and that they intended to reference G. L. c. 30, § 62A. That, however, is not the end of the matter, as nowhere in § 62A does it say that a person making application for a project that includes financial assistance must "file for determination from the EEA for environmental impact." Rather, § 62A provides that "[a] person applying or intending to apply to an agency for a permit or for financial assistance for a project . . . shall no later than ten days after filing the first application for such permit or assistance *notify* the secretary of environmental

affairs of the nature of the project and of such application. . . " (emphasis added). Section 62A goes on to state that the Secretary of EEA must then "consult with the person or agency proposing the project and the agency, if any, from which a permit or financial assistance is or may be sought and shall issue a certificate stating whether an environmental impact report is required." Meanwhile, 301 Code Mass. Regs. § 11.03(1)(b), which sets forth MEPA review thresholds, provides that the conversion of Article 97 land "to any purpose not in accordance with Article 97" requires an "ENF and other MEPA review if the Secretary so requires."

The plaintiffs now admit that, after they filed their Complaint on December 24, 2020, the City Defendants filed an ENF with the EEA on February 16, 2021, and the Secretary of the EEA issued a Certificate on the ENF determining that the project "**does not require** the preparation of an Environmental Impact Report" (emphasis in original) or any other further review on March 26, 2021. They now assert in their opposition to the City's summary judgment motion a new theory not alleged in the Complaint, that the ENF was not filed at the correct time, and should have been filed with the EEA before the School Committee voted on the property transfer and before the passage of Chapters 152 and 284. In support of this argument, they point to MSBA regulations 963 Code Mass. Regs. §§ 2.03(h)[7] and 2.10(8)(j) as "requir[ing] the school building project to have environmental assessments conducted *prior to* the Scope and Budget Conference, . . . which takes place before the MSBA's Board of Director's vote on the project" (emphasis in original). (Pls.' Mem. in Opp'n to City Defs.' Mot., Paper No. 9.3, p. 14-15.) Section 2.03(2)(h), however, falls under the heading of "general requirements" and simply provides that "[a]ll projects shall have undergone review, in accordance with applicable state law and regulations, to

[7] The court notes that there is no § 2.03(h) in the MSBA regulations and infers that the plaintiffs intended to refer to § 2.03(2)(h).

the extent applicable to the project, by the Massachusetts Historical Commission, the Massachusetts Commission against Discrimination, the Secretary of Environmental Affairs, the Architectural Access Board, and any other department or agency of the Commonwealth required by law to review such projects." With respect to 963 Code Mass. Regs. § 2.10(8)(j), as the MSBA points out in its reply to the plaintiffs' opposition to the MSBA's motion for summary judgment, the plaintiffs misunderstand the requirements of that section. (See MSBA's Reply to Pls.' Opp'n, Paper No. 12.3, pp. 3-4.) Section 2.10(8)(j) refers to environmental assessments performed during a project's Feasibility Study. The MSBA's Feasibility Study Guidelines[8] explain that as part of the Feasibility Study, the designer of the project is required to perform an evaluation of existing conditions, which "should include" various items, including a preliminary evaluation of significant structural, environmental, geotechnical, or other physical conditions, a determination of the need and schedule for soil exploration and geotechnical evaluation, an environmental site assessment, and an assessment of the school for the presence of hazardous materials. Section 2.10(8)(j) provides:

> The Eligible Applicant shall provide the Authority with the results of environmental assessment or assessments, if any, which the Eligible Applicant shall also make available for public review and shall provide a reasonable opportunity for public comment thereon. The Eligible Applicant shall submit to the Authority a summary of the public comments, in a format determined by the Authority, prior to the Project Scope and Budget Conference.

This process is separate and apart from the submission of an ENF to the EEA. Thus, § 2.10(8)(j) has no bearing on the timing for filing an ENF. As the MSBA explains in its summary judgment motion, the processing of a district's application often proceeds through multiple modules before

[8] The court takes judicial notice of the MSBA Feasibility Study Guidelines, which are "capable of accurate and ready determination by resort to resources whose accuracy cannot reasonably be questioned." Commonwealth v. Greco, 76 Mass. App. Ct. 296, 301 n.9 (2010).

an environmental review is completed. (SOF, para. 24.) Districts will typically file ENFs, if applicable, once the schematic design is further developed during the detailed design phase, which includes updating information and documentation with the technical expertise of the designer and that is necessary for a district to file basic zoning and environmental permits. (SOF, para. 24.)

Having dispensed with the plaintiffs' argument regarding the applicability of 963 Code Mass. Regs. §§ 2.03(h) and 2.10(8)(j), the plaintiffs are left with no reasonable expectation of proving Count 2. There is no evidence that the ENF in this case was filed at an inappropriate stage in the proceedings. As the Certificate from the EEA states, MEPA review is required if a project requires a state agency action (i.e., permits, financial assistance, or a land transfer) and it exceeds one or more review thresholds (301 Code Mass. Regs. § 11.03). The Certificate from EEA notes the City's petition for Article 97 legislation with respect to Mattos Field, the enactment of Chapters 152 and 284, and the City's assertion that the project "does not exceed any MEPA review thresholds, including 301 Code Mass. Regs. §11.03(1)(b)(3)," which requires an ENF and "other MEPA review if the secretary so requires" for the "conversion of land held for natural resources purposes in accordance with Article 97 . . . to any purpose not in accordance with Article 97." The City's assertion is not, as the plaintiffs assert, a false premise, due to the enactment of Chapters 152 and 284, which removed the land at issue from Article 97 protection.

For all these reasons, the plaintiffs cannot prevail on Count 2 of their Complaint and summary judgment in favor of the City Defendants is appropriate.

ORDER

For the foregoing reasons, the court hereby orders the following: defendants City of Gloucester, Gloucester City Council, and Mayor of Gloucester's Motion for Summary Judgment (Paper No. 9) is **ALLOWED**; defendant Executive Office of Energy and Environmental Affairs' Motion to Dismiss (Paper No. 10) is **ALLOWED**; and defendant Massachusetts School Building Authority's Motion for Summary Judgment (Paper No. 12) is **ALLOWED**. Plaintiffs' Complaint for Declaratory and Injunctive Relief is hereby **DISMISSED**.

Thomas Drechsler
Associate Justice of the Superior Court

Dated: August 2, 2021