COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

MIDDLESEX, ss. CASE NO. 19 MISC 000081 (DRR)

THE BOARD OF SELECTMEN FOR THE TOWN OF PEPPERELL,

Plaintiff,

v.

ZONING BOARD OF APPEALS FOR THE TOWN OF PEPPERELL and MARK G. WALSH, ANNETTE R. McLEAN, SEAN E. McCAFFEREY, ALAN LEAO, JR. in their capacity as members of the ZONING BOARD OF APPEALS, and MASS. COMPOSTING GROUP, INC.,

Defendants.

Consolidated with CASE NO. 19 MISC 000086 (DRR)

PHILLIP DZUBINKSI, ROSEANNE DZUBINSKI, HOLLY RIST, DEAN RIST, WILLIAM HAMMOND, PATRICIA HAMMOND, ROBERT LIVINGSTON, BRIAN J. HUTCHINSON, ROBERT P. CORDEIRO, MARK K. SPENGLER, LINA SPENGLER, MARGARET SCARSDALE, and CAROLINE AHDAB,

Plaintiffs,

v.

THE PEPPERELL ZONING BOARD OF APPEALS, MARK WALSH, ANNETTE McLEAN, SEAN McAFFERY, as they are Members of the PEPPERELL ZONING BOARD OF APPEALS, MASS. COMPOSTING GROUP, INC., and its President DAVID A. BURTON,

Defendants.

DECISION ON MOTIONS FOR SUMMARY JUDGMENT

The Plaintiffs' motions for summary judgment in each of these consolidated cases present the question of whether filling an old quarry with soils reclaimed from other sites constitutes a prohibited commercial dumping ground under the Town of Pepperell's Zoning Bylaw (the "Bylaw") or is otherwise a prohibited use under the Bylaw. A number of local residents and the Board of Selectmen view the proposed project as an impermissible "Commercial Dumping Ground" under the Bylaw, while Mass. Composting Group, Inc. and the Zoning Board of Appeals for the Town of Pepperell view the proposed project as a soil reclamation project lawfully undertaken pursuant to legislation enacted in 2014, Section 277 of Chapter 165 of the Acts of 2014 (the "Act"). The question is presented to the court pursuant to G.L. c. 240, § 14A and G.L. c. 231A, § 1. For the reasons discussed below, I conclude that the proposed project is prohibited under the Bylaw as a Commercial Dumping Ground and the Act does not preempt the Town's authority to regulate the proposed project as such a use. Accordingly, in both 19 MISC 000081 and 19 MISC 000086, Plaintiffs' motions for summary judgment are ALLOWED.

PROCEDURAL HISTORY

These consolidated cases began as two separate Chapter 40A, § 17 appeals of a decision by the Zoning Board of Appeals for the Town of Pepperell ("ZBA") purporting to reverse an advisory letter by the Town's Building Inspector that a project proposed by Mass. Composting Group, Inc. ("MCGI") to fill an old quarry with soil reclaimed from other sites (the "Project"), would qualify as a Commercial Dumping Ground under the Bylaw (the "Decision"). Those appeals were brought by the Town's Board of Selectmen (the "Board") and by a group of

neighbors (the "Private Plaintiffs") (together, the "Plaintiffs").[1] Because the Building Inspector had issued only an advisory opinion, rather than a binding determination, the court questioned whether the Land Court had jurisdiction under G.L. c. 40A and whether amended complaints under G.L. c. 240, § 14A were more appropriate vehicles to resolve the parties' dispute. A Joint Status Report was filed on June 26, 2020, setting forth the parties' positions about how best to frame the issues for decision, together with a proposed schedule. Amended pleadings were thereafter filed.

The following claims and counterclaims were before the court prior to the filing of the motions for summary judgment. On December 16, 2019, the Private Plaintiffs filed their Third Amended Complaint ("PP.'s Third Am. Compl.") in three counts: (I) seeking a declaration pursuant to Chapter 231A, § 1 that the ZBA lacked jurisdiction to hear the "appeal" of the Building Inspector's advisory opinion and the ZBA's Decision was *ultra vires*; (II) appealing the ZBA's Decision under Chapter 40A, § 17 to the extent the ZBA did have jurisdiction; and (III) seeking a declaration pursuant to Chapter 231A, § 1 that the Decision did not establish that the Project was an allowed use under the Bylaw.[2] MCGI filed its Answer on January 27, 2020 ("MCGI Answer"). On July 13, 2020, the Board filed its Second Amended Complaint in two counts: (I) appealing the Decision pursuant to Chapter 40A, § 17; and (II) seeking declarations pursuant to Chapters 231A and 240, § 14A that the Project is prohibited under the Bylaw (Bd.'s Second Am. Compl"). On July 31, 2020, MCGI filed its Answer to the Board's Second Amended Complaint, including a Counterclaim in two counts: (1) seeking declarations pursuant

[1] The Private Plaintiffs are Donald A. Brown, Lauretta A. Delegge, Phillip Dzubinski, Roseanne Dzubinski, Holly Rist, Dean Rist, William Hammond, Patricia Hammond, Robert Livingston, Brian J. Hutchinson, Robert P. Cordeiro, Mark K. Spengler, Linda Spengler, and Caroline Ahdab.

[2] In the Third Amended Complaint, which was filed with the assent of the adverse parties in that case, Donald A. Brown and Lauretta A. Delegge no longer appeared as Private Plaintiffs.

to Chapter 231A, § 1 that the Project does not constitute a "commercial dumping ground" under the Pepperell Bylaws and that Section 277 of Chapter 165 of the Acts of 2014 (the "Act") preempts the Bylaw; and (2) seeking a declaration pursuant to Chapter 240, § 14A that MCGI's importation of soils for reclamation of the quarry does not constitute a "use" under the Pepperell Bylaws. ("MCGI's Countercl."). The Board filed its answer to MCGI's counterclaims on August 20, 2020.

On February 2, 2021, Private Plaintiffs filed their motion for summary judgment and supporting pleadings.[3] On February 3, 2021, the Board filed its motion for summary judgment and supporting pleadings.[4] On March 12, 2021, MCGI filed its omnibus opposition pleadings.[5] On April 12, 2021, Private Plaintiffs filed their Reply to the Private Defendant's Opposition to the Private Plaintiffs' Motion for Summary Judgment. On April 12, 2021, the Board filed its

[3] These included Private Plaintiffs' Motion for Summary Judgment and Memorandum in Support of Private Plaintiffs' Motion for Summary Judgment. Private Plaintiffs joined the Board's Statement of Undisputed Facts.

[4] These included the Select Board for the Town of Pepperell's Motion for Summary Judgment; the Select Board for the Town of Pepperell's Memorandum in Support of Motion for Summary Judgment; the Select Board for the Town of Pepperell's Statement of Undisputed Material Facts ("Board's SOF"); Appendix of Exhibit Nos. 1-22 ("Bd.'s Exs."); Affidavit of Pepperell Town Clerk Brynn Montesanti; and Affidavit of Special Town Counsel, David K. McCay.

[5] These included Defendant Mass Composting Group, Inc's Omnibus Opposition to the Board's Motion for Summary Judgment; Defendant Mass Composting Group, Inc's Supplemental Appendix of Exhibits; and Mass Composting Group, Inc's Response to Town of Pepperell's Statement of Undisputed Facts and Statement of Additional Facts ("MCGI's SOF").

reply pleadings.[6] On April 30, 2021, MCGI filed sur-reply pleadings.[7] Hearing on the motions for summary judgment was then held on May 24, 2021.[8]

After initial briefing, all parties entered into or concurred with a Joint Stipulation that the ZBA lacked jurisdiction to hear MCGI's appeal under Chapter 40A, §17, and that the Decision was of no legal force of effect. The Joint Stipulation was accepted by the court on June 1, 2021, and accordingly, all claims brought with reference to that statute are dismissed. What remains are the parties' requests under Chapter 231A and 240, § 14A. As presented in the summary judgment filings, the Plaintiffs seek a declaration that the soil reclamation facility proposed by MCGI is prohibited under the Bylaw, because: (1) it is a "Commercial Dumping Ground" which is a prohibited use under the Bylaw, (2) it is not otherwise allowed under the Bylaw; and (3) MCGI has neither applied for nor obtained a WRPOD Special Permit.

On February 28, 2022, the court issued a docket entry seeking further briefing from the parties, inter alia, regarding giving notice to the Attorney General of the Commonwealth pursuant to Mass. R. Civ. P. 24(2).[9]

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[6] These included the Select Board for the Town of Pepperell's Reply in Support of Its Motion for Summary Judgment; Consolidated Statement of Undisputed, Material Facts and the Parties' Responses ("Consol. SOF"); Supplemental Affidavit of Special Town Counsel, David K. McCay; the Select Board for the Town of Pepperell's Supplemental Appendix of Exhibits ("Board's Supp. App."); and the Select Board for the Town of Pepperell's Motion to Strike Portions of the Affidavit of David Burton.

[7] These included Mass Composting Group, Inc's Omnibus Sur-Reply in Opposition to the Town's and Private Plaintiffs' Motion for Summary Judgment; Mass Composting Group, Inc's Opposition to the Board's Motion to Strike Portions of the Affidavit of David Burton; Supplemental Affidavit of David Burton; and Corrected Version of Exhibit 23 to the Summary Judgment Appendix. The Board then filed on May 21, 2021, the Select Board for the Town of Pepperell's Motion to Strike Paragraph 10 of the Supplemental Affidavit of David Burton,

[8] The Select Board for the Town of Pepperell's Motion to Strike Portions of the Affidavit of David Burton; Mass Composting Group, Inc's Opposition to the Board's Motion to Strike Portions of the Affidavit of David Burton; and the Select Board for the Town of Pepperell's Motion to Strike Paragraph 10 of the Supplemental Affidavit of David Burton were taken under advisement following the May 24, 2021, hearing. However, the statements at issue do not relate to material facts, and there is therefore no need to further address these motions.

[9] That docket entry read as follows: It has come to the court's attention that it would be prudent pursuant to Mass. R. Civ. P. 24(d), to provide notice to the Attorney General of the Commonwealth about the pendency of this case and

Following a status conference on April 21, 2022, additional briefs were filed, including: MCGI's Second Supplemental Memorandum of Law in Support of its Opposition to the Board's and Private Plaintiffs' Motions for Summary Judgment; MCGI's Second Supplemental Appendix of Exhibits; and The Select Board for the Town of Pepperell's Second Supplemental Memorandum in Support of its Motion for Summary Judgment. On May 2, 2022, counsel advised that they had conferred with the Chief of the Central Massachusetts Division and Director of the Municipal Law Unit of the Attorney General's Office and confirmed that the Attorney General's Office does not intend to participate in this litigation.

UNDISPUTED FACTS

I begin by noting that MCGI contends that there are material facts in dispute that require trial and preclude a decision on the Plaintiffs' pending motions for summary judgment. Nonetheless, a large number of material facts have been agreed upon as set forth below. Those material facts are derived from the record and are not in dispute. Based on these undisputed material facts and the arguments before the court, I conclude that resolution of this matter by summary judgment is appropriate. I further address MCGI's contention in the discussion below.

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the parties' arguments concerning the proposed soil reclamation project at issue. Rule 24(d) provides that when the validity of an ordinance of any city or the by-law of any town is drawn into question in any action to which the Commonwealth is not a party, the party asserting the invalidity of the ordinance or by-law shall notify the Attorney General within sufficient time to afford her an opportunity to intervene. Here, Defendant Mass. Composting Group, Inc. ("MCGI") contends that the provision of the Pepperell Bylaw governing "Commercial Dumping Grounds" is preempted by Section 277 of Chapter 165 of the Acts of 2014 (the "Act"), as applied to the proposed soil reclamation project. Accordingly, by March 14, 2022, MCGI shall provide notice to the Office of the Attorney General about the pendency of this case, the pending motions for summary judgment, and the claim of preemption. That notice shall be circulated to all counsel for review and comment prior to transmittal to the Office of the Attorney General and a copy shall be filed and docketed in this case. Further, it has also come to the court's attention that a legal issue of potential import for this case has not to date been the focus of the parties' briefing or argument. Specifically, the court asks whether Chapter 40A, Section 9 (paragraph 15) and Chapter 111 of the General Laws (and cases thereunder), which govern local regulation of solid waste disposal facilities, apply to the proposed soil reclamation project and/or use of the project site as a proposed Commercial Dumping Ground. Parties to appear for a status conference to discuss these issues on April 21, 2022, at 3:00 p.m. The Office of the Attorney General is invited to attend.

The Parties and the Property

1. Private Plaintiffs include the following Pepperell residents: Phillip M. and Roseanne Dzubinksi, with an address of 133 Nashua Road; Holly and Dean Rist, with an address of 137 Nashua Road; William and Patricia Hammond, with an address of 1 Dow Street; Robert and Kathy Livingston, with an address of 154 Nashua Road; Brian J. Hutchinson, with an address of 156 Nashua Road; Robert P. and Kathleen Cordeiro, with an address of 158 Nashua; Mark K. and Linda Spengler, with an address of 170 Nashua Road; Caroline Ahdab, with an address of 19 Deerfield Drive. With the exception of Carline Ahdab, each claims to be an abutter to the Project. PP.'s Third Am. Compl. ¶¶ 3-10.
2. The Board is the duly authorized executive board of the Town of Pepperell, with a principal place of business at 1 Main Street. Bd.'s Second Am. Compl. ¶ 6; MCGI's Countercl. ¶ 3.
3. The ZBA is the duly authorized zoning board of appeals for the Town with an address of 1 Main Street. The members of the ZBA included Defendants Mark Walsh, Sean McCaffery, Annette R. McLean, and Alan Leao, Jr. [10] PP.'s Third Am. Compl. ¶¶ 12-15; MCGI's Answer ¶¶ 12-15; Bd.'s Second Am. Compl. ¶¶ 9, 11-14; MCGI's Countercl. ¶¶ 4-8.
4. MCGI is a domestic limited liability company organized under the laws of the Commonwealth, with a mailing address of 163 Nashua Road, Pepperell. David A. Burton is the President, Treasurer, Secretary, Director, and Resident Agent of MCGI. PP.'s Third Am. Compl. ¶¶ 16-17; MCGI Answer ¶¶ 16-17; Bd.'s Second Am. Compl. ¶ 15.
5. MCGI owns property located at 161 Nashua Road, Pepperell (the "Property"). The Property is approximately 49 acres and is located in the Industrial zoning district. The Property was

[10] Alan Leao, Jr. is not included among the ZBA Board members in Private Plaintiffs' Third Amended Complaint.

the site of a gravel pit/quarry known as the Shattuck Gravel Pit or the Nashua Road Quarry. Consol. SOF ¶¶ 1-3.

6. The gravel pit/quarrying activities on the Property began around 1965. Consol. SOF ¶ 4; Bd.'s Ex. 2.

MCGI's Proposed Soil Reclamation Project

7. On June 28, 2018, MCGI submitted a letter to the Town Administrator indicating its intent to undertake a project to fill the quarry in accordance with the Interim Policy on the Re-Use of Soil for Large Reclamation Projects, Policy #COMM 15-01 issued by the Massachusetts Department of Environmental Protection ("DEP") on August 28, 2015 (the "2018 Proposal" and "Interim Policy"). The letter stated that MCGI intended to obtain an Administrative Consent Order from DEP, which would "incorporate the methods and procedures to be followed by MCGI during the management and execution" of the Project. Consol. SOF ¶¶ 18, 23, 83, 84; Bd.'s Exs. 9, 11.

8. A copy of the Interim Policy was attached to MCGI's June 28, 2018, letter, together with a detailed Soil Management Plan, a copy of DEP's "Similar Soils Provision Guidance: Guidance for Identifying When Soil Concentrations at a Receiving Location are 'Not Significantly Lower Than' Managed Soil Concentrations Pursuant to 310 CMR 40-0032(3), WSC#13-500" (the "Similar Soils Policy"), and construction drawings and renderings. MCGI sent a further letter to the Town Administrator on March 18, 2019, with a revised Soil Management Plan ("2019 Proposal"). Consol. SOF ¶¶ 23-25, 83, 84; Bd.'s Exs. 2, 11, 12 (together, the 2018 and 2019 Proposals are hereinafter referred to as the "Project Proposal").

9. The stated purpose of the Project Proposal was "to improve current topographic conditions by restoring elevations to pre-quarrying conditions, install a sustainable vegetative cover and prepare the property for future development." Consol. SOF ¶¶ 26; Bd.'s Exs. 2, 11.

10. In a letter to the Town Administrator dated October 24, 2019, MCGI stated that it had "recently determined" it would pursue placing a solar farm on the Property. MCGI has not applied for any permits or authorizations from the Town for a solar farm. Consol. SOF ¶¶ 30-31; Bd.'s Ex. 13; Aff. Town Clerk.

11. According to the 2019 Proposal, the Project would take approximately seven to nine years to complete. Over the course of that Project, approximately 3.2 million cubic yards of soil will be deposited on the Property. Three million cubic yards of soil equates to approximately 4.5 million tons. Trucks would dump the soil material on the ground at the Property where it would be moved by bulldozers to flatten the material and make room for additional soil material to come in. The perimeter slopes of the Project would be graded at a 2:1 slope and restored with topsoil and seeded. Consol. SOF ¶¶ 32-33, 35, 37, 40; Bd.'s Ex. 2.

12. The current topography of the Property ranges from approximately 172 to 260 feet above sea level. The highest elevation on the Property is approximately 260 feet above sea level. Consol. SOF ¶¶ 44-46; Bd.'s Exs. 2, 16.

13. The topography of the Property prior to any quarrying activities ranged from approximately 170 to 260 feet above sea level, though MCGI states that only a very limited area was at 170 feet while the majority of the site was over 200 feet in elevation. Consol. SOF ¶ 43; Bd.'s Ex. 15. The 2019 Proposal does not call for the restoration of the site to the historical topography shown in the 1944 U.S. Geological Survey Topographical Map, though MCGI states that the Project could be modified or amended to adjust the elevations downward. Consol. SOF ¶ 44.

14. Nashua Road, which runs along the western and northern edge of the Property, is approximately 195 to 220 feet above sea level as it fronts the Property. Consol. SOF ¶ 47; Bd.'s Ex. 2.

15. According to the 2019 Proposal, the finished grade and topography Project will result in a flat-topped plateau at an elevation of 299.5 feet above sea level, though MCGI states that the Project could be modified or amended to adjust the elevations downward. Upon completion of the Project, the area of the plateau would be approximately between 14 and 17 acres. Consol. SOF ¶¶ 48-50; Bd.'s Ex. 2 (p.40).

16. The total area of disturbed land will be 29.6 acres under the 2019 Proposal. At any one time during the Project, MCGI would disturb up to 10 acres of land. Consol. SOF ¶¶ 51, 52; Bd.'s Exs. 2 (p. 54), 16.

17. The soil material for the Project would be sourced from "excess soil from excavation and construction projects in Massachusetts, as well as qualified soils from Vermont, New Hampshire and Maine." The owner of the originating sites or a contractor at the originating sites will contract with and pay MCGI to deposit their excess soil and fill material on the Property. MCGI would not accept these fill materials from the originating site owners and contractors if it was not being paid to take them. Consol. SOF ¶¶ 53-55; Bd.'s Exs. 2, 14 (pp. 41-42, 56), 23 (pp. 3-7), 30 (pp. 126-127).

18. At current market rates, the Project would generate approximately $20 to $25 million in revenue over the course of the Project, although profits would be less; according to MCGI, revenues and profits would be modified downward if elevations were adjusted downward. Consol. SOF ¶ 56; Bd.'s Ex. 14 (pp. 43, 51).

19. The Project Proposal included a soil sampling and testing plan for all soils that would be deposited at the Property, including photo-ionization detector ("PID") screening prior to shipment to the Property, and certification by a licensed site professional ("LSP"). Non-compliant loads would be rejected by MCGI, returned to the originating site, and further shipments from that site would be cut off. Consol. SOF ¶¶ 77-80.

Building Inspector's Advisory Opinion and The ZBA Decision

20. In response to receiving the 2018 Proposal, by letter dated September 24, 2018, the Board requested a determination from the Building Inspector as to whether the Project: (1) would constitute a Commercial Dumping Ground under the Bylaw; and (2) whether a Commercial Dumping Ground is an allowed use under the Bylaw. Consol. SOF ¶ 68; Bd.'s Ex. 19.

21. At an October 1, 2018, Special Town Meeting, the Town voted in favor of a Citizen's Petition for a non-binding resolution opposing the 2018 Proposal. Consol. SOF ¶ 87; Bd.'s Ex. 24.

22. On October 9, 2018, the Building Inspector issued a letter concluding that, in his opinion: (1) the Project described in the 2018 Proposal would qualify as a Commercial Dumping Ground under the Bylaw, § 10000; and (2) such a use is not permitted under the Bylaw's Table of Use Regulations (the "Determination"). Consol. SOF ¶ 69; Bd.'s Ex. 20.

23. By Application dated November 6, 2018, and submitted to the Town Clerk on November 19, 2018, MCGI appealed the Determination to the ZBA. Consol. SOF ¶ 70; Bd.'s Ex. 21.

24. The ZBA issued a Decision on January 16, 2019, as filed with the Town Clerk on January 30, 2019, reversing the Building Inspector's Determination that the 2018 Proposal would qualify as a Commercial Dumping Ground. Consol. SOF ¶ 71; Bd.'s Ex. 22.

25. The ZBA Decision concluded that the 2018 Proposal does not constitute a Commercial Dumping Ground, but did not make a determination as to whether the 2018 Proposal constituted an allowable use under the Bylaw and further concluded that the 2018 Proposal did constitute a reclamation project under DEP's Interim Policy. Consol. SOF ¶ 72; Bd.'s Ex. 22.

The 1985 and 1991 Special Permits

26. On March 11, 1985, the Board of Selectmen issued a special permit to the P.I.C. Realty Trust for the removal of soil and gravel from the Property, recorded in the Middlesex South Registry of Deeds ("Registry"), Book 11012, Page 12 (the "1985 Special Permit"). Condition 1 to the 1985 Special Permit required that:

> The active earth removal area shall not exceed five acres, provided, however that upon substantial completion of the five acres, a two acre overlap into the adjacent five acre removal area shall be permitted to facilitate orderly closure and grading. The applicant shall restore the five acre area with retained topsoil to a depth of not less than four inches and seed the same area with a fast germinating ground cover prior to exceeding the two acre overlap onto the adjacent five (5) acres

Consol. SOF ¶¶ 5-6; Bd.'s Ex. 3.

27. The Bylaw in effect at the time of the 1985 Special Permit contained the following restoration standards for projects receiving special permits for removal of soil and gravel ("1985 Bylaw" and "1985 Soil Removal Restoration Standards"):

a. No slope shall be left with a slope steeper than 3:1.

b. All debris, stumps, boulders, etc. shall be disposed of in an approved location and manner.

c. Following excavation and as soon as possible thereafter ground levels and grades shall be established in accordance with the specifications set forth in the special permit.

d. Retained subsoil and topsoil removed shall be respread over the disturbed area to a depth to be determined by the Selectmen or their agent, in any case such depth not to be less than four (4) inches.

Consol. SOF ¶ 7; Bd.'s Ex. 4 (Excerpt from Town of Pepperell Zoning Bylaws, Revised Effective January 31, 1983). [11]

28. Under the 1985 Bylaw, Section 19(j)(1)(b), special permits for gravel removal were limited to a term of three years. Consol. SOF ¶ 9; Bd.'s Exs. 3-5.

29. No application was made to extend the 1985 Special Permit. Consol. SOF ¶ 10; Bd. Ex. 5 (p. 1).

30. On June 3, 1991, Leon Shattuck, the owner of the Property at that time, applied for a special permit for gravel removal. Consol. SOF ¶ 11; Bd.'s Ex. 5 (p. 1).

31. On September 24, 1991, the Board of Selectmen granted Mr. Shattuck's application for a special permit, subject to certain conditions ("1991 Special Permit"). Mr. Shattuck appealed the 1991 Special Permit to the Superior Court on October 9, 1991. While that appeal was pending, the Board of Selectmen revoked the 1991 Special Permit by a written decision filed with the Town Clerk on June 30, 1992 ("1992 Decision"). No appeal was taken of the 1992 Decision. Consol. SOF ¶¶ 12-15; Bd.'s Exs. 5-7.

32. On June 23, 1994, the Superior Court dismissed Mr. Shattuck's appeal of the 1991 Special Permit, and no further appeal was taken. Consol. SOF ¶ 16; Bd.'s Ex. 8.

33. Since the 1991 Special Permit, the Town has issued no special permit or other permit for gravel or soil removal at the Property. Consol. SOF ¶ 17; Aff. Town Clerk, ¶ 10.

[11] I note that MCGI disputes the cited document as containing insufficient information to verify its authenticity and completeness. Consol. SOF ¶ 7.

The Current Bylaw

34. Section 3100 of the Bylaw, entitled Principal Uses, provides: "No land shall be used and no structure shall be erected or used except as set forth in the following Table of Use Regulations, including the notes to the Schedule, or as otherwise set forth herein, or as exempted by General Laws. Any buildings or use of premises not herein expressly permitted is hereby prohibited." Consol. SOF ¶ 63; Bd.'s Ex.17 (p. 9).

35. Under the Bylaw's Table of Principal Uses, a "Commercial Dumping Ground" is not permitted in any zoning district in Town. Consol. SOF ¶ 58; Bd.'s Ex.17 (p. 62).

36. The Bylaw defines a "Commercial Dumping Ground" as: "A disposal site for garbage, rubbish, the deposit of demolition materials or other refuse or as a site for a refuse disposal incinerator." Consol. SOF ¶ 59; Bd.'s Ex.17, § 10000 (p. 54).

37. Section 3220 of the Bylaw states, in part: "Any use not allowed in the district as a principal use is also prohibited as an accessory use. Accessory uses are permitted only in accordance with lawfully existing principal uses." Consol. SOF ¶ 60; Bd.'s Ex.17 (p. 10).

38. "Use" is defined in the Bylaw as: "The purpose or activity for which land or buildings are designed, arranged or intended or for which land or buildings are occupied or maintained, including any such activity with respect to the requirements of this chapter." Consol. SOF ¶ 62; Bd.'s Ex.17, § 10000 (p. 58).

39. "Accessory Use" is defined in the Bylaw as: "A use customarily incidental to that of the main or principal building or use of the land." Consol. SOF ¶ 61; Bd.'s Ex.17, § 10000 (p. 53).

40. A facility to accept reclaimed soil is not a use listed in the Bylaw's Table of Principal Uses. Consol. SOF ¶ 57; Bd.'s Ex.17 (pp. 60-62).

41. As set forth in the Table of Principal Uses, "Earth & soil removal" is allowed only in the Industrial District with a special permit from the Board. Consol. SOF ¶ 64; Bd.'s Ex.17 (p. 62).

The Act and DEP's Interim Policy

42. On July 30, 2014, the Legislature enacted Section 277 of Chapter 165 of the Acts of 2014. That Act states in full:

> Not later than June 30, 2015, the department of environmental protection shall establish regulations, guidelines, standards or procedures for determining the suitability of soil used as fill material for the reclamation of quarries, sand pits and gravel pits. The regulations, standards or procedures shall ensure the reuse of soil poses no significant risk of harm to health, safety, public welfare or the environment considering the transport, filling operations and the foreseeable future use of the filled land. The department may adopt, amend or repeal regulations establishing: (i) classes or categories of fill or reclamation activities requiring prior issuance of a permit issued by the department; (ii) classes or categories of fill or reclamation activities that may be carried out without prior issuance of a permit issued by the department; and (iii) classes or categories or fill that shall require local approval based on the size, scope and location of a project; provided, however, that local approval shall not be required for projects involving less than 100,000 cubic yards of soil.

Consol. SOF ¶ 19; Bd.'s Exs. 9, 10.

43. On August 28, 2015, the DEP issued the Interim Policy pursuant to the Act. Consol. SOF ¶¶ 18, 19; Bd.'s Ex. 9.

44. DEP has not adopted regulations pursuant to the Act. Consol. SOF ¶ 20; Aff. Special Counsel, ¶ 7.

45. The Interim Policy states:

> This Interim Policy provides notice of MassDEP's intent to issue site-specific approvals, in the form of an Administrative Consent Order, to ensure the reuse of large volumes of soil for the reclamation of sand pits, gravel pits and quarries poses no significant risk of harm to health, safety, public welfare or the environment and would not create new releases or threats of releases of oil or hazardous materials.

Consol. SOF ¶ 75; Bd.'s Ex. 9.

46. The Interim Policy further states:

> To be eligible for MassDEP approval pursuant to this Interim Policy, the soil accepted by the quarry, gravel pit or sand pit can contain no more than the de minimis quantities of Solid Waste (e.g. Municipal Solid Waste and/or Construction and Demolition Waste) as defined in 310 CMR 16.00 and 310 CMR 19.000.
>
> Consol. SOF ¶ 76; Bd.'s Ex. 9.

47. The Interim Policy further states:

> Nothing in the Interim Policy eliminates, supersedes or otherwise modifies any local, state or federal requirements that apply to the management of soil, including any local, state or federal permits or approvals necessary before placing the soil at the receiving location, including but not limited to, those related to placement of fill, noise, traffic, dust control, stormwater management, wetlands, ground water or drinking water source protection.

Consol. SOF ¶ 22; Bd.'s Ex. 9.

Water Resource Protection Overlay District Historic Use of the Driveway

48. A portion of the proposed project is located in the Well Protection Zone ("WPZ") of the Water Resource Protection Overlay District ("WRPOD"), under Sections 8120 and 8122 of the Bylaw. Consol. SOF ¶ 65; Bd.'s Exs. 16, 17 (p. 39), 18.

49. Under Section 8130.33 of the Bylaw, for all uses within the WRPOD, "[a]ll other new construction for any and every residential, commercial and industrial use on lots now vacant not specifically addressed above" requires a special permit from the Planning Board. Consol. SOF ¶ 66; Bd.'s Exs. 17 (pp. 41-42).

50. MCGI has not applied for or obtained a WRPOD special permit (though MCGI disputes there is any need to do so). Consol. SOF ¶ 67; Aff. Town Clerk, ¶ 19.

DISCUSSION

A. Standard of Review

"Summary judgment is granted where there are no issues of genuine material fact, and the moving party is entitled to judgment as a matter of law." *Ng Bros. Constr. v. Cranney*, 436 Mass. 638, 643-44 (2002); Mass. R. Civ. P. 56(c). "The moving party bears the burden of

affirmatively demonstrating that there is no triable issue of fact." *Ng Bros. Constr.*, 436 Mass. at 644. In determining whether genuine issues of fact exist, the court must draw all inferences from the underlying facts in the light most favorable to the party opposing the motion. See *Attorney Gen. v. Bailey*, 386 Mass. 367, 371, *cert. denied*, 459 U.S. 970 (1982). Whether a fact is material or not is determined by the substantive law, and an "adverse party may not manufacture disputes by conclusory factual assertions." *Ng Bros. Constr.*, 436 Mass. at 648; see *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When appropriate, summary judgment may be entered against the moving party and may be limited to certain issues. *Community Nat'l Bank v. Dawes*, 369 Mass. 550, 553 (1976); Mass. R. Civ. P. 56(c).

Chapter 240, § 14A vests jurisdiction in the Land Court over cases concerning the validity of zoning ordinances or bylaws, or the extent to which such ordinances or bylaws affect a proposed use of property. *Banquer Realty Co. v. Acting Bldg. Comm'r of Boston*, 389 Mass. 565, 570 (1983). The statute provides, in relevant part,

> The owner of a freehold estate in possession in land may bring a petition in the land court against a . . . town wherein such land is situated, which shall not be open to objection on the ground that a mere judgment . . . is sought, for determination as to the validity of a municipal . . . by-law . . . which purports to restrict or limit the present or future use . . . improvement or development of such land . . . or for determination of the extent to which any such . . . by-law . . . affects a proposed use, enjoyment, improvement or development of such land . . . . The court may make binding determinations of right interpreting such ordinances, by-laws or regulations whether any consequential judgment or relief is or could be claimed or not."

G. L. c. 240, § 14A provides a mechanism separate from other administrative routes, including those set forth in G. L. c. 40A, such as appeals pursuant to G. L. c. 40A, § 17. The Land Court is vested with exclusive jurisdiction to determine the extent to which a zoning bylaw affects a proposed use of property, or the validity of a particular zoning ordinance or bylaw that purports

to limit the use of such property. *Whitinsville Ret. Soc'y, Inc. v. Northbridge*, 394 Mass. 757, 762–63 (1985), citing *Addison-Wesley Publ. Co. v. Reading*, 354 Mass. 181, 184–85 (1968).[12]

With respect to the claims brought pursuant to Chapter 231A, "The land court . . . may on appropriate proceedings make binding declarations of right, duty, status and other legal relations sought thereby . . . in any case in which an actual controversy has arisen and is specifically set forth in the pleadings." G.L. c. 231A, § 1. To establish subject matter jurisdiction for a declaratory judgment to issue under G.L. c. 231A, "the plaintiff must demonstrate that an actual controversy exists and that he has legal standing to sue." *District Att'y for the Suffolk Dist. v. Watson*, 381 Mass. 648, 659 (1980), citing *Massachusetts Ass'n of Indep. Ins. Agents & Brokers, Inc. v. Commissioner of Ins.*, 373 Mass. 290, 292 (1977). Chapter 231A is remedial in nature and is to be liberally construed. G.L. c. 231A, § 9. Declaratory judgment proceedings are "concerned with the resolution of real, not hypothetical, controversies; the declaration issued is intended to have an immediate impact on the rights of the parties." *Massachusetts Ass'n of Indep. Ins. Agents & Brokers, Inc.*, 373 Mass. at 292-93.

Here, all parties concur that an actual controversy exists as to whether the Project would be lawful under the Bylaw and, if so, whether and to what extent the Act and Interim Policy preempt the Bylaw. An actual controversy is a "real dispute caused by the assertion by one party of a legal relation, status, or right in which he has a definite interest, and the denial of such assertion by another party also having a definite interest in the subject matter, where the circumstances attending the dispute plainly indicate that unless the matter is adjusted such

[12] The Board appears to contend that it has standing to bring a claim under G.L. c. 240, § 14A, as it is a "party whose interest in land is affected by the proposed use." See Joint Status Report, filed June 26, 2020. Although no party has challenged the Board's standing under G.L. c. 240, § 14A, I note that Chapter 240, § 14A limits those who seeking review to "owners of a freehold estate in possession in land." In any event, the Chapter 240, § 14A claim is otherwise properly before the court as Count II of the Counterclaims in MCGI's Answer to the Board's Second Amended Complaint.

antagonistic claims will almost immediately and inevitably lead to litigation." *Bunker Hill Distrib., Inc. v. District Att'y for Suffolk Cnty.*, 376 Mass. 142, 144 (1978), quoting *School Comm. of Cambridge v. Superintendent of Sch. of Cambridge*, 320 Mass. 516, 518 (1946) (internal quotations omitted).

Each of Private Plaintiffs, the Board, and MCGI have standing to secure resolution of this controversy under G.L. c. 231A, § 1. *Bello v. South Shore Hosp.*, 384 Mass. 770, 778 (1981); *Massachusetts Ass'n of Indep. Ins. Agents & Brokers, Inc.*, 373 Mass. at 292-93. Standing to pursue a declaratory judgment claim requires that the plaintiff have a "definite interest in the matters in contention in the sense that his rights will be significantly affected by a resolution of the contested point." *Bonan v. Boston*, 398 Mass. 315, 320 (1986); see *Galipault v. Wash Rock Invs., LLC*, 65 Mass. App. Ct. 73, 84 (2005) (no standing for declaratory judgment that condominium unit owners had right of first refusal to purchase other units where court found they did not own right of first refusal nor have any other interest in it). Here, Private Plaintiffs, the Board, and MCGI have a definitive and concrete interest in the resolution of the contested issue of whether the Project may proceed.[13] Plaintiffs contend MCGI's proposed Project is prohibited under the Bylaw; MCGI disagrees.

B. Plaintiffs' Motion for Summary Judgment

In their summary judgment pleadings, Plaintiffs essentially seek two determinations: (1) whether the Project is expressly prohibited under the Bylaw as a "Commercial Dumping Ground" or is otherwise prohibited under the Bylaw; and (2) whether local prohibition of the Project is preempted by the Act and Interim Policy.[14] I address each argument in turn.

[13] Again, no party challenges standing under G.L. c. 231A.

[14] Beyond the "Commercial Dumping Ground" argument, the Board advances several independent arguments as to why the Project is prohibited under the Bylaw: (1) The Project would only be an allowable accessory use to a gravel

1. Whether the Project is a Prohibited Commercial Dumping Ground Under the Bylaw

In the Project Proposal, MCGI states that it intends to undertake the reclamation of the Nashua Road Quarry in order "to improve current topographic conditions by restoring elevations to pre-quarrying conditions, install a sustainable vegetative cover and prepare the property for future development." Plaintiffs dispute this rosy depiction of the Project and view the filling of the quarry with reclaimed soil as nothing short of a Commercial Dumping Ground, a use prohibited under the Bylaw. Commercial Dumping Grounds are prohibited in the Industrial District where the Property is located, pursuant to the Table of Use Regulations. The Bylaw defines a "Commercial Dumping Ground," in Section 10000, as a "disposal site for garbage, rubbish, the deposit of demolition materials or other refuse or as a site for a refuse disposal incinerator."

The Project is a Disposal Site for Unwanted Material. I first consider whether the Project is the equivalent of a "disposal site for garbage, rubbish, the deposit of demolition materials or other refuse . . ." Plaintiffs reason that the fact that MCGI is being paid to accept the soil reclamation materials means they are unwanted and that therefore the Project is a Commercial Dumping Ground. Indeed, MCGI has acknowledged that it would not accept the fill materials if it was not being paid to take them. In so reasoning, Plaintiffs harken back to a previous decision by the Land Court, between some of the same parties, which considered an earlier project proposed by MCGI for the same location. In 1996, in *Pepperell v. Mass Composting Grp., Inc.*, 4 LCR 38, 42 (Misc. Case No. 197658) (Scheier, J.), ("1996 MCGI Decision"), MCGI asked the

pit operation if the primary use itself were an allowed use under the Bylaw, but gravel pit operations are not currently allowed and prior permits have expired; (2) Soil reclamation is not accessory or incidental use to a quarry or gravel pit; (3) The Bylaw prohibits uses not expressly permitted, and the Project falls under no allowed use category; and (4) The Project requires a WRPOD special permit, which MCGI has not obtained. As discussed below, I do not address these additional arguments, having concluded that the proposed soil reclamation project constitutes an impermissible Commercial Dumping Ground under the Bylaw.

court for a determination under Chapter 240 § 14A, whether a composting project proposed for the Property was a Commercial Dumping Ground under the Bylaw. The raw material proposed for the composting project consisted of cranberry waste, paper pulp, waste paper and cardboard, yard waste, shredded pallets, soft drink excess, and certain animal manure. Judge Scheier concluded that the composting project was a manufacturing facility under the Bylaw in part because its purpose was to take a raw material and produce humus through a composting process. She explained, "It follows that if the project constitutes a manufacturing use it is not also a commercial dumping ground, as 'dumping ground' implies a depository for unwanted materials." *Id.*

For this analysis, Judge Scheier looked to the dictionary definition of a "dumping ground" for guidance in concluding the composting project was not a prohibited Commercial Dumping Ground under the Bylaw. She emphasized that the term "dumping ground" implied "a depository for unwanted materials." See Webster's New World Dictionary ('dump' is defined as 'to throw away (garbage, rubbish, etc.).'" *Id.* By contrast, "the humus would be sold at places remote to locus once processed." *Id.* She further noted that all composting operations would occur in a fully enclosed building such that neither the raw material nor the finished product would be stored outdoors or deposited in open air. *Id.*

Although the soil reclamation proposal now before the court differs from the composting project in several material respects, Judge Scheier's analysis provides useful guidance. Several of the factors found to militate against a finding of a Commercial Dumping Ground in 1996 are present here. The processing or handling activities are materially different, as is the outcome of those processes. Unlike the composting project, the soil reclamation materials would be permanently "deposited" at the Property in open air, rather than enclosed within a building and

transformed into a new product, consistent with the dictionary definition for a "dumping ground" cited above. In addition, the Project would not result in a product for sale. To the contrary, MCGI would be paid to take the unwanted materials off contractors' hands, also consistent with the dictionary definition. According to the Project Proposal, the owner of the originating sites or contractors at an originating site would contract with and pay MCGI to deposit their excess soil and fill material at the Property. At current rates, the Project would generate approximately $20 million to $25 million dollars in revenue over nine years, a sizable sum. As such, the proposed use of the Property as a "disposal site" is consistent with the dictionary definition for a "dumping ground."

The Component Parts of the Fill Are Either Expressly Prohibited or Otherwise Fairly Characterized as Unwanted Refuse. Plaintiffs further contend that not only would the proposed soil reclamation fill serve as a permanent disposal site for unwanted material, but all of the component parts of that fill fall within the Bylaw definition of a "Commercial Dumping Ground." According to the Bylaw, the components that make up a "Commercial Dumping Ground" are "garbage, rubbish, the deposit of demolition materials or other refuse." To understand the issue of fill composition, I turn to the Project Proposal. It states that the fill would be sourced from "excess soil from excavation and construction projects in Massachusetts, as well as qualified soils from Vermont, New Hampshire and Maine." The Soil Management Plan states that the fill material could include "up to 5% by volume of asphalt, brick and concrete material" and might also contain up to 1% of "ash and/or solid waste." Bd.'s Ex. 2, § 3.1.3.

Courts determine the meaning of a bylaw using the ordinary principles of statutory construction. *Deadrick v. Zoning Bd. of Appeals of Chatham*, 85 Mass. App. Ct. 539, 545 (2014). See also *Paulini Loam, LLC v. Ottaviana*, 23 LCR 436, 447 (2015) (Misc. Case No. 09 MISC

401214 (Long, J.), citing *Shirley Wayside Ltd. Partnership v. Bd. of Appeals of Shirley*, 461 Mass. 469, 477 (2012). When a term is not defined by the bylaw, it must be defined according to its common usage. *Langevin v. Superintendent of Pub. Bldgs*, 5 Mass. App. Ct. 892, 892 (1977). See also *Knapik v. Hansson*, 26 LCR 170, 176 (2018) (Misc. Case No. 15 MISC 000407) (Piper, J.), citing *Pepperell*, 4 LCR at 41. A bylaw must be construed reasonably and should not be interpreted "as to cause absurd or unreasonable results when the language is susceptible of a sensible meaning." *North Shore Realty Tr. v. Commonwealth*, 434 Mass. 109, 112 (2001), quoting *Green v. Bd. of Appeal of Norwood*, 358 Mass. 253, 258 (1970). Common sense teaches that the above-described discarded construction materials ("up to 5% by volume of asphalt, brick and concrete material") are appropriately categorized as prohibited "demolition materials," while the "ash and/or solid waste" are properly categorized as prohibited "garbage or rubbish."

Notwithstanding this commonsense interpretation, MCGI attempts to explain why fill material (with "up to 5% by volume of asphalt, brick and concrete material" and up to 1% of "ash and/or solid waste") does not constitute "garbage, rubbish, [and] the deposit of demolition materials" in accord with the Commercial Dumping Ground definition. MCGI points out that even though a small percentage of its fill might be "garbage, rubbish, [and] the deposit of demolition materials," the Interim Policy would permit only a de minimis quantity of those materials to be included in the overall volume of fill material as a whole. In so arguing, MCGI relies on the Interim Policy which specifically states that "[t]o be eligible for MASSDEP approval pursuant to this Interim Policy, the soil accepted by the quarry, gravel pit or sand pit can contain no more than de minimis quantities of Solid Waste (e.g. Municipal Solid Waste and/or Construction and Demolition Waste) as defined in 310 CMR 16.00 and 310 CMR 19.00."

I do not accept MCGI's argument that the quantities of expressly prohibited materials ("garbage, rubbish, [and] the deposit of demolition materials") would be de minimis. As Plaintiffs point out, MCGI's characterization of the percentage of prohibited materials as de minimis overlooks the sheer volume of those materials and the impact on the community of delivering those materials and depositing them at the Property. Based on the documents in the summary judgment record, I calculate that the quantity of demolition materials and rubbish would total no more than 6% of the total fill ("up to 5% by volume of asphalt, brick and concrete material" and "up to 1% of ash and/or solid waste").[15] Because MCGI contemplates a multi-year effort with 3.2 million cubic yards of fill in total, the Property would accept up to 192,000 cubic yards of prohibited materials. That equates with approximately 8,400 truck loads of prohibited materials traversing the neighborhood streets, or 18 truckloads each week over a period of nine years.[16] I conclude that the sheer volume of prohibited materials and the attendant impact of that many trucks entering Town, traversing the local streets, and depositing the fill at the Property would be significant and cannot be considered de minimis in the proposed context. In addition, as discussed in the next section of this decision, I conclude the de minimis standard as set forth in the Interim Policy is not here applicable because DEP has failed to adopt regulations for soil reclamation facilities as was permitted under the Act. I also note that the de minimis standard

[15] MCGI's Supplemental Memorandum of Law in Support of its Opposition to the Town of Pepperell's and Private Plaintiffs' Motion for Summary Judgment contends that the question of whether the composition of the fill proposed for the soil reclamation project meet the Bylaw definition of a Commercial Dumping Ground is a mixed question of law and fact, raising disputed issues of material facts and requiring trial, and potentially expert witness testimony. After careful review, I disagree. The facts are clearly laid out in the summary judgment briefing, as set forth above. Rather, I conclude that the parties disagree about the legal import of those facts. Accordingly, summary judgment is appropriate.

[16] Based on the estimate of approximately 15,625 truck loads per year for the entire project. See Consol. SOF ¶ 39; Bd. Ex. 14 (p. 41).

appears in the Interim Policy only, and the Bylaw definition of a "Commercial Dumping Ground" is not qualified by a threshold amount.

Moreover, Plaintiffs contend the Project is nonetheless properly characterized as a Commercial Dumping Ground even if the volumes of expressly prohibited material ("garbage, rubbish, the deposit of demolition materials") are viewed as de minimis relative to the total quantity of fill accepted at the Property, because the balance of the fill is fairly characterized as the final prohibited component material—"refuse." I concur. While the Bylaw does not define the term "refuse," the Plaintiffs' reading is consistent with the common usage of that term (as well as the 1996 MCGI Decision). Webster's New World Dictionary defines "refuse" as: "Anything thrown away or rejected as worthless or useless; waste; trash; rubbish." Because MCGI would not accept the fill at the Property if it were not being paid to do so and because the fill would have been rejected or deemed worthless by others, I conclude that all of the fill materials constitute refuse and their placement on the Property is prohibited under the Bylaw.[17]

MCGI advances one final argument to counter this conclusion and urges the court to consider the fill as surplus material being repurposed in accordance with the Act and Interim Policy. More specifically, MCGI explains that fill for the Project must be screened and tested in accordance with the Interim Policy before placement at the Property and contends that this screening and testing process ensures that the fill is primarily soil, containing only minute or de minimis amounts of garbage, rubbish, demolition materials or other refuse. Indeed, that screening process is comprehensively described in the Project Proposal, and documented with

[17]This reading is also consistent with use of the term "refuse" appearing elsewhere in the General Laws in connection with Chapter 111 regulating Refuse Treatment and Disposal Facilities (commonly known as sanitary waste facilities). Chapter 111, § 150A defines "Refuse" as: "all solid or liquid waste materials, including garbage and rubbish . . . ."

references to the Interim Policy, the detailed Soil Management Plan, construction drawings, and Similar Soils Policy. In essence, however, this argument presages the question of preemption, which I address in the next section of this decision below.

2. Whether the Local Bylaw is Preempted by the Act

According to MCGI, the Project cannot constitute a Commercial Dumping Ground under the Bylaw as a matter of law because the proposed soil reclamation activities would be undertaken in accordance with the Act and the Interim Policy. In other words, the Act preempts the Town's ability to prohibit the Project by categorizing it as a Commercial Dumping Ground. The starting point for a preemption analysis is Article 89 of the Amendments to the Constitution of the Commonwealth, "commonly referred to as the Home Rule Amendment." *Bloom v. Worcester*, 363 Mass. 136, 138 (1973). Section 6 of the Home Rule Amendment provides in pertinent part:

> Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court by section eight.

In considering a preemption question involving local zoning, I am mindful that the authority of cities and towns to enact zoning bylaws predated the 1966 adoption of the Home Rule Amendment. As noted by the Supreme Judicial Court in *Roma, III, Ltd. v. Bd. of Appeals of Rockport*, 478 Mass. 580, 585-86 (2018), the Legislature enacted the prior Zoning Enabling Act in 1954, which was then replaced by the current zoning statute, Chapter 40A, in 1975. Pursuant to Chapter 40A, municipalities "may enact zoning provisions to deal with a variety of matters, including fire safety; density of population and intensity of use; the adequate provision of water, water supply, and sewerage; the conservation of natural resources; and the prevention of pollution of the environment." *Id.* at 586, quoting *Sturges v. Chilmark*, 380 Mass. 246, 253

(1980). As recognized in *Roma*, Chapter 40A, § 1, defines "zoning" broadly to include "ordinances and by-laws, adopted by cities and towns to regulate the use of land, buildings and structures to the full extent of the independent constitutional powers of cities and towns to protect the health, safety and general welfare of their present and future inhabitants." *Id*.

That broad authority to regulate the use of local land is not unlimited, however. Local authority is "subject … to limitations expressly stated in that act (see, e.g., G. L. c. 40A, § 3) or in other controlling legislation." *Id*., quoting *Sturges*, 380 Mass. at 253. The inquiry before this court is whether the Legislature clearly intended to preclude local bylaws from prohibiting the filling of quarries with reclaimed soil. Such legislative intent "must be clear," *Fafard v. Conservation Comm'n of Barnstable*, 432 Mass. 194, 203 (2000), quoting *Bloom*, 363 Mass. at 155, and may be either "express or inferred." *Roma*, 478 Mass. at 589, quoting *St. George Greek Orthodox Cathedral of W. Mass., Inc. v. Fire Dep't of Springfield*, 462 Mass. 120, 126 (2012). In assessing legislative intent, courts consider whether the Legislature intended to create uniform standards across the Commonwealth and whether "the Legislature has explicitly limited the manner in which cities and towns may act on that subject." *St. George Greek Orthodox Cathedral*, 462 Mass. at 126, 127, citing *Bloom*, 363 Mass. at 155 (State Building Code expressly intended to ensure "[u]niform standards and requirements for construction and construction materials"). "In a close case, the considerations influencing the decision depend on the particular circumstances and a perception of the extent to which the Legislature has or has not made a preemptive intent clear." *Easthampton Savs. Bank v. Springfield*, 470 Mass. 284, 289 (2014), quoting *Wendell v. Attorney General*, 394 Mass. 518, 525 (1985).

Here, MCGI does not contend that the Act expressly prohibits local regulation of all soil reclamation projects. Rather, like the plaintiff in *Roma*, MCGI asks the court to infer that the

Legislature intended to preclude local regulation of its Project based on the comprehensive scope of the Act. *Easthampton Savs. Bank*, 470 Mass. at 289, quoting *Wendell*, 394 Mass. at 524 ("When 'legislation on a subject is so comprehensive that an inference would be justified that the Legislature intended to preempt the field,' a municipal law cannot stand."). In *Roma*, the Supreme Judicial Court considered whether a state aeronautics statute preempted a local zoning bylaw which prohibited the use of land for a private airfield unless local approval was obtained. 478 Mass. 580. The plaintiff argued that even in the absence of a clear intent to preempt, legislative intent to preempt local regulation in the field of aeronautics could be inferred because the purpose of the statute would otherwise be frustrated. In concluding otherwise, the Supreme Judicial Court looked to whether the aeronautics statute had a definite and identifiable purpose, explaining that if the "purpose can be achieved in the face of a local by-law on the same subject, the local by-law is not [held to be] inconsistent with the state legislation." *Id.* at 589, quoting *Wendell*, 394 Mass. at 524. The Court found that the statute's goal of fostering private flying within the Commonwealth would not be frustrated by local regulation, because even if such local airfields were rejected, private flying could be achieved through commercial airports and landing areas. *Id.* at 590-91.

I begin by examining the language and structure of the Act for guidance, then turn to the Interim Policy itself and DEP's commentary, legislative history, and the purpose of the Act.

The Language and Structure of the Act. A careful reading of the Act provides insight into legislative intent. The Act consists of a single paragraph, with three sentences. In full, the Act provides:

> Not later than June 30, 2015, the department of environmental protection shall establish regulations, guidelines, standards or procedures for determining the suitability of soil used as fill material for the reclamation of quarries, sand pits and gravel pits. The regulations, standards or procedures shall ensure the reuse of soil poses no significant risk of harm to

> health, safety, public welfare of the environment considering the transport, filling operations and the foreseeable future use of the filled land. The department may adopt, amend or repeal regulations establishing: (i) classes or categories of fill or reclamation activities requiring prior issuance of a permit issued by the department; (ii) classes or categories of fill or reclamation activities that may be carried out without prior issuance of a permit issued by the department; and (iii) classes or categories of fill that shall require local approval based on the size, scope and location of a project; provided, however, that local approval shall not be required for projects involving less than 100,000 cubic yards of soil.

While the Act does contemplate uniform standards for determining the suitability of fill for the reclamation of quarries, sand pits and gravel pits, it stops short of explicitly limiting the manner in which cities and towns may also act to regulate land within their boundaries. Indeed, though the Act explicitly does contemplate limitations on the role of local regulation of these projects, it does so only in certain circumstances—specifically where DEP has adopted, amended, or repealed regulations.

The structure and language of the Act make evident that it includes two separate tasks for DEP action. The first task is addressed in the first and second sentences, directing DEP to put in place uniform measures across the Commonwealth for the reclamation of quarries, sand pits and gravel pits, for the stated purpose of "ensur[ing] the reuse of soil poses no significant risk of harm to health, safety, public welfare or the environment considering the transport, filling operations and the foreseeable future use of the filled land." The second task is addressed in the third and final sentence of the Act. Therein, DEP is authorized and directed to implement these uniform measures by way of "regulations, guidelines, standards or procedures." It is in this third sentence, and in the context of DEP's enacting regulations, that the legislature contemplated the role of local regulation of soil reclamation projects. That third sentence is permissive rather than directive (using the term "may"), permitting DEP to enact regulations and establish three "classes and categories of fill" in accordance with parameters established in the Act (those classes and categories of fill requiring DEP approval, those not requiring DEP approval, and

those requiring local approval based on the size, scope, and location of a project). This two-part structure with two tasks (the first *directing* DEP to put in place regulations, guidelines, standards or procedures, and the second *permitting* DEP to promulgate regulations encompassing local involvement), indicates that the legislature intended that local regulation of the use of land for soil reclamation facilities would not be supplanted unless and until DEP enacted regulations.

The Interim Policy. DEP's Interim Policy further supports a conclusion that local authority to regulate land remains unimpeded in the absence of regulatory action. Although the Interim Policy adopts uniform standards for ensuring the safety of soils for reclamation projects (consistent with the directive in the first two sentences of the Act), to date DEP has not proceeded to enact regulations establishing classes or categories of fill or reclamation activities which require a DEP permit, those which do not, and those which "require local approval based on the size, scope and location of a project . . ." (under the third discretionary sentence of the Act).[18]

Significantly, DEP quotes only the first two sentences of the Act as "Authority" for issuance of the Interim Policy; the third sentence is omitted. Likewise, the Policy Statement introducing the Interim Policy states a limited goal: "to ensure the reuse of large volumes of soil for the reclamation of sand pits, gravel pits and quarries poses no significant risk of harm to health, safety, public welfare or the environment . . . ." No mention is made of classes or categories of fill, or whether certain classes of fill would require DEP or local approval. DEP's decision to focus solely on the Act's first task and wait until the future to issue regulations to

[18] The proviso to the third sentence specifies that "local approval shall not be required for projects involving less than 100,000 cubic yards of soil."

encompass the second, discretionary task is confirmed by the following language under the heading "Effective Date":

> This Interim Policy will remain in effect until it is specifically rescinded or superseded by MassDEP regulations governing soil fill projects promulgated pursuant to [the Act], M.G.L. c. 21E, Section 6, and M.G.L. c. 111, Section 150A. While such future regulations will likely differ in scope and detail from this Interim Policy, the Department anticipates that regulations and policies developed to implement the final approach will specifically accommodate projects commenced under an Administrative Consent Order issued pursuant to this Interim Policy through the incorporation of transition provisions.

In sum, DEP has not further regulated soil reclamation projects beyond its initial mandate to ensure the safety of soils.

The provisions of the Interim Policy are also instructive. The Interim Policy expressly cautions that it is not intended to eliminate local permits or approvals. Specifically: "Nothing in this Interim Policy eliminates, supersedes or otherwise modifies any local, state or federal requirements that apply to the management of soil, including any local, state or federal permits or approvals necessary before placing the soil at the receiving location . . . ."[19] The Interim Order also includes a specific process for incorporating local input into DEP's consideration of proposed soil reclamation projects. That process does not establish "classes or categories of fill that shall require local approval based on the size, scope and location of a project" as required by the third sentence of the Act or include the Act's limitation that local approval shall not be required for projects involving less than 100,000 cubic yards of soil. Instead, the Interim Policy puts in place a more informal process for local input. Specifically, the Interim Policy requires that proponents of proposed soil reclamation projects must demonstrate to DEP that appropriate local officials are aware of a proposed project and have been afforded the opportunity for

[19] See *Bloom*, 363 Mass. at 160 (views of a state agency on preemption are not conclusive but are a practical consideration).

meaningful input and states that DEP will only issue an Administrative Consent Order when comments from local officials related to noise, dust, odor and/or trucks have been appropriately addressed. These provisions support a conclusion that the Act was not intended to preempt local land use regulation and the Bylaw at issue.

Legislative History. The legislative history of the Act also supports such a conclusion. The initial text of the Act, as introduced in 2014 Senate Doc. 2160 ("Initial Proposed Act"), included several, now omitted, provisions regarding local regulation:

> (a) Notwithstanding any general or special law to the contrary, local approval shall be required for the delivery to a single location of a cumulative volume of more than 100,000 cubic yards of soil that is removed from any source other than permitted sand and gravel pit or quarry. In a city, the approval shall be by a majority vote of the city council with approval from the mayor. In a town, the approval shall be a majority vote of the board of selectmen. Approval shall not be required for soil delivered to a site assigned landfill facility which has otherwise received approval for use of the soil from the department of environmental protection. (b) Said vote shall commence after of an extensive review of a soil management plan prepared by a licensed professional engineer and filed for comment and approval with the local governmental unit that shall include, but shall not be not limited to, a detailed plan which addresses: (i) on site third party inspection working under the direction of a qualified environmental professional during importation and placement of all soils; (ii) third party review and approval of all soil analytical for suitability and reuse at the site; (iii) truck route, hours of operation and maximum number of trucks per day; (iv) erosion, noise, dust and odor control plans; and (v) host community mitigation fee of 50 cents per ton or an agreeable alternative amount.

These discarded provisions contemplate a much more expansive role for local approval than that ultimately adopted in the Act and also outline a detailed process for local approval with substantive requirements (such as for instance, a requirement that project proponents submit plans by a licensed professional engineer to the local government, as well as proposed truck routes, hours of operation and a maximum number of trucks per days). The Legislature's rejection of the Initial Proposed Act instructs that the Legislature carefully considered defining and delineating the scope and process of local review in connection with proposed reclamation

projects, but opted instead to remove those detailed provisions and delegate to DEP the authority to later regulate the local approval process, in its discretion.

Local Regulation Supplements and Does Not Supplant the Purpose of the Act. Having explored the language and structure of the Act, the Interim Policy, and its legislative history, I now return to *Roma* and the caselaw guidance and consider whether the purpose of the Act can be achieved even in the face of local regulation such as that here at issue. I conclude that the circumstances now before the court are like those in *Roma*, 478 Mass. 580, such that the purpose of the Act can be achieved despite the Commercial Dumping Ground Bylaw provision. In *Roma*, the Supreme Judicial Court concluded that the purpose of the state aeronautics statute, to foster private flying within the commonwealth, could still be achieved in the face of a local bylaw prohibiting private heliports without prior zoning approval. Here, the primary purpose of the Act—to ensure that the reuse of soil poses no significant risk of harm to health, safety, public welfare or the environment—can still be achieved, even if some municipalities choose to further regulate or limit the placement of soil reclamation facilities. The additional purpose of encouraging the reuse of quarries, sand pits and gravel pits can also be achieved by the Act, even if some municipalities choose to further regulate or prohibit that use.

Further, based on judicial review of other statutory schemes, it " is well established that municipalities may enact more stringent requirements than those in [an] act." *Hobbs Brook Farm Prop. Co Ltd. P'ship v. Conservation Comm'n of Lincoln*, 65 Mass. App. Ct. 142, 149 (2005), quoting *FIC Homes of Blackstone, Inc. v. Conservation Comm'n of Blackstone*, 41 Mass. App. Ct. 618, 686 (1996); see e.g. *Lovequist v. Conservation Comm'n of Dennis*, 379 Mass 7, 14-15 (1979) (Commonwealth's wetlands protection act does not preempt local wetlands bylaw where

the act set forth only minimum standards and left local communities free to adopt more stringent controls.).

The present circumstances are distinct from those in *Buckley v. Wilmington,* 68 Mass. App. Ct. 1113 (2007), which considered whether a local bylaw was preempted by the Massachusetts statute governing solid waste disposal facilities, G. L. c. 111, §§ 150A and 150A ½ and regulations thereunder. In *Buckley,* the Appeals Court affirmed a Land Court judgment declaring invalid a provision of the Wilmington zoning bylaw which limited the height of landfills. The Appeals Court concluded that the local bylaw would interfere with and frustrate the landowner's compliance under the comprehensive statutory scheme regulating the capping and closure of landfills. *Id.*, citing *Goldberg v. Board of Health of Granby,* 444 Mass. 627, 634 (2005) (G. L. c. 111, §§ 150A and 150A ½, grant DEP broad rulemaking authority). Similarly, in *Wheelabrator Land Res., Inc. v. Saugus,* 13 LCR 498 (2005) (Misc. Case No. 309676) (Trombly, J.), this court invalidated a municipal landfill height restriction, reasoning that the statutory scheme governing solid waste disposal facilities provides a comprehensive process for landfills to be regulated by state agencies, "most notably the DEP, to the exclusion of local authorities." *Id.* at 500.

The solid waste disposal facilities statute at issue in *Buckley* and *Wheelabrator Land Res., Inc.* differs markedly from the Act. Not only does the former establish a comprehensive framework for landfills to be regulated by state agencies, unlike the one-paragraph Act, but it also gives express authority to local boards to attach reasonable conditions to landfill operations. *Buckley,* 68 Mass. App. Ct. 1113. In comparison, while the Act similarly contemplates a role for local regulation in connection with soil reclamation projects, it does so only after regulations have been duly promulgated by DEP. Indeed, the Legislature rejected the Initial Proposed Act

and a more fulsome regulatory framework and instead enacted the streamlined Act. It may be that if and when DEP moves forward to promulgate regulations for soil reclamation facilities, that regulatory process may preempt local restrictions.

I conclude that the Commercial Dumping Ground Bylaw does not stymie the definite and identifiable purpose of the Act, which is to put in place uniform standards to make sure that when quarries, sand pits, and gravel pits are reclaimed, the fill used for those projects is safe for people and the environment. The plain text of the Act and its legislative history show that the legislature considered the role of local governments in soil reclamation projects and chose to limit local control only when DEP has adopted, amended, or repealed "regulations establishing . . . classes or categories of fill that shall require local approval based on the size, scope and location of a project." To date, that has not occurred.

For the reasons discussed above, I conclude that the Act does not preempt the Town's authority to regulate the proposed project.

Conclusion

For all of the reasons discussed above, I conclude that MCGI's proposed project is prohibited under the Bylaw as a Commercial Dumping Ground and further conclude that the Act does not preempt the Town's authority to regulate the proposed project. Accordingly, Plaintiffs' motions for summary judgment are ALLOWED.

Judgment shall issue accordingly.

SO ORDERED

By the Court (Rubin, J.)
/s/ Diane R. Rubin

Attest:

/s/ Deborah J. Patterson
Deborah J. Patterson
Recorder

Dated: August 1, 2022.