COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

BARNSTABLE, ss.

CASE NO. 21 PS 000324 (DRR)

LAUREN P. ANDERSON, ABBY LYNN COREA, GEORGE DINEEN, BARBARA GOLDING, SAMANTHA HAYMAN, JOANNE HOLLANDER, DONALD HORTON, ALICE LONGLEY, EVE M. TURCHINETZ, and CHRISTINE A. MAXWELL,

Plaintiffs,

v.

COMMUNITY HOUSING RESOURCES, INC., and ARTHUR F. HULTIN JR., FRED TODD, JOHN DUNDAS, JOHN THORNLEY, and CHRIS LUCY, as they constitute the members of the ZONING BOARD OF APPEALS OF THE TOWN OF TRURO,

Defendants,

and

TOWN OF TRURO,

Intervenor.

ORDER TO POST BOND

This matter is before the court on Defendants' Joint Motion to Require Posting of Bond ("Bond Motion"), to which plaintiffs Lauren P. Anderson, Abby Lynn Corea, George Dineen, Barbara Golding, Samantha Hayman, Joanne Hollander, Donald Horton, Alice Longley, Eve M. Turchinetz, and Christine A. Maxwell ("Plaintiffs") have filed Plaintiffs' Opposition to

Defendants' Motion to Require Posting of Bond. For the reasons set forth below, the Bond Motion is ALLOWED.

Plaintiffs appeal a decision of the Zoning Board of Appeals ("Board") granting a comprehensive permit to Community Housing Resources, Inc. ("CHR") to construct an affordable housing development on land with an address of 22 Highland Road, Truro, and owned by the Town of Truro ("Town") after that land was transferred to the Town by the Commonwealth for this express purpose ("Project"). Plaintiffs bring this appeal pursuant to G.L. c. 40A, § 17 and G.L. c. 40B. They are ten residents of the Town of Truro, only one of whom is a direct abutter to the site of the proposed Project. The Town has intervened in support of the Project.

In the Bond Motion, all Defendants jointly request that the Plaintiffs collectively post a surety or cash bond in the amount of $50,000 to secure the payment of costs owing to the harm to the public interest and to the Defendants caused by this appeal. The Bond Motion is based on a recent amendment to G. L. c. 40A, §17, enacted by Chapter 358 of the Acts of 2020, sometimes known as the "Housing Choice Act." Section 25 of Chapter 358, hereinafter identified as the "40A Amendment," states:

> The court, in its discretion, may require a plaintiff in an action under this section appealing a decision to approve a special permit, variance or site plan to post a surety or cash bond in an amount of not more than $50,000 to secure the payment of costs if the court finds that the harm to the defendant or to the public interest resulting from delays caused by the appeal outweighs the financial burden of the surety or cash bond on the plaintiffs. The court shall consider the relative merits of the appeal and the relative financial means of the plaintiff and the defendant.

The Affidavit of Edward Malone, the President of CHR ("Malone"), filed together with the Bond Motion attests to the critical need for affordable housing in Truro. Truro has the lowest percentage of affordable housing units of any town on Cape Cod, with only 2.3% of the year

round housing units being affordable. Malone further explains that the Project is the result of significant cooperative efforts, spanning almost four years, between the Town, the Commonwealth, and CHR to address the critical need for affordable housing in the Town, particularly for year-round, affordable rental units. The Project would consist of twelve duplex buildings and a fifteen-unit apartment building for a total of thirty-nine rental units, of which at least twenty-eight units would be earmarked for affordable housing. Malone's affidavit further states that Plaintiffs' appeal will delay the proposed Project and that delay, in turn, will threaten the viability of this Project and cause significant expense and burden to CHR, the Town, and the prospective residents of the proposed Project, as well as significant harm to the public interest in securing affordable housing in the Town and the Cape Cod region.

Pursuant to the 40A Amendment, prior to requiring that a bond be posted by a plaintiff challenging a proposed project under Chapter 40A, the court must find that the harm to the defendant or to the public interest resulting from delays caused by the appeal outweighs the financial burden of the surety or cash bond on the plaintiffs, as will be discussed below. I confidently make that finding in this case. The vote of the Board in support of the comprehensive permit, together with the intervention of the Town in this case and the long history of public contributions toward affordable housing at the Project site make clear that the public interest favors proceeding with the Project expeditiously. For instance, in 2019, the Town was awarded a grant of $2.1 million by the Commonwealth to fund the cost of extending a water line to the site of the Project, so as to enable increased housing density. In addition, the Town was designated a "Housing Choice Community" and awarded a technical assistance grant of $75,000 for engineering costs related to the extension of the water line. Significantly, as detailed in its decision in Case No. 2019-008/ZBA ("Decision"), the Board found that the Town's supply of

affordable rental housing was well below the 10% threshold established by G.L. c. 40B, § 20, with only 2.3% of the Town's housing stock being affordable.

In reviewing a motion for a bond under the 40A Amendment, a court must also consider both the relative merits of the appeal and the relative financial means of the plaintiff and the defendant. At this early stage in these proceedings, the court does not have the benefit of a fully developed record. Accordingly, I review what now is available in the record before the court. With respect to the relative merits of the appeal, on the one hand I consider the lengthy due diligence by the Town, beginning in 2017 and well before the Town solicited development proposals. That due diligence encompassed extensive engineering analyses to extend the water line along with the various reports, site plans, and engineering plans constituting the record before the Board in making their decision. Those efforts also included a review of the proposed wastewater disposal system by a hydrogeologist. In addition and as informed by the hydrogeologist's review, the Board imposed numerous conditions on the Project to ensure protection of public health and safety with respect to private wells. In addition, following selection of CHR's proposal, the Town convened twenty-six public hearings, spanning from November 21, 2019 to January 14, 2021, allowing opportunity for public comment and engagement before the Board voted and issued the Decision. Further, in the Bond Motion, Defendants explain that the delay will preclude them from applying for additional funding and will increase building costs, potentially threatening the viability of the entire project.

In contrast, to succeed on their appeal, Plaintiffs will first need to satisfy the standing requirement of G.L. c. 40A. In that regard, only one of the ten individual Plaintiffs is an actual abutter to the Project site who is entitled to a presumption of standing under Chapter 40A, § 11. Even with the benefit of the presumption, Plaintiffs have the burden of proving their standing

through credible evidence. *81 Spooner Rd., LLC v. Zoning Bd. of Appeals of Brookline*, 461 Mass. 692, 701 (2012). As of the date of the Case Management Conference on July 16, 2021, the Plaintiffs had yet to engage any experts such that their alleged concerns about potential traffic and wastewater harms were unsupported by engineering analysis and largely speculative. *Sweenie v. A.L. Prime Energy Consultants*, 451 Mass. 539, 543 (2008) (To support standing, the injury must be more than speculative, and plaintiffs must put forth credible evidence to substantiate any claims); *Neurath v. Krieger*, 25 LCR 149, 151 (Misc. Case No. 16 MISC 000529) (Long, J.), *aff'd*, 92 Mass. App. Ct. 1105 (2017) (citing *Standerwick v. Zoning Bd. of Appeals of Andover*, 447 Mass. 20, 36 (2006)) (traffic concerns are beyond common knowledge and must be supported by expert evidence). Plaintiffs will also need to show, in order to establish standing, that any alleged traffic or wastewater harm would be particularized to them rather than experienced by the community as a whole. *Standerwick*, 447 Mass. at 33; *Butler v. Waltham*, 63 Mass. App. Ct. 435, 440 (2005). The record before me is lacking in this regard; no further support for Plaintiffs' concerns was submitted with their opposition.

As to financial burden and means, while the imposition of a bond will also surely impose a financial burden on the Plaintiffs, they will be able to share that burden amongst themselves. I note that their opposition does not argue that they are unable to fund such a bond, but rather argues against the imposition of a bond on other grounds. The Defendants, on the other hand, have made a strong showing of harm occasioned by the delay of the lawsuit, as described in Malone's affidavit. For these reasons, I find that the considerable public commitment to the Project to date, as well the harm to the Defendants and the public interest resulting from delays caused by the appeal, outweighs the financial burden of a bond on the Plaintiffs.

I have considered and now reject Plaintiffs' contention that bonds may not be sought under the 40A Amendment for appeals of comprehensive permits under Chapter 40B. Chapter 40B was enacted to establish a streamlined comprehensive permitting procedure allowing a developer to file a single application to the local zoning board of appeals for construction of low or moderate income housing, there being clear legislative intent to "[minimize] lengthy and expensive delays occasioned by court battles commenced by those seeking to exclude affordable housing from their own neighborhoods." *Standerwick*, 447 Mass. at 29. As detailed in the legislative history referenced in Defendant's memorandum, the Housing Choice Act, which includes the 40A Amendment, was directed toward just such delays. Further, Section 21 of Chapter 40B specifically provides that judicial review of comprehensive permits or approvals may be had by filing an "appeal to the court as provided in section seventeen of chapter forty A." Indeed, Plaintiffs' Verified Complaint states on its face that it is an appeal brought pursuant to Chapter 40A. The 40A Amendment also specifies that bonds may be requested when a plaintiff appeals a "decision to approve a special permit, variance or site plan." In this case, in issuing the comprehensive permit, the Board granted variances from a number of density related provisions of the local zoning bylaw and approved a site plan for the Project.

I also reject Plaintiff's contention that the 40A Amendment requires a finding of bad faith or malice as a precondition for ordering that a bond be posted. In support of this argument, Plaintiffs rely on paragraph 5 of Chapter 40A, § 17, which has permitted costs to be allowed against the party appealing from the decision of the board if "it shall appear to the court that said appellant or appellants acted in bad faith or with malice in making the appeal to the court." I do not, as Plaintiffs' urge, read the 40A Amendment together with paragraph 5. To the contrary, I conclude that the 40A Amendment establishes an additional and distinct form of protection for

development projects. The 40A Amendment includes a separate and distinct standard of review, involving consideration of harm to the public interest, financial burden on the plaintiffs, the merits of the appeal, and relative financial means of the parties, all as considered above.

I turn now to the amount of the bond. Defendants request that the court require that a bond be posted to secure a broad range of litigation expenses, including such things as legal and expert witness fees, carrying costs for the project, and construction escalation expenses, in the amount of $50,000. In the first instance, I note that the actual amount of any costs will be determined after trial, if and when Defendants seek to recover under the requested bond. Nonetheless in setting the amount of the bond, this court may be constrained by the language of the 40A Amendment to require a bond only with respect to costs and not other damages. I reach this conclusion because although the 40A Amendment does not define or specify what expenses fall within the term "costs," that term is generally read to mean ordinary litigation costs. See, e.g., *Waldman v. American Honda Motor Co.*, 413 Mass. 320 (1992).

In contrast, another provision of the Home Choice Act pertaining to challenges to so-called "Smart Growth Projects" under Chapter 40R explicitly requires the plaintiffs to post a bond for an expansive range of defined costs and expenses. That provision of the Home Choice Act provides:

> A plaintiff seeking to reverse approval of a project under this section shall post a bond in an amount to be set by the court that is sufficient to cover twice the estimated: (i) annual carrying costs of the property owner, or a person or entity carrying such costs on behalf of the owner for the property, as may be established by affidavit; plus (ii) an amount sufficient to cover the defendant's attorney's fees, all of which shall be computed over the estimated period of time during which the appeal is expected to delay the start of construction.

The language of the 40A Amendment is more circumscribed. Had the legislature meant for the 40A Amendment to be as broad as the amendment to Chapter 40R, it would have drafted the

former with more expansive language. *Comm'r of Correction v. Superior Court,* 446 Mass. 123, 126 (2006) ("We do not read into the statute a provision which the Legislature did not see fit to put there, nor add words that the Legislature had an option to, but chose not to include."); *Souza v. Registrar of Motor Vehicles,* 462 Mass. 227, 232 (2012) (quoting *Commonwealth v. Galvin,* 388 Mass. 326, 330 (1983)) ("Where the Legislature has employed specific language in one paragraph, but not in another, the language should not be implied where it is not present."). For these reasons and in light of the complexity of this litigation and the number of Plaintiffs, which will likely result in a corresponding number of deposition costs, among others, I set the bond amount at twenty-five thousand dollars ($25,000.00).

For the reasons discussed above, the court ORDERS that Plaintiffs post a surety or cash bond in the amount of twenty-five thousand dollars ($25,000.00) on or before December 9, 2021, to secure the payment of costs.

SO ORDERED

By the Court (Rubin, J.)

/s/ Diane R. Rubin

Attest:

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

Dated: November 9, 2021.