COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2377CV00863

WENDY F. COPITHORNE & others[1]

vs.

STEPHEN CRANE[2] & others[3]

MEMORANDUM OF DECISION AND ORDER ON THE DEFENDANTS' MOTION TO DISMISS (Paper #21)

The plaintiffs, ten property owners in the Town of Ipswich (the "Town"), filed this civil action challenging the Town's plans to build a new public safety facility (the "project"). The Complaint alleges the following counts: (1) a claim for judicial review pursuant to G. L. c. 40A, § 17, of the Planning Board's special permits and site plan review approval for the project; (2) a ten-taxpayer claim pursuant to G. L. c. 40, § 53, alleging that the Select Board's decision to apply $2 million in federal funding from the American Rescue Plan Act ("ARPA") to the project violates the terms of the warrant article approved at Town Meeting and is, therefore, illegal; and (3) a claim under the Massachusetts Civil Rights Act (MCRA), G. L. c. 12, § 11I, alleging procedural irregularities and free speech violations.

The matter is now before the court on the defendants' motion to dismiss (Paper # 21), which seeks to dismiss Counts II and III of the Complaint. After review of the parties'

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[1] Caroline P. Exelby, Vanessa J. Gray, Georgia L. Martineau, Trustee, Seth W. Perry, Amy K. Ranier, Ronald A. Ranier, Amanda Tower, Caitlin Trindade, and Daniel J. Trindade.
[2] In his capacity as Town Manager of Ipswich.
[3] Town of Ipswich; and Toni Mooradd, Mitchell Lowe, John Crespi, and Tom Hammond, in their capacity as members of the Ipswich Planning Board.

submissions and a hearing on March 7, 2024, in which both parties were heard, the motion will be **ALLOWED**.

BACKGROUND

The following allegations are taken from the Complaint and the exhibits attached thereto:

Each of the plaintiffs own property in the Town. Stephen Crane (the "Town Manager") is the Town manager of Ipswich. Toni A. Mooradd ("Mooradd"), Mitchell Lowe ("Lowe"), John Crespi ("Crespi"), and Thomas M. Hammond ("Hammond") are members of the Ipswich Planning Board (the "Planning Board"). Sometime in late 2016 or early 2017, the Town's Select Board created a Public Safety Facility Committee (the "Committee") to identify a suitable site for the project. The Town purchased land for the project in December of 2020.

On October 16, 2021, in a special Town Meeting, the Committee requested funding for the project. The relevant warrant article stated, in relevant part:

> To see if the Town will vote to appropriate the sum of $27,500,000 to pay costs of designing, constructing, equipping, and furnishing [the project] . . . including all costs incidental and related thereto; and to meet this appropriation by authorizing the Treasurer, with the approval of the Select Board, to issue bonds or serial notes under the provisions of M.G.L. c.44, as amended, or any other borrowing authority; and to take any other action relative thereto.

Proponents of the project promised the voters that no additional money would be requested and that historically low interest rates made financing appealing. When a resident attempted to express concerns about the location, he was not allowed to speak. The article passed on a voice vote and voters approved a Proposition 2½ override ten days later.

On November 23, 2022, the Town Manager learned the project was overbudget by approximately $4.5 to $5 million, and expressed concern to the Select Board that simplifying the public safety building "may come at the expense of the most efficient use of the site" and that "some very difficult decisions" lay ahead."

The architect for the project issued a revised plan showing how the project would look if the budget remained within the $27.5 million approved by the Town Meeting.

On January 30, 2023, at a meeting of the Committee, an attorney for one of the plaintiffs, Vanessa J. Gray, asked whether the emergency scanner would be broadcast outdoors, and the answer was yes.

On March 20, 2023, at an open meeting at the Town Hall, the Select Board unanimously passed a motion "to commit the remaining ARPA funds to be used for the Ipswich Public Safety Building needs as necessary." On April 12, 2023, the architect told the Committee that the proposal was still over budget.

The Town Manager, on behalf of the Town, submitted an application for site plan review of the project to the Planning Board, Zoning Board Appeals and Conservation Commission. The Planning Board held its first public hearing on the project on May 18, 2023.

On June 23, 2023, the Committee held an open meeting and invited the public to weigh in on the project. The Committee refused to allow counsel for a citizens group called Build It Right to speak. Sixteen people spoke against the project.

The Planning Board hearing continued on June 29, 2023. In response to a Planning Board member's concern about traffic and suggestion that a traffic study be required, the Town Manager responded that the Town could rely on personnel from the fire and police departments to evaluate traffic related to the building. The Planning Board chair, Toni Mooradd, assured the development team that the Planning Board would support the project and stated, "We are with you" and "We are all working together." Seven people spoke in opposition to the project. The Town Manager and the Planning Board chair said that the Town has no responsibility to actively

inform the citizenry, and that it is up to the citizenry to seek out information. The hearing was continued to July 20, 2023.

At the July 20, 2023 hearing, two new members of the Planning Board were announced. Planning Board members are appointed by the Town Manager. The Town Manager presented revised plans for the project, which showed a different building façade. Four people spoke in opposition to the proposal.

On August 10, 2023, a Planning Board subcommittee met with the development team to discuss special permit criteria, traffic sightlines, the lack of a traffic data analysis, and whether the proposal was compatible with the neighborhood. Immediately after the subcommittee meeting, the full Planning Board met to discuss a written decision drafted by the Town's attorney. The attorney for Build It Right inquired about the number of daily visitors that were expected at the building, and pointed out that improvements to an intersection on the plan were not funded. Members of the Planning Board, Mooradd and Lowe, expressed concerns about parking in the front setback of the building and discomfort with an incomplete landscaping plan. A resident urged the Planning Board not to approve the application because of its failure to consider input from the Town's Design Review Board. The Planning Board approved the requested permits on August 16, 2023.

The plaintiffs allege they will suffer severe, irreparable harm if this facility is constructed, including but not limited to, noise from the outdoor emergency scanner and emergency vehicles, diesel fumes, visual pollution, traffic hazards, and the transformation of the neighborhood.

The plaintiffs also allege that the Planning Board decision approving the project fails to meet criteria required by the Scenic Road Bylaw. They also allege that the Planning Board failed to analyze traffic and pedestrian safety, failed to consider the character of the neighborhood, and

approved modifications to an intersection without adequate funding, and failed to consider requests made by the Town's Design Review Board.

The plaintiffs are members of a citizen group called Build It Right, whose purpose is to participate in the debate about the project and advocate for a modern, cost-effective public safety building. Build It Right as collected more than 1,000 signatures of Ipswich residents who are opposed to the location, design and/or functionality of the proposed building.

At Build It Right's first public meeting at a local social club, three on-duty uniformed firefighters showed up and parked their engine at the front of the parking lot. Build It Right's attorney sent an email to the town's Conservation Agent, the Town Manager attempted to prevent her from communicating directly with Town employees. Build It Right's attorney was not allowed to speak at a Committee meeting about permitting. On July 24, 2023, Build It Right's attorney filed a public records request. The Town's attorney delivered some, but not all, of the requested documents.

A subcommittee of the Committee has met regularly in so-called workshops. The subcommittee's members and the frequency of its meetings are not known. The subcommittee's meetings are not posted and no minutes were kept.

DISCUSSION

To survive a Rule 12(b)(6) motion to dismiss, a complaint must allege facts that, if true, would plausibly suggest an entitlement to relief. Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008). For the purpose of deciding a motion to dismiss, the court assumes the truth of the facts alleged in the complaint and any reasonable inferences that may be drawn in the plaintiff's favor. See Golchin v. Liberty Mut. Ins. Co., 460 Mass. 222, 223 (2011). In determining a motion to dismiss, the court must "look beyond the conclusory allegations in the complaint and focus on

whether the factual allegations plausibly suggest an entitlement to relief." Curtis v. Herb Chambers I-95, Inc., 458 Mass. 674, 676 (2011), citing Iannacchino, 451 Mass. at 635-636.

A. Count II - Ten-Taxpayer Claim

General Laws c. 40, § 53, the so-called ten-taxpayer statute, "permits taxpayers to act 'as private attorneys general' to enforce laws designed to prevent abuse of public funds by local governments." Caplan v. Town of Acton, 479 Mass. 69, 75 (2018), quoting Leclair v. Norwell, 430 Mass. 328, 332 (2018). The plaintiffs must also allege facts to support an interference that the expenditure of such funds would be contrary to "the legal and constitutional right and power to raise or expend money." G. L. c. 40, § 53.

Here, the Complaint alleges that the Town's decision to direct $2 million of federal ARPA funding to the project is an illegal expenditure because neither the Town Manager nor the Select Board has the authority to designate ARPA money for the project. The Complaint also alleges that any additional funding (in this case, the $2 million in ARPA money) must be approved by Town Meeting.

The defendants argue that the plaintiffs fail to state a ten-taxpayer claim because the Select Board has the authority to designate and spend ARPA money for the public safety building. The defendants also argue that the Town Meeting vote does not prohibit the Town from using other sources of money for the project. The court agrees with the defendants.

General Laws c. 44, § 53A, authorizes a department of any town to accept grants from the federal government which may be expended for the purposes of such grant with the approval of the board of selectmen.[4] The statute also provides grants may be expended without further

[4]General Laws c. 44, § 53A states, in relevant part, "An officer or department of any . . . town . . . may accept grants . . . from the federal government . . . and . . . may expend such funds for the purposes of such grant . . . with the approval of the board of selectmen . . . . Notwithstanding the

appropriation. Id. Contrary to the plaintiffs' assertions, the Town and its Select Board were authorized, by statute, to designate the $2 million in ARPA funds towards the project.

In addition, the ARPA fund designation is not prohibited by the warrant article that was approved by vote on October 16, 2021. The warrant article appropriated $27.5 million for the project and authorized the Town to borrow up to that amount. The warrant article also authorized the Select Board "to take any other action necessary to carry out this project." The court rejects the plaintiffs' interpretation of the warrant article as imposing a $27.5 million cap on the project and requiring that only borrowed funds be used for the project. Although the warrant article limits the amount the Select Board is authorized to borrow to $27.5 million, it does not contain any language which caps the project costs or limits the source of funding.

The court looks beyond the plaintiffs' conclusory allegations and concludes that the Town and the Select Board had the right and power to designate the ARPA funds. Since the plaintiffs have failed to allege facts suggesting an entitlement to relief under the ten-taxpayer statute, the court will dismiss Count II of the Complaint.

B. Count III – Claim for Violation of the Massachusetts Civil Rights Act

The Complaint alleges that the Town Manager violated the MCRA by attempting to prevent a citizens group from obtaining information from Town employees and by withholding records requested pursuant to a public records request. The Complaint alleges that, under the doctrine of respondeat superior, the Town Manager is responsible for the attendance of on-duty firefighters at Build It Right's public meeting. The Complaint also alleges that the plaintiffs' right

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provision of section fifty-three, any amounts so received by an officer or department of a . . . town . . . shall be deposited with the treasurer of such . . . town . . . and held as a separate account and may be expended as aforesaid by such officer or department receiving the grant . . . without further appropriation."

to free speech was impeded by the Committee because the Committee deliberated and made changes to the project plans in secret, and did not disseminate accurate or up-to-date information to citizens or the Planning Board.

The defendants argue that the MCRA does not apply to the Town or its town officers; thus, the plaintiffs cannot allege any facts to support their claim for violation of the MCRA. The plaintiffs argue that the issue whether the MCRA applies to the Town Manager is a question of law and encourages the court to apply the standard set forth in Gauthier v. Dracut, Mass. Super. No. Civ. A 03-2826 (June 27, 2005).[5] In their opposition, the plaintiffs do not dispute that the MCRA does not apply to the Town. The court agrees with the defendants; binding precedent establishes that towns and town officials are not subject to liability under the MCRA.

Pursuant to the MCRA, "persons" may be liable if they interfere with the exercise or enjoyment by any other person of rights secured by the constitutions or laws of the United States or the Commonwealth. G. L. c. 12, §§ 11H, 11I. A municipality, however, "is not a 'person' covered by the . . . [MCRA]." Howcroft v. Peabody, 51 Mass. App. Ct. 573, 591-592 (2001). In addition, individual officials in their official capacities are not "persons" under the MCRA. Id. at

[5] The court is not persuaded by the plaintiffs' argument that the court should not decide matters of law on a motion to dismiss pursuant to Rule 12(b)(6). See Dunn v. Genzyme Corp., 46 Mass. 713, 717 (2021) (reciting Rule 12(b)(6) standard as "whether the factual allegations in the complaint are sufficient as a matter of law, to state a recognized cause of action or claim and whether such allegations plausibly suggest an entitlement to relief"). Although a motion to dismiss may not be appropriate for matters of undecided substantive law, in this case, the law on the issues before the court is established.

In their Opposition, the plaintiffs quote Gauthier v. Town of Dracut, No. 03-2826, 2005 WL 166912 at *7 (Mass. Super. 2005), for the standard for reviewing a complaint under the MCRA. This is not the applicable standard. The language quoted by the plaintiffs applies to a court's assessment of whether a government official is entitled to qualified immunity, not the standard of review for a motion under Rule 12(b)(6). In addition, whether the doctrine of qualified immunity applies is not currently at issue before the court.

594. Nor are municipal departments within the Town subject to liability under the MCRA, as they have no legal existence or potential liability separate from the Town. See, e.g., Henschel v. Worcester Police Dept., 445 F.2d 624, 624 (1st Cir. 1971) ("[i]f a police department may be successfully sued it is the city which will pay; the result is the same as suing the city").

Since the Town, the Town Manager, and the members of the Planning Board are not liable under the MCRA, the court will dismiss Count III of the Complaint.

ORDER

For the reasons stated above, it is hereby **ORDERED** that the defendants' Motion to Dismiss Counts II and III (Paper #21) is **ALLOWED. COUNTS II and III of the complaint are HEREBY DISMISSED.**

Elizabeth A. Dunigan
Justice of the Superior Court

Dated: May 1, 2024

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SUPERIOR COURT
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NO. 2377CV00863

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vs.

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ORDER ON THE PLAINTIFFS' MOTION TO AMEND THEIR COMPLAINT (Paper #27)

On May 1, 2024, the court dismissed the plaintiffs' claims under the Massachusetts Civil Rights Act (MCRA), G. L. c. 12, § 11I, against the Town of Ipswich (the "Town"), Stephen Crane ("Crane"), in his capacity as Town Manager of Ipswich, and members of the Ipswich Planning Board, on the grounds that municipalities and their officials are not "persons" subject to liability under the MCRA. The court now turns to the Plaintiffs' Motion to Amend Their Complaint (Paper #27) to assert a claim for violation of the MCRA against Crane, individually. The court held a hearing on this matter and the Defendant's Motion To Dismiss (paper #21) on March 7, 2024 in which both sides were heard.

Standard of Review

A motion to amend shall be "freely given when justice so requires." Mass. R. Civ. P. 15(a); Harvard Law Sch. Coalition for Civil Rights v. President & Fellows of Harvard Coll., 413

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Mass. 66, 72 (1992); All Seasons Servs., Inc. v. Commissioner of Health & Hosps. of Boston, 416 Mass. 269, 272 (1993) ("[A] leave to amend should be granted unless there appears some good reasons for denying the motion."). The decision to grant such a motion is within the broad discretion of the trial judge. Harvard Law Sch., 413 Mass. at 72. Nevertheless, a motion to amend may be denied where such amendment would be futile. See All Seasons Servs. Inc., 416 Mass. at 272. And, "[a]n amendment is futile if it could not withstand a Rule 12(b)(6) motion to dismiss." Menard v. CSX Transportation, Inc., 840 F. Supp. 2d 421, 427 (D. Mass.), vacated on other grounds, 698 F.3d 40 (1st Cir. 2012).

The Proposed Amended Complaint

The factual allegations in the proposed Amended Complaint are identical to the factual allegations in the original Complaint and it does contain any new allegations. As far as the court can tell, the only difference between the proposed Amended Complaint and the Complaint is that the plaintiffs have added "and, INDIVIDUALLY," after defendant Crane's name in the caption.

The facts alleged in the proposed Amended Complaint do not establish that Crane, individually, violated the MCRA. Paragraphs 107, 124, 125, and 126 are the only paragraphs which relate to the plaintiffs' MCRA claim and mention Crane; however, the allegations concern actions taken by Crane, in his capacity as Town Manager. The facts alleged do not establish that Crane acted in his individual capacity or that he acted outside the scope of his employment. And, although the plaintiffs contend, in their reply brief, that Crane, individually, abused his authority and violated their right to free speech, the Amended Complaint is devoid of any such allegations.

Since the facts do not establish a basis for Crane's individual liability under the MCRA, it would be futile to allow the plaintiffs to amend their complaint to assert a claim that would be subject to immediate dismissal. Accordingly, the Plaintiffs' Motion to Amend Their Complaint (Paper # 27) is **DENIED**.

Elizabeth A. Dunigan
Justice of the Superior Court

Dated: May 2, 2024