

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
NO. FAR _____

APPEALS COURT No. 2024-P-0267

Superior Court No. 2374CV00020

LYNN ALLEGAERT, trustee,
Plaintiff-Appellant,

v.

HARBOR VIEW HOTEL OWNER, LLC, et al.,
Defendants-Appellees.

ON APPEAL FROM AN ORDER
OF THE SUPERIOR COURT AND A DECISION OF THE APPEALS COURT

**APPLICATION FOR FURTHER APPELLATE REVIEW OF DEFENDANT-
APPELLEE HARBOR VIEW HOTEL OWNER, LLC**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21,
defendant-appellee Harbor View Hotel Owner LLC states
that it has no parent corporation and no publicly held
corporation owns 10% or more of its stock.

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I. REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW.

In accordance with Rule 27.1 of the Massachusetts Rules of Appellate Procedure, defendant-appellee Harbor View Hotel, LLC (the "Hotel Owner") requests that this Court grant it leave to obtain further appellate review of the April 18, 2025 decision of the Appeals Court (the "Decision") which reversed the Superior Court's denial of Plaintiff-Appellant Lynn Allegaert, trustee's Motion to Dismiss the Hotel's abuse of process counterclaim pursuant G.L. c. 231, §59H (the "SLAPP Motion"). A copy of the rescript and Decision of the Appeals Court pursuant to Rule 23.0 are attached as Addendum **Exhibit A**. A copy of the Superior Court's December 11, 2023 Memorandum of Decision and Order denying the SLAPP Motion (per Buckley, J.) is attached hereto as **Exhibit B** to the Addendum.

Further Appellate Review is warranted because:

(1) the Appeals Court failed to follow and apply this Court's ruling in *Bristol Asphalt Co., Inc., et al v. Rochester Bituminous Products, Inc., et al.*, 493 Mass. 539 (2024) by totally abdicating its responsibility to conduct the second prong of the *Bristol Asphalt* test;

(2) the Appeals Court's ruling wrongfully interprets this Court's ruling in *Bristol Asphalt* and the Appeals Court's own ruling in *Hidalgo v. Watch City Const. Corp.*, 105 Mass.App.Ct. 148 (2024), as creating a rule that an abuse of process counterclaim by its very nature and *per se* runs afoul of the state's Anti-SLAPP Act and is automatically subject to dismissal under the Anti-SLAPP Act "because the claim that is alleged to lack reasonable basis has not yet been adjudicated"; (3) the Appeals Court's Decision also runs counter to the Rules of Civil Procedure and to the interests of justice and judicial economy which require that all claims, crossclaims, and counterclaims arising from the same underlying operative facts be litigated together in one action rather than in piecemeal or serial fashion; (4) the Appeals Court's ruling creates a Catch-22 for parties like the Hotel Owner, requiring that they choose between (a) asserting a compulsory abuse of process counterclaim which according to the Appeals Court's Decision is *per se* subject to immediate dismissal as a SLAPP suit with an award of substantial attorneys' fees against them; or (b) forgoing the assertion of a compulsory abuse of process counterclaim only to risk

being precluded by the Rules of Civil Procedure from later attempting to assert that claim; and (5) this Court should conduct a *de novo* review of the trial court's decision as required by the second prong of *Bristol Asphalt*, including a full consideration of the documentary and testimonial evidence that was before the trial court and affirm the trial court's decision which properly found that Allegaert's claims lacked reasonable factual and arguable legal basis.

In short, this Court should grant Further Appellate Review because the public interest and interests of justice require that this Court correct the Appeals Court's erroneous Decision which effectively overrules this Court's *Bristol Asphalt* decision and the Appeals Court's own decision in *Hidalgo*.

II. STATEMENT OF PRIOR PROCEEDINGS

By original complaint dated May 1, 2023, plaintiff Lynn Allegaert, trustee of the Lynn Allegaert Revocable Trust ("Allegaert") filed a five-count complaint against the Hotel Owner. [RA12-62].¹ In count I of her complaint, Allegaert sought to

¹ References to the Record Appendix in the Appeals Court will be in the form "A [page number(s)]".

challenge pursuant to G.L. c. 40A, § 17 a 2023 decision of the Edgartown Zoning Board of Appeals (the "Board") in which the Board approved a further modification (the "2023 Modification") of the Hotel's 2008 special permit (the "2008 Special Permit") which the Board had previously modified in 2018 (the "2018 Modification"). The 2008 Special Permit, the 2018 Modification, and the 2023 Modification all allowed the Hotel Owner, among other things, to construct a new building (the "Pease Cottage") in the heart of its 4.4-acre campus. Allegaert has owned property that abuts the Hotel Property since 1996. She did not oppose or appeal from the 2008 Special Permit or the 2018 Modification, both of which approved the proposed construction of the Pease Cottage. In fact, Allegaert expressly supported both the 2008 Special Permit and the 2018 Modification. However, in her complaint appealing the 2023 Modification Allegaert claimed for the first time that the construction of the Pease Cottage would cause her harm. Allegaert also added a claim for breach of contract (count II), equitable and quasi-contract claims (count III), a claim for

nuisance (count IV), and a claim for infliction of emotional distress (count V).²

The Hotel Owner answered, asserted affirmative defenses, and counterclaimed on June 5, 2023. [A 74-110]. On July 31, 2023, the Hotel Owner amended its answer, affirmative defenses, and counterclaim, asserting abuse of process as its sole counterclaim. [A 183-244].

On September 21, 2023, Allegaert filed a motion to dismiss the Hotel Owner's abuse of process counterclaim pursuant to Mass. R. Civ. P. 12(b)(6) for failure to state a claim and also brought a special motion to dismiss the abuse of process counterclaim pursuant c. 231, § 59H (the "Anti-SLAPP Act") [RA 245-269]. The Hotel Owner opposed and submitted testimonial and documentary evidence to support its opposition. [A 270-371].

The Superior Court (Buckley, J.) heard Allegaert's motions to dismiss on October 23, 2023. [A 373-462]. By decision dated December 11, 2023, the trial court denied Allegaert's 12(b)(6) motion, finding, among other things, that the Hotel Owner's

² Allegaert filed an amended complaint on May 8, 2023 [A 63-73]. The amended complaint asserted the same five counts as the original complaint.

abuse of process claim alleged facts upon which “a reasonable person could conclude that [Allegaert’s] commencement of this suit...was made for the purposes of forestalling construction at the hotel as a means of economic coercion and as a means of now challenging permitting granted previously to the hotel which she did not previously dispute.” [A467.] The trial court also denied Allegaert’s special motion to dismiss, finding in relevant part that Allegaert’s lawsuit was “sham petitioning”; that none of her five counts were tenable as a matter of fact or law; and that Allegaert’s sham petitioning had caused the Hotel actual injury. [A 470-472.]

Allegaert appealed the denial of her special motion to dismiss to the Appeals Court on an interlocutory basis. [A 474-475].

On January 14, 2025, a three-judge panel heard the appeal. In a Rule 23.0 decision dated April 18, 2025 [Addendum Exhibit A], the Appeals Court reversed the trial court and remanded, directing the trial court to dismiss the Hotel Owner’s abuse process counterclaim. The Appeals Court did not conduct a *de novo* review of the facts and law which the Hotel presented to show that Allegaert’s petitioning

activity "was devoid of any reasonable factual support or arguable basis in law." Instead, the Appeals Court concluded that because Allegaert's underlying claims had yet to be adjudicated by the trial court, the Appeals Court was without the ability to determine that Allegaert's claims lacked a reasonable factual support or arguable basis in law. The Appeals Court remanded the matter to the Superior Court, directing the trial court to: dismiss the abuse of process counterclaim without prejudice; assess attorneys' fees incurred by Allegaert in bringing the special motion to dismiss; and inviting Allegaert to petition the Appeals Court for an award of attorneys' fees incurred in appealing the Superior Court's denial of her Anti-SLAPP motion.³

By this filing, the Hotel Owner seeks Further Appellate Review of the Appeals Court's Decision. No party is seeking a reconsideration or modification in the Appeals Court.

III. STATEMENT OF FACTS

The Appeals Court's Decision contains a cursory statement of facts and summary recitation of the

³ Allegaert has filed requests in the trial court and Appeals Court seeking a total of approximately \$80,000 in costs and fees.

procedural posture of the case. The Appeals Court's decision makes no mention whatsoever of the evidence which the Hotel presented to the trial court to demonstrate that Allegaert's five-count complaint was "devoid of any reasonable factual support or any arguable basis in law." Therefore, it is necessary to summarize those facts here as, among other things, the Hotel Owner is requesting that this Court affirm the trial court's decision which found that the evidence presented by the Hotel Owner demonstrated that Allegaert's claims lacked factual and legal footing.

The Hotel Owner owns and operates the Harbor View Hotel (the "Hotel") at 131 North Water Street, Edgartown, MA (the "Hotel Property"). [A. 159]. The Hotel was opened in 1891 and has been operating on the Hotel Property ever since. [A. 159]. The Hotel Property is a 4.4-acre campus, improved by, among other things: (1) a main, historic hotel building containing about 45 guest rooms, bars, a restaurant, meeting rooms, and event space; (2) a 3-story, 50-plus guestroom building formerly called the Mayhew and now called the Roxana; (3) and eight, free-standing buildings, the "cottages," containing guest rooms and condominium units. [A. 159]. The Hotel is a legally

pre-existing nonconforming commercial use in an area of Edgartown that was zoned for residential uses long after the Hotel opened and began to operate. [A. 24].

In 2008, a predecessor in interest to the Hotel Owner, Scout Harbor View Property 1, LLC ("Scout"), proposed a significant expansion and construction project at the Hotel (the "Scout Project"). [A. 159]. At that time, Scout entered into an agreement (the "Scout Agreement") with Allegaert individually, not as trustee, with respect to the Scout Project. [A. 46-50].

Among other things, the Scout Agreement required that prior to the occupancy of cottages shown on Scout's plan for the Hotel Property, including a proposed new Cottage 11, later called the Pease Cottage, Scout was to install and maintain landscaping between the Hotel Property and the property Allegaert owns, located at 14 Thayer Street (the "14 Thayer Property"), to buffer the 14 Thayer Property from the buildings shown on the plan. [A. 46, 49-50, 64].

In exchange for Scout's promise to install and maintain this landscaping, Allegaert agreed to "support any and all permitting by Scout" including permits Scout sought in connection with the Scout

Project. [A. 47]. Allegaert also agreed to waive any and all rights of appeal from permits granted to Scout for the Scout Project, including with respect to the construction of the Pease Cottage, and she also agreed to waive any and all rights to appeal from any future decision from any permitting authority with respect to the Hotel Property so long as the impacts from future development and renovation plans would be substantially the same, less than, or reduced, when compared to the impacts from the plans Scout had shown to Allegaert in connection with the Scout Agreement. [A. 47]. The Scout Agreement was not recorded and does not run with the land. [A. 46-50 and 284].

In 2008, Scout applied to the Zoning Board of Appeals for the Town of Edgartown (the "Board") for a special permit for the Scout Project. [A. 159]. The Board granted the special permit (the "2008 Special Permit"). [A. 168-174].

Among other things, the 2008 Special Permit authorized the Hotel to construct the Pease Cottage, a new multi-guestroom building located in the middle of the Hotel Property. [A. 168-174]. Allegaert supported the 2008 Special Permit, including the construction of the Pease Cottage, and sent a letter to permitting

authorities expressing that support. [A. 69]. The 2008 Special Permit was not appealed and was duly recorded. [A. 159, 169].

Scout installed and maintained vegetative screening as required by the Scout Agreement. [A. 341-342]. About ten years later, in January 2018, the Hotel was purchased by its current ownership.⁴ [A. 159-160]. Shortly thereafter, the Hotel Owner applied to the Board for a modification of the 2008 Special Permit (the "2018 Modification"). [A. 159-160]. While under no obligation to do so, representatives of the Hotel Owner met with Allegaert to review and explain the 2018 Modification. [A. 340-341]. The 2018 Modification sought to modify the 2008 Special Permit in certain respects. [A. 160]. Importantly, under the 2018 Modification, the Hotel Owner still intended to construct the Pease Cottage, but proposed to substantially increase its square footage, from 7,052 sf to 9,066 sf, and to locate the Pease Cottage on a portion of the Great Lawn, an open area on the Hotel Property located directly behind the 14 Thayer Property. [A. 160].

⁴ The principal of the Hotel Owner is Mr. Bernard Chiu ("Mr. Chiu"). [A. 28].

As she had done with respect to the 2008 Special Permit, Allegaert wrote letters to local permit granting authorities in support of the 2018 Modification. [A. 160-161]. Allegaert did not claim at that time, 10 years after the Scout Agreement, that the proposed construction of the Pease Cottage was a violation of the Scout Agreement; nor did she claim that Scout had failed to install or maintain the landscaping called for by the Scout Agreement; nor did she claim that the landscaping along the property line was somehow insufficient; nor did she seek to have a landscape condition inserted by the Zoning Board in the 2018 Modification; nor did she claim that the substantial increase in the size of the proposed Pease Cottage or its location on the Great Lawn, closer to the 14 Thayer Property, violated the Scout Agreement or created greater impacts on the 14 Thayer Property than those imposed by the 2008 Special Permit.

The Board approved the 2018 Modification without any condition related to a landscape buffer between the Hotel Property and the 14 Thayer Property. [A. 161, 176-179]. No one appealed the 2018 Modification, and it was duly recorded. [A. 161, 176-178].

After the 2018 Modification was granted, the Hotel Owner exercised its rights under the 2018 Modification and proceeded with the Project, substantially rehabilitating the historic main hotel building and the 3-story Mayhew wing. [A. 160]. This portion of the expansion and redevelopment of the Hotel Property cost approximately \$30 million. [A. 159-160]. The rights granted in the 2018 Modification, which included the right to construct the Pease Cottage, were, therefore, perfected and vested by the Hotel's exercise of the 2018 Modification.

In 2019, as part of its renovation and expansion Project, the Hotel Owner added landscaping to various areas on the Hotel Property, including supplementation of the existing, thick vegetation between the Hotel Property and the 14 Thayer Property with approximately 25 large, arborvitae trees. [A. 31, 164, 341-342].

In the Spring of 2019, the Hotel Owner sought another special permit from the Board. [A. 313]. In this special permit, the Hotel Owner sought the Board's approval to relocate and continue to operate an existing outdoor pool bar. The Hotel Owner sought to replace the old pool bar with a new pool bar (the

"New Pool Bar") that would be located on the other side of the Hotel's pool and within the Hotel's pool area. [A. 313].

Alleggaert and others brought three cases seeking to challenge the New Pool Bar. [A. 292-293]. Alleggaert and others also asked the Edgartown Selectmen to revoke the Hotel Owner's liquor license. When that effort failed, Alleggaert appealed to the State Alcoholic Beverages Control Commission (the "ABCC"). [A. 292-293]. The ABCC dismissed that appeal.

While engaged in efforts to challenge the New Pool Bar and the Hotel's liquor license, Alleggaert sent an email to a relative in which she identified Mr. Chiu as a "Chinese American." [A. 338]. Then, in a statement Alleggaert filed with the Board in December 2019, she employed a string of anti-Asian tropes, accusing Mr. Chiu of being "deceptive," "sneaky" and of "launching a carefully orchestrated sneak attack" with respect to the New Pool Bar. [A. 293, 337-338, 340-343]. However, she also admitted to the Board that the Hotel had increased the vegetative buffer between the Hotel and Alleggaert property by planting new arborvitae and that she was grateful for this increased vegetative buffer.

In September 2020, the Hotel Owner again sought to modify the 2008 Special Permit as previously modified by the 2018 Modification. [A. 161]. The construction of the Pease Cottage, first granted in the 2008 Special Permit, and affirmed in the 2018 Modification, remained part of the plan, although the Hotel Owner now proposed to reduce the overall square footage of and number of guestrooms in the proposed Pease Cottage from what had been approved in the 2018 Modification, and also proposed to move the Pease Cottage entirely off the Great Lawn and further from the 14 Thayer Property. [A. 161-162]. The request was referred by the Board to the Martha's Vineyard Commission (the "MVC"). [A. 23]. Ultimately in July 2022, the MVC approved the modification. [A. 23]. The matter was then sent back to the Board which held a public hearing on March 29, 2023 [A.24].

Allegaert appeared at the Board's public hearing on the modification request and voiced opposition. [A. 30]. Specifically, she claimed to the Board that the construction of the Pease Cottage would adversely impact privacy at the 14 Thayer Property. [A. 30]. On this basis, she urged the Board to deny the 2023 Modification, or to impose a condition in any approval

that would require the Hotel Owner to increase the landscaping along the boundary between the 14 Thayer Property and the Hotel Property. [A. 30].

In response, the Hotel Owner's director of development, Rod Jané, testified that the Hotel maintained a dense vegetative buffer between the 14 Thayer and Hotel Properties, a buffer that pre-existed the current ownership but which the Hotel Owner had augmented in 2019 with the planting of 25 tall, arborvitae trees. [A. 31]. Mr. Jané also provided the Board with photographs of the boundary which showed the existing thick vegetative buffer and the additional arborvitae the Hotel had installed in 2019. [A. 31]. The Board unanimously approved the 2023 Modification by decision dated April 10, 2023. [A. 23].

Allegaert then filed the underlying lawsuit to challenge the 2023 Modification and to assert other claims against the Hotel Owner. [A. 63-73]. Allegaert specifically and expressly sought to enjoin the Hotel Owner from proceeding with the construction of the Pease Cottage notwithstanding the fact that she had twice previously supported the construction of the Pease Cottage and despite the fact that the Hotel

Owner's rights to construct the Pease Cottage had vested with the Hotel Owner's exercise of its rights under the 2018 Modification. [A. 71-73].⁵

On July 31, 2023, the Hotel Owner filed its Answer, Affirmative Defenses, and Amended Counterclaim. [A. 183-232]. The Hotel Owner asserted a counterclaim for Abuse of Process. [A. 205].⁶

⁵ In her brief to the Appeals Court, Allegaert repeatedly argued that her challenge to the 2023 Modification was not a challenge to the construction of the Pease Cottage or any other permitted improvement on the Hotel Property but that she only appealed the 2023 Modification to force the Hotel Owner to install even more vegetation between the 14 Thayer Property and the Hotel Property. The assertion is nonsense. The Prayers for Relief in Allegaert's Amended complaint repeatedly seek an injunction against the construction of the Pease Cottage and other work first approved under the 2008 Special Permit and confirmed in the 2018 Modification which rights vested when the Hotel Owner exercised its rights under the 2018 Modification. [A. 71-73]. Allegaert's assertion that she did not file the lawsuit to stop the construction of the Pease Cottage but only to force the Hotel to install additional vegetative screening - even though she had represented to the Board that she was satisfied with the additional screening the Hotel had voluntarily installed in 2019 - was tantamount to an admission that her lawsuit challenging the 2023 Modification was brought to force the Hotel to install expensive screening that even she had admitted was unnecessary. This is evidence that her lawsuit is frivolous and an abuse of process.

⁶ The Hotel Owner initially also asserted a counterclaim for malicious prosecution. The Hotel Owner subsequently amended its counterclaim to eliminate that claim but maintained its abuse of

Allegaert sought dismissal of the Hotel Owner's abuse of process claim pursuant to Mass. R. Civ. P. 12(b)(6) and the anti-SLAPP Act. [A. 250-267]. The Hotel filed an opposition, attaching two affidavits along with more than 50 pages of exhibits which included copies of relevant administrative decisions, photographs of the large arborvitae the Hotel had installed along the property line between the Allegaert property and the Hotel Property, and a December 11, 2019, letter from Allegaert to the Board in which she acknowledged her satisfaction with the additional vegetative screening the Hotel had installed. [A 270-371].

After a hearing, the Superior Court denied Allegaert's Special Motion to Dismiss. The motion judge acknowledged that the abuse of process counterclaim sought to impose liability on Allegaert solely as a result of her petitioning activities (i.e. her legal challenge to the 2023 Modification). However, the motion judge went on to conclude that because Allegaert's petitioning was a "sham" lawsuit without reasonable basis in fact or arguable basis in

process counterclaim. [A. 183-207]. That is the claim Allegaert sought to dismiss under the anti-SLAPP Act.

law and that the sham lawsuit had caused injury to the Hotel, Allegaert was not entitled to dismissal of the Hotel's counterclaim under the Anti-SLAPP Act. [A. 463-473].

Allegaert appealed the dismissal to the Appeals Court on an interlocutory basis. [A.474]. After hearing, the Appeals Court reversed the trial court in a Rule 23.0 decision. The Appeals Court did not conduct a *de novo* review under the second prong of the *Bristol Asphalt* test but instead held that an abuse of process counterclaim is *per se* and without such review subject to dismissal under the Anti-SLAPP Act.

IV. STATEMENT OF POINTS WITH RESPECT TO WHICH FURTHER APPELLATE REVIEW IS SOUGHT.

1. Did the Appeals Court err in failing to follow and apply this Court's ruling in *Bristol Asphalt*, and by abdicating its responsibility to conduct, *de novo*, the second prong of the *Bristol Asphalt* analysis?

2. Did the Appeals Court misinterpret this Court's ruling in the *Bristol Asphalt* case and the Appeals Court's own ruling in *Hidalgo* by holding that those cases have created a rule that abuse of process counterclaims *per se* run afoul of the state's Anti-

SLAPP Act, and that a reviewing court is not required to conduct the second prong of the *Bristol Asphalt* analysis because an abuse of process claim is automatically subject to dismissal under the Anti-SLAPP Act?

3. Did the Appeals Court err in ruling that a compulsory and well-supported counterclaim for abuse of process is subject to automatic dismissal under the Anti-SLAPP Act notwithstanding the clear and unequivocal requirements of the Rules of Civil Procedure and considerations of judicial economy which require that all claims, counterclaims, and crossclaims arising from the same underlying operative facts be litigated together in one action rather than in piecemeal or serial fashion?

4. Did the Appeals Court err by creating a Catch-22 for parties like the Hotel Owner, forcing them to choose between (a) asserting a compulsory abuse of process counterclaim which, according to the Appeals Court's ruling, would be subject to immediate dismissal as a SLAPP suit entailing an award of attorneys' fees to the motion proponent; or (b) forgoing an abuse of process counterclaim at the outset of a case only to be precluded from asserting

it later by the Rules of Civil Procedure which provide that such compulsory counterclaim is waived by the failure to assert it?

5. Where the Appeals Court failed to conduct the *de novo* review of the facts and arguments submitted by the SLAPP motion opponent, should this Court grant Further Appellate Review in order to affirm the trial court's decision that the Hotel Owner had demonstrated by a preponderance of the evidence that Allegaert's claims were without legal and factual basis and have caused damage to the Hotel Owner?

V. STATEMENT REGARDING WHY FURTHER APPELLATE REVIEW IS APPROPRIATE.

A. The Appeals Court failed to follow and misinterpreted *Bristol Asphalt* and *Hidalgo*.

There is no dispute that the special motion movant, Allegaert, satisfied the first prong of the *Bristol Asphalt* test. The problem with the Appeals Court's Decision is that the Appeals Court stopped there and did not proceed to the second prong of the *Bristol Asphalt* analysis. The Appeals Court erroneously ruled that an abuse of process counterclaim is, by definition, subject to dismissal as a SLAPP suit.

In *Bristol Asphalt* this Court recognized that “proving petitioning is ‘devoid’ of any reasonable factual support or any arguable basis in law is a difficult task.” *Bristol Asphalt* at 557 (emphasis in the original). However, this Court did not create a *per se* rule that this showing can never be made prior to the trial court’s ultimate adjudication of the underlying case. In fact, in *Bristol Asphalt* this Court found that the showing had been made.

As this Court explained in *Bristol Asphalt*, where the first prong of the *Bristol Asphalt* analysis is satisfied and a counterclaim is shown to be aimed at petitioning activity, the reviewing court must proceed to examine the parties’ documentary submissions *de novo* and determine whether a special motion opponent has made the required showing that the petitioning activity is devoid of reasonable factual basis or arguable legal basis. The Appeals Court’s Decision ignores this obligation. Citing its own decision in *Hidalgo*, the Appeals Court completely absolved itself from undertaking the second prong of the *Bristol*

Asphalt analysis. This was error. Further Appellate Review should be granted to correct it.⁷

B. The Appeals Court's Decision conflicts with the Rules of Civil Procedure.

Mass. R. Civ. P 13(a) provides in relevant part that:

A pleading shall state as a counterclaim any claim for relief the court has power to give which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim.

Accordingly, the Hotel's abuse of process counterclaim was a compulsory counterclaim. See *Keystone Freight Corp. v. Barlett, Inc.*, 77 Mass.App.Ct. 304, 310 (2010). As noted in *Keystone*, the purpose of the rule is to effectuate resolution in one proceeding of controversies which are so closely connected as to be combined in one trial in order to prevent duplication of testimony, avoid unnecessary expense to the parties and the public, and expedite

⁷ The Appeals Court's ruling also misinterprets *Hidalgo*. *Hidalgo* did not establish a *per se* rule that an abuse of process counterclaim can never survive an anti-SLAPP motion. While confirming the dismissal of an abuse of process claim, the *Hidalgo* court was careful to note that its decision "does not mean that every claim for abuse of process...must be dismissed, of course." *Hidalgo* at 151.

the adjudication of lawsuits. The Appeals Court's Decision in this case runs counter to these principles.

The Appeals Court's decision also runs counter to other decisions where this Court has applied a constitutional construction to the Anti-SLAPP Act so as not to "alter[] procedural and substantive law in a sweeping way." *Duracraft Corp. v. Holmes Prods. Corp.*, 427 Mass. 156, 167, 691 N.E.2d 935 (1998); see also, *Benoit v. Frederickson*, 454 Mass. 148, 156-157, (2009) (Cordy, J., concurring) (opining that an interpretation of the Anti-SLAPP Act that would abolish malicious prosecution or abuse of process "would ... be constitutionally suspect"). The Appeals Court's Decision has, for all practical purposes, abolished abuse of process as a counterclaim. This Court should correct that error.

C. The Appeals Court has created a Catch-22.

The Appeals Court's decision puts defendants like the Hotel between a rock and a hard place. On the one hand, as noted above, under the circumstances of this case, the Hotel Owner's abuse of process counterclaim was compulsory. But under the Appeals Court's ruling, the compulsory counterclaim would be subject to

automatic dismissal under the anti-SLAPP Act. Accordingly, a defendant like the Hotel Owner would be forced to choose between (1) asserting a compulsory abuse of process counterclaim that would not survive an anti-SLAPP motion to dismiss and which also would subject the defendant to payment of substantial costs and fees; or (2) forgoing the compulsory abuse of process counterclaim with the risk this would constitute a waiver of that claim. Further Appellate Review is warranted to eliminate this Catch-22.

D. The trial court correctly applied *Bristol Asphalt*.

This Court should grant Further Appellate Review to conduct the second prong of the *Bristol Asphalt* analysis which the Appeals Court failed to conduct and to affirm the Superior Court's ruling that the documentary evidence presented by the Hotel Owner demonstrated that each count of Allegaert's five-count complaint lacked reasonable factual and colorable legal basis.

1. Count I of Allegaert's Complaint lacks factual and legal basis.

As the Superior Court correctly held, the evidence the Hotel Owner provided to the trial court demonstrated that Count I of Allegaert's complaint is

an untimely and legally prohibited collateral attack on zoning relief granted to the Hotel in the 2008 Special Permit and the 2018 Modification. Allegaert's appeal of the 2023 Modification is an improper and untimely challenge to the Hotel Owner's perfected and vested rights under those permits, including its right to construct the Pease Cottage. Allegaert not only failed to appeal those underlying zoning decisions, she supported them. Her belated attempt to challenge zoning relief that was granted and the rights which have vested is factually and legally frivolous.

Count I of Allegaert's complaint also fails because she lacks standing to bring it. Allegaert's alleged harm is that the Pease Cottage will diminish "privacy" at 14 Thayer Street. Allegaert purchased property next to a hotel that has been in operation since 1891. There is nothing in zoning that prohibits Hotel guests of the legally pre-existing Hotel from looking into the Allegaert Property. Privacy qua privacy is not an interest that zoning protects. Zoning does not prohibit a neighbor from looking into the property next door. Harm to privacy is a surrogate for harm from density—which is a protected interest. *See, e.g. McGee v. Bd. of Appeal of Boston*, 62

Mass.App.Ct. 930, 931 (2004) and *Bertrand v. Bd. of Appeals of Bourne*, 58 Mass.App.Ct. 912 (2003). Harm to privacy must be tethered to excessive density, to an invasion of bulk and dimensional limits, to incursions into setbacks, to excessive heights and the like. The construction of the Pease Cottage does not violate density limits. The evidence before the trial court, including three zoning approvals and project site plans, showed that the Pease Cottage will comply with all bulk and dimensional provisions of zoning and there is no allegation in Allegaert's complaint to the contrary. [A. 23-26, 196-232]. Under these circumstances Allegaert's alleged harm to "privacy" is not a legally cognizable basis for standing. Moreover, Allegaert's claim that that guests from an as-of-yet to be constructed building might possibly be able to look through dense vegetation and into the 14 Thayer Property is completely speculative and conjectural. Such speculative claims cannot be a basis for standing. See *Barvenik v. Bd. of Aldermen of Newton*, 33 Mass.App.Ct. 129, 133 (1992) and *Kenner v. Zoning Bd. of Appeals of Chatham*, 459 Mass. 115, 117-24 (2011). To the extent Allegaert believes she needs more vegetative screening, she is free to

install it on her property. Edgartown zoning does not require the Hotel Owner to provide it.

Finally, the Board did not exceed its discretion in issuing the 2023 Modification without a condition requiring the Hotel to increase the existing thick vegetative buffer along the Hotel Property and 14 Thayer boundary. The record before the Board and the trial court demonstrated that the Hotel Owner had already voluntarily increased that buffer and that Allegaert had acknowledged to the Board her satisfaction with that work. [A. 345-370 and 340-343]. Given these facts, the Board's decision to issue the 2023 Modification without the condition Allegaert demanded was neither arbitrary nor capricious as there was substantial evidence to support the Board's action. The trial court correctly concluded that Count I of Allegaert's complaint was without basis in fact and law.

2. Counts II and III of Allegaert's complaint lacked basis in fact and law.

In Count II, Allegaert contends that the Hotel Owner breached the Scout Agreement. As the trial court noted, neither the Hotel Owner nor Allegaert as trustee were parties to the Scout Agreement. The

trial court properly held that Allegaert could not enforce the Scout Agreement against the Hotel Owner because there was no privity.⁸

Likewise, the trial court properly held that Count III of Allegaert's complaint, which alleges various quasi-contract and equitable theories, has no legal force because, among other reasons, Allegaert cannot simultaneously seek to enforce promises she claims are covered by the Scout Agreement via equitable and quasi-contract theories. *Zarum v. Brass Mill Materials Corp.*, 334 Mass. 81, 84 (1956).

3. Allegaert's claims for nuisance (count IV) and infliction of emotional distress (count V) have no basis in fact or law.

In counts IV and V, Allegaert claimed that the non-existent Pease Cottage is creating a nuisance and is inflicting emotional distress on her. The claims are speculative in the extreme. *See Citizens for a Safe Chatham Airport, Inc. v. Chatham*, 99 Mass.App.Ct. 115, 2021 WL 961112 at *2 (2021). The claims, some

⁸ On appeal, Allegaert abandoned her breach of contract and equitable theories to argue for the first time that the Hotel Owner, while not bound by the Scout Agreement, later ratified it. This claim also has no legal force because, as the trial court noted, the Hotel Owner did not exist at the time the Scout Agreement was made. *See Hushion v. McBride*, 296 Mass. 4,7 (1936) and *Abbott v. Hapgood*, 150 Mass. 248, 252 (1889).

kind of anticipatory torts, are frivolous and without legal basis on their face.⁹

4. Allegaert's sham litigation has caused and will continue to cause actual injury to the Hotel Owner.

The trial court properly held that Allegaert's complaint has delayed the Hotel Owner in proceeding with its project and, in doing so, has harmed the Hotel Owner. Construction costs for labor and materials are rising and will continue to rise. The Hotel Owner presented competent evidence to the trial court that the delay caused by Allegaert's appeal of the 2023 Modification will add over \$3 Million to the Hotel Owner's costs. [A. 352]. This evidence demonstrates that Allegaert's meritless claims have caused, are causing, and will continue to cause actual injury to the Hotel Owner. *See Vittands v. Sudduth*, 49 Mass.App.Ct. 401, 415 (2000).

VI. CONCLUSION.

For all the foregoing reasons, the Hotel Owner respectfully requests that this Court grant its Application for Further Review.

⁹ On appeal to the Appeals Court, Allegaert did not address these tort claims or the Hotel Owner's argument that the claims had no reasonable factual support or arguable legal basis—effectively conceding that the claims were frivolous.

Respectfully submitted,

HARBOR VIEW HOTEL OWNER, LLC

By its attorneys

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ADDENDUM

- Exhibit A: Rescript and Memorandum and Order
Pursuant to Rule 23.0 (105 Mass. App.
Ct. 1123 (2025))
- Exhibit B: Memorandum of Decision and Order on
Plaintiff-Appellant's Motion to Dismiss
pursuant to G.L. c. 59 (Mass. Super Ct.
2374CV00020).

EXHIBIT A

Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston

In the case no. 24-P-267

LYNN ALLEGAERT, trustee,

vs.


HARBOR VIEW HOTEL OWNER, LLC. & another.

Pending in the Superior

Court for the County of Dukes

Ordered, that the following entry be made on the docket:

The order denying the special motion to dismiss is reversed. A new order shall enter dismissing the amended counterclaim for abuse of process without prejudice. The matter is remanded to the Superior Court for further proceedings consistent with the memorandum and order of the Appeals Court.

By the Court,

_____, Clerk
Date April 18, 2025.

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

24-P-267

LYNN ALLEGAERT, trustee,¹

vs.

HARBOR VIEW HOTEL OWNER, LLC & another.²

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff-in-counterclaim, Harbor View Hotel Owner, LLC, (Harbor View) filed an abuse of process counterclaim against the defendant-in-counterclaim, Lynn Allegaert. A judge of the Superior Court denied Allegaert's special motion to dismiss the counterclaim pursuant to the anti-SLAPP statute, G. L. c. 231, § 59H. Allegaert appeals from the order denying her special motion to dismiss. We reverse.

Discussion. The following facts are derived from the pleadings and documentary evidence before the Superior Court. Allegaert owns a residential property that abuts the Harbor View

¹ Of the Lynn Allegaert Revocable Trust.

² Zoning board of appeals of Edgartown.

Hotel in Edgartown. In 2008, the zoning board of appeals of Edgartown (board) granted a special permit to Harbor View and, in 2018 and 2023, modified the special permit. The project for which Harbor View sought the permit involved the demolition and reconstruction of three cottages and the construction of a new cottage. In 2023, Allegaert filed a complaint challenging the 2023 modification of the special permit. The complaint asserted that the 2023 modification was an abuse of discretion in violation of G. L. c. 40A, § 17. Allegaert also sought recovery for detrimental reliance, promissory estoppel, unjust enrichment, nuisance, and infliction of emotional distress. Harbor View filed an answer and counterclaim, seeking recovery against Allegaert for abuse of process in connection with her claims. Allegaert filed an anti-SLAPP special motion to dismiss Harbor View's counterclaim, which the judge denied.

We review de novo the ruling on an anti-SLAPP motion to dismiss. See Bristol Asphalt Co. v. Rochester Bituminous Prods., Inc., 493 Mass. 539, 560 (2024) (Bristol Asphalt). "[A] proponent of a special motion to dismiss under [G. L. c. 231, § 59H] must make a threshold showing . . . that the claims against it are based on the [party's] petitioning activities alone and have no substantial basis other than or in addition to the petitioning activities" (quotation and citation omitted).

Id. at 555. Harbor View does not dispute that its abuse of process counterclaim is based solely on Allegaert's petitioning activity.

Once the threshold showing is made, the second stage of analysis follows, requiring the opponent of the motion to show that the petitioning activity "was devoid of any reasonable factual support or any arguable basis in law." Bristol Asphalt, 493 Mass. at 557, quoting G. L. c. 231, § 59H. "Proving petitioning is 'devoid' of any reasonable factual support or any arguable basis in law is a difficult task." Id. Claims for abuse of process "must ordinarily await the outcome of the lawsuit that they are challenging," because "the claim that is alleged to lack reasonable basis has not yet been adjudicated." Hidalgo v. Watch City Constr. Corp., 105 Mass. App. Ct. 148, 153 (2024).

Here, the challenged claims in the lawsuit have not been resolved, and we cannot conclude at this stage of the proceedings that Allegaert's claims lack any reasonable factual support or any arguable basis in law. Thus, we conclude that Allegaert's special motion to dismiss Harbor View's counterclaim should have been allowed. We note that at the time the judge decided the motion, she did not have the benefit of either the Bristol Asphalt or the Hidalgo decision. The dismissal of

Harbor View's abuse of process counterclaim "is not as to the merits of the claims at this juncture, and is accordingly without prejudice."³ See Hidalgo, 105 Mass. App. Ct. at 155.

The order denying the special motion to dismiss is reversed. A new order shall enter dismissing the amended counterclaim for abuse of process without prejudice. The matter is remanded to the Superior Court for further proceedings consistent with the memorandum and order of the Appeals Court.

By the Court (Grant,
Brennan & Toone, JJ.⁴),


Clerk

Entered: April 18, 2025.

³ Because the anti-SLAPP statute, G. L. c. 231, § 59H, requires the award of attorney's fees if the special motion to dismiss is allowed, see Bristol Asphalt, 493 Mass. at 555, we remand the matter to the Superior Court for a determination of Allegaert's request for attorney's fees associated with the trial court special motion to dismiss.

Allegaert also requests appellate attorney's fees. Allegaert may file with the clerk of this court a motion for fees detailing and supporting her request within fourteen days of the date of this decision. Harbor View shall have fourteen days thereafter to respond.

⁴ The panelists are listed in order of seniority.

EXHIBIT B

COMMONWEALTH OF MASSACHUSETTS

DUKES, SS

SUPERIOR COURT NO.: 2374CV00020

LYNN ALLEGAERT, TRUSTEE,
LYNN ALLEGAERT REVOCABLE TRUST,
Plaintiff

v.

HARBOR VIEW HOTEL OWNER LLC, TOWN of
EDGARTOWN, et. al.,
Defendants

MEMORANDUM OF DECISION and ORDER on PLAINTIFF'S
MOTION TO DISMISS COUNTS I AND II OF DEFENDANT HARBOR VIEW
HOTEL'S AMENDED COUNTERCLAIM PURSUANT TO G.L. c. 231, §59H and Mass.
R. Civ. P. 12(b)(6)

E.M. Buckley, Judge.

Plaintiff, Lynn Allegaert, Trustee of the Lynn Allegaert Revocable Trust ("Allegaert") has filed suit¹ against the Defendant, Harbor View Hotel Owner LLC ("Harbor View") and the Town of Edgartown Zoning Board, ("ZBA"), challenging the grant of a Special Permit² by the ZBA. The Special Permit modified a prior special permit issued in 2008 and amended in 2018 and approved by the Martha's Vineyard Commission in 2002 which involves the demolition of three "cottages"³ currently upon the property and the construction of a new cottage.⁴ The demolished cottages per the Special Permit are to be reconstructed and the square footage increased. Plaintiff contends the grant of the Special Permit was based upon legally untenable grounds, arbitrary, capricious, whimsical and an abuse of discretion. Plaintiff's Amended Complaint seeks recovery for violations of G.L. c. 40A sec. 17 (Count I); Detrimental Reliance/Promissory Estoppel/Unjust Enrichment (Count II); Nuisance (Count III); Emotional Distress (Count IV)⁵; The Defendant Harbor View filed an Answer and Amended Counterclaim on July 31, 2023. The Answer denies the allegations

¹ The original Complaint was Amended on May 8, 2023.

² Granted after public hearing.

³ The Bradley Cottage, the Morse Cottage and the Snow Cottage.

⁴ The Pease Cottage

⁵ Counts II through IV- are against the defendant Harbor View only.

in the Plaintiff's Complaint and asserts various defenses. The Amended Counterclaim seeks recovery against the Plaintiff for Abuse of Process. Plaintiff now seeks to dismiss the defendant's Amended Counterclaim pursuant to the Massachusetts Anti-SLAPP statute, G.L. c. 231 sec. 59H and Mass. R. Civ. P. 12(b)(6). For the following reasons, the court finds defendant has alleged sufficient facts to maintain its abuse of process claim, and the Plaintiff's Special Motion to Dismiss pursuant to G.L. c. 231 sec 59H and Mass. R. Civ. P. 12 (b)(6) is **DENIED**.

BACKGROUND:

The following facts are taken from the pleadings and documents incorporated therein. This case represents yet another chapter in the ongoing saga involving these parties, abutting property owners⁶. Allegaert is record the owner ⁷ of a residential home located at 14 Thayer Street, Edgartown, MA. The defendant, Harbor View Hotel Owner, LLC., is a Delaware LLC doing business as the Harbor View Hotel. ("Harbor View"). Both properties are in a residential ("R-5") zoning district within the Town of Edgartown. The current owner of the hotel acquired the 4.4-acre property and improvements located at 131 North Water Street, Edgartown, MA in January 2018. The Harbor View is a legally pre-existing non-conforming commercial use entity in a residential area of Edgartown.

Harbor View was previously owned by Scout Harbor View Property I, LLC ("Scout"). In 2008, Scout embarked upon a significant renovation and construction project at the hotel which created a new "Master Plan". That plan required Scout to obtain a special permit from the Edgartown ZBA. That special permit allowed, among other things, renovation/rebuilding of three existing cottages and the construction of five new cottages on the Hotel's property as well as the expansion of the footprint of the hotel campus.

On April 16, 2008, Scout and Allegaert, entered into an Agreement ("Scout Agreement"). That Agreement provided Scout was to maintain and increase landscaping between the Hotel and the Allegaert property to allow for a buffer from the new construction. Additional agreements as to lighting and sound were incorporated in the agreement. In exchange, Allegaert agreed to

⁶ List the lawsuits:

⁷ Although she does not use the residence as her primary or even secondary residence on Martha's Vineyard since 2019.

“support any and all permitting by Scout” including permits that Scout needed for its project. Allegaert also agreed to waive all rights of appeal from permits granted to Scout for its project.

Scout and Allegaert symbiotically carried out their arrangement over the ensuing years that Scout owned the property. That relationship included Allegaert sending a letter expressing her support of Scout’s 2008 expansion of the Hotel (“Scout Agreement”). The 2008 special permit was not appealed per the parties’ agreement and duly recorded. The 2008 special permit allowed for the construction of five cottages,⁸ including the Pease Cottage as well as the expansion of the Harbor View campus and the installation of landscaping along the property bounds prior to the occupancy of the cottages.

In January 2018, the property was purchased by its new owner, Harbor View Hotel Owner LLC., which applied to the ZBA for a modification of the 2008 special permit. (“2018 modification”). The modification sought to modify the 2008 permit⁹ by constructing the Pease Cottage¹⁰ and to increase its square footage¹¹. Representatives of Harbor View and Mr. Bernard Chu, its current owner, met with Allegaert to review the plans discuss the modifications of the 2008 special permit. Allegaert thereafter wrote letters of support to the ZBA for the modification; she did not appeal or challenge that modification of the 2008 special permit.

Thereafter, in 2020, Harbor View sought to modify the 2008 special permit¹² (“the 2023 modification”) which was approved by the ZBA. This modification involved a reconfiguration of the main hotel building, modification of the Mayhew Buildings, as well as modifications of the cottages, including the Pease Cottage. Allegaert in this suit challenges the grant of the modification of the special permit which allowed the construction of the Pease Cottage. Allegaert contends, among her other grievances, that the location of the construction of the Pease Cottage is close to her property and in a location not contemplated nor approved by the prior 2008 and 2018 permitting. Equally, she challenges the 2023 modification on the grounds that the newly configured Pease Cottage structure will greatly diminish her privacy and will create noise and light pollution. Allegaert further contends in her ABA appeal that Harbor View destroyed and did not

⁸ Sometime during 2018-2019, this plan was later changed and instead of demolishing the Mayhew building to make way for the cottages, that building was to be renovated and four cottages instead of five to be constructed.

⁹ The modification sought as well to renovate the Mayhew Building and the renovation of the main hotel building.

¹⁰ This structure was not built in the 2008 special permit. Harbor View contends that the 2008 permit allowed for the construction of this cottage.

¹¹ as well as the square footage of the other four cottages.

¹² The permit to Scout, the former owner.

replace the vegetation previously installed on the property line. Harbor View challenges this allegation and claims it is false as photographs belie the installation of significant number of Arborvitae trees planted and maintained by it along the property line. Allegaert further claims that the decision of the ZBA granting the 2023 modification is arbitrary, capricious, and not based on legally tenable grounds.

Defendant's Amended Counterclaim ("counterclaim") filed in response to the suit brings a claim for Abuse of Process against Allegaert for the filing of this matter. Harbor View contends that at the time Allegaert brought her 2023 lawsuit, she knew, or reasonably should have known, that her claims were without legal merit and void based upon the myriad of lawsuits, court rulings, and decisions of the ZBA, many of which she supported. Harbor View avers that Allegaert's instant suit is not a legitimate exercise of her right to petition, but rather, a strategic use of litigation to harass and burden the Harbor View and to cause them to expend monies to defend claims she knew, or reasonably should have known, are devoid of merit and advanced in bad faith.

DISCUSSION

A. The Plaintiff's Motion to Dismiss the Amended Counterclaim- Mass. R. Civ. P. 12(b)(6)

For the purposes of decision on the Motion, the court takes the well-pled facts in the Amended Counterclaim as true and gives the defendant/plaintiff in counterclaim the benefit of "all reasonable inferences that can be drawn from them". Goodwin v. Lee Pub. Schs., 475 Mass. 280, 284 (2016) (citations omitted); Galisatro v. Mortg. Elec. Regis. Sys., 467 Mass. 160, 171 (2014). Equally, the court considers the allegations not only in the Complaint but may also "[t]ake notice of any fact which judicial notice may be taken, or matters of public record, orders and items appearing in the case record¹³." Merriam v. Demoulas Super Markets, Inc., 464 Mass. 721, 7223 (2013), quoting Schaer v. Brandeis Univ., 432 Mass. 474, 477 (2000); Stevens v. Stevens, 72 Mass. App. Ct. 1105 (2008); Locierco v. Leslie, 948 F. Supp. 10, 12 (D. Mass. 1996).

In order to recover on its Abuse of Process Counterclaim, the defendant must establish that "(1) process was used; (2) for an ulterior or illegitimate purpose; (3) resulting in damage." Harrison

¹³ This includes the Affidavits accompanying the defendant's Opposition to the Plaintiff's Motions.

II, 483 Mass. at 526-27; Vittands v. Sudduth, 49 Mass. App. Ct. 401, 406 (2000); Ladd v. Polidoro, 424 Mass. 196, 198 (1997). Abuse of process is the use of a lawful process primarily for a purpose for which it is not designed. Gutierrez v. Massachusetts Bay Transportation Authority, 437 Mass. 396, 407 (2002). Abuse of process is a “[f]orm of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money.” Vittands, 49 Mass. App. Ct. at 406.

Without question, the defendant’s counterclaim arises out of Allegaert’s use of process in commencing and serving this lawsuit. Here, viewing the counterclaim and granting all reasonable inferences in favor of Harbor View, a reasonable person could conclude that the Plaintiff’s commencement of suit in this matter was made for the purposes of forestalling construction at the hotel as a means of economic coercion and as a means of now challenging permitting granted previously to the hotel which she did not previously dispute. While her suit in this case challenges the 2023 Special Permit granted by the ZBA, that permit relied upon prior grants of Special Permits in 2008, with modifications in 2018 and 2020 for which Plaintiff did not challenge, and indeed, wrote letters of support.

Additionally, Plaintiff’s Complaint alleges that Harbor View violated the “Scout Agreement” as it related to the maintenance of vegetation along the property line. The counterclaim challenges not only whether the Scout Agreement is binding upon the current hotel owner but also has produced photographs accompanying an Affidavit which show the mature vegetation in place on the property line. Further, the Plaintiff’s claims of “Nuisance” and “Emotional Distress” are based upon the putative construction, which has not yet occurred. As such, these claims of the Plaintiff are premature and lack legal heft. Plaintiff knew or should have known at the time of the drafting of the Complaint these claims were not ripe for adjudication which allows for the inference that Allegaert’s filing of suit in this case is motivated by an improper purpose.

It is without question that the defendant/ plaintiff in counterclaim will suffer substantial damages due to the delay in construction caused by this suit.¹⁴

¹⁴ See affidavit of Rod Jane.

Upon review, the court finds the defendant has established a threshold showing of a viable claim for abuse of process. For the aforementioned reasons, the Plaintiff's Motion to Dismiss the Counterclaim pursuant to Mass. R. Civ. P. 12(b)(6) is **DENIED**.

ORDER

Plaintiff's Motion to Dismiss defendant's Amended Counterclaim pursuant to Mass. R. Civ. P. 12(b)(6) is **DENIED**.

B. Plaintiff's Special Motion to Dismiss Defendant's Counterclaim- G.L. c. 231, §59H.

The anti-SLAPP statute, G.L. c. 231 sec. 59H, provides a "procedural remedy for early dismissal of 'lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances, Duracraft v. Holmes Productes Corp., 427 Mass. 156, 161 (1998). The statute is directed at "[m]eritless suits that use litigation to 'intimidate opponents' exercise of rights of petitioning and speech.'" Vittands v. Sudduth, 49 Mass. App. Ct. 401, 413 (2000), quoting Duracraft Corp. v. Holmes Prod. Corp., 427 Mass. 156, 161-164 (1998). The statute was designed to "[i]mmunize parties from claims based on their petitioning activities by allowing a party to file a special motion to dismiss." Vittands, 49 Mass. App. Ct. at 413. The remedy for such suits is the special motion to dismiss, which allows a special movant to seek dismissal of 'civil actions, counterclaims, or crossclaims' based solely on its exercise of the right to petition." G.L. c. 231, §59H.

A party seeking dismissal under the anti-SLAPP statute must make a threshold showing "[t]hrough pleadings and affidavits, that each claim it challenges is based solely on its own protected petitioning activity, and that the claim has no other substantial basis." 477 Harrison Ave., LLC v. Jace Bros., LLC, 483 Mass. 514, 518 (2019) ("Harrison II"). The "[a]ugmented Duracraft framework was devised to be applied sequentially. That is to say, the moving party (Plaintiff) must demonstrate, at the threshold stage, that the claims filed against it, (here, the amended counterclaim) are based solely on her petitioning activity. If, the moving party (here, Plaintiff) satisfies its burden, then the burden shifts to the nonmoving party (here Defendant) to demonstrate at the second state that the anti-SLAPP statute, G.L. c. 231, §59H, does not require dismissal of its

claims”. 477 Harrison Ave., LLC v. JACE Boston, LLC, 483 Mass. 514, 515 (2019). (“Harrison II”). The court’s inquiry here looks to the factual basis for the claim, not the motivation for pursuing it. Office One, Inc., v. Lopez, 437 Mass. 113, 122 (2002).

The nonmoving party can meet its burden in one of two ways: “First it may show that the moving party’s petitioning activity was a ‘sham’ by establishing, by a preponderance of the evidence that...(1) the moving party’s exercise of [her] right to petition was devoid of any reasonable factual support or any arguable basis in law and (2) the moving party’sacts caused actual injury to the responding party.” Blanchard v. Steward Carney Hosp., Inc., 483 Mass. 200, 204 (2019) (“Blanchard II”), citing G.L. c. 231 sec. 59H. Alternatively, the “[n]onmoving party may void dismissal by establishing that its claims, although based on petitioning activity, nonetheless are not SLAPP suits.” Harrison II, 483 Mass. at 522 citing Blanchard II, 483 Mass. at 204. The path requires that the nonmoving party show “[s]uch that the motion judge could conclude with fair assurance”, that each claim was “colorable” and “not brought with the ‘primarily motivating goal’ of chilling” the moving party’s exercise of its right to petition. Harrison II, 483 at 522 citing Blanchard II at 204, 209.

I. Plaintiff’s Initial Burden

The plaintiff seeks dismissal of the defendant’s counterclaim for abuse of process, under the anti-SLAPP statute, G.L. c. 231, §59H. “[T]he ‘anti-SLAPP’ (‘strategic litigation against public participation’) statute, is intended to protect the ‘exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.’ ...It creates a special motion to dismiss for the prompt resolution of SLAPP suits, actions designed not to win, but, rather, ‘to deter or retaliate against individuals who seek to exercise their right of petition.’” North American Expositions Company Limited Partnership v. Corcoran, 452 Mass. 852, 853 (2009) (footnote omitted), quoting Duracraft Corp. v. Holmes Prods. Corp., 427 Mass. 156, 161 (1998) and Wenger v. Aceto, 451 Mass. 1, 4 (2008).

At the first stage of the analysis, the Plaintiff, the moving party, must show that the Defendant’s Counterclaim is based solely on plaintiff’s protected petitioning activity and that the claims alone have no other substantial basis. See, Harrison II, 483 Mass. at 518. The motive behind the petitioning activity is irrelevant to this analysis; rather, the “focus is solely on the conduct

complained of.” Office One, 437 Mass. at 122, citing Fabre v. Walton, 436 Mass. 517, 523-24 (2002). “[I]n assessing the conduct that is complained of, a judge considers only the allegations that are relevant to the discrete causes of action brought.” 477 Harrison Ave., LLC v. Jace Bros., LLC, 477 Mass. 162, 168 (2017) (“Harrison I”). Plaintiff carries her burden at this threshold stage, by showing “(1) the complained conduct is petitioning activity; (2) the petitioning activity is their own petitioning activity; and (3) the nonmoving party’s claims are solely based on the petitioning activity”. Reichenbach v. Haydock, 92 Mass. App. Ct. 567, 572-73 (2017), citing Blanchard v. Steward Carney Hosp., Inc., 477 Mass. 141, 153 n. 19 (2017) (“Blanchard I”).

Defendant/Counterclaim Plaintiff’s abuse of process claim alleges that the Plaintiff has filed an appeal of the ZBA grant of permitting to Harbor View for the purposes of forestalling the development of the premises. The elements of abuse of process claim include petitioning activity and are always based on petitioning activity. The elements are: (1) process was used; (2) for an ulterior or illegitimate purpose; (3) resulting in damages. See, Johnson v. Frei, 93 Mass. App. Ct. 1111 (2018), citing Vittands v. Sudduth, 49 Mass. App. Ct. 401, 406 (2000) quoting Kelley v. Stope and Shop. Cos., 26 Mass. App. Ct. 557, 558 (1998). Plaintiff’s filing of the Complaint in qualifies as process; the defendant avers that the plaintiff’s Complaint is filed for an ulterior purpose (or illegal purpose) again, to prevent the permitted development of the Harbor View and that damages have resulted. “Given that the invocation of process necessarily constitutes petitioning activity for the purposes of the anti-SLAPP statute, G.L. c. 231 sec. 59H, the defendant’s counterclaim is based in the circumstances of this case, on the plaintiff’s petitioning activity. See, Harrison I, 477 Mass. at 169.

As the Plaintiff, moving party, has satisfied its threshold burden to prove that the defendant’s counterclaim is based solely upon its petitioning activity, I now turn to the question of whether the Defendant/Plaintiff in Counterclaim has met its second-stage burden under either the first or second path described above.

II. Second Stage: First Path:

(a) Sham Petitioning

To avoid dismissal under the first path, the defendant must establish by a preponderance of the evidence that the plaintiff’s ZBA Appeal was devoid of any reasonable factual support or any arguable basis in law and that this “sham petitioning” caused them actual injury. See, Blanchard

II, 483 Mass. at 204; Bristol Asphalt Co. v. Rochester Bituminous Products, Inc., 102 Mass. App. Ct. 522, 532 (2023). In determining whether the defendant has met its burden, the Court considers “[t]he pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based”. See, G.L. c. 231 sec. 59H. Proving that the moving party’s petitioning activity was, in essence, a sham presents a “high bar”. See, Blanchard II at 204.

Here, defendant contends that the plaintiff’s lawsuit lacks any reasonable factual support or arguable basis in law. The plaintiff’s Complaint avers five (5) causes of action. (1) G.L. c. 40A sec. 17 “appeal” of the ZBA permitting 2023; (b) Breach of Contract; (c) Detrimental Reliance/Promissory Estoppel/Unjust Enrichment; (4) Nuisance and (5) Emotional Distress.

The plaintiff’s’ G.L.c. 40A sec. 17, despite her professed statements to the contrary is essentially an omnibus appeal of the ZBA permitting granted in 2008, 2018, and 2023. The most recent ZBA permitting in 2023 relates directly back to the prior permitting, which the plaintiff never appealed, indeed, she never opposed. G.L. c. 40A sec. 17 has a twenty (20) day jurisdictional statute of limitations for appeals and the plaintiff’s appeal is untimely.

The plaintiff’s Breach of Contract, Detrimental Reliance/Promissory Estoppel Claims fare no better. The gravamen of these claims relates to the Scout Agreement entered into by the prior owner of the Harbor View. The Scout Agreement is not binding upon the current ownership of Harbor View. See, Nectas v. General Motors Corp., Pontiac Division, 357 Mass. 546, 549 (1970). There are no provisions presented in the record that establish that such an agreement runs with the land or indeed, is binding upon successive owners of the properties. Additionally, plaintiff’s Complaint fails to identify any promise, outside of the Scout Agreement which would be a basis for her equitable claims.

The plaintiff’s claims for Nuisance and Emotional Distress (Counts 4 and 5) are not actionable at this time, as both counts portend future damages should the Harbor View develop the property as permitted. These claims are not ripe for review and courts “[s]hould avoid ‘entangling themselves in abstract disagreements.’”. Citizens for a Safe Chatham Airport, Inc. v. Town of Chatham, 99 Mass. App. Ct. 1115 (2021) citing Abbott Lab. v. Gardner, 387 U.S. 136, 148 (1967); Quincy City Hosp. v. Rate Setting Comm’n, 406 Mass. 431, 439 (1990); Bridgeman v. District Attorney for the Suffolk Dist., 471 Mass. 465, 474 (2015).

Based upon the Motions, Affidavits, Memoranda of Law and materials before this court, all of the plaintiff's petitioning activity was based upon arguments which are legally untenable. It was therefore sham petitioning. Blanchard I, supra at 159.

(b) Injury

To prevail, the defendant must also show that the "petitioning activity at issue caused it injury". Id. The defendant avers it has sustained injury due to construction delays in the project which have arisen during the pendency of this case. The court credits the Affidavit of Rod Jane which elucidates that the defendant while it awaits final determination of this matter, will incur construction costs due to the delay in construction of at least \$3,328,000 not including lost profits and revenue due to the plaintiff's sham petitioning. To the extent that plaintiff contends that the defendant is able to proceed with development pending this litigation and, as such, the defendant has not suffered damages, is unavailing. The defendant does not have to prove its damages with certitude at this stage of the proceedings but must only prove "that the [sham] petitioning activities at issue caused it injury." Blanchard I at 159. The affidavit of Rod Jane establishes the damages for the purposes of this motion. The defendant has satisfied its burden.

III. Stage 2: Second Path

(a) Colorable Claims

As the court has previously ruled that the plaintiff's Complaint is sham petitioning and that the defendant incurred damages, it does not have to reach this issue. However, for completeness, the court will discuss.

Under this alternate path, the defendant could avoid dismissal of the counterclaim upon a showing "[s]uch that the motion judge could conclude with fair assurance", that each claim was "colorable" and "not brought with the 'primarily motivating goal' of chilling" the moving party's exercise of its right to petition. Harrison II, 483 Mass. at 522 citing Blanchard II at 204, 209.

Here, the defendant's counterclaim is not devoid of merit. In the counterclaim the defendant seeks recovery of damages for the harm (economic) it will suffer due to the plaintiff's "legally transgressive acts". See, Blanchard I, 477 Mass. at 160. Viewing the pleadings holistically the court finds that the purpose of the counterclaim was not retaliatory to chill or interfere with the plaintiff's petitioning activity, but just the reverse, to seek compensation for the damages incurred as a result of the sham petitioning activity.

ORDER

The court finds that the defendant's claims are based upon the plaintiff's petitioning activity, and they may proceed because the plaintiff's petitioning activity was a sham that caused injury to the defendant. The court **DENIES** the Plaintiff's Special Motion to Dismiss.

So Ordered,

Elaine M. Buckley, Judge

December 11, 2023

CERTIFICATE OF COMPLIANCE

I, Kevin P. O'Flaherty, counsel for Defendant-Appellee Harbor View Hotel Owner, LLC hereby certify that the foregoing Application for Further Appellate Review complies with the rules of the Court that pertain to the filing of briefs, including, but not limited to Rules 16, 20 and 27.1 of the Massachusetts Rules of Appellate Procedure.

Compliance with the applicable rules was ascertained as this brief was produced in 12-point monospaced Courier New font and contains no more than 10 pages setting out why further appellate review is appropriate.

/s/ Kevin P. O'Flaherty
Kevin P. O'Flaherty

CERTIFICATE OF SERVICE

I, Kevin P. O'Flaherty hereby certify that on the 8th day of May 2025, and pursuant to Mass. R. App. P. 13, I served the foregoing Application for Further Appellate Review of Defendant-Appellee Harbor View Hotel Owner, LLC by causing a copy thereof to be delivered via email to counsel of record listed below:

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