
Commonwealth of Massachusetts Supreme Judicial Court

Middlesex County

No. 2026-P-0147

MARIA B. del ROSARIO, *et al.*,

Plaintiffs,

– against –

STOW BOARD OF HEALTH, *et al.*,

Defendants.

ON APPEAL FROM THE ORDER OF THE LOWELL DIVISION OF THE TRIAL
COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

APPLICATION FOR DIRECT APPELLATE REVIEW

BRIAN BURKE
BBO # 542198
LAW OFFICES OF BRIAN BURKE
Attorney for Plaintiffs
P.O. Box 904
Stowe, Massachusetts 01775
(508) 767-1400

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	4
I. Request for Direct Appellate Review	8
II. Statement of Prior Proceedings	8
III. Short Statement of Facts.....	11
IV. Statement of Issues of Law on This Appeal.....	21
V. Brief Argument in Support of this Appeal	22
A. THE MUNICIPAL DEFENDANTS FOUND, AS THEY SHOULD HAVE, THAT THE INTERIOR REMODELING SOUGHT BY PLAINTIFFS DID NOT ADD ANY ACTUAL BEDROOMS TO 125 BIRCH HILL AND THEREFORE WOULD NOT INCREASE THE DESIGN FLOW TO ITS SEPTIC SYSTEM UNDER TITLE 5	22
B. BY ITS EXPRESS TERMS AND CLEAR PURPOSE, THE BEDROOM RATIO PRESUMPTION DOES NOT APPLY OUTSIDE THE CONTEXT OF LAA’S LICENSING OR APPROVING DESIGNS FOR CONSTRUCTING OR UPGRADING AN ONSITE SEWAGE DISPOSAL SYSTEM	24
C. THE MUNICIPAL DEFENDANTS COULD NOT HAVE VALIDLY DETERMINED EVEN ON AN <i>EX POST FACTO</i> BASIS THAT §15.204 AS PROPERLY CONSTRUED AND APPLIED REQUIRED THE PLAINTIFFS TO UPGRADE 125 BIRCH HILL’S SERVICING SEPTIC SYSTEM	27
VI. Statement of Reasons Supporting the Appropriateness of Direct Appellate Review.....	29
A. The Questions Raised in this Appeal Present a Case of First Impression on the Application of the Bedroom Ratio Presumption Outside the Context of Constructing, Expanding, And Upgrading On-Site Sewage Disposal Systems	31

B. The Superior Court Decision Conflicts with Express DEP
Guidance for Interpreting Title 5 in Furtherance of the AHA’s
Aims of Increasing the Commonwealth’s Stock Of
Affordable Housing.....34

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Chestnut Hollow, LLC v. Sullivan</i> , 2017 WL 5907508 (Mass. Land Ct. 2017, Vhay, J.)	30
<i>City Elec. Supply Co. v. Arch Ins. Co.</i> , 481 Mass. 784 (2019)	23
<i>Fellsway Realty Corp. v. Bldg. Comm’r of Medford</i> , 332 Mass. 471 (1955)	30
<i>In the Matter of Geomatrix Systems, LLC</i> , 2020 WL 2616479	29
<i>In the Matter of Joseph N. Alosso and Evelyn R. Alosso</i> , 2010 WL 2465099	28
<i>Lussier v. Zoning Bd. of Appeals of Peabody</i> , 447 Mass. 531 (2006)	26
<i>Sampson v. Treasurer & Receiver Gen.</i> , 282 Mass. 119 (1933)	24
<i>Shirley Wayside Ltd. P’ship v. Bd. of Appeals of Shirley</i> , 461 Mass. 469 (2012)	28
<i>Stevens v. Sherborn Bd. of Health</i> , 2017 WL 3251495 (Mass. Land Court, Speicher, J.)	27
<i>TBI, Inc. v. Bd. of Health of N. Andover</i> , 431 Mass. 9 (2000)	26, 27
Statutes & Other Authorities:	
310 Mass. Code Regs. § 15.000.....	6
310 Mass. Code Regs. § 15.001(1).....	6
310 Mass. Code Regs. § 15.002.....	<i>passim</i>
310 Mass. Code Regs. § 15.021.....	28
310 Mass. Code Regs. § 15.022.....	20, 28
310 Mass. Code Regs. § 15.024(3).....	20, 28

310 Mass. Code Regs. § 15.203(1).....	12, 28, 29
310 Mass. Code Regs. § 15.204.....	<i>passim</i>
310 Mass. Code Regs. § 15.301(1-4).....	23
310 Mass. Code Regs. § 15.301(5).....	18, 22
310 Mass. Code Regs. § 15.303(1).....	7
310 Mass. Code Regs. § 15.351(1).....	14
310 Mass. Code Regs. § 15.401.....	19
310 Mass. Code Regs. § 15.403.....	19
310 Mass. Code Regs. § 15.411(1).....	19, 34
310 Mass. Code Regs. § 15.414.....	17
G. L. c. 21A, § 13.....	6
G. L. c. 40A, § 3(11).....	7, 23, 35
G. L. c. 249, § 4.....	9, 17
Mass. Acts c. 150, § 8.....	7
Mass. Const. Pt. 1, art. X.....	30
Mass. Const. Pt. 1, art. XI.....	30
Mass.G.Evid. § 301(d).....	26
Mass.R.App.P. 9(e)(2).....	11
Mass.R.App.P. 11.....	35
Mass.R.App.P. 11(b)(5).....	29
Mass.R.App.P. 16(d).....	8
Mass.R.App.P. 27.1.....	35
Mass.R.Civ.P. 12(c).....	10
Mass.R.Civ.P. 15(a).....	9
Mass.R.Civ.P. 54(b).....	11
Superior Court Rule 9A.....	10

This appeal presents a novel issue of regulatory interpretation which significantly affects the interests of any member of the public who owns any home serviced by an underground on-site sewage disposal system. 310 Code Mass. Regs. §15.000, *et seq.*, of the State Environmental Code (hereinafter, "Title 5") was promulgated by the Massachusetts Department of Environmental Protection ("DEP") under the statutory authority granted in and encoded at G. L. c. 21A, § 13. Title 5 is expressly purposed "to provide for the protection of public health, safety, welfare and the environment by requiring the proper siting, construction, upgrade, and maintenance of on-site sewage disposal systems." 310 Mass. Code Regs. §15.001(1): Purpose, Authority and Related Provisions. In the main, these regulations supply design criteria and specific sanitation engineering parameters for safely siting, designing, constructing, expanding, and upgrading onsite sewage disposal systems. By its express terms, clearly obvious purpose, and overall regulatory framework, Title 5's regulations are irrelevant to Massachusetts homeowners who are applying for permits to perform interior remodeling to their property's existing structures and which do not involve actual work to the servicing septic systems and do not impair those system's operations.

Specifically, the appertaining Title 5 regulations on which this appeal is predicated do not grant local boards of health and health agents the power to demand Massachusetts homeowners upgrade their property's servicing septic

systems unless and until that system is documented and demonstrated to be failing or is otherwise dangerous to public health, safety, and the environment. See 310 Mass. Code Regs. §15.303(1): Systems Failing to Protect Public Health and Safety and the Environment (hereinafter, “§15.303”). The decision being appealed from nevertheless construes inapposite Title 5 regulations in such a way as to empower any municipality to demand costly and expensive upgrades of perfectly functioning and well-maintained septic systems. So erroneously construing and applying these Title 5 regulations out of the contexts for which they were plainly intended and in contravention of their even plainer express language, seriously undermines homeowners’ rights to use and enjoy their property as guaranteed in the Massachusetts Declaration of Rights.

Furthermore, upholding this decision on appeal would contravene express DEP guidance issued to interpret these Title 5 regulations. Additionally, failing to overturn this legally untenable construction and application of the implicated Title 5 regulations would irreconcilably conflict with cognate guidance the DEP has furnished for interpreting the recently enacted Affordable Homes Act, 2024 Mass. Acts c. 150, § 8, codified as amendments to the Massachusetts Zoning Act at G.L. c. 40A, § 3(11) (hereinafter, the AHA). In consequence thereof, the Legislature's eminently reasonable efforts to increase affordable housing stock available to Massachusetts residents could be severely jeopardized.

I. Request for Direct Appellate Review

Now come Maria B. del Rosario and Brian Burke (hereinafter, the "Plaintiffs")¹ who are homeowners in the Town of Stow (hereinafter the "Town"), a municipal corporation duly organized under the laws of the Commonwealth of Massachusetts, and respectfully petition the Supreme Judicial Court to grant their Application for Direct Appellate Review of their appeal against the Stow Board of Health (hereinafter, the Stow BOH), which is a municipal Department of the Town with licensing authority over Title 5 in accordance with the terms of those regulatory provisions , and the Town's Chief Health Agent James Garreffo who is engaged by the Town and statutorily charged with joint and overlapping licensing responsibilities (hereinafter, the "CHA"). These appellees are hereinafter jointly referred to as the "Municipal Defendants."²

II. Statement of Prior Proceedings

On April 23, 2023, Plaintiffs, through their contractor, filed an application with the Town's Building Commissioner for a permit to conduct interior remodeling to the basement of their home, the single-family dwelling they own as tenants in the entirety at 125 Birch Hill Road in Stow, Massachusetts (hereinafter

¹ Who are Husband and wife; Burke is also counsel representing the Plaintiffs.

² See Mass.R.App.P.16(d).

"125 Birch Hill"). Plaintiffs' application sought a permit to remodel three existing rooms in 125 Birch Hill's basement. The CHA declined to grant Plaintiffs' permitting application on his own authority and set down a hearing before the Stow BOH on May 18, 2023. At that hearing, the Stow BOH, in consultation with the CHA, entered a decision conditionally denying the Plaintiffs' interior remodeling permit until they recorded a Bedroom Count Deed Restriction (hereinafter, the "bedroom deed restriction"). Exhibit A.

On July 17, 2023, Plaintiffs filed their Verified Complaint in the Lowell Division of the Middlesex Superior Court averring five counts, including Count I: a petition for Writ of Certiorari pursuant to G. L. c. 249, §. 4 -- the sole count subject to this appeal. Plaintiffs' Count I certiorari petition sought judicial review overturning the decisions of the Municipal Defendants to conditionally deny their application to permit interior remodeling in the basement of 125 Birch Hill unless they first recorded the demanded bedroom deed restriction. Plaintiffs amended their pleadings as of right pursuant to Mass.R.Civ.P. 15(a) on August 2, 2023, appending as a new exhibit, *inter alia*, a letter received by Plaintiffs' counsel from the Town's counsel via email dated July 18, 2023.³

³ As more fully related in the following section of this application, the Town's counsel's July 18, 2023 letter revised the legal grounds on which the Municipal Defendants had predicated their permitting decision. In their original verified complaint, Plaintiffs had pled a count seeking injunctive relief allowing the long-delayed basement remodeling to proceed without conditions, and a hearing was

On September 29, 2024, the parties filed their cross motions for judgment on the pleadings pursuant to Mass.R.Civ.P. 12(c) along with supporting Memoranda in accordance with Superior Court Rule 9A.⁴ By joint motion, the parties then agreed that each side could present a written opposition to one another's Rule 12(c) motions, which agreement was reduced to a joint motion that was filed and entered as a court order on September 11, 2024.⁵

On February 27, 2025, Superior Court Associate Justice Brent Tingle heard the parties on their cross motions for judgment on the pleadings. On May 6, 2025, Justice Tingle entered a Memorandum and Order of Decision on several, but not all, the counts that the Plaintiffs had pled, most significantly, on their Count I claims seeking certiorari review (hereinafter the "Superior Court Decision").

scheduled on their motion for preliminary injunction for July 24, 2023. After Plaintiffs' counsel received the July 18, 2023, letter, the parties stipulated that the basement remodeling in 125 Birch Hill could advance so long as Plaintiffs would not transfer title to this property. This stipulation was entered as an order of the court on July 21, 2023, and the hearing on Plaintiffs' preliminary injunction motion was taken off the court's schedule. Since that date, remodeling of 125 Birch Hill's basement has been completed, but the Town's Building Commissioner has yet to issue a Certificate of Occupancy.

⁴ By that point in the litigation, the Municipal Defendants had become represented by successor and current counsel. Both Plaintiffs' counsel and Municipal Defendants' successor counsel had previously jointly agreed to file these competing motions on or before that date, as more fully explained in the Plaintiffs' motion for judgment on the pleadings: Exhibit B.

⁵ Only Plaintiffs took advantage of the opportunity granted by this Court Order to file an opposition brief.

Exhibit C. In part, the Superior Court Decision denied Plaintiffs' motion for judgment on the pleadings as to Count I and granted the Municipal Defendants' cross-motion on this count.

On June 13, 2025, Plaintiffs moved for separate entry of judgment on Count I of their Amended Verified Complaint pursuant to Mass.R.Civ.P. 54(b). Associate Justice Tingle granted Plaintiffs separate entry of judgment as to their Count I claims on September 29, 2025. Exhibit D. Plaintiffs filed their notice of appeal on the separately entered judgment on October 27, 2025.

On January 21, 2026, the Clerk of the Middlesex Superior Court gave notice to the Massachusetts Appeals Court that the record on this appeal had been assembled pursuant to Mass.R.App.P. 9(e)(2), also copying the parties by mail as required by that rule. A certified copy of the Middlesex Superior Court Docket Sheet is annexed to this Application as Exhibit E.

On February 9, 2026, Plaintiffs docketed this appeal in the Massachusetts Appeals Court.

III. Short Statement of Facts

Plaintiffs' permitting application sought solely to remodel three existing rooms in the basement of 125 Birch Hill. This remodeling would not add any rooms in 125 Birch Hill, nor would it add any more bedrooms than the four existing on this property. The septic system servicing 125 Birch Hill was rated to

accommodate design flows for a four-bedroom single family dwelling, and that use would not change after the basement remodeling. See 310 Code Mass. Regs.

§15.203(1): Design Flows (hereinafter “§15.203”).⁶

Nevertheless, Plaintiffs’ interior remodeling permit application filed with the Town’s Building Commissioner came before the CHA and the Stow BOH. The Municipal Defendants are the Local Approving Authorities (LAA’s) for the Town recognized by Title 5 for licensing permits, approvals, and variances on the design, siting, construction, expansion, and upgrading of septic systems with 125 Birch Hill’s design flows and type.⁷

The CHA refused to exercise his independent authority to grant Plaintiffs’ interior remodeling permit, citing to a Municipal Regulation. The CHA maintained

⁶ "Design flow" is the quantity of sanitary sewage, expressed in gallons per day (GPD) for which a system must be designed in accordance with 310 CMR 15.203." 310 Code Mass. Regs. § 15.002: Definitions. The design flow criteria listed in § 15.203 for various “Types of Establishments,” including single family dwellings such as 125 Birch Hill, operate as a rough predictive gauge of the number of gallons of sewage that all components of an onsite sewage disposal system will receive daily, and therefore must be capable of sanitarily treating, based on the expected number of regular users. “Design flow is equivalent to estimated generated flow for the proposed use plus a factor representing flow variations.” § 15.203(1),

⁷ An LAA is defined as “[t]he board of health or its authorized agent or an agent of a health district . . . acting on behalf of the applicable board of health.” 310 CMR 15.002. Therefore, both the Stow BOH and the CHA were jointly vested with authority under the Title 5 for all necessary permitting of septic systems in the Town as well as approving upgrades and variances.

that the terms of this Municipal Regulation were sufficiently broad to allow interpolation of parts of the definition of Bedroom in §15.002 to Plaintiffs' interior remodeling permit, most pertinently the “bedroom ratio presumption” contained therein.⁸ Accordingly, the CHA set Plaintiffs’ application down for hearing before the Stow BOH. Afterwards, both the CHA and the Stow BOH disregarded Plaintiffs’ counsel’s numerous verbal and written requests that they seek advice from legal counsel regarding their overly broad reading of the Municipal Regulation’s terms.

At the May18, 2023 ZOOM hearing on this interior remodeling permitting, Plaintiffs' counsel established without demur from the Municipal Defendants that 125 Birch Hill's servicing septic system had always been regularly pumped and emptied every two years, properly maintained, and had never failed during their entire ownership of this property.⁹ Plaintiffs’ counsel strenuously contended that

⁸ Living rooms, dining rooms, kitchens, halls, bathrooms, unfinished cellars and unheated storage areas over garages are not considered bedrooms. Single family dwellings shall be presumed to have at least three bedrooms. Where the total number of rooms for single family dwellings exceeds eight, not including bathrooms, hallways, unfinished cellars and unheated storage areas, the number of bedrooms presumed shall be calculated by dividing the total number of rooms by two then rounding down to the next lowest whole number. The applicant may design a system using design flows for a smaller number of bedrooms than are presumed in this definition by granting to the Approving Authority a deed restriction limiting the number of bedrooms to the smaller number.

⁹ The Municipal Defendants had access to 125 Birch Hill's servicing septic system's pumping records, including reports on its operating condition at all those

the Municipal Regulation's terms were clearly inapplicable to his and his wife's interior remodeling permit and could not trigger the Municipal Defendants' authority to interpolate the bedroom ratio presumption in approving this permitting.

Nonetheless, the CHA informed the Stow BOH that the Town's Assessor Records indicated that 125 Birch Hill's basement was unfinished, but the plans submitted along with Plaintiffs' permitting application showed that this basement had been finished. The CHA therefore contended that by application of the bedroom ratio presumption ensconced in the Title 5's definition of Bedroom, 125 Birch Hill should be deemed to contain five bedrooms because its total room count with a finished basement now consisted of 11 countable rooms but its serving septic system was rated for a four-bedroom design flow. The CHA further maintained that the following sentence in §15.002's definition of Bedroom permitted Plaintiffs to overcome the presumed number of bedrooms in 125 Birch

intervals. 310 Mass. Code Regs. § 15.351(1): System Pumping and Routine Maintenance ("Whenever a system component including, but not limited to, a septic tank, tight tank, cesspool, grease trap, pump chamber or distribution box is pumped, its condition shall be noted by the system pumper on a system pumping form approved by the Department, and the results shall be submitted by the system pumper to the [LAA] within 14 days from the pumping date.")

Hill by recording a deed restriction limiting its use to the existing four actual bedrooms.

In the course of this hearing, Plaintiffs' counsel established to the satisfaction of the Stow BOH and the CHA that 125 Birch Hill's basement had been finished when he and his wife acquired this property approximately thirty years previously. Additionally, Plaintiffs' counsel also proved by substantial evidence that 125 Birch Hill only contained four bedrooms and remodeling three existing rooms in its basement would not increase that actual number. The CHA and Stow BOH implicitly and explicitly accepted this proof in their findings: the Municipal Defendants would not have demanded a bedroom restriction limiting the number of bedrooms in Plaintiffs' home to four if they had not found that it had always contained and would continue to contain any more bedrooms after approving the interior remodeling. Notwithstanding this finding, the Municipal Defendants then expressly determined they were authorized to employ and then apply the bedroom ratio presumption retroactively in deciding Plaintiffs permitting application, declaring that they had a long-standing, unwritten policy of "right sizing" residential structures when any permitting application came before them for approval. The Stow BOH's rationale for demanding a bedroom deed restriction in return for granting the Plaintiffs' interior remodeling permit was that at some point in the past they encountered an unspecified number of situations where Stow

property owners attempted to market their homes as suitable for accommodating more bedrooms than the servicing septic system was designed to accommodate. Accordingly, the Stow BOH and the CHA denied Plaintiffs' permitting application until they first recorded a deed restriction limiting the number of bedrooms in 125 Birch Hill to four in perpetuity.

On the following day, the CHA, at the direction of the Stow BOH, emailed Plaintiffs' counsel a template for the demanded bedroom deed restriction which he and his wife were required to convert, research, fill out, execute, and record with the Middlesex Registry of Deeds – all at their expense, including any legal fees for reviewing and recording that deed restriction. A copy of this email attaching the bedroom deed restriction form is Exhibit A hereto.¹⁰

On June 27, 2023, Plaintiffs' counsel delivered a written demand to the Town's administrator, copying the CHA and the Stow BOH, for reversal of the decision preconditioning his and his wife's interior remodeling permit and to grant this application unconditionally because the Municipal Regulation could not be read broadly enough to trigger the Municipal Defendants' authority to render any other decision. And in that written request, Plaintiffs' counsel notified the Town

¹⁰ As stated in the CHA's email, the deed restriction form supplied to appellant's counsel was attached thereto, and it was also reproduced at the bottom of that email. This form is available on the DEP's website. <https://www.mass.gov/doc/bedroom-count-deed-restriction-0/download>. Exhibit A is also part of the Board Record filed in the Superior Court proceedings.

and the Municipal Defendants that unless this relief was granted, he would have no choice but to file a civil action for, *inter alia*, certiorari relief within sixty days of the May 18, 2023 hearing. This written request repeated Plaintiffs' counsel's previous urgings to the Municipal Defendants that they seek legal counsel regarding their overly broad reading of the Municipal Regulation on which their decision was expressly grounded.

One day after the sixty-day deadline for filing a petition for writ of certiorari under G. L. c. 249, § 4, the Town's counsel emailed Plaintiffs' counsel a response to his June 27, 2023 demand upon the Town in which he conceded that the Municipal Regulation did not apply to his and his wife's permitting application. Nonetheless, Town Counsel's response invoked a Title 5 regulation which had never been specifically raised during the proceedings before the Municipal Defendants that he asserted would have given his clients the right to order an upgrade of 125 Birch Hill's servicing septic system. 310 Code Mass. Reg. §15.204: Increases in Design Flow to System (hereinafter "§15.204").¹¹ The Town's counsel

¹¹ No person shall increase the actual or design flow to any cesspool or to any other system above the existing approved capacity or change the type of establishment of a facility served by a cesspool, unless the cesspool or system is upgraded first. Upgrades to accept increased design flow shall be performed in full compliance with the requirements applicable to new construction unless a variance is allowed pursuant to 310 CMR 15.414. For purposes of 310 CMR 15.204, the approved design flow shall be the flow listed in the most recent Disposal Works Construction Permit.

the justified his clients' demand for a bedroom deed restriction in lieu of ordering a septic system upgrade.

In briefing their motion for judgment on the pleadings, Plaintiffs argued, *inter alia*, that the bedroom ratio presumption by its express terms was inapplicable to permitting interior remodeling of existing structures which did not involve construction, expansion, or upgrade of a septic system. Plaintiffs further argued that §15.204 expressly applied only to those person(s) responsible for increasing the design flow to septic systems even presumptively. Because they were not responsible for adding to the total countable number of rooms as they had not finished its basement, Plaintiffs argued that §15.204 did not trigger the Municipal Defendants authority to order them to upgrade their septic system. Thus, the demand for a bedroom deed restriction was similarly unauthorized by Title 5. In briefing his clients' motion for judgment on the pleadings, Municipal Defendants' successor counsel cited to yet another Title 5 regulation which he contended also authorized his clients to order upgrading of 125 Birch Hill's septic system. 310 Code Mass. Reg. §15. 301(5): System Inspection (hereinafter, §15. 301"). Plaintiffs' counsel rebutted that further contention in the additional opposition memorandum that the parties agreed could be filed.

The Superior Court Decision granting the Municipal Defendants judgment on the pleadings held that they correctly applied the bedroom ratio presumption to

interior remodeling permitting, and because they would have been entitled to demand that Plaintiffs upgrade 125 Birch Hill's servicing septic system in, they were likewise empowered to demand a variance type condition authorized by Subsection 1 of 310 Code Mass. Reg. §15.401: Conditioning of Variances (hereinafter, "§15. 401"). The Superior Court below reached this holding notwithstanding the fact that Plaintiffs had never been ordered either to file for a Local Upgrade Approval in accordance with 310 Code Mass. Reg. §15.403: Local Upgrade Approvals (hereinafter, "§15. 403") or submitted a written request for a variance subsequent to filing for a septic system upgrade pursuant to 310 Code Mass. Regs. §15.411(1): Process for Seeking a Variance from Local Approving Authorities (hereinafter, "§15. 411").¹² The Superior Court Decision nevertheless disregarded all these requirements and prerequisites set forth in Subpart E of Title 5 for approving upgrades and variances as mere technicalities causing no manifest

¹² Ordinarily, applications for Local Upgrade Approvals subject to an LAA's determination must be accompanied by a Disposal System Construction Permit (hereinafter, a "DSCP") which would be required for permitting any newly constructed or expanded underground on-site sewage disposal system. 310 Mass. Code Regs. § 15.401: General Provisions (hereinafter, "§ 15.401"). Furthermore, the following subsection of § 15.401 requires that "[i]n general, full compliance with the provisions of [Title 5] is presumed to be necessary for the protection of public health, safety, welfare and the environment. Any requests to vary from the standards of [Title 5] by means of a local upgrade approval or a variance shall be carefully reviewed by the [LAA] and, where required, by the [DEP]."

injustice to the Plaintiffs under the certiorari review standard. Exhibit C at 8 and n.11.¹³

The Superior Court Decision additionally noted and accepted the Municipal Defendants finding that 125 Birch Hill's basement had been finished before plaintiffs had acquired their home. In overcoming Plaintiffs' argument that they could therefore not be the person charged with increasing, even presumptively, their home's servicing septic system, however, the Superior Court below cited to two other Title 5 regulations which he determined imposed an "affirmative duty" upon the Plaintiffs to bring 125 Birch Hill into compliance with the presumed number of bedrooms by either upgrading its servicing septic system or accepting the variance type condition which the Municipal Defendants had demanded: 310 Code Mass. Regs. §15.022: Duty of Compliance (hereinafter "§15.022"); 310 Mass. Code Regs. §15.024(3): Violations of 310 CMR 15.000 (hereinafter "§5.024(3)"). Exhibit C at 8 and n. 9. These two additional Title 5 regulations had

¹³ Of course, Plaintiffs brought these regulatory provisions to the attention of the Superior Court below not to adduce evidence of manifest injustice, but rather to assist the Associate Justice in correctly interpreting the regulations which were appertaining, especially §15.204, in view of Title 5's purposes and within the context of its overall regulatory framework as discussed *infra* in Section VI of this application.

never been raised, briefed, or argued by any of the parties before entry of the Superior Court Decision.

IV. Statement of Issues of Law on This Appeal

- A. Whether the Municipal Defendants' Finding that the Interior Remodeling Sought by Plaintiffs would not Add any Actual Bedrooms to 125 Birch Hill Dispositively Established that this Permitting would not Increase the Design Flow to its Servicing Septic System under Title 5
- B. Whether the Municipal Defendants Improperly Applied the Bedroom Ratio Presumption Outside the Context of Permitting and Approving Designs for the Construction, Expansion, or Upgrading of Underground Sewage Disposal Systems.
- C. Whether §15.204 Validly Triggered the Municipal Defendants Authority to Demand an Upgrade of 125 Birch Hill's Servicing Septic System where Plaintiffs were Not the Person[s] who – Even Presumptively -- Increased the Design Flows to that System.

The Superior Court Decision, which is Exhibit C hereto expressly notes on page 5 that Plaintiffs had argued these legal issues; therefore, they were raised in the lower court and properly preserved.¹⁴

¹⁴ Plaintiffs argue that the Board of Health erred in conditioning their remodel permit because there was no triggering event for it to apply Title 5 analysis and because the Board of Health applied Title 5's presumptive bedroom calculation out of context.

V. Brief Argument in Support of this Appeal

A. THE MUNICIPAL DEFENDANTS FOUND, AS THEY SHOULD HAVE, THAT THE INTERIOR REMODELING SOUGHT BY PLAINTIFFS DID NOT ADD ANY ACTUAL BEDROOMS TO 125 BIRCH HILL AND THEREFORE WOULD NOT INCREASE THE DESIGN FLOW TO ITS SEPTIC SYSTEM UNDER TITLE 5

There is no sound, rational, or approved justification for an LAA to count anything but the actual number of bedrooms when permitting interior remodeling for an existing single-family dwelling which does not involve constructing, expanding, or upgrading its servicing underground onsite sewage disposal system. DEP guidance directs LAA's to take into account solely the number of actual bedrooms proposed in determining the approved design flows when permitting comparable construction projects. On its government website, the DEP maintains a webpage entitled "Repairs and New Construction for Title 5: Frequently Asked Questions." Exhibit F. On this webpage, the DEP purports to answer a hypothetical question directed to the Title 5 requirements for homeowners planning additions to residential dwellings without adding any bedrooms. *Id.* §15.301(5) mandates inspections of servicing septic system whenever a building permit is sought in which the proposed construction would, *inter alia*, increase "design flows." Although the question answered on its webpage concerns inspection requirements, the DEP plainly does not consider interior remodeling, even those projects which

add rooms to a residential property but which do not add any actual bedrooms, to increase design flows to the servicing septic system.¹⁵

Furthermore, the DEP has recently issued correspondingly equivalent guidance to LAA's in implementing the AHA enacted last year. G.L. c. 40A, § 3(11). This statute prohibits every Massachusetts municipality from prohibiting by right construction of Accessory Dwelling Units ("ADU's") in residentially zoned districts, those are, apartments in existing structures or accessory dwellings erected on the same property. Expressly exempted from this amendment to the Massachusetts Zoning Act, however, are reasonable regulations, including, where applicable, Title 5. In assisting local Boards of Health in interpreting Title 5 regulations in relation to permitting ADU construction, the DEP once again issued a Frequently Asked Questions guidance page which is published on its government website. Exhibit G. And in answering whether an LAA should consider the total number of rooms that an ADU would add to the entire residential dwelling serviced by a single septic system, the DEP once again directed that permitting decisions

¹⁵ It should also be noted that §15.301(1-4) mandates septic system inspections in virtually every arm's-length sale of real property before the closing. Accordingly, the bedroom deed restriction demand is unnecessary and would render these Title 5 inspection regulations superfluous surplusage. Cf. *City Elec. Supply Co. v. Arch Ins. Co.*, 481 Mass. 784, 790 (2019) ("At the same time, however, '[w]e do not 'interpret a statute so as to render it or any portion of it meaningless.'"") (citations to internal quotations omitted),

should consider solely the actual number of bedrooms that would be added by the construction or erection. *Id.* Fairly clearly, therefore, the DEP regards its own regulations as foreclosing LAA's from determining any cognizable design flow increase when permitting interior remodeling to existing structures which do not involve adding any actual bedrooms or upgrades to those structures' servicing septic systems.

It is axiomatic that the DEP's interpretation of its own regulations should be accorded especial deference in any judicial review of LAA's licensing actions. See *Sampson v. Treasurer & Receiver Gen.*, 282 Mass. 119, 122 (1933). While its guidance to homeowners and LAA's does not represent adjudication construing the non-applicability of Title 5's design flow standards in deciding to permit projects which do not add bedrooms to an existing residential structure, the DEP almost certainly would hold so if presented with this precise legal question.

B. BY ITS EXPRESS TERMS AND CLEAR PURPOSE, THE BEDROOM RATIO PRESUMPTION DOES NOT APPLY OUTSIDE THE CONTEXT OF LAA'S LICENSING OR APPROVING DESIGNS FOR CONSTRUCTING OR UPGRADING AN ONSITE SEWAGE DISPOSAL SYSTEM

The Municipal Defendants' sole justification for conditionally denying Plaintiffs' application to permit interior remodeling of their basement was that they were entitled to calculate the number of bedrooms based upon 125 Birch Hill's total room count according to the bedroom ratio presumption and its subsequent

language allowing them to request a bedroom deed restriction. Nonetheless, the Municipal Defendants' attorney maintained that his clients permissibly found a theoretically possible, but not actual, fifth bedroom justifying their demanding a bedroom deed restriction from the Plaintiffs. But this was not a factual finding: it represents merely a rote recitation of the formula contained in the bedroom ratio presumption and calculating therefrom without any regard to the presumption's express language and patent purpose.

The preface to Title 5's definitional section declares that "[f]or the purposes of [Title 5], the following [defined] terms shall have the following meanings, **unless the context clearly requires otherwise.** §15.002 (emphasis supplied).

When reviewing plans for permitting onsite sewage disposal systems accompanying an LAA's permitting of New Construction, presuming the number bedrooms based upon total expected room count makes perfect sense. But this formula for calculating design flows was never meant to contravene or overcome actuality by substituting design flows parameters for any speculative possible future number of bedrooms in an existing single-family dwelling. The last sentence of 15.002's bedroom definition demonstrates unmistakably that the preceding sentences do not apply to interior remodeling which involves no design work to a septic system. As used therein, applicant must be read as meaning someone applying with DSCP design plans which is required for both New

Construction and a Local Upgrade Approvals – the only relevant licensing which Title 5 contemplates or controls.

Assuming *in arguendo* that the bedroom ratio presumption should be applied outside permitting and approving designs for constructing, expanding, or upgrading septic systems – which it should not – it is just that: a mere “presumption.” And because that term is undefined in Title 5, the DEP must be imputed to have promulgated the term “presumption” purposefully and according to its conventional, common law meaning. *See Lussier v. Zoning Bd. of Appeals of Peabody*, 447 Mass. 531, 534 (2006). Therefore, the bedroom ratio presumption must be construed as any evidentiary presumption, and as such, it can be rebutted – as the Plaintiffs did here in the course of the May 18, 2023 Stow BOH hearing. *See TBI, Inc. v. Bd. of Health of N. Andover*, 431 Mass. 9, 11-13 (2000).

Consequently, the Superior Court Decision’s ruling on page 7 that Plaintiffs would only be able to overcome the bedroom ratio presumption by showing that 125 Birch Hill "could only accommodate four bedrooms based on the definition [of bedroom]," misapprehends the rules of, and reasons for, evidentiary presumptions. See Mass.G.Evid. § 301(d): Civil Cases. Construing a presumption in such a way that can only be overcome by disproving speculative or theoretical facts, conditions, or events that might conceivably come into existence in the future can never be effectively rebutted and is no way a presumption. Had it intended the

bedroom ratio presumption to be applied otherwise, the DEP would have expressed this term as an absolute, irrebuttable, or conclusive presumption, that is, as a rule of law. See *TBI, Inc. v. Bd. of Health of N. Andover*, 431 Mass. at 13.¹⁶

C. THE MUNICIPAL DEFENDANTS COULD NOT HAVE VALIDLY DETERMINED EVEN ON AN *EX POST FACTO* BASIS THAT §15.204 AS PROPERLY CONSTRUED AND APPLIED REQUIRED THE PLAINTIFFS TO UPGRADE 125 BIRCH HILL'S SERVICING SEPTIC SYSTEM

Plaintiffs contend that §15.204 never would have lawfully triggered the Municipal Defendants' Title 5 authority demand an upgrade of 125 Birch Hill's servicing septic system because they were not the persons who had increased, even presumptively, the design flow to their home. See *Stevens v. Sherborn Bd. of Health*, 2017 WL 3251495, at *7 (Mass. Land Court, Speicher, J.). Nonetheless, the Municipal Defendants expressly decided to apply the bedroom ratio presumption **retroactively** in order to demand Plaintiffs record a bedroom deed. But because §15.204's upgrade obligations are expressed in the present tense, it failed to trigger the Municipal Defendants authority to demand an upgrade even by employing an *ex post facto* rationale. The Superior Court Decision's citation to two other Title 5 regulations, without analyzing their language or their rightful place in the Title 5 regulatory framework, in order to overcome this triggering

¹⁶ In this precise regard, it is highly significant that the DEP guidance reproduced in Exhibits F and G do not mention, refer, or call for the application of the bedroom ratio presumption by LAA's.

requirement do not validly place Plaintiffs under an "affirmative duty" to come into compliance with a presumed five-bedroom design flow level. §15.022 merely imposes joint and several liability on both “owners and operators” of a facility with "the duty to comply" with Title 5’s permitting and approval regulations and render them equally liable with system designers, installers, and inspectors for discharging sewage into a system without LAA approval. See 310 Code Mass. Regs. §15.021: Certificate of Compliance. Compare *In the Matter of Joseph N. Alosso and Evelyn R. Alosso*, 2010 WL 2465099, *9 (Recommended Final Decision of DEP Office of Appeals and Dispute Resolution on Enforcement Order Appeal, Jones, PO).

§15.002 defines the terms “persons,” “owners,” and “operators” separately, and had the DEP intended for §15.204 to impose an “affirmative duty” on anyone other than persons responsible for increasing design flows – even presumptively – this regulation would have so stated.

Insofar as §15.024(3) prohibits the “use modification, or alteration of a facility in such a way that a larger system is required under [Title 5] using the design flows at [§15.203].” The terms “use” and “larger system” are undefined in §15.002 or anywhere else in Title 5. See *Shirley Wayside Ltd. P’ship v. Bd. of Appeals of Shirley*, 461 Mass. 469, (2012) (“When the meaning of the language is plain and unambiguous, we enforce [a municipal zoning bylaw] according to its plain wording ‘unless a literal construction would yield an absurd or unworkable

result.”)(citations to internal quotations omitted). Thus, these terms should be accorded h their commonly understood meaning, and the §15.203 reference does not explicitly or implicitly import the bedroom ratio presumption. Plaintiffs never used 125 Birch Hill with any higher number of bedrooms than the approved four for which its septic system was designed and certified and would continue to do so after remodeling the three existing rooms in its basement.¹⁷

VI. Statement of Reasons Supporting the Appropriateness of Direct Appellate Review

All Title V regulations necessarily relate with one another; none of its regulatory provisions can be interpreted in isolation so to operate as if in a silo. See *In the Matter of Geomatrix Systems, LLC*, 2020 WL 2616479, *16-17 (DEP Recommended Final Decision, Rothchild, P.O) (“[A]ll sections of Title 5 are read together [to produce internal consistency] . . . (internal citations omitted) individual sections of [the Title 5] regulations must be read in the context of the regulations as a whole . . .”) The chief and insurmountable nodus of the Superior Court Decision’s approach to the various Title 5 regulations implicated in this appeal is

¹⁷ Plaintiffs’ Principal Brief in this appeal will explicate all the arguments summarized in this section of their Application for DAR, along with additional points and authorities relevant to correctly determining these legal questions. Further, this briefing will adduce additional arguments demonstrating the legal untenability of the Superior Court decision. However, Plaintiffs are constrained from doing so in the ten-page limit imposed under Mass.R.App.P. 11(b)(5).

that it reads these individual provisions out of context and not as a whole, thus failing to achieve their stated regulatory purpose consistent with their place in the regulatory framework. Consequently, this decision is not only manifestly unjust to the Plaintiffs but imperils the rights of single-family dwelling owners whose property is lawfully and sanitarily being used in conformance with Title 5 to improve those properties. See *Chestnut Hollow, LLC v. Sullivan*, 2017 WL 5907508, *6 (Mass. Land Ct. 2017; Vhay, J.) (“A landowner ‘has a right to improve his premises by the erection and use of buildings thereon where he complies with the existing statutes and ordinances, and he is entitled to whatever permits may be necessary to enable him to exercise this right’.”). quoting *Fellsway Realty Corp. v. Bldg. Comm'r of Medford*, 332 Mass. 471, 472 (1955). The guaranteed right of every Massachusetts resident to lawfully use and enjoy their homes free of pointless Government interference is, in part, sourced in the Declaration of Rights in this Commonwealth’s organic law. See, e.g., Mass. Const. Pt. 1, art. X (“Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws.”); Mass. Const. Pt. 1, art. XI (“Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character.”) Consequently, this appeal presents important issues of regulatory interpretation of immense public interest.

A. The Questions Raised in this Appeal Present a Case of First Impression on the Application of the Bedroom Ratio Presumption Outside the Context of Constructing, Expanding, And Upgrading On-Site Sewage Disposal Systems.

As the Superior Court Decision notes on page 8 at footnote 10, the Plaintiffs contended "that there are no cases discussing a scenario where the presumptive calculation was applied to an existing structure (interior remodeling permit) . . . [and] the court is unaware of such cases" This footnote also stated that Superior Court below "is equally unaware of any appellate decision applying the bedroom definition." Accordingly, in the nearly 40-year history of Title 5, there have been no judicial rulings approving the interpretation and application of Title 5's bedroom ratio presumption outside the context of construction, expansion, or upgrades of underground on-site sewage disposal systems. Furthermore, there is no extant case law authorizing local boards of health and their health agents to disregard the actual number of bedrooms proposed in permitting either New Construction or Local Upgrade Approval applications. The dearth of judicial rulings in this area should be concluded as establishing that most local boards of health never thought to apply the bedroom ratio presumption to interior remodeling permitting in light of its clear limiting language.

As of 2021, "[a]pproximately one third of all Massachusetts residents use subsurface wastewater systems." The Legal Handbook for Massachusetts Boards of Health, Massachusetts Association of Health Boards, chapter 5 at page 52 (3rd

ed. 2021).¹⁸ Providing legal guidance not only to the lower courts but also the numerous local boards of health and municipal health agents on the proper application of the implicated Title 5 regulations is therefore critically necessary. Moreover, any homeowner in this Commonwealth whose property is serviced by a non-failing septic system deserves to know whether interior remodeling permitting which does not directly impact, as opposed to presumptively increase, design flows, is permissible.

Consequent to allowing the Superior Court Decision to stand on this appeal, any Massachusetts homeowner would be obligated to come into compliance with the design flow levels based upon an LAA's determination that the total room count exceeded the presumed number of bedrooms irrespective of the use those residential properties are actually put. Furthermore, the Superior Court Decision necessarily would allow LAA's to impose these obligations upon the owners of single-family dwellings outside permitting interior remodeling, that is, whenever

¹⁸ This legal guidebook published by the Massachusetts Association of Health Boards also provides an excellent discussion of the **design** criteria for such systems encoded into Title 5. *Id.* at 52-66. Additionally, this publication explains the operation of properly installed septic systems with helpful exploratory diagrams. *Id.* at 50-51. It should be considered instructive that nowhere does this guidebook 's specifically address or discuss applying Title 5 to interior remodeling permitting of existing structures. Plaintiffs' counsel has been informed that this handbook is in the Social Law Library's collection.

they learn through any source of these conditions. The Superior Court below held that by virtue of the fact the Municipal Defendants could have ordered Plaintiffs to upgrade 125 Birch Hill's servicing septic system – although not in fact doing so -- they were also within their rights to demand a variance type condition such as recording a deed restriction, notwithstanding the fact Plaintiffs had never filed for a Local Upgrade Approval or submitted a written variance request. In so holding, the Superior Court below disregarded the express regulatory procedures contained in Title 5's Subpart E as mere technicalities which could be overlooked under his expansive reading of the certiorari review standards. Id. at 8, n. 11.

Perhaps even more disturbingly, the Superior Court Decision ineluctably ramifies local boards of health's and/or municipal health agents ordering the owners of single-family dwellings to pay for expensive engineering plans and design specifications necessary in filing a Local Upgrade Approval and potentially expend even more considerable expense, time, and burdens in upgrading their septic systems upon their determining that a property is not “right sized” -- not merely imposing a variance type condition. Both of those scenarios now face the Plaintiffs after completing their interior remodeling project: the demand for a bedroom deed restriction is no longer "on the table."

It should be equally concerning that the Superior Court Decision could now be read as allowing local boards of health and municipal health agents to overlook

Title 5's Subpart E filing prerequisites and their own required determinations. Even with respect to failing systems, these municipal authorities could now disregard these adjective regulatory provisions in dereliction of their grave responsibilities for "public health, safety, and the environment." Furthermore, leapfrogging over the processed prescribed for approving variance requests would deprive abutters of their rights to written notice of and a public hearing on the requested variance.

§15.411(1).

While the Plaintiffs' rights are manifestly impacted by the Superior Court decision, therefore, the justiciable interests of many other Massachusetts residential homeowners would be greatly served by granting this application for Direct for Appellate Review. The Supreme Judicial Court's dispositive interpretation of the appertaining Title 5 regulations will lessen the need for unnecessary litigation and provide critical guidance to municipalities, residential homeowners, septic system installers, designers, and developers. A speedy, final, and just determination of the legal questions raised herein is vital to achieve all of these shared public interests.

B. The Superior Court Decision Conflicts with Express DEP Guidance for Interpreting Title 5 in Furtherance of the AHA's Aims of Increasing the Commonwealth's Stock Of Affordable Housing.

As explained above in Section VIA, *supra*, upholding the Superior Court Decision would contravene recent guidance furnished by the DEP to local boards of health for approving permits for accessory apartments or dwellings. This AHA's

amended additions in G.L. c. 40A, § 3(11) supports the important public policy of expanding affordable housing in Massachusetts. If allowed to stand on appeal, the Superior Court Decision would create an irreconcilable conflict with this DEP interpretation of its own Title 5 regulations. Local boards of health and health agents could use the Superior Court Decision to demand that permits for apartments or dwellings accessories to residential properties should not be approved unless the servicing septic systems are upgraded to accommodate a presumed number of bedrooms rather than the actual number of bedrooms. Local boards of health and health agents could thereby thwart needed growth in Massachusetts' available affordable housing stock.¹⁹ Plaintiffs, especially their

¹⁹ While this Court may not suppose it substantiating the suitability of his appeal for a final determination as provided in Mass.R.App.P. 11, Plaintiffs' counsel is a 68-year-old attorney who retired from the active practice of law over three years ago. Since then, he has been treated for a coronary condition that impaired his health and stamina and undergone a surgical procedure to ameliorate that condition. Exhibit B at 5-7. To the extent he has competently advocated in these proceedings on behalf of himself and his wife, as well as the implicated interests of the general public -- which competency might reasonably be questioned given the paltry results he has achieved so far in this litigation -- Plaintiffs' counsel is unsure that he can continue to do so much longer. Obliging Plaintiffs' counsel to pursue his appeal in the Massachusetts Appeals Court, and if unsuccessful, then further petition the Supreme Judicial Court for a final determination on these significant legal questions pursuant to Mass.R.App.P. 27.1, might be expecting too much of his remaining time, depleted funds, and diminishing faculties: it is perhaps more than can be realistically expected from him, in spite of the condignly high expectations every Justice on the Supreme Judicial Court has for every attorney appearing before this Commonwealth's most high, and this Nation's most venerable, judicial tribunal.

counsel, hope and trust that the Supreme Judicial Court will recognize and endorse these compelling justiciable considerations and grant their application for Direct Appellate Review.

Appellants,

**MARIA B. del ROSARIO and BRIAN
BURKE**

By their attorney,

Date: March 2, 2026

/s/ Brian P. Burke, Esquire

Brian P. Burke, Esquire

BBO #542198

LAW OFFICES OF BRIAN BURKE

P.O. Box 904

Stow, MA 01775

(508) 767-1400

BBurkeLaw@msn.com

CERTIFICATON UNDER RULE 16 OF MASS.R.A.P.

Now comes, Brian P. Burke, Esq., counsel for the Plaintiff, and hereby certifies that the Brief submitted herewith complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass.R.A.P. 16(a)(6) (pertinent findings or memoranda of decision); Mass.R.A.P. 16(e) (references to the record); Mass.R.A.P. 16(f) (reproduction of statutes, rules, regulations); Mass.R.A.P. 16(h) (length of brief); Mass.R.A.P. 18 (appendix to the briefs); and Mass.R.A.P. 20 (form of briefs, appendices and other papers). The font used in this Brief is Times New Roman, 14 point. Not including the non-exclusionary pages, Brief contains 1782 words.

I further attest that this brief is being filed and service via electronic filing.

/s/ Brian P. Burke, Esq.

TABLE OF CONTENTS

	<u>Pages</u>
Exhibit A: Email Reproducing Count Deed Restriction Form	39
Exhibit B: Plaintiffs Motion for Judgment on the Pleadings on Count I of their Amended Verified Complaint Seeking a Writ of Certiorari dated July 26, 2024 (DE 20).....	45
Exhibit C: Memorandum and Decision on the Parties ‘Cross-Motions for Judgment on the Pleadings entered on May 6, 2025. (DE 23)	55
Exhibit D: Judgment on Count I of plaintiffs amended verified complaint against the plaintiffs and in favor of the defendants entered on September 29, 2025 (DE 28).....	67
Exhibit E: Certified copy of the Superior Court Docket.....	69
Exhibit F: DEP Guidance to Homeowners Planning to Construct Additions.....	86
Exhibit G: DEP Guidance to Local Boards of Health for AHA	88

APPENDIX “A”

125 Birch Hill Rd

James Garreffi JGarreffi@nashoba.org
To Brian P. Burke, Esquire bburkelaw@msn.com
CC: Cyndie Colosi/ Board of Health <health@stow-ma.gov>; Kalene Gendron
<kgendron@nashoba.org>

Attorney Burke,

Attached is the deed restriction template from the MA Department of Environmental Protection.

There is site specific information which needs to be completed on the first page of the document: property information, the town and mailing address of the Town Hall (380 Great Rd.) and near the bottom of the page, 1. Restriction, fill in the number of bedroom in the locations which are in bold. The end of the document is the signature page.

Once the document is complete, it needs to be recorded at the Registry of Deeds, we have found that Real Estate attorneys will often have the ability to electronically file the document.

Once the document has been recorded, let the office know and we can endorse the clearance form for your building project.

If you have any questions please don't hesitate to contact me at the office.

Jim Garreffi, Director
Nashoba Associated Board of Health
30 Central Ave
Ayer, MA 01432

jgarreffi@nashoba.org
978 772 3335 X305

GRANT OF TITLE 5 BEDROOM COUNT DEED RESTRICTION

This Grant of Title 5 Bedroom Count Deed Restriction is made as of this ____ day of _____, 20____, by [Grantor's Name] ("Grantor"), of [Town/City], _____ County, [State], pursuant to M.G.L. c. 21A, §13 and 310 CMR 15.000 (collectively, "Title 5").

WITNESSETH

WHEREAS, Grantor, being the owner(s) in fee simple of that [those] certain parcel[s] of [vacant] land located in [Town/City], _____ County, Massachusetts, [with the buildings and improvements thereon], pursuant to a deed from _____ to Grantor, dated _____, and recorded with _____ County Registry of Deeds in Book _____, Page _____ [source of title other than by deed] and/or pursuant to Certificate of Title No. _____ issued by the Land Registration Office of the _____ County Registry District, said parcel(s) of land being more particularly bounded and described in Exhibit A, attached hereto and made a part hereof, and being shown on a plan entitled,

"_____", dated _____, prepared by _____, recorded with _____ County Registry of Deeds as Plan No. _____, in Plan Book _____ and/or registered as Land Court Plan No. _____, on file with the Land Registration Office of _____ County Registry District ("Property"); and

WHEREAS, Grantor desires to restrict the number of bedrooms, as the term bedroom is defined at 310 CMR 15.002 ("Bedroom"), through the granting of this Title 5 Bedroom Count Deed Restriction;

NOW, THEREFORE, Grantor does hereby GRANT to [Town/City] of _____ County, Massachusetts, a municipal corporation located in _____ County, having a mailing address of _____, Massachusetts, and acting by and through its Board of Health ("Local Approving Authority"), for nominal and non-monetary consideration, the sufficiency and receipt of which are hereby acknowledged, with QUITCLAIM COVENANTS, a TITLE 5 BEDROOM COUNT DEED RESTRICTION ("Restriction") in, on, upon, through, over and under the Property.

Said Restriction operates to restrict the Property as follows:

1. **Restriction.** Grantor hereby restricts the total number of Bedrooms in, on, upon, through, over and under the Property to [insert number of bedrooms] Bedrooms, such that at no time shall there exist more than [insert number of bedrooms] Bedrooms in, on, upon, through, over and under said Property.
2. **Severability.** Grantor hereby agrees that, in the event that a court or other tribunal determines that any provision of this instrument is invalid or unenforceable:
 - (i) That such provision shall be deemed automatically modified to conform to the requirements for validity and enforceability as determined by such court or tribunal; or
 - (ii) That any such provision, by its nature, cannot be so modified, shall be deemed deleted from this instrument as though it had never been included herein.

In either case, the remaining provisions of this instrument shall remain in full force and effect.

3. **Enforcement.** Grantor expressly acknowledges that a violation of the terms of this Restriction could result in the following:
 - (i) upon determination by a court of competent jurisdiction, in the issuance of criminal and civil penalties, and/or equitable remedies, including, but not limited to, injunctive relief, such injunctive relief could include the issuance of an order to modify or remove any improvements constructed upon the Property in violation of the terms of this Restriction; and
 - (ii) in the initiation of an enforcement action and/or assessment of penalties by the Local Approving Authority and/or the Massachusetts Department of Environmental Protection, a duly constituted agency with a principal office located at One Winter Street, Boston, MA 02108 (DEP), to enforce the terms of this Restriction pursuant to

Title 5; M.G.L. c.111, §§ 2C, 17, 31, 122, 123, 125, 127A-O, inclusive, and 129; and M.G.L c. 83, §11.

4. Provisions to Run with the Land. The rights, liabilities, agreements and obligations created under this Restriction shall run with the Property and any portion thereof for the term of this Restriction. Grantor hereby covenants for [himself/herself/itself] and [his/her/its] executors, administrators, heirs, successors and assigns, to stand seized and to hold title to the Property and any portion thereof subject to this Restriction.

The rights granted to the Local Approving Authority, its successors and assigns, do not provide, however, that a violation of this Restriction shall result in a forfeiture or reversion of Grantor's title to the Property.

5. Concurrence Presumed. It is agreed that:
- (i) Grantor and all parties claiming by, through, or under Grantor agree to and shall be subject to the provisions of this Restriction; and
 - (ii) Grantor and all parties claiming by, through, or under Grantor, and their respective agents, contractors, sub-contractors and employees, agree that the Restriction herein established shall be adhered to and shall not be violated, and that their respective interests in the Property shall be subject to the provisions herein set forth.
6. Incorporation into Deeds, Mortgages, Leases, and Instruments of Transfer. Grantor hereby agrees to incorporate this Restriction, in full or by reference, into all deeds, easements, mortgages, leases, licenses, occupancy agreements or any other instrument of transfer by which an interest and/or a right to use the Property, or any portion thereof, is conveyed.
7. Recordation. Grantor shall record and/or register this Restriction with the appropriate Registry of Deeds and/or Land Registration Office within 30 days of receiving the approved Restriction from the Local Approving Authority. Grantor shall file with the Local Approving Authority and the DEP a certified Registry copy of this Restriction as recorded and/or registered within 30 days of its date of recordation and/or registration.
8. Amendment and Release. This Restriction may be amended only upon the approval and acceptance of such amendment by the Local Approving Authority. Release of this Restriction shall be granted by the Local Approving Authority upon (i) Grantor's request of such release; and (ii) the Property being connected to a municipal sewer system and the septic system serving the Property being abandoned in accordance with 310 CMR 15.354. Any such amendment or release shall be recorded and/or registered with the appropriate Registry of Deeds and/or Land Registration Office and a certified Registry copy of said amendment or release shall be filed with the Local Approving Authority and the DEP within 30 days of its date of recordation and/or registration.

- 9. Term. This Restriction shall run in perpetuity and is intended to conform to M.G.L. c.184, §26, as amended.
- 10. Rights Reserved. This Restriction is granted to the Local Approving Authority. It is expressly agreed that acceptance of this Restriction by the Local Approving Authority shall not operate to bar, diminish, or in any way affect any legal or equitable right of the Local Approving Authority or of DEP to issue any future order with respect to the Property or in any way affect any other claim, action, suit, cause of action, or demand which the Local Approving Authority or DEP may have with respect thereto. Nor shall acceptance of the Restriction serve to impose any obligations, liabilities, or any other duties upon the Local Approving Authority.
- 11. Effective Date. This Restriction shall become effective upon its recordation and/or registration with the appropriate Registry of Deeds and/or Land Registration Office.

WITNESS the execution hereof under seal this ____ day of _____, 20__.

Grantor

[STATE]

_____, ss _____, 20__

Then personally appeared the above-named [Grantor's Name] and acknowledged the foregoing instrument to be [his/her] free act and deed before me.

Notary Public:
My commission expires:

APPENDIX “B”

20

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss

LOWELL SUPERIOR COURT
CA No. 2381CV02061

MARIA B. del ROSARIO and BRIAN BURKE)
)
 Plaintiffs,)
)
 v.)
)
)
 STOW BOARD OF HEALTH, et al,)
)
 Defendants.)

FILED
IN THE OFFICE OF THE
CLERK OF COURTS
FOR THE COUNTY OF MIDDLESEX

SEP 09 2024

[Signature]
CLERK

**PLAINTIFFS MOTION FOR JUDGMENT ON THE PLEADINGS PURSUANT TO
Mass.R.Civ.P. 12(c) on COUNT I OF THEIR AMENDED VERIFIED COMPLAINT
SEEKING A WRIT OF CERTIORARI UNDER G. L. c. 249, § 4**

Now come the married plaintiffs Maria B. del Rosario and Brian Burke (also plaintiffs' counsel) and pursuant to Rule 12(c) of the Massachusetts Rules of Civil Procedure request judgment against defendants the Stow Board of Health (Stow BOH), Town of Stow (the "Town"), and its Chief Health Agent James Garreffo in his official capacity (the "Chief Health Agent") (hereinafter, collectively the "Municipal Defendants") on Count I of their Amended Verified Complaint ("AVC") which seeks a writ of certiorari pursuant to G. L. c. 249, § 4 ("certiorari review") along with all orders necessary and proper to effectuate that judgment writ.

In support of the instant motion, plaintiffs state that their claim for certiorari review arises out of decisions of the Municipal Defendants – which should have been non-discretionary -- to precondition approval of plaintiffs' application for a permit to conduct remodeling to the interior of the basement of their home, 125 Birch Hill Road, Stow, Middlesex County, Massachusetts ("125 Birch Hill") upon their recording – and at their expense – a deed restriction with the

Middlesex Registry of Deeds. At a hearing held on May 18, 2023 on plaintiffs' permitting application, the Municipal Defendants contended that the Stow BOH 's 1996 Municipal Regulation entitled Regulation Concerning Additions or Renovations to Existing Dwellings Not Meeting Title 5 (the "Municipal Regulation"), according to their interpretation, authorized them to import and interpolate the definition of Bedroom contained in Title V of the State Environmental Code, 340 CMR 15.000, *et seq.* (generally referenced hereinafter as "Title 5.")¹ to all construction permits applied for in the Town, regardless of whether the project came within the terms in or stated rationale of the Municipal Regulation. Based upon their erroneous and non-contextual reading of the Municipal Regulation and Title 5, the Municipal Defendants refused to grant plaintiffs' permitting application unless and until they recorded a deed restriction limiting the number of bedrooms in plaintiffs' home to its current number of four (4) (the "bedroom deed restriction").

In order for this Honorable Court to fully understand the fairly unique presentation and timing of plaintiffs' motion for judgment on the pleadings, it is helpful, if not absolutely necessary, to relate the procedural background of this civil action subsequent to the Stow BOH's May 18, 2023 decision.

A. Procedural Background of this Civil Action

On June 27, 2023, plaintiffs' legal counsel served by hand a 26-page demand letter upon the Municipal Defendants urging reconsideration of the decision to deny their permitting

¹ Title 5 was promulgated by the Department of Environmental Protection ("DEP") pursuant to the authority granted in G.L. c. 21A, § 13. The Title 5 provisions which the Municipal Defendants have contended pertain to 135 Birch Hill's septic system took effect in 1996. See 340 CMR 15.001

application unless and until they recorded the bedroom deed restriction. AVC Exhibit I, Docket Entry ("DE") 13. Plaintiffs' demand letter reasserted, substantiated by citation to additional legal authority, and amplified the arguments their counsel made at that May 18, 2023 hearing -- and even before then -- to the Chief Health Agent. DE 1. Exhibit I; Board Record ("BR") 48-76 The June 27, 2023 demand letter urged the Municipal Defendants, as plaintiffs' counsel had so done repeatedly, to consult with legal counsel in respect to the Municipal Regulation's clear inapplicability to their May 18, 2023 decisions. DE 1 Exhibit I at 7; BR 54. This demand letter further stated that in the event the Municipal Defendants declined to reconsider and reverse their decision on plaintiffs' permitting application within fourteen (14) days of its receipt, that is July 11, 2023, plaintiffs would have no other recourse but to file a civil action seeking legal relief and redress. DE 1 Exhibit I at 25; BR 72; AVC ¶ 64.

The Municipal Defendants, either by themselves or through legal counsel, never responded to the plaintiffs' demand -- either within its 14-day deadline or before the 60-day deadline for filing actions for certiorari review. AVC ¶ 65. In consequence thereof, plaintiffs were impelled to file their original verified complaint on July 17, 2023, that is the last day for filing for certiorari review of the Municipal Defendants' decision on their permitting application. DE 1. In addition to seeking certiorari review of the Municipal Defendants' May 18, 2023 decision, plaintiffs' original complaint also sought entry of a writ of mandamus to the Municipal Defendants pursuant to G. L. c. 249, § 4 (Count II) and a declaration of their rights pursuant to G. L. c. 231A, §§ 2 and 3 (Count III). As adumbrated in their July 27, 2023 demand letter, plaintiffs also brought a claim under the Massachusetts Civil Rights Act, G. L. c. 12, §§ 11H and 11I (Count IV) (the MCRA) against the Municipal Defendants and the individual members of the Stow BOH. Plaintiffs' original complaint also included a count seeking preliminary and

permanent injunctive relief ordering the Municipal Defendants to grant plaintiffs' permitting application forthwith and without any preconditions (Count VI) and for class action relief (Count V).

After filing the original pleadings on July 17, 2023, plaintiffs' legal counsel then began completing the drafting of an emergency motion for a preliminary injunction and supporting affidavit to effectuate plaintiffs' claims for equitable relief in Count VI. The grounds plaintiffs asserted in their request for emergency injunctive relief were, *inter alia*, the considerable expense, inconvenience, and immense difficulties unavoidably resulting from the Municipal Defendants further delaying their contractor from conducting the interior remodeling of their basement. DE 1 at ¶¶ 18-20, 97.

Shortly after noon on July 18, 2023, one day after the expiration of the deadline for filing civil actions seeking certiorari review, Stow's Town Counsel ("predecessor counsel"), on behalf of the Municipal Defendants, electronically transmitted to plaintiffs' counsel a response to his June 27, 2023 Demand Letter. AVC Exhibit J; BR 75-77. In material part, predecessor counsel's July 18, 2023 response conceded that the Municipal Regulation "does not apply" to plaintiffs application to permit interior basement remodeling and recognized "that some confusion may have been caused by the [Stow BOH's] reference to [the Municipal Regulation]." AVC Exhibit J at 2, BR at 76. However, predecessor counsel further opined that the Municipal Defendants had yet been validly justified in deciding plaintiffs permitting application pursuant to Title V's definition of Bedroom 340 CMR 15.002, in conjunction with 310 CMR 15.204. *Id.*; *Id.* Predecessor counsel further opined that the Title 5 regulations he cited nevertheless authorized the Municipal Defendants "to refuse to sign off on your building permit unless and until a deed restriction is recorded or the septic system is upgraded." *Id.*; *Id.*

On July 19, 2023, plaintiffs filed their completed emergency motion for a preliminary injunction, supporting memorandum, and supporting affidavit. DE 4-6. Plaintiffs' legal counsel then notified predecessor legal counsel via electronically transmitted correspondence that he had filed for a preliminary injunction and that a hearing on his emergency motion had been scheduled for July 23, 2023. AVC Exhibit K at 1-2; BR 78-78. Along with his July 19, 2023 letter, plaintiffs provided predecessor legal counsel with un-signed copies of all filings in this civil action up to that date Id.; Id.. Plaintiffs' legal counsel also indicated that he planned to go forward on his emergency motion for a preliminary injunction on the scheduled July 23rd hearing date. Id.; Id.

On July 21, 2023, the parties agreed, by and through their legal counsel, to stipulate to the entry of an order in lieu of a hearing on the plaintiffs' preliminary injunction motion. DE 8. The written stipulation electronically filed with the Court on that date provided for entry of an order to the effect that "the Stow BOH, by and through its authorized agent," would approve the plaintiffs' interior basement remodeling application no later than July 24, 2023, subject to the plaintiffs agreeing not to market the property for sale of the dwelling with more than four bedrooms during the pendency of the litigation or endorsed by order of the court on July 24, 2023." Id.

On August 2, 2023, plaintiffs filed, as of right pursuant to Rule 15(a) of the Massachusetts Rules of Civil Procedure, the AVC in order to reflect the change in the Municipal Defendant's position that the Municipal Regulation no longer applied to their permitting application. DE 13. The AVC sought all the relief plaintiffs had claimed in their original pleadings, referenced the stipulation entered on their motion for a preliminary injunction, (AVC

¶ 69), and attached two new exhibits: the exchange of correspondence between the plaintiffs and predecessor legal counsel on July 18 and 19, 2023, AVC Exhibits K and J.

All defendants were served with process in this civil action at various times thereafter, but no later than August 30, 2023, DE 9-16. But because the defendants were in the process of securing successor legal counsel to represent them in this civil action, plaintiffs refrained from defaulting the defendants for failing to file a responsive pleading pursuant to Mass.R.Civ.P. 55(a). On September 14, 2023, all defendants' current legal counsel filed a substitute appearance in this civil action, along with notice of service of a partial motion to dismiss Count IV of the plaintiffs' AVC on the grounds that those averments failed to state a claim upon which relief could be granted. DE 17. Service of the motion to dismiss on plaintiffs stayed entry of default against the defendants until its resolution, and the defendants have not filed any other responsive pleading.

Around this time, however, plaintiffs' legal counsel came under the active medical care of two cardiologists for advanced cardiomyopathy significantly affecting his heart's ejection rate. Plaintiffs' legal counsel was advised not to engage in significant or strenuous work activity during this course of his cardiac care and treatment. Notwithstanding his cardiologist's recommendation, plaintiffs' counsel cooperated with defendants' new attorneys in preparing the contents of the record of the proceedings before the Stow BOH on the defendants' permitting application. which was eventually filed on April 2, 2024, DE 18. On April 13, 2024, plaintiffs' counsel underwent an ablation procedure at the Mass General Hospital.²

² Upon request, plaintiffs' counsel can provide medical records supporting this care and treatment as well as his cardiologist's recommendations.

In the meantime, however, the interior basement remodeling to plaintiffs' home has been ongoing pursuant to the permit issued under the July 24 2023 stipulated order. At this point, Stow has not issued a certificate of occupancy, although it is unclear whether such a certificate is necessary given the remodeling undertaken. Nevertheless, plaintiffs remain bound by the other terms of the stipulated order entered by the court on July 24, 2023.

B. Proceeding On Plaintiffs' Motion For Judgment On The Pleadings For Certiorari Review

General Laws c. 249, § 4 allows for certiorari review of, *inter alia*, decisions by or on behalf of local boards and commissions for which no other express statutory procedure for appeal is provided. *Garrity v. Conservation Comm'n of Hingham*, 462 Mass. 779, 791-792 (2012). Claims for certiorari review are to be decided on the record of the proceedings before the adjudicating board. In a certiorari review, “[t]he reviewing judge is limited to what is contained in the record of proceedings below, and it is settled that “[t]he standard of review in an action in the nature of certiorari is to correct substantial errors of law apparent on the record adversely affecting material rights.” “ *Police Comm'r of Boston v. Robinson*, 47 Mass.App.Ct. 767, 770 (1999) (citations omitted). *See also Northboro Inn, LLC v. Treatment Plant Bd. of Westborough*, 58 Mass.App.Ct. 670 (2003).

Defendants entitled the record of the proceedings before the Municipal Defendants on plaintiffs' permitting application "Administrative Record " (Plaintiffs' counsel refers to this filing as the "Board Record or BR.") The record filed by the defendants does not include a transcript of the May 18, 2023 hearing before the Stow BOH. However, plaintiffs previously attached a scan disk containing the Zoom recording of this hearing along with their motion for preliminary injunction. DE 5. Additionally, plaintiffs uploaded this hearing recording to YouTube, and plaintiffs set out the internet link to this recording in footnote 1 of the AVC. DE

13 at p. 10. This YouTube link is also included in the BR at 111. Accordingly, time stamps citations to the Hearing Record ("HR") are made in the accompanying memorandum of points and authority supporting the instant motion for judgment on the pleadings.

The plaintiffs never considered, nor have they agreed, that Superior Court Standing Order 1-96 applies to any of their claims in the civil action, and certainly not with respect to the filing deadlines contained therein for motions for judgment on the pleadings. On the other hand, plaintiffs recognize the regrettable delays attendant to resolving this civil action resulting from plaintiffs' counsel's medical care and treatment; he is further mindful of the defendants' forbearance in taking into account his medical condition.³

Accordingly, plaintiffs offered, and the defendants agreed, to jointly move to extend the tracking orders in this civil action so that service of the instant motion for judgment on the pleadings, as well as plaintiffs' opposition to the defendants' partial motion to dismiss Count IV of the AVC, would be made on or before July 19, 2024. DE 19. The court endorsed this joint motion on May 6, 2024. Pursuant to this agreed-upon briefing schedule, plaintiffs have served their motion for judgment on the pleadings for certiorari review under Count I of the AVC, along with their supporting memorandum of points and authority, both of which will ultimately be filed pursuant to Superior Court Rule 9A.

Because the original permit was granted on July 24, 2023, and the interior remodeling the basement of 125 Birch Hill has been virtually completed, plaintiffs original specific prayers for relief have been mooted. The judgment relief requested in the instant motion, therefore includes the Municipal Defendants' issuance of a Certificate of Occupancy, if necessary, and for an order

³ It is premature for plaintiffs to move for judgment on their claims stated in Count II and III of their AVC because the pleadings have not yet closed. Mass.R.Civ.P. 12(c).

releasing plaintiffs from any and all previously stipulated conditions that were entered by order the court on July 24, 2023.

WHEREFORE, plaintiffs Maria B. del Rosario and Brian Burke hereby request that this Honorable Court enter judgment in their favor on Count I of their amended pleadings, simultaneously enter orders directing the defendants Town of Stow, Stow Board of Health, and Chief Health Agent James Garreffo to issue a Certificate of Occupancy of the basement of 125 Birch Hill, if necessary, releasing plaintiffs from any of the conditions entered by order of the court on July 24, 2023, and awarding them all costs and other expenses to which they are entitled.

Plaintiffs Request A Hearing On Their Motion.

**PLAITNFFIS MARIA B. del ROSARIO and
BRIAN BURKE**

By their attorney,

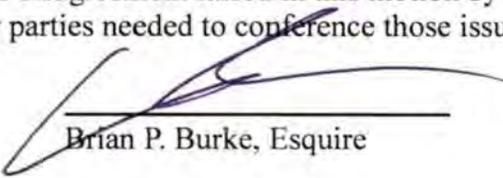
Date: July 26, 2024


Brian P. Burke, Esquire
BBO #542198

LAW OFFICES OF BRIAN BURKE
P.O. Box 904
Stow, MA 01775
(508) 767-1400
BBurkeLaw@msn.com

CERTIFICATE OF COMPLIANCE WITH SUPERIOR CORUT RULE 9C

Plaintiffs' counsel hereby certifies that he has, to the greatest extent practicable, made a good faith effort to narrow the areas of disagreement raised in this motion by multiple emails attempting to determine whether parties needed to conference those issues.


Brian P. Burke, Esquire

CERTIFICATE OF SERVICE

I, Brian Burke, hereby certify that on July 26, 2024 as agreed by the defendants' counsel I have served a true copy of this document and the supporting memorandum and addendum by causing their delivery to the offices of counsel listed below:

Matthew J. Hamel, Esq.
PIERCE DAVIS & PERRITANO LLP
10 Post Office Square, Suite 1100N
Boston, MA 02109

Brian P. Burke, Esquire

APPENDIX “C”

23

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2381CV02061MARIA DEL ROSARIO & another¹vs.STOW BOARD OF HEALTH & others²**MEMORANDUM OF DECISION AND ORDER ON THE PARTIES'
CROSS MOTIONS FOR JUDGMENT ON THE PLEADINGS**

This case arises out of a dispute between plaintiffs, Maria Del Rosario and Brian Burke, and defendants, Stow Board of Health and its members, Mary McDowell, Marcia Rising, and Merrily Evdokimoff (collectively "Board of Health"), the Town of Stow ("Town"), and James Garreffi, a health agent for the Board of Health, as to the Board of Health's reliance on Title 5 of the State Environmental Code, 310 Code Mass. Regs. §§ 15.000 ("Title 5") as grounds for conditionally approving the plaintiffs' application for a permit for a home remodeling project. The Board of Health, relying on Title 5 analysis, approved plaintiffs' remodel permit application conditioned upon filing a deed restriction limiting the use of the property to a four bedroom residence. Plaintiffs disagree with the Board of Health's decision, particularly the application of Title 5 analysis in a case where the proposed basement remodel added no additional bedrooms.

Plaintiffs bring claims for certiorari review under G. L. c. 249, § 4 (Count I); mandamus under G. L. c. 249, § 5 (Count II); declaratory relief under G. L. c. 231A, §§ 1, 2 (Count III);

¹ Brian Burke

² Town of Stow, James Garreffi, Mary McDowell, Marcia Rising, and Merrily Evdokimoff.

violation of the Massachusetts Civil Rights Act under G. L. c. 12, §§ 11H, 11I (Count IV); class action relief (Count V); and permanent injunctive relief (Count VI).

Now before the court are the parties' cross motions for judgment on the pleadings. Both sides so move on Count I of plaintiffs' complaint, and defendants also move for judgment on the pleadings on Counts II, III, and VI. Following a hearing on February 27, 2025, and after considering the parties' submissions, plaintiffs' motion for judgment on the pleadings is **DENIED**, and defendants' cross motion for judgment on the pleadings is **ALLOWED**.

BACKGROUND

The following facts were before the Board of Health when it made its decision.

In 1997, plaintiffs purchased 125 Birch Hill Road in Stow, MA ("Property"). The Property disposes of its sewage waste in a septic system. Prior to plaintiffs' purchase of the Property, an approved septic system inspector certified the Property's septic system under Title 5, certifying that the septic system's designed sewage flow was proper for a four-bedroom residential structure.

Plaintiffs purchased the Property which, at the time of purchase, had a finished basement. In April 2023, plaintiffs sought to remodel the Property's existing finished basement. Plaintiffs engaged a contractor, and the contractor filed a permit to conduct the remodel. Plaintiffs sought a permit solely to remodel the Property's existing basement layout, which contained three rooms and a storage space, into another layout with three rooms and a storage space. After the remodel, the Property would contain the same number of rooms, and would not add any bedrooms.

After filing the permit application, plaintiffs were notified that they needed approval from the Board of Health. The Board of Health believed that plaintiffs' remodel would result in the addition of three new rooms to the Property's basement because the Board of Health was

unaware that the Property's existing finished basement.³ The Board of Health claimed that the remodel would result in the Property presumptively having five bedrooms under Title 5 calculations, which would make the current septic system inadequate.

The Board of Health held a hearing on plaintiffs' permit application on May 18, 2023. Plaintiffs, through plaintiff Burke, attended and participated in the hearing. Plaintiffs maintained that the Property's basement was already finished prior to plaintiffs' purchase of the Property with three existing rooms in the basement. The Board of Health accepted plaintiffs' representation that the basement was already finished, see Administrative Record, Exhibit N, Recording of Hearing at 6:20 (Board of Health stating that "it's clearly finished").⁴

The Board of Health expressed concerns about future use of the Property, including that it might be offered for sale or used by a future owner as a property containing more than four bedrooms. The Board of Health concluded that the Property contained five bedrooms, applying Title 5's presumptive bedroom calculation for single-family residences containing more than eight rooms. Ultimately, the Board of Health voted unanimously to require plaintiffs to record a deed restriction, which would restrict plaintiffs' use and their successors' use of the Property as a four-bedroom residence, prior to granting plaintiffs a permit to remodel the Property's basement.

DISCUSSION

³ The assessor's records showed that the Property had an unfinished basement, and the Town had no record of a building permit to finish the basement.

⁴ For ease of reference, the court refers to statements made by individual members of the Board of Health as statements of the Board of Health.

1. Standard of Review

Certiorari review allows a court to correct “a substantial injury or injustice arising from the proceeding under review.” *Perisho v. Board of Health of Stow*, 103 Mass. App. Ct. 593, 597 (2023), quoting *Indeck v. Clients’ Sec. Bd.*, 450 Mass. 379, 385 (2008). The court’s review is limited to the record before the Board of Health. See *Abner A. v. Massachusetts Interscholastic Athletic Ass’n*, 490 Mass. 538, 546 (2022). When reviewing the Board of Health’s decision, the court limits its review to the Board of Health’s rationale. See *Fieldstone Meadows Dev. Corp. v. Conservation Comm’n of Andover*, 62 Mass. App. Ct. 265, 266 n.2 (2004).

“Certiorari review ‘is calibrated to the nature of the action for which review is sought,’ . . . and thus may involve either the substantial evidence standard or the arbitrary and capricious standard” (citation omitted). *Perisho*, 103 Mass. App. Ct. at 597. The court declines to address which standard applies in this case because the Board of Health’s decision to condition plaintiffs’ remodel permit succeeds under both the substantial evidence standard and the arbitrary and capricious standard. See *id.* (“we need not decide which standard applies, because we conclude that the board’s decision is neither unsupported by substantial evidence nor arbitrary and capricious”).

“Substantial evidence means such evidence as a reasonable mind might accept as adequate to support a conclusion” (quotation and citation omitted). *Chadwick*, 461 Mass. at 96. “A decision is arbitrary or capricious . . . where it ‘lacks any rational explanation that reasonable persons might support.’” *Perullo v. Advisory Comm. on Personnel Standards*, 476 Mass. 829, 836 (2017), quoting *Frawley v. Police Comm’r of Cambridge*, 473 Mass. 716, 729 (2016). The court’s review is limited to the record before the Board of Health, and the court cannot substitute

its own view as to the facts “as long as there is substantial evidence to support the findings of the [Board]” (citation omitted). *Id.*

2. Count I – Certiorari Relief

Plaintiffs argue that the Board of Health erred in conditioning their remodel permit because there was no triggering event for it to apply Title 5 analysis and because the Board of Health applied Title 5’s presumptive bedroom calculation out of context. The Board of Health argues that it should not be required to turn a blind eye to known design flow violations and that the Property’s bedroom count would exceed the approved septic design after the remodel. Defendants persuade the court.⁵

Septic systems for single-family residences are designed using design flow criteria listed in 310 Code Mass. Regs. § 15.203, which estimates a property’s expected sewage flow based on a gallons per day per bedroom calculation. 310 Code Mass. Regs. § 15.204 prohibits property owners from increasing the actual or design flow of a septic system above the approved capacity unless they upgrade the septic system first. 310 Code Mass. Regs. § 15.204.⁶ Instead of requiring an upgrade to a septic system, the Board of Health can grant a variance. See *id.* See generally 310 Code Mass. Regs. §§ 15.401-15.422 (Title 5 variance and upgrade approval regulations). As

⁵ The Board of Health concedes that, despite references to its local regulations as part of its decision, the Town’s local regulations did not apply in plaintiffs’ case. Accordingly, the court declines to address arguments related to any reliance by the Board of Health on its local regulations.

⁶ 310 Code Mass. Regs. § 15.204 states that the approved design flow is the flow listed on the “most recent Disposal Works Construction Permit.” This permit was not before the Board of Health, but the absence of the permit was inconsequential here because the parties agreed that the Property’s approved septic system design flow was for a four-bedroom residence. Thus, the absence of the permit was a technical error and is not grounds for reversal of the Board of Health’s decision. See *Massachusetts Prisoners Ass’n Political Action Committee v. Acting Governor*, 435 Mass. 811, 824 (2002) (“The court’s power on certiorari is not exercised to remedy mere technical errors that have not resulted in manifest injustice . . .”).

part of granting a variance, the Board of Health can condition a variance by requiring a property owner to file a deed restriction. See 310 Code Mass. Regs. § 15.413(1).

310 Code Mass. Regs. § 15.002 defines a bedroom as “[a] room providing privacy, intended primarily for sleeping” and consisting of, among other things, electrical service and at least one window. In addition, the definition provides presumptive counting, which states, in relevant part:

Where the total number of rooms for single family dwellings exceeds eight, not including bathrooms, hallways, unfinished cellars and unheated storage areas, the number of bedrooms presumed shall be calculated by dividing the total number of rooms by two then rounding down to the next lowest whole number.

Id. The final sentence of the definition further states that “[t]he applicant may design a system using design flows for a smaller number of bedrooms than are presumed in this definition by granting to the Approving Authority a deed restriction limiting the number of bedrooms to the smaller number.” *Id.*

Here, plaintiffs’ remodel permit brought to light the fact that the Property’s basement was, and would continue to be, finished. Although an unfinished basement is not considered when determining the number of bedrooms in a residence, there is no exclusion for finished basements under the bedroom definition. See 310 Code Mass. Regs. § 15.002. Applying the presumptive bedroom calculation, the Board of Health determined that the remodel would result in a presumption of five bedrooms at the Property.⁷ As a result, the presumed number of bedrooms at the Property increased above the approved, four-bedroom capacity of the septic system.

⁷ Plaintiffs do not challenge the Board of Health’s mathematical calculation under the presumption formula that the Property contained eleven rooms, which meant that the Property contained five bedrooms under the formula.

The decision to apply the bedroom calculation presumption was rational. If the Board of Health only applied the presumption to new construction, or system upgrades that property owners intended to make, properties would be subject to inconsistent counting and results. In addition, the Board of Health's application of the presumptive calculation appears to be consistent with the broad purpose of the Title 5 regulations where, in addition to protecting the public through proper construction, the regulation also seeks to protect the public through proper upgrades. See 310 Code Mass. Regs. § 15.001 (purpose of Title 5 is "the protection of public health, safety, welfare and the environment by requiring the proper siting, construction, *upgrade*, and maintenance of" septic systems [emphasis added]). Uniform counting supports such a goal.

Even if the presumption could be overcome, cf. Mass. G. Evid. § 301(d) ("A presumption imposes on the party against whom it is directed the burden of production to rebut or meet that presumption."), it does not appear from the record that plaintiffs overcame the presumption. The bedroom definition excludes specifically certain rooms as bedrooms. See 310 Code Mass. Regs. § 15.002 (excluding "[l]iving rooms, dining rooms, kitchens, halls, or bathrooms" as bedrooms). Thus, to overcome the presumption, it appears that plaintiffs would need to show that the Property's structure as finished could only accommodate four bedrooms based on the definition, not just that plaintiff used, and would continue to use, the Property as a four-bedroom residence, which is what plaintiffs argued at the hearing.⁸

Plaintiffs' arguments that the Board of Health was required to count the actual number of bedrooms (i.e., accept plaintiffs' representations as to the use of the house) instead of applying the presumptive calculation are unpersuasive. For example, relying on the final sentence of the

⁸ It is not apparent from the record that plaintiffs advanced this argument before the Board of Health, and plaintiffs do not advance the argument before this court.

bedroom definition and their perceived definition of “applicant,” plaintiffs argue that the Board of Health misapplied the presumption “outside the context of an application to permit expanding or upgrading” the Property’s septic system. However, reconfiguration of the interior of the house implicates the potential number of bedrooms, which in turn affects the required, minimum septic system capacity. Moreover, limiting the presumptive calculation to the context where an application to upgrade is actually submitted would encourage property owners to ignore their affirmative duty to comply with Title 5, see 310 Code Mass. Regs. § 15.022,⁹ and apply for a permit to upgrade where, as here, the remodel increases the number of bedrooms and design flow, which required upgrade approval or a variance under 310 Code Mass. Regs. § 15.204.¹⁰

Because plaintiff’s remodel increased the presumptive number of bedrooms on the Property from four to five, which is above the approved capacity of their existing septic system, plaintiffs needed to upgrade their system or seek a variance from the Board of Health. In lieu of requiring plaintiffs to upgrade the entire septic system, the Board of Health exercised its power under 310 Code Mass. Regs. § 15.413(1), to require plaintiffs to file a deed restriction.¹¹

⁹ Because property owners have an affirmative duty to comply with Title 5, it appears that it is inconsequential that the Property’s basement was finished prior to plaintiffs’ purchasing the Property. It is a violation of Title 5 to use or modify a facility such that an upgrade is required. See 310 Code Mass. Regs. § 15.024(3). Thus, after learning of the Property’s noncompliance, it appears that plaintiffs would have been obligated to upgrade their system or seek a variance from the Board of Health given the existing layout would have resulted in a use or alteration requiring a larger system.

¹⁰ Plaintiffs also argue that there are no cases discussing a scenario where the presumptive calculation was applied to an existing structure (interior remodeling permit). While the court is unaware of such cases, the absence of such cases does not conclusively demonstrate that the presumptive definition cannot be applied here. In addition, the court is equally unaware of any appellate decision applying the bedroom definition. In the absence of such guidance, this court must interpret the regulations.

¹¹ While plaintiffs argue that they did not file for a variance, the absence of their application is a technical failure. It was their obligation under 310 Code Mass. Regs. § 15.022 to comply with all Title 5 requirements, which would have required them to apply for a variance if they did not want to upgrade their system. That the Board of Health exercised their power to require a deed restriction under 310 Code Mass. Regs. § 15.413 in the absence of an actual application from plaintiffs is of no consequence. See *Massachusetts Prisoners Ass’n Political Action Committee*, 435 Mass. at 824.

Accordingly, because the Board of Health's decision to apply the presumptive bedroom calculation formula was rational and supported by the substantial evidence, the Board of Health had authority to require plaintiff to file a deed restriction in lieu of requiring a full septic system upgrade or seeking a variance, and plaintiffs' motion for judgment on the pleadings on its claim for certiorari review of the Board of Health's decision (Count I) is **DENIED** while the defendants' cross motion on that same count is **ALLOWED**.¹²

3. Defendants' Cross Motion for Judgment on the Pleadings (Motion to Dismiss)¹³

a. Standard of Review

A motion to dismiss allows for dismissal of a complaint when the factual allegations contained within it do not suggest a plausible entitlement to relief. *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 635-636 (2008); *Fraelick v. PerketPR, Inc.*, 83 Mass. App. Ct. 698, 699-700 (2013). Cf. *Mullins v. Corcoran*, 488 Mass. 275, 281 (2021) (judgment on pleadings). In ruling on the motions, the court accepts the factual allegations as true and draws all reasonable inferences in the non-moving party's favor. *Fraelick*, 83 Mass. App. Ct. at 699-700. Cf. *Mullins*, 488 Mass. at 281.

b. Count II – Mandamus

Defendants argue that the court should dismiss Count II of plaintiffs' complaint because, as plaintiffs concede, a building permit was issued and the construction is largely complete.¹⁴ Because the building permit has already issued, see First Amended Complaint par. 69; Paper No.

¹² Because the court concludes that the Board of Health acted rationally based on the substantial evidence before it when it applied the Title 5 bedroom calculation, the court declines to address any reliance by the Board of Health on its belief that requiring a deed restriction was necessary to prevent future violations and harm.

¹³ Although the defendants style their cross motion as one for judgment on the pleadings, the court treats their motion as to Counts II, III, and VI as a motion to dismiss because the pleadings are not closed.

¹⁴ Plaintiffs did not make a counterargument.

8, plaintiffs' claim for mandamus to require defendants to issue the permit is moot. See *Branch v. Commonwealth Emp. Retirement Bd.*, 481 Mass. 810, 817-818 (2019) (case moot where no actual controversy exists and court cannot order an effective relief). Accordingly, defendants' motion for judgment on the pleadings (motion to dismiss) on plaintiffs' claim for mandamus (Count II) is **ALLOWED**.

c. Counts III and VI – Declaratory Relief and Permanent Injunctive Relief

Defendants argue that Counts III and VI of plaintiff's complaint are moot because the court resolved plaintiffs' certiorari claim.¹⁵ The court agrees.

Where a party is aggrieved by a discretionary decision of a local board, they "must either 'appeal under a statute which specifically provides a right of appeal from the decision, or, if no right of appeal is so provided, to petition for a writ of certiorari.'" *Bermant v. Board of Selectmen of Belchertown*, 425 Mass. 400, 403 (1997), quoting *Johnson Prods., Inc v. City Council of Medford*, 353 Mass. 540, 545 (1968). A declaratory judgment action is not an alternative or substitute remedy. *Bermant*, 425 Mass. at 403.

Here, as demonstrated by plaintiffs' complaint, plaintiffs' remedy was an appeal of the Board of Health's decision through their certiorari action. Thus, the declaratory relief claim is duplicative and an improper avenue for recovery. See *Bermant*, 425 Mass. at 403.

Although the declaratory relief claim also encompasses a claim for class action relief, plaintiffs cannot act as representative parties where their certiorari claim fails. This is not a case where plaintiffs' complaint, as to Count III, contains broad allegations that allow for substitute representatives. But see *Foster v. Commissioner of Correction*, 484 Mass. 698, 713-715 (2020)

¹⁵ Plaintiffs did not make a counterargument.

(allowing plaintiff time to find substitute representative); *Gonzalez*, 407 Mass. 448, 451-453 (1990) (same). Thus, the claim fails because plaintiffs cannot act as the representative parties.

As to plaintiffs' claim for permanent injunctive relief on Counts I, II, and III, that claim fails because plaintiffs' Counts I-III fail, as discussed above.

Accordingly, defendants' motion for judgment on the pleadings (motion to dismiss) on Counts III and VI is **ALLOWED**.

ORDER

For all the foregoing reasons, it is hereby **ORDERED** that plaintiffs' motion for judgment on the pleadings is **DENIED** and that defendants' cross motion for judgment on the pleadings is **ALLOWED**.

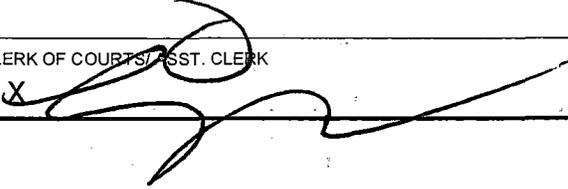
Dated: May 2, 2025

Brent A. Tingle

Brent A. Tingle
Justice of the Superior Court

APPENDIX “D”

#281

JUDGMENT		Trial Court of Massachusetts The Superior Court	
DOCKET NUMBER 2381CV02061		Michael A. Sullivan, Clerk of Court Middlesex County	
CASE NAME Del Rosario, Maria B et al vs. Stow Board of Health et al		COURT NAME & ADDRESS Middlesex Superior - Lowell 370 Jackson Street Lowell, MA 01852	
<p>This action came before the Court, Hon. Brent A Tingle, presiding, and upon consideration thereof,</p> <p>It is ORDERED and ADJUDGED:</p> <p>Because the board of Health's decision to apply the presumptive bedroom calculation formula was rational and supported by the substantial evidence, the Board of Health had the authority to require plaintiff to file a deed restriction in lieu of requiring a full septic system upgrade or seeking a variance, and plaintiff's motion for judgment on the pleadings on its claim for certiorari review of the Board of Health's decision (Count I) is DENIED while the defendants' cross motion on that same count is ALLOWED.</p> <p>Judgment hereby enters for the defendants and against the plaintiffs on Count I of the First Amended Complaint only.</p>			
DATE JUDGMENT ENTERED 09/29/2025	CLERK OF COURTS/ ASST. CLERK 		

APPENDIX “E”



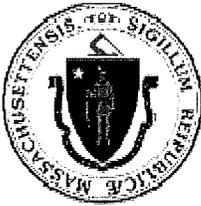
COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX COUNTY
Public Docket Report

2381CV02061 Del Rosario, Maria B et al vs. Stow Board of Health et al

CASE TYPE: Administrative Civil Actions	FILE DATE: 07/17/2023
ACTION CODE: E03	CASE TRACK: X - Accelerated
DESCRIPTION: Certiorari Action, G. L. c. 249 § 4	
CASE DISPOSITION DATE:	CASE STATUS: Open
CASE DISPOSITION: Pending	STATUS DATE: 07/17/2023
CASE JUDGE:	CASE SESSION: Civil L2 CR16

PARTIES

<p>Plaintiff Burke, Brian Stow, MA 01775</p> <p>Plaintiff Del Rosario, Maria B</p>	<p>Attorney 542198 Brian P Burke Law Offices of Brian Burke Law Offices of Brian Burke PO Box 904 Stow, MA 01775 Work Phone (508) 767-1400 Added Date: 07/19/2023</p> <p>Attorney 542198 Brian P Burke Law Offices of Brian Burke Law Offices of Brian Burke PO Box 904 Stow, MA 01775 Work Phone (508) 767-1400 Added Date: 07/19/2023</p>
---	---



COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX COUNTY
Public Docket Report

Defendant Evdokimoff, Merrily	Private Counsel 632617 Adam Simms Pierce Davis and Perritano LLP Pierce Davis and Perritano LLP 10 Post Off Square Suite 1100N Boston, MA 02109 Work Phone (617) 350-0950 Added Date: 09/14/2023
	Attorney 641459 Gregg J Corbo KP Law, P.C. KP Law, P.C. 101 Arch St 12th Floor Boston, MA 02110 Work Phone (617) 556-0007 Added Date: 07/21/2023
	Private Counsel 706146 Matthew J Hamel Pierce Davis and Perritano Pierce Davis and Perritano 10 Post Off Square Suit 1100N Boston, MA 02109 Work Phone (617) 350-0950 Added Date: 09/14/2023



COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX COUNTY
Public Docket Report

<p>Defendant Garreffi, James</p>	<p>Private Counsel 632617 Adam Simms Pierce Davis and Perritano LLP Pierce Davis and Perritano LLP 10 Post Off Square Suite 1100N Boston, MA 02109 Work Phone (617) 350-0950 Added Date: 09/14/2023</p>
	<p>Attorney 657175 Mark J Clafin CMBG3 Law P.C. CMBG3 Law P.C. 53 State St Boston, MA 02109 Work Phone (617) 885-8055 Added Date: 04/25/2024</p>
	<p>Attorney 641459 Gregg J Corbo KP Law, P.C. KP Law, P.C. 101 Arch St 12th Floor Boston, MA 02110 Work Phone (617) 556-0007 Added Date: 07/21/2023</p>
	<p>Private Counsel 706146 Matthew J Hamel Pierce Davis and Perritano Pierce Davis and Perritano 10 Post Off Square Suit 1100N Boston, MA 02109 Work Phone (617) 350-0950 Added Date: 09/14/2023</p>



COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX COUNTY
Public Docket Report

<p>Defendant McDowell, Mary</p>	<p>Private Counsel 632617 Adam Simms Pierce Davis and Perritano LLP Pierce Davis and Perritano LLP 10 Post Off Square Suite 1100N Boston, MA 02109 Work Phone (617) 350-0950 Added Date: 09/14/2023</p> <p>Attorney 641459 Gregg J Corbo KP Law, P.C. KP Law, P.C. 101 Arch St 12th Floor Boston, MA 02110 Work Phone (617) 556-0007 Added Date: 07/21/2023</p> <p>Private Counsel 706146 Matthew J Hamel Pierce Davis and Perritano Pierce Davis and Perritano 10 Post Off Square Suit 1100N Boston, MA 02109 Work Phone (617) 350-0950 Added Date: 09/14/2023</p>
<p>Defendant Rising, Marcia</p>	<p>Private Counsel 632617 Adam Simms Pierce Davis and Perritano LLP Pierce Davis and Perritano LLP 10 Post Off Square Suite 1100N Boston, MA 02109 Work Phone (617) 350-0950 Added Date: 09/14/2023</p> <p>Attorney 641459 Gregg J Corbo KP Law, P.C. KP Law, P.C. 101 Arch St 12th Floor Boston, MA 02110 Work Phone (617) 556-0007 Added Date: 07/21/2023</p> <p>Private Counsel 706146 Matthew J Hamel Pierce Davis and Perritano Pierce Davis and Perritano 10 Post Off Square Suit 1100N Boston, MA 02109 Work Phone (617) 350-0950 Added Date: 09/14/2023</p>



COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX COUNTY
Public Docket Report

<p>Defendant Stow Board of Health</p>	<p>Private Counsel 632617 Adam Simms Pierce Davis and Perritano LLP Pierce Davis and Perritano LLP 10 Post Off Square Suite 1100N Boston, MA 02109 Work Phone (617) 350-0950 Added Date: 09/14/2023</p> <p>Attorney 641459 Gregg J Corbo KP Law, P.C. KP Law, P.C. 101 Arch St 12th Floor Boston, MA 02110 Work Phone (617) 556-0007 Added Date: 07/21/2023</p> <p>Private Counsel 706146 Matthew J Hamel Pierce Davis and Perritano Pierce Davis and Perritano 10 Post Off Square Suit 1100N Boston, MA 02109 Work Phone (617) 350-0950 Added Date: 09/14/2023</p>
<p>Defendant Town of Stow</p>	<p>Private Counsel 632617 Adam Simms Pierce Davis and Perritano LLP Pierce Davis and Perritano LLP 10 Post Off Square Suite 1100N Boston, MA 02109 Work Phone (617) 350-0950 Added Date: 09/14/2023</p> <p>Attorney 641459 Gregg J Corbo KP Law, P.C. KP Law, P.C. 101 Arch St 12th Floor Boston, MA 02110 Work Phone (617) 556-0007 Added Date: 07/21/2023</p> <p>Private Counsel 706146 Matthew J Hamel Pierce Davis and Perritano Pierce Davis and Perritano 10 Post Off Square Suit 1100N Boston, MA 02109 Work Phone (617) 350-0950 Added Date: 09/14/2023</p>



COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX COUNTY
Public Docket Report

FINANCIAL DETAILS

Date	Fees/Fines/Costs/Charge	Assessed	Paid	Dismissed	Balance
07/17/2023	Civil Filing Fee (per Plaintiff)	240.00	240.00	0.00	0.00
07/17/2023	Civil Security Fee (G.L. c. 262, § 4A)	20.00	20.00	0.00	0.00
07/17/2023	Civil Surcharge (G.L. c. 262, § 4C)	15.00	15.00	0.00	0.00
07/19/2023	Fee for Blank Summons or Writ (except Writ of Habeas Corpus) MGL 262 sec 4b	30.00	30.00	0.00	0.00
Total		305.00	305.00	0.00	0.00



COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX COUNTY
Public Docket Report

INFORMATIONAL DOCKET ENTRIES

Date	Ref	Description	Judge
07/17/2023		Attorney appearance On this date Pro Se added for Plaintiff Maria B Del Rosario	
07/17/2023		Attorney appearance On this date Pro Se added for Plaintiff Brian Burke	
07/17/2023		Case assigned to: DCM Track X - Accelerated was added on 07/17/2023	
07/17/2023	1	Original civil complaint filed.	
07/17/2023	2	Civil action cover sheet filed.	
07/17/2023	3	Maria B Del Rosario, Brian Burke's MOTION for appointment of Special Process Server. Francis J. Trapasso and/or his agents. Motion ALLOWED. Copy given in hand.	
07/19/2023		Attorney appearance On this date Brian P Burke, Esq. added for Plaintiff Brian Burke	
07/19/2023		Attorney appearance On this date Pro Se dismissed/withdrawn for Plaintiff Maria B Del Rosario	
07/19/2023		Attorney appearance On this date Brian P Burke, Esq. added for Plaintiff Maria B Del Rosario	
07/19/2023		Attorney appearance On this date Pro Se dismissed/withdrawn for Plaintiff Brian Burke	
07/19/2023	4	Plaintiff Maria B Del Rosario, Brian Burke's EMERGENCY Motion for a preliminary injunction on Counts I though III of their verified complaint and for a short order of notice for the hearing on their motion.	
07/19/2023	5	Maria B Del Rosario, Brian Burke's Memorandum in support of motion for a preliminary injunction ("Attachment B" is a flash drive)	
07/19/2023	6	Affidavit filed by Plaintiff Maria B Del Rosario, Brian Burke in support of motion for preliminary injunction	
07/19/2023	7	Summons and order of notice issued on a EMERGENCY Motion for a Preliminary Injunction , returnable on 07/24/2023 02:30 PM Hearing on Preliminary Injunction.	Wall
07/21/2023		Attorney appearance electronically filed.	



COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX COUNTY
Public Docket Report

07/21/2023	8	<p>Party(s) file Stipulation</p> <p>Now come the parties to the above-captioned case and hereby jointly stipulate that the following shall enter as an order of the Court:</p> <p>The Town of Stow Board of Health, by and through its authorized agent, shall approve the Building Permit application which is the subject to the above-captioned litigation with regard to the suitability of the septic system serving the subject property only by the close of business on Monday, July 24, 2023, subject to the plaintiffs' agreement not to market the property for sale as a dwelling with more than four bedrooms during the pendency of the litigation or until further order of the Court or agreement of the parties. This stipulation is entered without prejudice and without waiver of any claims and defenses that either party may assert in this action, including but not limited to the right of the Board of Health to assert that a deed restriction is required. Upon endorsement of this Stipulation by the Court, the Plaintiffs' Motion for Preliminary Injunction shall be deemed withdrawn.</p> <p>Applies To: Burke, Esq., Brian P (Attorney) on behalf of Burke, Brian, Del Rosario, Maria B (Plaintiff); Corbo, Esq., Gregg J (Attorney) on behalf of Evdokimoff, Merrily, Garreffi, James, McDowell, Mary, Rising, Marcia, Stow Board of Health, Town of Stow (Defendant)</p>	
07/21/2023		<p>Attorney appearance</p> <p>On this date Gregg J Corbo, Esq. added for Defendant Stow Board of Health.</p>	
07/21/2023		<p>Attorney appearance</p> <p>On this date Gregg J Corbo, Esq. added for Defendant Town of Stow.</p>	
07/21/2023		<p>Attorney appearance</p> <p>On this date Gregg J Corbo, Esq. added for Defendant James Garreffi.</p>	
07/21/2023		<p>Attorney appearance</p> <p>On this date Gregg J Corbo, Esq. added for Defendant Mary McDowell.</p>	
07/21/2023		<p>Attorney appearance</p> <p>On this date Gregg J Corbo, Esq. added for Defendant Marcia Rising.</p>	
07/21/2023		<p>Attorney appearance</p> <p>On this date Gregg J Corbo, Esq. added for Defendant Merrily Evdokimoff.</p>	
07/24/2023		<p>Endorsement on Submission of Joint Stipulation (#8.0): Other action taken</p> <p>The joint stipulation is accepted for filing, which resolves the preliminary injunction issues and plaintiff withdraws the motion for preliminary injunction.</p> <p>SO ORDERED.</p>	Wall
07/24/2023		<p>EDocument sent:</p> <p>Clerk's Notice (eDoc)</p> <p>Sent On: 07/24/2023 09:31:09</p> <p>Notice Sent To: Brian P Burke, Esq. bburkelaw@msn.com</p> <p>Notice Sent To: Gregg J Corbo, Esq. gcorbo@k-plaw.com</p>	



COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX COUNTY
Public Docket Report

07/24/2023		Event Result:: Hearing on Preliminary Injunction scheduled on: 07/24/2023 02:30 PM Has been: Not Held For the following reason: Joint request of parties Comments: See Court's endorsement of Joint Stipulation (paper # 8). Plaintiff's motion for preliminary injunction withdrawn Hon. Joshua Wall, Presiding Staff: Amanda Rowan, Assistant Clerk Magistrate	Wall
08/02/2023	9	Service Returned for Defendant Stow Board of Health: Service through person in charge / agent; Cyndie Colosi, 380 Great Road, Stow MA, 7/20/23	
08/02/2023	10	Service Returned for Defendant Town of Stow: Service through person in charge / agent; Linda Hathaway, 380 Great Road, Stow MA, 7/20/23	
08/02/2023	11	Service Returned for Defendant Garreffi, James: Service through person in charge / agent; Cyndie Colosi, 380 Great Road, Stow MA, 7/20/23	
08/02/2023	12	Plaintiffs Maria B Del Rosario, Brian Burke's Motion to Amend Their Pleading as of Right Pursuant to Mass.R.Civ. P. 15(a)	
08/02/2023		Endorsement on Motion to Amend Their Pleading as of Right Pursuant to Mass.R.Civ.P.15(a) (#12.0): ALLOWED	Wall
08/02/2023	13	Amended: amended complaint filed by Maria B Del Rosario, Brian Burke	
09/11/2023	14	Service Returned for Defendant McDowell, Mary: Service made in hand; to Mary McDowell at 161 Packard Road Stow, MA 01775 on 8/28/2023.	
09/11/2023	15	Service Returned for Defendant Rising, Marcia: Service made at last and usual; at 34 Meeting House Lane Stow, MA 01775 on 8/28/2023.	
09/11/2023	16	Service Returned for Defendant Evdokimoff, Merrily: Service made at last and usual; at 154 North Shore Drive Stow, MA 01775 on 8/28/2023.	
09/14/2023		Attorney appearance On this date Matthew J Hamel, Esq. added as Private Counsel for Defendant Stow Board of Health	
09/14/2023		Attorney appearance On this date Matthew J Hamel, Esq. added as Private Counsel for Defendant Town of Stow	
09/14/2023		Attorney appearance On this date Matthew J Hamel, Esq. added as Private Counsel for Defendant James Garreffi	



COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX COUNTY
Public Docket Report

09/14/2023		Attorney appearance On this date Matthew J Hamel, Esq. added as Private Counsel for Defendant Mary McDowell
09/14/2023		Attorney appearance On this date Matthew J Hamel, Esq. added as Private Counsel for Defendant Marcia Rising
09/14/2023		Attorney appearance On this date Matthew J Hamel, Esq. added as Private Counsel for Defendant Merrily Evdokimoff
09/14/2023		Attorney appearance electronically filed.
09/14/2023		Attorney appearance On this date Adam Simms, Esq. added as Private Counsel for Defendant Stow Board of Health
09/14/2023		Attorney appearance On this date Adam Simms, Esq. added as Private Counsel for Defendant Town of Stow
09/14/2023		Attorney appearance On this date Adam Simms, Esq. added as Private Counsel for Defendant James Garreffi
09/14/2023		Attorney appearance On this date Adam Simms, Esq. added as Private Counsel for Defendant Mary McDowell
09/14/2023		Attorney appearance On this date Adam Simms, Esq. added as Private Counsel for Defendant Marcia Rising
09/14/2023		Attorney appearance On this date Adam Simms, Esq. added as Private Counsel for Defendant Merrily Evdokimoff
09/14/2023		Attorney appearance electronically filed.
09/14/2023	17	Defendants Stow Board of Health, Town of Stow, James Garreffi, Mary McDowell, Marcia Rising, Merrily Evdokimoff's Notice of Motion to Dismiss
04/02/2024	18	Defendants Stow Board of Health, Town of Stow, James Garreffi, Mary McDowell, Marcia Rising, Merrily Evdokimoff's Submission of Administrative Record
04/25/2024		Attorney appearance electronically filed.
04/29/2024	19	Plaintiffs, Defendants Maria B Del Rosario, Brian Burke, Stow Board of Health, Town of Stow, James Garreffi, Mary McDowell, Marcia Rising, Merrily Evdokimoff's Joint Motion to extend tracking deadline(s)
05/06/2024		Endorsement on Motion to Amend Deadlines (#19.0): ALLOWED
		Campbell



COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX COUNTY
Public Docket Report

05/06/2024		EDocument sent: Clerk's Notice (eDoc) Sent On: 05/06/2024 15:22:22 Notice Sent To: Brian P Burke, Esq. bburkelaw@msn.com Notice Sent To: Adam Simms, Esq. asimms@piercedavis.com Notice Sent To: Gregg J Corbo, Esq. gcorbo@k-plaw.com Notice Sent To: Matthew J Hamel, Esq. mhamel@piercedavis.com
09/09/2024	20	Plaintiffs Maria B Del Rosario, Brian Burke's Motion for judgment on the pleadings MRCP 12(c) on Count I of their Amended Verified Complaint seeking a Writ of Certiorari Under G.L. c. 249, § 4
09/09/2024	20.1	Maria B Del Rosario, Brian Burke's Memorandum in support of their Motion for judgment on the pleadings on Count I of their Amended Verified Complaint pursuant to Mass. R. Civ. P. 12(c)
09/09/2024	20.2	Defendants Stow Board of Health, Town of Stow, James Garreffi, Mary McDowell, Marcia Rising, Merrily Evdokimoff's Cross Motion for Judgment on the Pleadings
09/09/2024	20.3	Stow Board of Health, Town of Stow, James Garreffi, Mary McDowell, Marcia Rising, Merrily Evdokimoff's Memorandum in support of their Cross-Motion for Judgment on the Pleadings
09/09/2024	20.4	Maria B Del Rosario, Brian Burke's Memorandum in opposition to Defendants' Cross-Motion for Judgment on the Pleadings and/or Reply to that Response/Opposition to Plaintiffs own Motion for Judgment on the Pleadings
09/09/2024	21	Defendants Town of Stow, Stow Board of Health, James Garreffi, Mary McDowell, Marcia Rising, Merrily Evdokimoff's Motion to Dismiss Count IV of Plaintiffs' First Amended Complaint, Pursuant to Rule 12(b)(6)
09/09/2024	21.1	Stow Board of Health, Town of Stow, James Garreffi, Mary McDowell, Marcia Rising, Merrily Evdokimoff's Memorandum of Law in Support of Their Motion to Dismiss Count IV of Plaintiffs' First Amended Complaint, Pursuant to Rule 12(b)(6)
09/09/2024	21.2	Opposition to All Defendants Motion to Dismiss Count IV of their Amended Verified Complaint Seeking Recovery From All Defendants filed by Maria B Del Rosario, Brian Burke
09/09/2024	21.3	Defendants Stow Board of Health, Town of Stow, James Garreffi, Mary McDowell, Marcia Rising, Merrily Evdokimoff's Request for Hearing
09/09/2024	21.4	Affidavit of Compliance with Superior Court Rule 9A
09/09/2024	21.5	Certificate of Compliance Superior Court Rule 9C
09/09/2024	21.6	Rule 9A list of documents filed.
09/09/2024	21.7	Rule 9A notice of filing



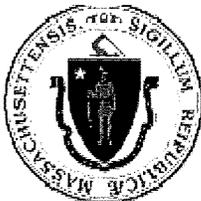
COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX COUNTY
Public Docket Report

09/10/2024	EDocument sent:	<p>Notice to Appear was generated and sent to: Plaintiff: Brian P Burke, Esq. bburkelaw@msn.com Defendant: Gregg J Corbo, Esq. gcorbo@k-plaw.com Defendant: Matthew J Hamel, Esq. mhamel@piercedavis.com Defendant: Adam Simms, Esq. asimms@piercedavis.com Defendant: Mark J Claflin, Esq. mclaflin@hl-law.com Sent On: 09/10/2024 11:15:02</p>	
09/10/2024	EDocument sent:	<p>Notice to Appear was generated and sent to: Plaintiff: Brian P Burke, Esq. bburkelaw@msn.com Defendant: Gregg J Corbo, Esq. gcorbo@k-plaw.com Defendant: Matthew J Hamel, Esq. mhamel@piercedavis.com Defendant: Adam Simms, Esq. asimms@piercedavis.com Sent On: 09/10/2024 12:38:10</p>	
09/10/2024	EDocument sent:	<p>Notice to Appear was generated and sent to: Plaintiff: Brian P Burke, Esq. bburkelaw@msn.com Defendant: Gregg J Corbo, Esq. gcorbo@k-plaw.com Defendant: Matthew J Hamel, Esq. mhamel@piercedavis.com Defendant: Adam Simms, Esq. asimms@piercedavis.com Defendant: Mark J Claflin, Esq. mclaflin@hl-law.com Sent On: 09/10/2024 13:05:05</p>	
09/11/2024	22	<p>Plaintiffs, Defendants Maria B Del Rosario, Brian Burke, Stow Board of Health, Town of Stow, James Garreffi, Mary McDowell, Marcia Rising, Merrily Evdokimoff's Joint Motion for Leave to File or Approve the Filing of Plaintiffs' Opposition and/or Reply Memorandum to Defendants' Cross-Motion for Judgment on the Pleadings and Defendants Reply and/or Sur-Reply Thereto Pursuant to Superior Court Rule 9A(A)(3)</p>	
09/19/2024		<p>Endorsement on Motion for Leave to File or Approve the Filing of Plaintiffs' Opposition and/or Reply Memorandum to Defendants' Cross-Motion for Judgment on the Pleadings and Defendants Reply and/or Sur-Reply Thereto Pursuant to Superior Court Rule 9A(A)(3) (#22.0): ALLOWED by agreement.</p>	Rooney
		<p>Judge: Rooney, Hon. Lynn C</p>	
09/19/2024	EDocument sent:	<p>Clerk's Notice (eDoc) Sent On: 09/19/2024 08:46:03 Notice Sent To: Brian P Burke, Esq. bburkelaw@msn.com Notice Sent To: Adam Simms, Esq. asimms@piercedavis.com Notice Sent To: Gregg J Corbo, Esq. gcorbo@k-plaw.com Notice Sent To: Matthew J Hamel, Esq. mhamel@piercedavis.com</p>	



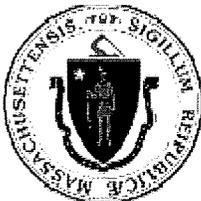
COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX COUNTY
Public Docket Report

02/27/2025	<p>Matter taken under advisement: Hearing for Judgment on Pleading scheduled on: 02/27/2025 03:00 PM Has been: Held - Under advisement Hon. Brent A Tingle, Presiding Appeared: Plaintiff Brian P Burke, Esq., Defendant Matthew J Hamel, Esq., Private Counsel Staff: Emily Jackson, Assistant Clerk Magistrate</p>	Tingle	
05/06/2025	23	<p>MEMORANDUM & ORDER: MEMORANDUM OF DECISION AND ORDER ON THE PARTIES' CROSS MOTIONS FOR JUDGMENT ON THE PLEADINGS: ORDER: For all the foregoing reasons, it is hereby ORDERED that plaintiff's motion for judgment on the pleadings is DENIED and the defendants' cross motion for judgment on the pleadings is ALLOWED (See scanned image for complete text - 11 pages). Judge: Tingle, Hon. Brent A</p>	Tingle
05/06/2025		<p>EDocument sent: Clerk's Notice (eDoc) Sent On: 05/06/2025 16:14:55 Notice Sent To: Brian P Burke, Esq. bburkelaw@msn.com Notice Sent To: Adam Simms, Esq. asimms@piercedavis.com Notice Sent To: Gregg J Corbo, Esq. gcorbo@k-plaw.com Notice Sent To: Matthew J Hamel, Esq. mhamel@piercedavis.com Notice Sent To: Mark J Claflin, Esq. mclaflin@hl-law.com</p>	
06/12/2025		<p>EDocument sent: Notice to Appear for Final Pre-Trial Conference was generated and sent to: Plaintiff: Brian P Burke, Esq. bburkelaw@msn.com Defendant: Gregg J Corbo, Esq. gcorbo@k-plaw.com Defendant: Matthew J Hamel, Esq. mhamel@piercedavis.com Defendant: Adam Simms, Esq. asimms@piercedavis.com Sent On: 06/12/2025 08:59:04</p>	
06/13/2025	24	<p>Plaintiffs Maria B Del Rosario, Brian Burke's Motion for Separate Entry of Judgment on Count I of the First Amended Complaint</p>	
06/13/2025	24.1	<p>Affidavit of compliance with Superior Court Rule 9A Applies To: Burke, Esq., Brian P (Attorney) on behalf of Burke, Brian, Del Rosario, Maria B (Plaintiff)</p>	



COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX COUNTY
Public Docket Report

07/03/2025	25	MEMORANDUM & ORDER:	Tingle
MEMORANDUM OF DECISION AND ORDER ON THE DEFENDANTS' MOTION TO DISMISS COUNT IV OF THE PLAINTIFF'S COMPLAINT PURSUANT TO RULE 12(b)(6) (PAPER 21)			
ORDER (page 2)			
For all the foregoing reasons, it is hereby ORDERED that the defendants' motion to dismiss Count IV pursuant to Rule 12(b)(6) is ALLOWED.			
Brent A. Tingle Justice of the Superior Court			
Dated: July 3, 2025			
(see scanned image for full contents of memorandum and order, 2 pages)			
Judge: Tingle, Hon. Brent A			
07/03/2025		EDocument sent:	
Clerk's Notice (eDoc) Sent On: 07/03/2025 14:33:37 Notice Sent To: Brian P Burke, Esq. bburkelaw@msn.com Notice Sent To: Adam Simms, Esq. asimms@piercedavis.com Notice Sent To: Gregg J Corbo, Esq. gcorbo@k-plaw.com Notice Sent To: Matthew J Hamel, Esq. mhamel@piercedavis.com			
08/07/2025	26	Plaintiffs, Defendants Maria B Del Rosario, Brian Burke, Stow Board of Health, Town of Stow, James Garreffo, Mary McDowell, Marcia Rising, Merrily Evdokimoff's EMERGENCY Joint Motion to Continue Final Pretrial Conference	
08/07/2025	27	Defendant Stow Board of Health, Town of Stow, Mary McDowell, Marcia Rising, Merrily Evdokimoff, James Garreffo's Motion to dismiss Count V and the entry of judgment in defendant's favor on all counts.	
08/07/2025	27.1	Stow Board of Health, Town of Stow, James Garreffo, Mary McDowell, Marcia Rising's Memorandum in support of motion to dismiss Count V and the entry of judgment in defendant's favor on all counts.	
08/07/2025	27.2	Opposition to Defendants' motion to dismiss Count V and the entry of judgment in defendant's favor on all counts, and in the alternative, for immediate action on their unopposed motion for separate entry of judgment on Count I filed by Maria B Del Rosario, Brian Burke	
08/07/2025	27.3	Defendant Stow Board of Health, Town of Stow, James Garreffo, Mary McDowell, Marcia Rising, Merrily Evdokimoff's Reply in support of their motion to dismiss Count V and the entry of judgment in defendant's favor on all counts.	
08/07/2025	27.4	Defendant Stow Board of Health, Town of Stow, James Garreffo, Mary McDowell, Marcia Rising, Merrily Evdokimoff's Motion of compliance with Superior Court Rule 9C.	



COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX COUNTY
Public Docket Report

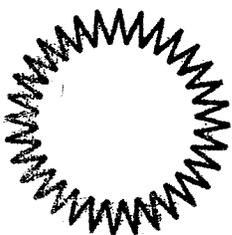
08/07/2025	27.5	Defendants' Affidavit of compliance with Superior Court Rule 9A.	
08/11/2025		Endorsement on Motion to continue / reschedule an event Final Pretrial Conference currently scheduled for 8/20/25 (#26): ALLOWED Clerk will send notice of new hearing date when scheduled.	Barrett
		Judge: Barrett, Hon. C. William	
08/11/2025		EDocument sent: Clerk's Notice (eDoc) Sent On: 08/11/2025 13:05:56 Notice Sent To: Brian P Burke, Esq. bburkelaw@msn.com Notice Sent To: Adam Simms, Esq. asimms@piercedavis.com Notice Sent To: Gregg J Corbo, Esq. gcorbo@k-plaw.com Notice Sent To: Matthew J Hamel, Esq. mhamel@piercedavis.com Notice Sent To: Mark J Claflin, Esq. mclaflin@hl-law.com	
08/11/2025		Event Result:: Final Pre-Trial Conference scheduled on: 08/20/2025 02:00 PM Has been: Rescheduled For the following reason: Joint request of parties Hon. C. William Barrett, Presiding Staff: Emily Jackson, Assistant Clerk Magistrate	Barrett
09/29/2025		Endorsement on Motion for Separate Entry of Judgment on Count I of the First Amended Complaint (#24.0): ALLOWED After review and without opposition, motion ALLOWED.	Haggan
09/29/2025		EDocument sent: Clerk's Notice (eDoc) Sent On: 09/29/2025 11:55:26 Notice Sent To: Brian P Burke, Esq. bburkelaw@msn.com Notice Sent To: Adam Simms, Esq. asimms@piercedavis.com Notice Sent To: Gregg J Corbo, Esq. gcorbo@k-plaw.com Notice Sent To: Matthew J Hamel, Esq. mhamel@piercedavis.com	
09/29/2025	28	Partial Judgment. It is ORDERED and ADJUDGED:: Because the board of Health's decision to apply the presumptive bedroom calculation formula was rational and supported by the substantial evidence, the Board of Health had the authority to require plaintiff to file a deed restriction in lieu of requiring a full septic system upgrade or seeking a variance, and plaintiff's motion for judgment on the pleadings on its claim for certiorari review of the Board of Health's decision (Count I) is DENIED while the defendants' cross motion on that same count is ALLOWED. Judgment hereby enters for the defendants and against the plaintiffs on Count I of the First Amended Complaint only.	Tingle



COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX COUNTY
Public Docket Report

10/27/2025	29	Notice of appeal filed of the separate entry of judgment entered on September 29, 2025 with respect to the denial of the plaintiffs' motion for judgment on the pleadings on Count I of their amended complaint and the granting on the defendants' cross-motion on said Count.
		Applies To: Del Rosario, Maria B (Plaintiff); Burke, Brian (Plaintiff)
10/27/2025	30	Certification/Copy of Letter of transcript ordered from Court Reporter 02/27/2025 03:00 PM Hearing for Judgment on Pleading
		Applies To: Del Rosario, Maria B (Plaintiff); Burke, Brian (Plaintiff)
11/25/2025		EDocument sent: Notice to Appear was generated and sent to: Plaintiff: Brian P Burke, Esq. bburkelaw@msn.com Plaintiff: Brian P Burke, Esq. bburkelaw@msn.com Defendant: Gregg J Corbo, Esq. gcorbo@k-plaw.com Defendant: Matthew J Hamel, Esq. mhamel@piercedavis.com Defendant: Adam Simms, Esq. asimms@piercedavis.com Defendant: Mark J Claflin, Esq. mclaflin@hl-law.com Sent On: 11/25/2025 16:12:01
01/06/2026		Attorney appearance electronically filed.
01/16/2026		CD of Transcript of 02/27/2025 03:00 PM Hearing for Judgment on Pleading received from Diane Harris. 1
01/21/2026	31	Notice of assembly of record sent to Counsel
01/21/2026	32	Notice to Clerk of the Appeals Court of Assembly of Record
01/21/2026	33	Appeal: Statement of the Case on Appeal (Cover Sheet).
02/10/2026	34	Appeal entered in Appeals Court on 02/09/2026 docket number NO:2026-P-0147

MIDDLESEX, SS. **Commonwealth of Massachusetts**
SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT



In testimony that the foregoing is a true copy on file and of record made by photographic process, I hereunto set by hand and affix the seal of said Superior Court this 25th day of FEBRUARY, 2026

Deputy Assistant Clerk

APPENDIX “F”

DEP Guidance to Homeowners Planning to Construct Additions

I am thinking about adding living space to my home (family room, garage, etc.) but am maintaining the same number of bedrooms. Am I required to have a Title 5 inspection to get a building permit?

A system must be inspected upon any change of use or expansion of use for which a building permit or occupancy permit is required. However, if the change of use or expansion does not increase the existing design flow, the requirement is for an assessment only, in order to determine the location of all system components, including the reserve area. This will ensure that the proposed construction is not placed on top of any system components. The requirement for an assessment can be waived if an official record exists that shows the location of system components as they relate to the proposed construction. (310 CMR 15.301(5) [SIC].

<https://www.mass.gov/guides/repairs-and-new-construction-for-title-5-frequently-asked-questions>.

APPENDIX “G”

DEP Guidance to Local Boards of Health in Applying
Title 5 To ADU Permitting under the AHA

2. Q. If the total number of rooms between the principal dwelling and the ADU exceeds eight, is the number of bedrooms determined in accordance with the definition of bedroom in 310 CMR 15.002 by dividing the total number rooms by two and rounding down?

A. No. Both the principal dwelling and the ADU are separate and distinct dwelling units that occupy the same facility and the number of bedrooms in each of these units must be counted separately. This is consistent with how the number of bedrooms in an apartment building are counted: the number of rooms in the building are not totaled and then divided by two.

<https://www.mass.gov/doc/frequently-asked-questions-faq-related-to-guidance-on-title-5-310-cmr-15000-compliance-for-accessory-dwelling-units>

AFFIDAVIT OF SERVICE

DOCKET NO. 2026-P-0147

-----X

Del Rosario

vs.

Stow Board of Health

-----X

I, Elissa Diaz, swear under the pain and penalty of perjury, that according to law and being over the age of 18, upon my oath depose and say that:

on March 2, 2026

I served the Application for Direct Appellate Review pursuant to Rule 13(a) of the Massachusetts Rules of Appellate Procedure within in the above captioned matter upon:

Mathew Hamel, Esquire
**PIERCE DAVIS & PERRITANO,
LLP**
10 Post Office Square, Suite 1100N
Boston, MA 02109
mhamel@piercedavis.com

Mark Claflin, Esq,
CMBG3 Law, PC
53 State St. Suite 1302
Boston, MA 02109
Mclaflin@cmbg3.com

via **Electronic Service** through the efileMA electronic filing system.

Filing has been completed on the same date as above via **Electronic Filing** through the efileMA electronic filing system.

Sworn to before me on March 2, 2026

/s/ Robyn Cocho

/s/ Elissa Diaz

Robyn Cocho
Notary Public State of New Jersey
No. 2193491
Commission Expires January 8, 2027

Brian Burke
B.B.O. 542198

Job #390803