(33)

COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
Docket No. 2276CV00127

COURTNEY GILARDI, CHARLIE HERZIG, JUDY HERZIG, MARK MARKHAM, ANGELA MARKHAM, and ELAINE IRELAND,

Plaintiffs

v.

LINDA TYER as MAYOR OF PITTSFIELD; STEPHEN N. PAGNOTTA as CITY SOLICITOR; PITTSFIELD CELLULAR TELEPHONE COMPANY d/b/a VERIZON WIRELESS, FARLEY WHITE SOUTH STREET, LLC; and ROBERTA ORSI, BRAD GORDON, STEPHEN SMITH, KIMBERLY LORING and DR. JEFFREY LEPPO as they are members of and are collectively THE PITTSFIELD BOARD OF HEALTH

Defendants

**CITY DEFENDANTS' MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS PURSUANT TO MASS. R. CIV. P. 12**

THE COMMONWEALTH OF MASSACHUSETTS
BERKSHIRE S.S. SUPERIOR COURT
FILED DEC 19 2022 FILED

NOW COME the defendants Linda Tyer as Mayor of the City of Pittsfield ("Tyer"), Stephen N. Pagnotta as City Attorney for the City of Pittsfield ("Pagnotta") and the City of Pittsfield Board of Health (Roberta Orsi, Brad Gordon, Stephen Smith, Kimberly Loring, and Dr. Jeffrey Leppo) (collectively, "the Board") (collectively "City Defendants") who submit the following memorandum in support of their Motion to Dismiss the above-captioned action pursuant to Mass. R. Civ. P. 12(b)(1) and 12(b)(6).



TAS

## A. BACKGROUND

To avoid the unnecessary repetition and for the ease of the Court, City Defendants refer to the background previously provided in their opposition to the plaintiffs', Courtney Gilardi, Charlie Herzig, Judy Herzig, Mark Markham, Angelika Markham, and Elaine Ireland (collectively, "Plaintiffs"") Motion to Disqualify the law firm of Donovan O'Connor & Dodig, LLP.

Plaintiffs seek review of the decision to rescind a prior Emergency Order issued by the Board on April 2, 2022 ("the Order"). The focus of this action is the Board's decision to rescind the Order following the filing of litigation by Verizon-and whether that recission was appropriately supported. As it relates to Pagnotta and Tyer, Plaintiffs allege that their actions relative to the Board's decision to rescind the Order violated G.L. c. 268A § 19 and 23 and that Pagnotta's actions also violated the rules of "legal ethics." Plaintiffs seek only a declaratory judgment as to the propriety of Tyer's and Pagnotta's actions and no monetary relief.[1] Pittsfield Cellular Telephone Company d/b/a Verizon Wireless and Farley White South Street, LLC are named as defendants but plaintiffs asserted no counts against them.

## B. LAW

### I. Mass. R. Civ. P. 12(b)(1) – Lack of Subject Matter Jurisdiction

Mass. R. Civ. P. 12(b)(1) requires dismissal of complaints over which a particular court lacks subject matter jurisdiction over the asserted claims. A lack of subject matter jurisdiction divests a court of its ability to hear a particular action and cannot be waived.[2] Superior Courts

[1] The headings for the counts asserted against Tyer and Pagnotta are not recognizable claims but, instead, are incomplete, inflammatory, and conclusory statements. The count against Tyer is entitled "Mayor Refusal to Enforce Board Order" and the count against Pagnotta is titled "City Solicitor Conflict, Improper Coercion." Neither count sets for a cognizable legal basis for the relief sought.

[2] Mass. R. Civ. P. 12, Reporter's Notes (1973).

are courts of general jurisdiction; however, there are certain actions or administrative processes over which the Superior Courts do not have jurisdiction. These include claims that should be heard, in the first instance, by other agencies, such as the Department of Industrial Accidents, the Massachusetts Labor Commission, the Massachusetts State Ethics Commission, and the Massachusetts Board of Bar Overseers.[3] As is set forth below, the Superior Court does not have jurisdiction over professional responsibility or ethics complaints against lawyers or municipal employees. Further, where a plaintiff fails to exhaust its available administrative remedies prior to filing litigation, the court lacks subject matter over the action and dismissal is appropriate.[4] As is set forth below, the Court lacks subject matter jurisdiction over the ethics claims pled against Tyer and Pagnotta and, as such, those counts must be dismissed.

II. Mass. R. Civ. P. 12(b)(6) – Failure to State a Claim

Mass. R. Civ. P. 12(b)(6) permits dismissal of a plaintiff's complaint where the allegations of the complaint fail to state a claim upon which relief can be granted. "The purpose of rule 12(b)(6) is to permit prompt resolution of a case where the allegations in the complaint clearly demonstrate the plaintiff's claim is legally insufficient."[5]

In Bell Atlantic v. Twombly,[6] the Court held that the traditional "notice pleading" standard, if taken literally, would permit survival of "a wholly conclusory statement of claim [on the] possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery." Rather, the more appropriate inquiry is whether the facts as alleged "raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint

[3] See sections V and VI *infra*. See also McCracken v. Sears, Roebuck & Co., 51 Mass. App. Ct. 184 (2001); Newton v. Commissioner of the Department of Youth Services, 62 Mass. App. Ct. 343 (2004).
[4] Town of Wrentham v. W. Wrentham, VIII, LLC, 451 Mass. 511 (2008)
[5] Harvard Crimson, Inc. v. President and Fellows of Harvard College, 445 Mass. 745, 748 (2006).
[6] 550 U.S. 544 (2007).

are true (even if doubtful in fact)."[7] It is not enough that the facts alleged are consistent with liability, the factual allegations must plausibly suggest, not be merely consistent with, entitlement to relief in order to "reflect[] the threshold requirement of [Fed. R. Civ. P.] 8(a)(2) that the 'plain statement' possess enough heft to 'show the pleader is entitled to relief.'"[8]

The Supreme Court reiterated the Twombly standard in Ashcroft v. Iqbal,[9] noting that "[w]hile legal conclusions can provide the framework of a complaint, they must be supported by factual allegations."[10] A well-pleaded complaint must assert "more than an unadorned, the-defendant-unlawfully-harmed-me accusation."[11] "A pleading that offers 'labels and conclusions' or 'a formulaic recitation' of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'[12]

As is set forth below, Plaintiffs have failed to state any cognizable legal claim against any of the City Defendants and, as such, the action must be dismissed.

III. Declaratory Relief

Declaratory relief pursuant to G.L. c. 231A §2 is available to determine "the right, duty, status or other legal relations under deeds, wills or written contractors or other writings constituting a contract or contracts or under the common law, or a charter, statute, municipal ordinance or by-law, or administrative regulation ...." A declaratory action can only proceed if "an actual controversy sufficient to withstand a motion to dismiss [appears] on the pleadings"[13]

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[7] Iannacchinio v. Ford Motor Co., 451 Mass. 623, 636 (2008).
[8] Id. at 636.
[9] 556 U.S. 662 (2009).
[10] Id. at 679.
[11] Id. at 678 (citing Twombly, 478 U.S. at 555).
[12] Id. (citing Twombly, 478 U.S. at 557).
[13] Wells Fargo Financial Massachusetts, Inc. v. Mulvey et al, 93 Mass. App. Ct. 768, 770-71 (2018).

Declaratory relief is "reserved for real controversies and is not a vehicle for resolving abstract, hypothetical, or otherwise moot questions."[14]

Declaratory judgments can be used to "obtain a determination of the legality of the administrative practices and procedures of any municipal agency . . . or official" but only where the violation has been consistently repeated.[15] The term "practices and procedures" refers only to "the customary and usual method" for conducting municipal business.[16] Where entry of a declaratory judgment would not terminate "the uncertainty or controversy" giving rise to the proceedings or for other "sufficient reasons" such as failure to exhaust administrative remedies the matters should be dismissed absent a showing of futility.[17]

IV. Ethics Complaints against Municipal Employees

Pursuant to G.L. c. 268B §3, the State Ethics Commission "act[s] as the primary civil enforcement agency for violations of all sections of chapter [268A] and of this chapter."[18] G.L. c. 268A provides standards for the conduct of public officials and employees and was significantly revised in 2009 to provide that the State Ethics Commission has the power to investigate and adjudicate allegations related to violations of G.L. c. 268A in the first instance.[19]

G.L. c. 268A § 3 confers jurisdiction on the State Ethics Committee over all civil complaints alleging violations of G.L c. 268A and c. 268B. The process for the investigation and adjudication of any State Ethics Commission complaints is set out in G.L. c. 268B § 4. G.L. c.

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[14] Id. at 771 (*quoting* Libertarian Association of Massachusetts b. Secretary of the Commonwealth, 462 Mass. 538, 547 (2012)).
[15] G.L. c. 231A § 2.
[16] Id.
[17] G.L. c. 231A §3.
[18] See Craven v. State Ethics Commission, 390 Mass. 191 (1983).
[19] See discussion of history of G.L. c. 268A in Leder v. Superintendent of Schools of Concord, 465 Mass. 305 (2018). See also G.L. c. 268B §§3, 4.

268B § 4. G.L. c. 268B § 4(k) confers jurisdiction on the Superior Court to review any final action by the State Ethics Commission.

G.L. c. 268A § 21(a) provides that violations of G.L. c. 268A §§2, 3, 8, 17-20, or 23 "which [have] substantially influenced the action taken by any municipal agency in any particular matter, shall be grounds for avoiding, rescinding or cancelling the action of said municipal agency *upon request by said municipal agency*." However, the ability to seek that relief is limited since "a finding of a violation of [G.L. c. 268A] §23 by the [State Ethics] commission *after* an adjudicatory proceeding *and* a request for rescission by the municipal agency are *both* prerequisites to the filing of a complaint seeking rescission under G.L. c. 268A §21(a)."[20]

If an injured party seeks relief relative to the action of a municipal employee other than in form of rescission, they must seek relief under G.L. c. 268A §21(b). Again, that initial claim for relief is brought before the State Ethics Commission rather than before the Superior Court. Any final action taken by the State Ethics Commission pursuant to G.L. c. 268A or G.L. c. 268B is subject to review in Superior Court upon petition.

V. Complaints against Attorneys Licensed in Massachusetts

Matters relating to attorney discipline and licensing to practice law all within the exclusive jurisdiction of the Supreme Judicial Court, which has delegated that authority to the Massachusetts Board of Bar Overseers ("BBO").[21] Complaints, other than civil actions for malpractice,[22] must be filed with the BBO. The Superior Court Department does not have

[20] Leder, 465 Mass. 305 (emphasis added).
[21] Sup. Jud. Ct. Rule 4:01 §§ 1 and 5.
[22] This memorandum does not address the standing requirements for a civil claim for malpractice as it is not relevant to this action; however, City Defendants note that Plaintiffs in this case would not have standing in any such case.

jurisdiction over complaints alleging violations of the Massachusetts Rules of Professional Conduct.[23]

VI. Certiorari Relief

a. Availability of Relief

Plaintiffs' complaint describes this action as an "appeal in the nature of certiorari and a request for related declaratory relief pursuant to Massachusetts General Laws ('G.L') c. 249 § 4." G.L. c. 249 § 4 is "not generally available to review discretionary administrative action except to determine whether the board acted arbitrarily and capriciously."[24] "Certiorari is a limited procedure reserved for correction of substantial errors of law apparent on the record created before a judicial or quasi-judicial tribunal."[25] A plaintiff must demonstrate three elements to be entitled to certiorari review: "(1) a judicial or quasi-judicial proceeding, (2) from which there is no other reasonably adequate remedy, and (3) a substantial injury or injustice arising from the proceeding under review."[26]

If a plaintiff seeking certiorari review has an adequate alternative remedy or has failed to exhaust its administrative remedies, certiorari must be denied.[27] Certiorari is not an appropriate vehicle to challenge administrative, political, or legislative decisions.[28]

To determine whether a governmental body acted in a quasi-judicial manner, a court will look to "the form of the proceeding reasonably employed by the agency, and the extent to which

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[23] Sup. Jud. Ct. Rule 4:01 §§ 1 and 5. See also Hung-Ming Lin v. Vanita Cheung, 1999 Mass. Super. LEXIS 377 (1999).
[24] Forsyth School for Dental Hygienists v. Board of Registration in Dentistry, 404 Mass. 211, (Mass. 1989).
[25] Grandoit v. Massachusetts Comm'n Against Discrimination, 95 Mass. App. Ct. 603, 607 (2019)
[26] Grandoit, 95 Mass. App. Ct. at 607 (quoting Indeck v. Clients' Sec. Bd., 450 Mass. 379, 385 (2008)).
[27] Taunton Eastern Little League v. City of Taunton, 389 Mass. 719 (1983); Bermant v. Board of Selectmen of Brockton, 425 Mass. 400 (1997); Friedman v. Conservation Commission of Edgartown, 62 Mass. App. Ct. 539 (2004); Reedy v. Acting Director of Civil Service, 354 Mass. 760 (1968). See also Cumberland Farms, Inc. v. Planning Board of Bourne, 56 Mass. App. Ct. 605 (2002).
[28] Botolph Citizens Comm., Inc. v. Boston Redevelopment Auth., 429 Mass. 1, 7 (1999).

that proceeding resembles judicial action."[29] A court should consider "the nature of the governing standard, and whether the proceedings 'consist[s] primarily of unsworn statements by interested persons advocating or disapproving the proposed new policy [or course of action], as contrasted with sworn testimony by witnesses subject to cross examination in a hearing preceded by specific charges and followed by the adoption of formal findings of fact.'"[30] If the decision of the agency or board does not implicate the procedural protections afforded to adjudicatory proceedings, it is less likely to be "judicial" or "quasi-judicial" in nature.

b. Standard of Review of Underlying Decision/Action

Pursuant to G.L. c. 249 §4, which provides for certiorari review, is "not generally available to review discretionary administrative action except to determine whether the agency acted arbitrarily and capriciously."[31] The test is not whether the Court would reach the same result, but rather whether the decision is supported by "substantial evidence," which is evidence that "a reasonable mind might accept as adequate to support a conclusion."[32] It is not the function of the Court to reverse factual findings.[33] A reviewing court is not empowered to make a *de novo* determination of facts, evaluate credibility of witnesses, or draw inferences from the facts found below; it cannot disturb a choice made below between conflicting inferences or views of the facts even if, on a de novo review, it might make a different choice.[34]

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[29] Hoffer v. Board of Registration in Medicine, 461 Mass. 451, 457 (2012).
[30] Alford v. Boston Zoning Comm'n, 84 Mass. App. Ct. 359, 367 (2013)(internal citation omitted).
[31] Forsyth School for Dental Hygienists, 404 Mass. 211.
[32] Durbin v. Board of Selectmen of Kingston, 62 Mass. App. Ct. 1 (2004).
[33] Johnson Products, Inc. v. City Council of Medford, 353 Mass. 540, 541 n. 2 (1968); *cert. denied* 392 U.S. 296 (1968).
[34] Medi-Cap of Massachusetts Bay, Inc. v. Rate Setting Commission, 401 Mass. 357, 369 (1987). See also Durbin, 62 Mass. App. Ct. 1.

c. Role of Board of Health and Limits on Authority Relative to Pre-Emption

Pursuant to the City Charter, the Board was "established to advise on and manage all matters relative to health and sanitation in the City and to promulgate health regulations *in conformity with the law.*"[35] While it is a general charge to protect the health of residents and visitors of the City, it is not without limits. The Board cannot act in a way that is contrary to the law or in areas where its ability to act has been pre-empted by Congress.

Preemption can apply to limited situations or to an entire subject area.[36] When local or state action is preempted, the entity is "prohibited from regulating within a protected zone, whether it be a zone protected and reserved for market freedom . . . or for federal jurisdiction."[37] Federal regulations and statutes have the same preemptive effect.[38] "Field preemption" is a form of preemption where state or local law is preempted because the "scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it."[39]

The Telecommunications Act of 1996 ("the TCA"), is one area of law in which Congress has preempted action by state and local government to regulate the cell phone industry, including any attempts to regulate personal wireless service facilities ("PWSF"), such as the tower at issue in Plaintiffs' complaint, based upon real or perceived health effects of radiofrequency emissions

[35] City of Pittsfield Charter at Chapter 2, Article XVIII §2-87. Available at https://ecode360.com/15966434 site last visited on November 10, 2022.
[36] Mich. Canners & Freezers Ass'n v. Agric. Mktg. & Bargaining Bd., 467 U.S. 461, 469 (1984)({I]f Congress has not displaced state regulation entirely, it may nonetheless pre-empt state law to the extent the state law actually conflicts with federal law.")
[37] Bldg. & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc., 507 U.S. 218, 224 (1993).
[38] Fid. Sav. And Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153, 54 (1983).
[39] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

so long as the PWSF is in compliance with Federal Communications Commission ("FCC") regulations relative to such emissions.[40]

The purpose of the TCA is "to provide a pro-competitive, de-regulatory national policy framework designed to accelerate private sector deployment of advanced telecommunications and information technologies and services . . . by opening all telecommunications markets to competition."[41] The TCA includes a robust regulatory scheme delineating the roles and responsibilities of the FCC as well as state and local authorities relative to whether and how PWSF can be built, monitored, and regulated.[42] Local and state zoning agencies retain limited authority over decisions regarding the placement, construction and modification of PWSF; however, the TCA is clear that any such exercise of authority "preempt[s] state and local governments from regulating the placement, construction or modification of [PWSF] on the basis of health effects of RF radiation where the facilities would operate within levels determined by the FCC to be safe."[43] The Second Circuit made clear that TCA preemption extended to the regulation of PWSF once they were operational stating there is "no doubt that Congress may preempt state and local governments from regulating the operation and construction" of PWSF[44] and noted that 47 USC s. 332(c)(7)(A) did not preserve the authority of local/state government to regulate the operations of such facilities. Based on that analysis, the Court held that there was no

[40] 47 U.S.C. § 332(c)(7)(B)(iv).
[41] Cellular Tel. Co. v. Town of Oyster Bay, 166 F.3d 490, 493 (2d Cir. 1990).
[42] 47 U.S.C. §332(c).
[43] Cellular Phone Taskforce v. FCC, 205 F.3d 82, 96 (2d Cir. 2000). See also FCC Decision In the Matter of Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934 WT Docket 97-192 (In that decision, the FCC noted that while local/state government is preempted from regulating the facilities to the extent they comply with FCC regulations relative to RF emissions, there was an open question as to what information local/state governments can require for proof of compliance.)
[44] Id. at 96.

clear congressional intent to permit local/state governments to regulate the operation of such facilities.

Beyond the decision in Cellular Phone Taskforce, there is limited case law on the issue of TCA preemption; however, the courts that have addressed the issue have uniformly held that the TCA preempts local and state governmental action to regulate PWSF, including such as the tower at issue in this case, based upon perceived environmental or health effects of RF emissions.[45]

The Massachusetts Association of Health Boards ("MAHB") publishes The Legal Handbook for Massachusetts Boards of Health[46], which was first published in 1982 and serves as a general guide focused on "assuring that local boards of health are properly resourced with the knowledge, regulatory information, legal guidance and professional standards needed to regulate issues, businesses and public institutions in a way that most optimally serves the public health across the Commonwealth."[47] Chapter 17 of the Legal Handbook highlights emerging issues of which Boards of Health should be aware and includes a section specifically addressing "Cell

[45] Nextel Communications of the Mid-Atlantic, Inc. v. Town of Provincetown, 2003 U.S. Dist. LEXIS 10932, *40 n. 3 (D. Ma. 2003)("in general, the Federal Communications Commission has broad preemption authority under the Telecommunications Act, particularly with respect to attempts by a state or locality to regulate wireless services on the basis of perceived environmental effects of radio frequency emissions. 47 U.S.C. s. 332(c)(7)B). See e.g. Cellular Phone Task Force v. FCC, 205 F.3d 82, 96 (2d Cir. 2000); In re Appeal of Graeme and Mary Beth Freeman, 975 F. Supp. 570 (D. Vt. 1997)('given FCC's persuasive regulation' TCA does not authorize state or local regulation of radio frequency interference, notwithstanding the grand of authority to localities in s. 332(c)(7) to administer regulations pertaining to 'placement, construction and modification' of wireless facilities.))" See also Stanley v. Amalithone Realty, Inc., 940 N.Y.S.2d 65 (2012)(an action to stop continued operation of rooftop wireless tower was preempted by the federal standards permitting the RF emissions at their measured levels. The Appeals Court noted since the RF emission levels in the apartment were within the permissible range, they were "in compliance with FCC regulations and thus not subject to the kind of state regulation the plaintiff seeks."). The Stanley court quoted Perrin v. Bayville Village Board, 2008 NY Slip OP. 32401[U], *6-7 (2008)) for the proposition that "[A] local government may not require a facility to comply with RF emissions or exposure limits that are stricter than those set forth in the Commission's rules, and it may not restrict how a facility authorized by the Commission may operate based on RF emissions."

[46] Which is available at https://www.mahb.org/wp-content/uploads/2021/05/Legal-Handbook-3rd-Edition-2021.pdf site last visited on November 10, 2022.

[47] Handbook at page ii.

Tower Radiation Exposure."[48] The MAHB acknowledges that the ubiquitous nature of cell towers should not "be confused with the presumption that [cell towers] do not present certain health risks," however, that potential health risk does not provide local Boards of Health power to regulate cell towers due to those health concerns. As noted by the MAHB, the FCC preempts local governmental action based upon real or perceived health risks presented by radio frequency emissions.[49] In light of the authority on the issue of preemption, the MAHB is clear in its recommendations to Massachusetts' Boards of Health that "[i]f a successful challenge to a placement of a cell tower is to be mounted, it will have to be grounded in something other than public health risk from radio frequency."[50]

## C. ARGUMENT

### I. Complaint against Stephen N. Pagnotta should be dismissed

The Superior Court lacks subject matter over claims that Atty. Pagnotta violated the standards of professional conduct pertaining to lawyers practicing in the Commonwealth since those claims fall within the exclusive jurisdiction of the BBO and the Supreme Judicial Court. Likewise, any claims that Atty. Pagnotta, in his capacity as a municipal employee, violated G.L. c. 268A belong before the State Ethics Commission. Lack of subject matter cannot be waived. Based upon the foregoing, the claims against Atty. Pagnotta should be dismissed for lack of subject matter jurisdiction.

The claims against Pagnotta should also be dismissed pursuant to 12(b)(6). The availability of declaratory judgments is limited to those actions where there exists an actual controversy between the parties relative to their respective rights, duties, and obligations. It can

[48] Handbook at pages 157-60.
[49] Handbook at 158-60.
[50] See Handbook at page 160.

be used to seek a "determination of the legality of the administrative practices and procedures of any municipal agency . . . or official" but only where the violations has been *consistently repeated.*[51] Denial of declaratory relief is appropriate when the determination sought would not end the "uncertainty or controversy" giving rise to the action or where the party seeking has alternative remedies available and/or failed to exhaust administrative remedies. Based upon the facts asserted, such as they are, there is no support for Plaintiffs' contention they are entitled to declaratory relief as it relates to Atty. Pagnotta thus, there is no evidence of an existing controversy such that declaratory relief is available. Any declaration by this Court relative to the alleged acts/omissions of Atty. Pagnotta would not be binding since, as set forth above, the Superior Court lacks subject matter over the complaints against Atty. Pagnotta, and, therefore, would not end any uncertainty or controversy. Finally, as set forth above, Plaintiffs are not without appropriate remedy relative to the claimed acts/omissions of Atty. Pagnotta.

Based upon the foregoing, all counts against Atty. Pagnotta should be dismissed.

II. Complaint against Linda Tyer should be dismissed

As is the case with claims related to any alleged ethics violation on the part of Pagnotta, the nearly identical claims against Tyer fail for the same reasons. Pursuant to G.L. c. 268A and c. 268B and the Massachusetts Supreme Judicial Court, those claims are rightfully the providence of the State Ethics Commission. The Superior Court lacks jurisdiction over those claims against Tyer and since lack of subject matter jurisdiction cannot be waived those claims must be dismissed.

Further, the claims against Tyer should also be dismissed pursuant to 12(b)(6) for the same reasons discussed above relative to the claims against Pagnotta.

[51] G.L. c. 231A § 2.

III. Complaint against Board of Health should be dismissed

a. Certiorari is not available to review the Board's rescission of the Order

The complaint alleges that it is an action in certiorari and seeks review of the Board of Health's decision to rescind its Emergency Order. Certiorari is available in limited circumstances. In the instant case, the rescission of the Order was not judicial or quasi-judicial in nature, Plaintiffs are not without other adequate remedies, and the rescission was based upon substantial evidence such that it was not arbitrary or capricious.

The proceedings at hand did not consist of sworn testimony of witnesses subject to cross examination. There was no governing standard pursuant to which the Board accepted evidence or made its decision. Rather the proceedings at hand consisted of statements and submissions by interested persons who were advocating their own positions relative to the tower at issue. As such, the proceedings were not judicial or quasi-judicial such that certiorari is available and Plaintiffs' claims against the Board should be dismissed.

b. The Board's decision to rescind the Order was based upon substantial evidence

If this Court determines that the proceedings before the Board were quasi-judicial such that review is appropriate, the Board's decision to rescind the order was based upon the substantial evidence before the Board and, as such, was not arbitrary or capricious such that Plaintiffs are entitled to relief.

Specifically, the Board's decision to rescind the order was reasoned and supported. Once Verizon filed federal litigation claiming the Board's order was invalid, illegal, and unenforceable, it was incumbent on the Board to review the legality and viability of the Emergency Order and the likelihood of success if it persisted in its course of action. Based upon

the current state of the law relative to the ability of municipal and state governments to regulate the operation of cell phone towers, and specifically, RF Emissions and any claimed health impacts of same, it was reasonable for the Board to rescind the Emergency Order. As set forth above, the courts that have addressed the issue have squarely determined that the TCA preempts such attempts at regulation. The likely outcome of the litigation would not have been favorable and any judgment would have foreclosed future Board action. The rescission preserved the Board's ability to take other action in the future and did not impair Plaintiffs' ability to pursue other forms of relief through other avenues.

Based upon the foregoing, the Board's decision was neither arbitrary nor capricious and, as such, Plaintiffs' complaint against the Board should be dismissed.

c. Plaintiffs have other reasonably adequate remedies

Plaintiffs are not left without an adequate remedy at law. That the Board may currently believe itself to be precluded from acting under the TCA due to preemption, does not limit Plaintiffs' other remedies including their ability to (1) file a civil action for damages; (2) file a federal civil action seeking injunctive relief; (3) working with elected officials to amend the TCA, (4) and petitioning the FCC to amend the standards relative to RF emissions for PWSF, including cell towers.[52]

Because Plaintiffs have other reasonably adequate remedies, their complaint against the Board should be dismissed.

[52] City Defendants note that the issue of whether the FCC's guidelines relative to exposure to RF radiation are adequate is currently the subject of litigation. See Environmental Health Trust v. FCC, 9 F.4th 893 (2021). In August 2021, the DC Circuit Court determined that the FCC's decision to terminate a notice of inquiry on the issue was not appropriate supported and remanded the matter to permit the FCC to provide "a reasoned explanation for its determination that its guidelines adequately protect against harmful effects of exposure to radiofrequency radiation unrelated to cancer." The Court held that the FCC's order declining to alter its guidelines adequately addressed the reasons why no change in the guidelines was needed to address cancerous effects.

## D. CONCLUSION

For the foregoing reasons, Plaintiffs' complaint should be dismissed in its entirety.

Dated: November 17, 2022

DEFENDANTS LINDA TYER as MAYOR OF PITTSFIELD; STEPHEN N. PAGNOTTA as CITY SOLICITOR; and ROBERTA ORSI, BRAD GORDON, STEPHEN SMITH, KIMBERLY LORING and DR. JEFFREY LEPPO as they are members of and are collectively THE PITTSFIELD BOARD OF HEALTH
By their attorneys:

Buffy D. Lord
BBO No. 662330
For Donovan O'Connor & Dodig, LLP
1330 Mass MoCA Way
North Adams, MA 01247
Tel: (413) 663-3200
Fax: (413) 663-7970
Email: mail@docatty.com

Gregory P. Howard
BBO No. 682230
For Donovan O'Connor & Dodig, LLP
1330 Mass MoCA Way
North Adams, MA 01247
Tel: (413) 663-3200
Fax: (413) 663-7970
Email: mail@docatty.com

## CERTIFICATE OF SERVICE

We, Buffy D. Lord and Gregory P. Howard, Attorneys for the Defendants, hereby certifies that on November 17, 2022, we have caused the foregoing document to be served on the parties to this matter by mailing a true copy, postage prepaid, to:

Paul Revere, III, Esq.
Law Offices of Paul Revere, III
226 River View Lane
Centerville, MA 02632

Mark J. Esposito, Esq.
Shatz, Schwartz and Fentin, P.C.
1441 Main Street, Suite 1100
Springfield, MA 01103

Brian K. Lee, Esq.
Nutter, McClennen and Fish, LLP
155 Seaport Boulevard
Boston, MA 02210

Gregory P. Howard

## CERTIFICATE OF COMPLIANCE

I, Gregory P. Howard, Esq., hereby certify that the foregoing document is being filed within the designated time or by leave of the Regional Administrative Justice.

Gregory P. Howard, Esq.

COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

| | |
|---|---|
| COURTNEY GILARDI, et als., | |
| Plaintiffs, | |
| v. | |
| | DOCKET NO. 2276CV00127 |
| LINDA TYER, et als., | |
| Defendants | |

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Pursuant to Mass. R. Civ. P. 12(b)(6), Defendant Pittsfield Cellular Telephone Company d/b/a Verizon Wireless ("Verizon") hereby submits this memorandum in support of its motion to dismiss the complaint seeking certiorari in this matter. As more fully set forth below, Plaintiffs' complaint fails to state a claim upon which relief may be granted and must be dismissed as a matter of law.

## I. Statement of Relevant Facts[1]

Verizon sought and obtained a special permit allowing the erection of a wireless tower on land located at 877 South Street in Pittsfield (the "Tower"). Complaint, ¶¶ 13-14. Upon completion of the Tower, it was activated on August 4, 2020 and became fully operational on August 21, 2020. *Id.*, ¶ 15. At the invitation of the Pittsfield Board of Health (the "Board"), Verizon attended a Zoom meeting with a Board member and Pittsfield public health employees on September 9, 2021. Complaint Exhibit 1, p. 9, ¶ 18. At that meeting, Verizon presented evidence that "the only

[1] The alleged facts set forth in the complaint and exhibit thereto are accepted as true for the purposes of this motion only.

verifiable biological effect of non-ionizing wireless radiation is heat, and the FCC so strictly regulates those emissions levels" that they cannot cause adverse health effects to abutters to the Tower. *Id.*, pp. 9-10, ¶¶ 19-20. The Board dismissed that evidence. *Id.*, pp. 10-11, ¶¶ 21-23.

On April 2, 2022, the Board issued a document entitled "Emergency Order Requiring that Pittsfield Cellular Telephone Company, d/b/a Verizon Wireless, and Farley White South Street, LLC, Show Cause Why the Pittsfield Board of Health Should Not Issue a Cease and Desist Order Abating a Nuisance at 877 South Street Arising from the Operation of a Verizon Wireless Cell Tower Thereon and Constituting Immediate Order of Discontinuance and Abatement If No Hearing Is Requested" (the "Order"). *Id.*, ¶ 33 and Exhibit 1. The Board did not intend to seek judicial enforcement of the Order but instead "intended to provide an incentive for Verizon Wireless to meaningfully engage at the administrative level and collaborate with the affected parties to find a solution." Complaint, ¶ 29 n. 1. The Chairperson of the Board stated that "she believes the [O]rder should be issued with the hopes that Verizon will respond in some way." *Id.*, ¶ 63, *quoting* Minutes from April 2, 2022 Board meeting. The vote to issue the Order was subject to "the condition that it may be withdrawn, without prejudice, if legal counsel is not retained prior to any judicial or administrative hearing." *Id.*

On May 10, 2022, Verizon filed suit arguing that the Order was preempted under federal law. *Id.*, ¶ 36. Upon the advice of the City Solicitor, the Pittsfield City Council declined to appropriate funds to engage counsel to defend the Order in the federal court proceeding filed by Verizon. *Id.*, ¶¶ 60-68.[2] On June 1, 2022, the Board voted to rescind the Order, consistent with the

[2] While the complaint alleges that the City Solicitor's law firm had previously represented Verizon in litigation, Complaint, ¶ 56(e)(A), that allegation is flatly untrue. The City Solicitor's law firm represented a client in a lawsuit *against Verizon*. *North Adams Tower Company, Inc. v. Pittsfield Cellular Telephone Company d/b/a Verizon Wireless*, Berkshire Superior Court, Civil Action No. 1676CV00031, Document 1. As referenced in footnote 3, *infra*, this Court may take judicial notice of the records of other proceedings.

condition on which it was first issued. *Id.*, ¶¶ 63, 69. On June 2, Verizon voluntarily dismissed the suit as moot. Notice of Voluntary Dismissal, *Pittsfield Cellular Telephone Company d/b/a Verizon Wireless v. Board of Health of the City of Pittsfield, Massachusetts*, United States District Court, District of Massachusetts, Case 3:22-cv-10718-MGM, Document 10; Complaint, ¶ 69 n. 24.

## II. Legal Standard

### A. Motion to Dismiss

Rule 12(b)(6) of the Massachusetts Rules of Civil Procedure provides that the defense of failure to state a claim upon which relief can be granted may be raised by motion. Mass. R. Civ. P. 12(b)(6). In ruling on such a motion to dismiss, the Court must "take as true the allegations of the complaint, as well as such inferences therefrom in the plaintiff's favor. . . . [A] complaint is sufficient unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief." *Marram v. Kobrick Offshore Fund, Ltd.*, 442 Mass. 43, 45 (2004) (internal citations and punctuation marks omitted).[3] "However, [the Court must] not accept legal conclusions cast in the form of factual allegations[;]" a plaintiff may not "rest on subjective characterizations or conclusory descriptions of a general scenario which could be dominated by unpleaded facts." *Schaer v. Brandeis Univ.*, 432 Mass. 474, 477-478 (2000).

### B. Certiorari

The certiorari statute provides in pertinent part that:

> A civil action in the nature of certiorari to correct errors in proceedings which are not according to the course of the common law, which proceedings are not otherwise reviewable by motion or be appeal, may be brought in the . . . superior court . . . . Such action shall be commenced within sixty days next after the

[3] "A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." Mass. R. Civ. P. 10(c). Thus, references to an exhibit to the complaint do not convert a motion for judgment on the pleadings into a motion for summary judgment. *See, e.g., Marram v. Kobrick Offshore Fund, Ltd.*, 442 Mass. 43, 45 & n. 4. Similarly, a Court may "take judicial notice of facts when considering a motion to dismiss under Mass. R. Civ. P. 12(b)(6)[.]" *Jarosz v. Palmer*, 436 Mass. 526, 530 (2002), *quoting Jackson v. Longcope*, 394 Mass. 577, 580 n. 2 (1985). Judicial notice of court records is appropriate. *Jarosz*, 436 Mass. at 530; Mass. G. Evid. § 201(b)(2).

> proceeding complained of. Where such an action is brought against a body or officer exercising judicial or quasi-judicial functions to prevent the body or officer from proceeding in favor of another party, or is brought with relation to proceedings already taken, such other party may be joined as a party defendant by the plaintiff. . . . Such other party may file a separate answer . . . .

G.L. c. 249, § 4.

"[T]he requisite elements for availability of certiorari are (1) a judicial or quasi judicial proceeding; (2) a lack of all other reasonably adequate remedies; and (3) a substantial injury or injustice arising from the proceeding under review." *Bos. Edison Co. v. Bd. of Selectmen*, 355 Mass. 79, 83 (1968). Certiorari relief "is not available to review discretionary administrative action." *Sch. Comm. of Hatfield v. Bd. of Educ.*, 372 Mass. 513, 517 (1977). "Judicial review . . . is limited to correcting substantial errors of law that affect material rights and are apparent on the record. A decision is not arbitrary and capricious unless there is no ground which reasonable men might deem proper to support it." *LaCava v. Lucander*, 58 Mass. App. Ct. 527, 536 (2003) (internal citations and punctuation omitted). "Whether a complaint adequately alleges a claim for relief in the nature of certiorari may be tested by means of a motion to dismiss." *State Bd. of Ret. v. Woodward*, 446 Mass. 698, 704 (2006).

C. Declaratory Judgment

The declaratory judgment statute provides in pertinent part that:

> The . . . superior court . . . may on appropriate proceedings make binding declarations of right, duty, status and other legal relations sought thereby, . . . in any case in which an actual controversy has arisen and is specifically set forth in the pleadings and whether any consequential judgment or relief is or could be claimed at law or in equity or not . . . .

G.L. c. 231A, § 1.

Private parties' disagreement with the legal opinions and advice of a city's law department does not in and of itself give rise to an entitlement to a declaratory judgment, *Picard v. Worcester*,

338 Mass. 644, 647-48 (1959), and the declaratory judgment statute does not provide an alternative remedy to a petition for a writ of certiorari. *Johnson Products, Inc. v. City Council of Medford*, 353 Mass. 540, 545 (1968).

## III. Argument

### A. It was reasonable for the Board to withdraw its Order which violated federal law and was therefore invalid and unenforceable.

Section 332 of the Telecommunications Act of 1996 ("TCA") completely prohibits state and local governments from regulating a personal wireless service facility ("PWSF") on the basis of alleged health effects of radiofrequency ("RF") emissions where the emissions comply with applicable Federal Communications Commission ("FCC") regulations. 47 U.S.C. § 332(c)(7)(B)(iv). Specifically, the TCA provides in relevant part that:

> No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the purported environmental effects of radio frequency emissions to the extent that such facilities comply with the [Federal Communications] Commission's regulations concerning such emissions.

47 U.S.C. § 332(c)(7)(B)(iv). Health effects are subsumed within the term "environmental effects." *See, e.g., Green Mountain Realty Corp. v. Leonard*, 688 F.3d 40, 52 n. 6 (1st Cir. 2012); *T-Mobile Northeast LLC v. City Council of Newport News*, 674 F.3d 380, 390 (4th Cir. 2012); *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 88 (2nd Cir. 2000).

The Board violated Section 332 of the TCA when it issued the Order requiring that Verizon cease and desist operating the Tower, a lawfully constructed and lawfully operating PWSF. The Board improperly based the Order on the premise that the RF emissions from the Tower have health effects and that state and local law give the Board authority to address those effects by requiring Verizon to shut down the Tower, even though the Board recognized that the Tower

complies with the TCA and the FCC's regulations. To the contrary, the TCA preempts the Board's authority to regulate the Tower on the basis of RF emissions where, as here, the Tower complies with the FCC's regulations. 47 U.S.C. § 332(c)(7)(B)(iv). Therefore, the Order was unlawful and improper.[4]

To the extent any state law, including the ones the Board references in the Order and/or the ones that Plaintiffs reference in their complaint might somehow be construed as providing the Board with authority to issue the Order regulating the Tower on the basis of alleged health effects of RF emissions, that state law would be ineffective and preempted pursuant to the Supremacy Clause of the United States Constitution. *See, e.g., Robbins v. New Cingular Wireless LLC*, 854 F.3d 315, 319-20 (6th Cir. 2017); *Farina v. Nokia, Inc.*, 625 F.3d 97 (3d Cir. 2010); *Cellular Phone Taskforce v. FCC*, 205 F.3d 82 (2d Cir. 2000). As a matter of law, then, rescission of the Order could not have been arbitrary and capricious because it was inherently reasonable and proper for the Board to withdraw its illegal and unenforceable command.

B. The City Council's decision not to appropriate funds to defend the Order in court was an appropriate reason for the Board to rescind the Order.

As Plaintiffs allege, on May 10, 2022, Verizon filed suit arguing that the Order was preempted under federal law. Complaint, ¶ 36. Upon the advice of the City Solicitor, the Pittsfield City Council declined to appropriate funds to engage counsel to defend the Order in the federal court proceeding. *Id.*, ¶¶ 60-68. On June 1, 2022, the Board voted to rescind the Order. *Id.*, ¶ 69. The Board's decision to rescind the Order in light of its inability to defend the Order in court was reasonable and was consistent with the condition on which the Board had issued the Order.

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[4] Indeed, the complaint makes clear that the Board did not intend to seek judicial enforcement of the unenforceable and illegal Order – rather, it sought to induce Verizon "to meaningfully engage at the administrative level and collaborate with the affected parties to find a solution[.]" Complaint, ¶ 29 n. 1, i.e., to power down and/or move the Tower. *See also* Complaint, ¶ 67 ("The Board's only option was to try and force Verizon Wireless to the negotiating table . . . .").

Even had the City Council appropriated funds for the Board to engage counsel to defend the Order, the Order was illegal because it was preempted by federal law. Thus, the Order ultimately would have been stricken in any event. It cannot, then, fairly be said that the Board acted arbitrarily and capriciously in withdrawing an order that it in fact had no authority even to issue, let alone enforce.

## IV. Conclusion

For the foregoing reasons, Plaintiffs' complaint fails to state a claim upon which relief could be granted: there is no set of facts which, if proven, would entitle Plaintiffs to relief either by a writ of certiorari or by entry of a declaratory judgment. Accordingly, all counts of the complaint must be dismissed.

Respectfully submitted,
For the Defendant,
PITTSFIELD CELLULAR TELEPHONE COMPANY D/B/A VERIZON WIRELESS,
By its attorney,

Mark J. Esposito, BBO # 672638
Shatz, Schwartz and Fentin, P.C.
1441 Main Street, Suite 1100
Springfield, MA 01103
(413) 737-1131
(413) 736-0375 (f)
mesposito@ssfpc.com

Dated: November 22, 2022

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing document has been served upon:

Paul Revere, III, Esq.
Law Offices of Paul Revere, III
226 River View Lane
Centerville, MA 02632
revereiii@aol.com

W. Scott McCollough, Esq.
McCollough Law Firm PC
2290 Gatlin Creek Road
Dripping Springs, TX 78620
wsmc@dotlaw.biz

Buffy D. Lord, Esq.
Gregory P. Howard, Esq.
Donovan O'Connor & Dodig, LLP
1330 Mass MoCA Way
North Adams, MA 01247
ghoward@docatty.com
blord@docatty.com

Brian K. Lee, Esq.
Nutter McClennen & Fish LLP
155 Seaport Boulevard
Boston, MA 02210
blee@nutter.com

via first-class mail, postage prepaid, and via email, this 22nd day of November, 2022.

Mark J. Esposito

COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

COURTNEY GILARDI, et al.,

Plaintiffs,

v.

LINDA TYER, et al.,

Defendants

DOCKET NO. 2276CV00127

**DEFENDANT FARLEY WHITE SOUTH STREET, LLC'S JOINDER IN DEFENDANT PITTSFIELD CELLULAR TELEPHONE COMPANY D/B/A VERIZON WIRELESS'S MOTION TO DISMISS**

The defendant Farley White South Street, LLC ("Farley White") joins Defendant Pittsfield Cellular Telephone Company d/b/a Verizon Wireless's ("Verizon") Motion to Dismiss pursuant to Mass. R. Civ. P. 12(b)(6). For the reasons stated in Verizon's Motion to Dismiss and Memorandum in Support of its Motion to Dismiss, Plaintiffs' complaint fails to state a claim upon which relief may be granted and must be dismissed as a matter of law.

FARLEY WHITE SOUTH STREET, LLC,

By its attorneys,

/s/*Brian K. Lee*
Brian K. Lee (BBO #676268)
blee@nutter.com
Nutter McClennen & Fish LLP
Seaport West, 155 Seaport Boulevard
Boston, MA 02210
Telephone: 617-439-2000
Facsimile: 617-310-9000

Dated: November 22, 2022

**CERTIFICATE OF SERVICE**

I, Brian K. Lee, hereby certify that a true and accurate copy of the foregoing document was served by U.S. First Class Mail upon the following attorneys of record:

Mark J. Esposito, Esq.
Shatz Schwarts and Fentin
1441 Main Street, Suite 1100
Springfield, MA 01103
mesposito@ssfpc.com

Paul Revere III, Esq.
Law Offices of Paul Revere, III
226 River View Lane
Centerville, MA 02631
revereiii@aol.com

W. Scott McCollough, Esq.
McCollough Law Firm PC
2290 Gatlin Creek Road
Dripping Springs, TX 78620
wsmc@dotlaw.biz

Buffy D. Lord, Esq.
Gregory P. Howard, Esq.
Donovan O'Connor & Dodig, LLP
1330 Mass MoCA Way
North Adams, MA 01247
ghoward@docatty.com
blord@docatty.com

*/s/Brian K. Lee*
Brian K. Lee

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COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, ss

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| COURTNEY GILARDI, CHARLIE HERZIG, JUDY HERZIG, MARK MARKHAM, ANGELIKA MARKHAM AND ELAINE IRELAND) Plaintiffs v. LINDA TYER, MAYOR OF PITTSFIELD, STEPHEN N. PAGNOTTA, CITY SOLICITOR PITTSFIELD CELLULAR TELEPHONE COMPANY D/B/A VERIZON WIRELESS, FARLEY WHITE SOUTH STREET, LLC, ROBERTA ORSI, BRAD GORDON, STEPHEN SMITH, KIMBERLY LORING, DR. JEFFREY LEPPO as they are members of and are collectively the PITTSFIELD BOARD OF HEALTH Defendants | SUPERIOR COURT<br>CIVIL ACTION NO. 2276-CV-00127<br>**PLAINTIFFS' OPPOSITION TO MOTIONSTO DISMISS** |

THE COMMONWEALTH OF MASSACHUSETTS
BERKSHIRE S.S. SUPERIOR COURT
FILED DEC 19 2022 FILED

The "City Defendants"[1] and Verizon have served Motions to Dismiss under Mass. Civ. Pro. R. 12(b)(1) and (6). Defendant Farley White has served a joinder in Verizon's motion. The parties have agreed that Plaintiffs will provide a single Opposition comprising less than 40 pages.[2] All page citations will be to the Movants' Memoranda in Support ("City Defendants' Mem." and "Verizon Mem.").

Summary of Argument

The City Defendants have not shown entitlement to dismissal under R. 12(b)(1).[3] The City Defendants have not contested standing or controverted the subject-matter jurisdictional averments in the Complaint. There is no factual challenge – the City

[1] Plaintiffs continue to question the Donovan O'Connor & Dodig law firm's assertion that it is truly representing the Board of Health's interests in this matter. The City Defendants' Motion to Dismiss makes arguments that are decidedly contrary to the Board's desire to have a role, its authority under state law and its findings and conclusions.

[2] Leave to file a consolidated opposition of less than 40 pages was granted by the Superior Court on December 8, 2022. Docket Entry #29.

[3] Verizon did not assert lack of subject-matter jurisdiction. Its motion invokes only Rule 12(b)(6).

Defendants raise only a facial jurisdictional attack – so the averments in the Complaint are taken as true. *Hiles v. Episcopal Diocese of Mass.*, 437 Mass. 505, 516 n.13 (2002), *citing Holt v. United States,* 46 F.3d 1000, 1002 (10th Cir. 1995). The Court has jurisdiction over Count One, and at least, *concurrent* jurisdiction over Counts Two and Three. Declaratory relief (Count Four) is proper.

The Movants' efforts under R. 12(b)(6) also fail. Defendants have not shown with certainty that Plaintiffs failed to present sufficient facts with enough particularity to state a cause of action and entitlement to the requested relief for each cause of action. The Motions to Dismiss should be denied.

## I. Background

### A. Summary of Argument

The Movants pointedly avoid any discussion of the human suffering involved here. This lawsuit is about a cluster of seriously injured Pittsfield residents. Several families, including multiple sickened children, were constructively evicted because their homes are uninhabitable. Others have nowhere to go so they suffer in a toxic home environment. Complaint ¶¶16-27.

After receiving multiple complaints of illness in "Shacktown," the City Council asked the Board of Health ("Board") to conduct an investigation. Eighteen months later, after receiving evidence and analyzing thousands of peer-reviewed studies and other medical information, the Board determined that the complaints were valid and Verizon's facility was causing the residents' injury. Complaint ¶¶28, 31-34.[4] The Board then,

[4] *See* Complaint Exhibit One, Emergency Order pp. 12-13, reciting "evidence from specific Shacktown residents who have been and are being injured by the continued operation of the Verizon" and concluding that "Shacktown residents in the vicinity of the facility have suffered

consistent with state law requirements, ordered Verizon to appear within seven days and show cause why it should not be required to eliminate the injurious facility. The Emergency Order also held that if Verizon did not appear the order would be converted into a notice of discontinuance. Complaint ¶35; Complaint Exhibit One page 14.

Verizon did not appear or otherwise exhaust administrative remedies. Instead, fifteen days after the Emergency Order, it filed suit in federal court. The Verizon federal complaint did not contest any of the factual findings or legal conclusions, but, rather, raised a single legal claim – that the Board's state law authority was preempted and the Board had no power to eliminate the nuisance and threat to public health that it found. The action was not an administrative appeal pursuant to state law. Complaint ¶36.

The City Solicitor agreed with Verizon's preemption argument and convinced the City Council it should not act on the Board's request for outside counsel to defend the Verizon action. This rendered the Board defenseless, so on June 1, 2022 the Board rescinded the Emergency Order. Verizon promptly withdrew its case. Complaint ¶¶57-60, 63-71. Plaintiffs then timely filed this action.

The City Defendants and Verizon have now served R. 12(b)(1) and (6) motions to dismiss. Verizon claims its federal license provides free rein to injure without state or local consequence. The City Defendants' renounce any local or state level power or duty to step in, in great contrast to the Board's state law duties and its express desires

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and are suffering injuries and illnesses directly caused by the pulsed and modulated RFR emitted by the facility in issue, and for so long as the facility is in operation it will continue to be injurious to the public health and continue to drive residents from their homes."

to craft a reasonable and collaborative solution.[5] The Solicitor's similar position before the City Council and the Board effectively became the Board's legal determination through duress and coercion, and now one clearly stated on behalf of the entire City through counsel's pleadings. This Court will – at the appropriate time – be required to correct whether this legal determination is an error of law.

None of the Movants express even momentary concern for the peoples' lives that have been devastated, and all – even the nominal counsel for the Board itself – completely dismiss any permissible Board role over the situation even though the Board adjudication started when the Pittsfield City Council (another firm client) asked the Board to investigate. They whistle past the Board's specific findings of both harm and causation and denigrate its efforts to help the Plaintiffs go home and live in peace, all based on the legal premise that the Board's authority is preempted by federal law.

B. The Board Has Independent State Law Duties and Is Not Subject to Commands or Overrides by Municipal Executive or Legislative Officials

The Board, unlike many other Pittsfield commissions and agencies, has independent powers and duties prescribed by state law. For those, the Board is statutorily exempt from the Mayor's executive (and sometimes even the City Council's legislative) supervision and direction. The General Court has delegated specific jobs or functions to the Board and when it is exercising those duties it is an "agent" of the State. *Bd. of Health v. Mayor of N. Adams*, 368 Mass. 554, 567-68 (1975) *citing Breault v. Auburn*, 303 Mass. 424, 427-428 (1939); *Gibney v. Mayor of Fall River*, 306 Mass. 561 (1940) and *Malden v. MacCormac*, 318 Mass. 729 (1945). A municipality can exercise

[5] The City Solicitor asserts veto power over the Board of Health's findings and conclusions. As explained below his actions (and those of Defendant Tyer and Deanna Ruffer) justify judicial intervention even if they do not rise to the level of ethical violations.

no direction or control over one whose duties have been defined by the Legislature. *Daddario v. Pittsfield*, 301 Mass. 552, 558 (1938), *citing Cox v. Segee*, 206 Mass. 380, 382 and *Wood v.Concord*, 268 Mass. 185, 190-191. Indeed, in some situations a board of health can compel action and even expenditure of funds by the executive or legislative branch of the city government to which it is attached, *North Adams, supra*. It can hire its own personnel and independently fix their salary. M.G.L ch. 111 s. 27; *Breault, supra, Gibney, supra*. Stated simply, the Mayor, City Council and even the Board's city-assigned lawyer cannot dictate how the Board exercises its state law duties.

G.L. c. 111, §§122-152 and the state Sanitary Code, including but not limited to Sanitary Code Chs. 11 and 410, grant independent powers and impose specific duties on the Board.[6] Under state law if, "in its opinion," a nuisance is "injurious to the public health" the Board "*shall* destroy, remove or prevent the same as the case may require." G.L. c. 111, s. 122 (emphasis added). M.G.L ch. 111 s. 123 provides that upon a nuisance determination the board *shall* order the owner to remove the nuisance. This is mandatory, not discretionary, language given the employment of the term "shall" in combination with other sections within Chapter 111 that use "may" when the intent was to allow discretion. *See, e.g.*, G.L. c. 111, s. 152 (noxious and offensive trades). If the Board finds there is a nuisance or a threat to public health then it is required to act and, when enforcing the state sanitary code, its procedure for enforcement including service and requiring hearings are governed by state regulations. 105 C.M.R. 400.200–.700.

[6] It is not uncommon for a local agency to have both state and local duties and powers. When that is the case the agency disposes the state law issues wearing its "state hat" and then adorns a "local hat" to address the local issues. *See, e.g., Fafard v. Conservation Comm'n*, 41 Mass. App. Ct. 565, 566, (1996).

In other words, state law commands that a local health board take affirmative administrative action once it finds a health injury. This is so even if the activity in issue has received local land use approval for that activity. *P & D Svc. Co., Inc. v. Zoning Bd. of Appeals of Dedham,* 359 Mass. 96, 104 (1971) (Health Board nuisance order independent of land use permit); *Waltham v. Mignosa,* 327 Mass. 250, 253 (1951) *citing Building Commissioner of Medford v. C. & H. Co.*, 319 Mass. 273, 282, 286 (1946) ("the fact that a trade or employment is permitted under such [zoning] laws does not mean that it need not also comply with valid orders and regulations of a board of health"); *Marshall v. Holbrook,* 276 Mass. 341, 348 (1931) ("If there are reasons apart from the zoning law why the business may not be legally carried on in the district, the zoning law furnishes no protection to it." A permittee gains "no right so to operate his plant as to create a nuisance to the injury of' others).

The Board has a state-imposed duty to take administrative action once it finds a nuisance or health injury. No local officials, whether executive, legislative or part of the legal department, can lawfully impede the Board from accomplishing its state-prescribed administrative duties.

Administrative action is different from enforcement in the courts. Administrative action by the Board is mandatory once harm is found. The Board has discretion whether and when to seek judicial enforcement, however. G.L. ch. 111 s. 125 ("If the owner or occupant fails to comply with such order, the board may cause the nuisance, source of filth or cause of sickness to be removed")(emphasis added). If the object of the order refuses to comply and the Board wants to take legal action in the courts to enforce the order but outside counsel is required for that purpose then it may be the case that the city

council must approve the outside counsel contract. If approval is withheld, then perhaps the Board will not be able to go to court and obtain enforcement. *Bd. of Pub. Works v. Bd. of Selectmen*, 377 Mass. 621 (1979). *But see* G.L. ch. 111, Sec. 32 ("A board of health shall retain charge of any case arising under this chapter in which it has acted."). None of this, however, eliminates the state law duty to take administrative action once injury is found.

The Board did not seek to enforce the order in court. It sought outside counsel to defend its Emergency Order only because Verizon contumaciously disobeyed the order to appear, skipped over exhaustion of administrative remedies and went to federal court claiming preemption.[7] All parties agree the Board did not intend to sue for enforcement, at least initially; the goal was to have Verizon appear in the administrative proceeding and engage in collaborative problem-solving at the administrative level. Complaint ¶¶29, 67; Verizon Mem. @ 2, 6 & n.4. Once this Court rejects the "preemption" claim Verizon will have no choice but to appear and meaningfully participate. Plaintiff's goal, and the relief sought here, is to return the matter to the Board so it can perform its duties without further improper interference by non-Board city actors.

The Board's putative counsel – whom one would normally expect to zealously advance and preserve the Board's duties and powers – asserts as part of the motion to dismiss that a Board of Health has absolutely no role *over health matters* if a wireless

[7] It should be noted that the recipient of an order under G.L. ch. 111, Sec. 123 to abate a nuisance cannot obtain a Massachusetts court order enjoining or otherwise preventing the board of health from acting on it, but are limited to adjudicating those issues if a claim for expenses or damages is asserted. *DeVincent v. Curtin*, 319 Mass. 170, 171 (1946), *see also* G.L. ch. 111, Sec. 115 (actions to recover expenses incurred in removing nuisances by Board of Health) and ch. 111, Sec. 116 (recovery of expenditures by Boards of Health from individuals and towns relating to individuals with infectious diseases).

company is somehow involved. The Board of course found differently. Even as it was rescinding the Emergency Order all voting members reaffirmed the finding of harm, causation and desire to act, but its own counsel persistently and continuously threw the Board under the bus by forcibly implementing Verizon's argument it has a federally-issued license to kill. The City Defendants' Motion continues the same practice.

Clearly, other city actors or other outside interests are commanding counsel's loyalty and action and making every effort to frustrate the Board's execution of its independent state law powers and duties. The "outside political interference" that led to the incorrect forced position on preemption renders the Board's coerced rescission unlawful under well-founded administrative law precedent and requires judicial relief. *See* part II.A.

C. Complaint is Well-Pleaded

City Defendants' Mem. @ 3-4 cite to the *Twombly*[8] and *Iqbal*[9] well-pleaded complaint standards in terms of require factual sufficiency but they do not claim the Complaint lacks sufficient factual support. *See also Iannacchio v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (adoption of the standards of *Twombly and Iqbal* by the Supreme Judicial Court). Nor could they since the Complaint is bereft of "naked" or "conclusory" assertions. The averments are sourced and provide logical and plausible connections to the Counts that were raised and the requested remedies. If this Court does determine the averments are insufficient then Plaintiffs should be allowed an opportunity to replead.

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[8] *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007).

[9] *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

The City Defendants ultimately present legal argument that, despite the well-pleaded facts in the Complaint, Plaintiffs have no entitlement to relief on the basis that some claims are subject to a different body's primary jurisdiction and the others are preempted. As shown below those arguments are both too early and unfounded.

## II. The Motions are Premature

The City Defendants do not refer to the Counts by numbers, but they do provide some indication of the ones to which they are referring.[10] Each of the Counts identified by City Defendants' Mem. @ 12-15 will require factual development and, at minimum, the administrative record before the Board. Dismissal under R. 12(b) is therefore not appropriate.

Count One squarely requires review of the administrative record (once properly constituted) as a matter of law. *But see* City Defendants' Nem @ at 14 (C.III.b). City Defendants' Mem. @ 14 (C.III.a) also improperly asserts facts not stated in the Complaint when it characterizes the nature of the proceedings below as non-adjudicatory by contending there was no "sworn testimony" and there was "no governing standard" for the decision. This argument is wrong in any event.

"Adjudications involve specifically identified persons who are affected, whereas general rules involve legislative or policy decisions that have a prospective and general application." *Desrosiers v. Governor*, 486 Mass. 369, 387 (2020)(internal quotations and citations omitted). The Board was investigating injuries to specifically-identified residents, and Verizon was also affected.

[10] Verizon does not identify any specific counts subject to its motion.

The precedent consistently denominates health board proceedings relating to nuisances and Sanitary Code violations as "adjudicatory" in nature. That is because the health board is applying generally-applicable statutes and regulations and determining whether a specific party is violating them based on the particular facts of the case. *Swansea v. Pivo*, 265 Mass. 520, 523 (1929) (characterizing as "*quasi*-judicial"); *Mansfield v. Atl. Chem. Co.*, 237 Mass. 56, 59 (1921); *United States Drainage & Irrigation Co. v. Medford,* 225 Mass. 467, 469, 470 (1917); *Durgin v. Minot*, 203 Mass. 26, 30 (1909); *Stone v. Heath*, 179 Mass. 385, 386 (1901) (nuisances); *Salem v. E. R. Co.*, 98 Mass. 431, 441, 449 (1868)(board of health is a tribunal with judicial powers).[11]

None of these health law violation cases state any requirement that testimony be sworn. The Sanitary Code "hearing procedures" for dwellings unfit for human habitation in 105 CMR 410.853 require allowance for "witnesses" and presentation of "documentary evidence" but they do not mandate trial-type proceedings or that any testimony be sworn. In *Frawley v. Police Comm'r of Cambridge*, 473 Mass. 716, 726-27 (2016) there was no "adjudicatory" hearing but there was an investigation and an "individualized determination." This was held to be *quasi*-judicial and reviewable by certiorari. The court held the "arbitrary and capricious/abuse of discretion" and "error of law" standard of review applied. *See also* note 11 *supra* (certiorari review of matters before local boards where no sworn evidence is presented).

[11] Further, Superior Courts in Massachusetts regularly review decisions of Conservation Commissions and Boards of Health through actions in the nature of certiorari and the Appeals Court does not disallow such review because no sworn testimony was presented during public hearings before such bodies. *See Fafard, supra* (Conservation Commission) and *Robinson v. Bd. of Health of Chatham*, 58 Mass. App. Ct 394 (2003) (Board of Health).

The Board did apply governing standards – those established by state law. It found facts and applied them to those laws with regard to specific people. Emergency Order p. 1,[12] 2-3,[13] 14.[14] The hearings below were adjudicatory.

A. Count One Requires Review of the Administrative Record

Count One ¶¶77-78 asserts *inter alia* improper outside political interference, and resolution of this point will require consideration of material that will be supplied pursuant to Standing Order 1-96(3)(b) and (c). This aspect of Count One is related to, but also independent of Counts Two and Three.[15] Additional evidence needs to be taken for all Counts.

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[12] "Pursuant to, *inter alia*, MGL 111 ss 122-125, 127-127I, 130, 143-144, 146-150, and State Sanitary Code 410.750, 410.831-832, 410.850-.960, the Board of Health deems the following actions necessary to protect the public health in the City of Pittsfield, State of Massachusetts."

[13] ...pulsed and modulated RF can constitute a "public nuisance" or a "cause of sickness," and can constitute a trade which may result in a nuisance or be dangerous to the public health for purposes of G.L. ch. 111 ss 122-125, 127B, 127C, 143-150, and 152." ... "RF/EMF may effectively render certain dwellings Unfit for Human Habitation or constitute a Condition Which May Endanger or Materially Impair the Health or Safety and Well-Being of an Occupant as defined in State Sanitary Code 410.020 and 410.750(P)." ... the Sanitary Code and other Massachusetts law allow the Health Board to act as necessary to ensure that activity or operations in a non-dwelling building, structure, or facility do not contribute to conditions that impact occupants of a dwelling to the point they render a dwelling unfit for habitation for purposes of Sanitary Code 410.831.

[14] The Verizon Wireless 877 South Street wireless facility operated by Verizon Wireless is a public nuisance, a cause of sickness, and a trade which may result in a nuisance or be dangerous to the public health for purposes of G.L. ch. 111 ss 122-125, 127B, 127C, 143-150 and 152." ... "The Verizon Wireless 877 South Street wireless facility operated on the premises creates an access barrier that directly causes harm to certain individuals, and renders dwellings Unfit for Human Habitation or constitutes a Condition Which May Endanger or Materially Impair the Health or Safety and Well-Being of an Occupant as defined in State Sanitary Code 410.020 and 410.750(P)." ... "The Verizon Wireless 877 South Street wireless facility operated on the premises creates conditions that impact occupants of a dwelling to the point that it renders a dwelling unfit for habitation for purposes of Sanitary Code 410.831.

[15] City Defendants' challenge to subject-matter jurisdiction with regard to Counts Two and Three are addressed in part II.B.

Vacatur and remand lies even if none of the political interference gave rise to a violation of the ethics rules. *See, e.g., D. C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1249 (1971):

> To avoid any misconceptions about the nature of our holding, we emphasize that we have not found -- nor, for that matter, have we sought -- any suggestion of impropriety or illegality in the actions of Representative Natcher and others who strongly advocate the bridge. They are surely entitled to their own views on the need for the Three Sisters Bridge, and we indicate no opinion on their authority to exert pressure on Secretary Volpe. Nor do we mean to suggest that Secretary Volpe acted in bad faith or in deliberate disregard of his statutory responsibilities. He was placed, through the action of others, in an extremely treacherous position. Our holding is designed, if not to extricate him from that position, at least to enhance his ability to obey the statutory command notwithstanding the difficult position in which he was placed.

See *also*, *Tex. Med. Asso. v. Mathews*, 408 F. Supp. 303, 315 (W.D. Tex. 1976); *Pillsbury Co. v. Fed. Trade Com.*, 354 F.2d 952 (5th Cir. 1966)(legislative branch interference); *Portland Audobon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534 (9th Cir. 1993)(executive branch interference); *Jarrott v. Scrivener*, 225 F. Supp. 827, 834 (D.D.C 1964)(and cases cited)(setting aside and remanding base on executive branch interference, but noting "[o]f course, it is unnecessary that I find intentional wrongdoing on the part of anyone, and I do not so find").

Further, these cases demonstrate that evidence outside of the administrative record is also necessary to assess the claims, because the improprieties are not reflected by that record. *See, D. C. Fed'n of Civic Assos. v. Volpe*, 316 F. Supp. 754, 760 (1970) and *Tex. Med. Asso.* (court receipt of testimony for procedural irregularities and outside interference); *Portland Audobon, supra*; *Jarrott v. Scrivener*, 225 F. Supp. 827, 833 (D.D.C 1964), *citing WKAT v. Federal Communications Commission*, 258 F.2d 418 (D.C. Cir. 1958), *WORZ, Inc. v. F.C.C.*, 268 F.2d 889 (D.C. Cir. 1958), *Massachusetts Bay Telecasters v. F.C.C.*, 261 F.2d 55 (D.C. Cir. 1958), *Sangamon*

*Valley Television Corp. v. United States*, 269 F.2d 221 (D.C. Cir. 1959) and *Berkshire Emps. Ass'n v. NLRB*, 121 F.2d 235, 239 (3d Cir. 1941)(remand to agency for development of additional evidence regarding improprieties).

Insofar as the City Defendants and/or Verizon are claiming that Count One must be dismissed based on preemption, that is also premature, especially with regard to express and conflict preemption. The Court must examine the evidence before it can make the kind of findings required by the legal tests for those two varieties. See part VI.A.5 and VI.A.7.

B. The Court has Subject Matter Jurisdiction Over Counts Two and Three. At Most the BBO and Ethics Boards Have Concurrent but not Exclusive Jurisdiction

City Defendants Mem. @ 5-7, 12-14 contend Counts Two and Three should be dismissed for lack of subject matter jurisdiction. Specifically, they assert that either the State Ethics Commission or the Board of Bar Overseers have "exclusive" or "primary" jurisdiction and this Court cannot grant relief. The argument is misplaced. Neither the Ethics Commission or BBO have exclusive[16] jurisdiction over Counts Two and Three.

First, the City Defendants forget that the same acts for which relief is sought under Counts Two and Three are also part of the basis for the administrative appeal in Count One. The Superior Courts have exclusive jurisdiction over administrative appeals under G.L. c. 249, § 4. Neither the Ethics Commission or BBO can determine whether the Board's action was (a) in violation of constitutional provisions, (b) in violation of or

[16] There are some matters for which an agency does have exclusive jurisdiction. Among them are workers' compensation claims of the type addressed in *HDH Corp. v. Atl. Charter Ins. Co.*, 425 Mass. 433 (1997), cited by the City Defendants @ 3, n.3. There is, however, a significant difference between exclusive agency jurisdiction and primary jurisdiction, where an agency and the court have concurrent jurisdiction and the court has discretion whether to refer a matter for agency disposition in the first instance.

contrary to state law, (c) in violation of or contrary to the Pittsfield Charter and Code, (d) in excess or in the alternative in derogation of the Board's authority or jurisdiction, (e) based upon error of law, (f) made upon unlawful procedure, (g) tainted and rendered unlawful by the actions of the Mayor, City Solicitor and/or others under the Mayor's influence and control, or (f) not supported by substantial evidence.

Plaintiffs had only 60 days to file this administrative appeal. An effort to first seek recourse at the Ethics Commission or BBO would lead to loss of the right to file an administrative appeal due to limitations. At minimum, this Court has concurrent jurisdiction with the Ethics Commission and BBO. It does, in theory, have discretion to refer any matters to those agencies under the primary jurisdiction doctrine and abate disposition of Claims Two and Three (*see* II.B.2), but it should not dismiss them. Referral of the entirety of the political interference issues is not workable here since the Court must apply the same underlying facts to Count One, which is not subject to a primary jurisdiction referral.

1. The BBO Does Not Have Exclusive Jurisdiction

The Supreme Judicial Court (not the BBO) has exclusive *disciplinary* and *licensing* jurisdiction. It has delegated those powers to the BBO, subject to the high court's review. *Wong v. Luu*, 472 Mass. 208 (2015) and *Robert L. Sullivan, D.D.S., P.C. v. Birmingham*, 11 Mass. App. Ct. 359 (1981).

However, the courts can and do address claims that a lawyer has violated an ethical conduct rule in various contexts. *See, e.g., Maling v. Finnegan, Henderson, Farabow, Garrett & Dunner, LLP*, 473 Mass. 336 (2015). These courts are not enforcing the disciplinary rules (*i.e.*, adjudicating whether a violation occurred to impose

discipline) but are using them as a test or guideline for purposes of resolving a matter properly before the court, where the cause of action is independent of the ethical violation. *See Kraner v. Law Offices of Sonja B. Selami*, No. 19-00096, 2019 Mass. Super. LEXIS 5025, at *8 (Sep. 26, 2019)("The complaint's references to ethical violations serve as ways in which the Plaintiffs allege the Defendants breached the standard of care.").[17] While doing so the adjudicating court can additionally refer the matter to the BBO for attorney discipline. *Wong*, 472 Mass. at 209, 214.

Plaintiffs are not seeking discipline or any impingement on Defendant Pagnotta's license, nor do they seek damages. Rather, the Complaint invokes the RPCs to provide an objective measure of conduct against which Defendant Pagnotta's actions below can be measured as one means to demonstrate irregular procedure and improper interference in the Board's duties. As such, the Plaintiff's claim is akin to that of a court applying RPC 3.7(a) to determine whether an attorney can serve as a witness and as an advocate in a proceeding. *See Smaland Beach Ass., Inc. v. Genova*, 461 Mass. 214 (2005) (review of disqualification order). This Court has subject matter jurisdiction over this aspect of Count Three.

2. The Ethics Board Does Not Have Exclusive Jurisdiction

The Ethics Board has primary, not exclusive, jurisdiction over ethical violations of G. L. c. 268A. "Although the remedies provided for in G. L. c. 268A are not exclusive, the statute "contemplates a primary role for the commission." *Nantasket Beachfront Condos., LLC v. Hull Redevelopment Auth.*, 87 Mass. App. Ct. 455, 466 (2015).

[17] The City Defendants argument is similar to an auto accident negligence defendant arguing to a Superior Court that the state District Court has exclusive jurisdiction to determine whether the Defendant was speeding at the time of the accident.

A ruling by that agency and a request by the municipal agency is at most a ***prerequisite for relief*** based on an ethics violation. *Leder v. Superintendent of Schools of Concord*, 465 Mass. 305 (2018); *McKenney v. Zoning Bd. of Appeals*, 84 Mass. App. Ct. 1105 (2013). The *Leder* court left open whether a private cause of action exists under c. 268A. 465 Mass. at 313 n.13.

The Supreme Judicial Court has explained the difference between exclusive agency jurisdiction and primary jurisdiction, and whether a matter subject to primary jurisdiction should be stayed or dismissed:

> The doctrine of primary jurisdiction, like exhaustion [of administrative remedies], 'is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties.'" *Murphy*, 377 Mass. at 221, quoting from *Nader*, 426 U.S. at 303. It arises in cases "where a plaintiff, 'in the absence of pending administrative proceedings, invokes the original jurisdiction of a court to decide the merits of a controversy' that includes an issue within the special competence of an agency." *Fernandes v. Attleboro Hous. Authy.*, 470 Mass. 117, 121, 20 *N.E.*3d 229 (2014) (*Fernandes*), quoting from *Murphy, supra* at 220. *See Everett v. 357 Corp.*, 453 Mass. 585, 609, 904 N.E.2d 733 (2009) (*Everett*). The primary jurisdiction doctrine allows a judge to delay or deny judicial review in favor of administrative proceedings "when an action raises a question of the validity of an agency practice, ... or when the issue in litigation involves 'technical questions of fact uniquely within the expertise and experience of an agency'" (citations omitted). *Murphy, supra* at 221, quoting from *Nader, supra* at 304. See *Leahy v. Local 1526, Am. Fedn. of State, County, & Mun. Employees,* 399 Mass. 341, 349-350, 504 N.E.2d 602 (1987) (Leahy).
>
> Where an agency has statutorily been granted exclusive authority over a particular issue, the doctrine of primary jurisdiction requires that a court refer the issue to the agency for adjudication in the first instance" (emphasis in original). *Fernandes, supra*, quoting from *Blauvelt v. AFSCME Council 93, Local 1703,* 74 Mass. App. Ct. 794, 801, 910 N.E.2d 956 (2009) (*Blauvelt*). See Everett, supra; *Puorro v. Commonwealth*, 59 Mass. App. Ct. 61, 64, 794 N.E.2d 624 (2003) (*Puorro*). "Where, however, no statute has conferred exclusive authority to the agency, primary jurisdiction is 'a doctrine exercised in the discretion of the court.'" *Blauvelt, supra* at 801-802, quoting from *Columbia Chiropractic Group, Inc. v. Trust Ins. Co.,* 430 Mass. 60, 62, 712 N.E.2d 93 (1999). *See Everett,* 453 Mass. at 610 n.32. The primary jurisdiction doctrine has no applicability where the issues presented to the court concern only questions of law that do not call for

> agency expertise. *See Murphy*, 377 Mass. at 221-222; *Casey v. Massachusetts Elec. Co.*, 392 Mass. 876, 879-880, 467 N.E.2d 1358 (1984).

*Malden Police Patrolman's Ass'n v. City of Malden*, 92 Mass. App. Ct. 53, 58-59 (2017).

> A determination that primary jurisdiction over an issue in a civil case resides with an administrative agency requires that the case be stayed or dismissed to permit the administrative agency the opportunity to issue its determination. A court "has discretion either to retain jurisdiction" over the claim by issuing a stay, "or, if the parties would not be unfairly disadvantaged, to dismiss the case without prejudice." *Reiter v. Cooper*, 507 U.S. 258, 268-269, 113 S. Ct. 1213, 122 L. Ed. 2d 604 (1993). *See J. & J. Enters., Inc. v. Martignetti*, 369 Mass. 535, 540, 341 N.E.2d 645 (1976) (when "dismissal may give rise to serious problems in the application of the statute of limitations," in such cases 'the proper course may be to stay the action instead of dismissing it").

*Everett v. 357 Corp.*, 453 Mass. 585, 610 n.32 (2009)(emphasis added).

Further, it is important here that the *Leder* decision involved a request that a decision be reversed because the decisionmaker had a conflict of interest. In this matter, the Plaintiffs have not alleged that the members of the Board had a conflict of interest. Rather, the claim is that the Mayor and Town Counsel improperly interfered with the decision-making process resulting in the Board having no ability to perform its state law duties. As such, the allegations regarding potential violations of ethical obligations are similar to a court establishing a breach of a "standard of care" through the alleging violations of ethical obligations. *See Kraner, supra.*

The plaintiffs in *Leder* and *McKenney* chose to not file a complaint with the Ethics Board. Plaintiffs here are willing to initiate an action there if instructed by the Court to do so as part of a primary jurisdiction referral.[18] The Court should not, however, dismiss, since that would unfairly disadvantage the Plaintiffs by denying them their day in court.

[18] Plaintiffs have reason to believe complaints at both Ethics Commission and BBO have already been filed by a third party. The Court might want to ask the City Defendants about this. Even so, Plaintiffs are willing to directly file a complaint so long as the Court stays rather than dismisses Claims Two and Three. Plaintiffs, however, emphasize that the referral should be only with relation to the question of whether Defendants Tyer and Pagnotta violated ethics rules. As noted in II.A, even if there was no ethics violation the Court must still decide whether the

## III. Declaratory Relief is Available

City Defendants Mem. @ 4-5 and Verizon Mem. @ 4-5 wrongly contest availability of declaratory relief. Plaintiffs are seeking a determination of the legality of acts by two specific officials whose "practices or procedures are alleged to be in violation" of laws of the commonwealth and the Pittsfield Charter. The challenged acts were "consistently repeated." G.L. ch. 231A §2; *c.f.*, City Defendants 5. Each of these municipal officials, over the period of two years, repeatedly and consistently interfered in, and tried to frustrate and impede the Board's exercise of its independent state law duties. Complaint ¶¶37-73. Complaint Count Four seeks, among other things, a declaratory ruling that these officials have no right or power to do so, under state law or the Pittsfield Charter Art. 3, Section 3-2.

There is a live legal controversy over the Board's independence from other city actors' control and whether the Board is preempted under federal law. There is "a real dispute caused by the assertion by one party of a legal relation, status or right in which he has a definite interest, and the denial of such assertion by another party also having a definite interest in the subject matter." *Wells Fargo Fin. Mass., Inc. v. Mulvey*, 93 Mass. App. Ct. 768, 771 (2018) (City Defendants 4 & n.13). These are not "abstract, hypothetical or otherwise moot questions." *Id.* at 771.

City Defendants' Mem. @ 5 alleges that a declaratory judgment can only be obtained when a practice has been "consistently repeated." That limitation is found in the second sentence of G.L. ch. 231A, Sec. 2 involving "administrative practices and procedures" and does not apply to a claim under the first sentence involving the

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same acts constituted improper outside interference, which can be a basis for reversal and remand even if all actors had innocent motives and violated no law.

construction of a statute which is at issue in this matter (*i.e.*, whether the Board was required by state statute to issue the Order when it made the statutory findings). *Holden v. Div. of Water Pollution Control*, 6 Mass. App. Ct. 423, 428 (1978).

The Court can terminate all these controversies.

## IV. This Matter is Proper for Certiorari Relief

### A. Discretionary Acts Are Subject to Arbitrary/Capricious/Abuse Standard

Board of health decisions – whether legislative (in the form of a generally-applicable regulation) or adjudicative (application of law or regulation to a specific party) – are properly reviewed through certiorari, *Bd. of Health v. Sousa,* 338 Mass. 547, 553 (1959) and declaratory relief, *Butler v. E. Bridgewater*, 330 Mass. 33, 39 (1953).

It is not clear whether the Defendants contend certiorari is unavailable for discretionary acts. Verizon Mem. @ 4. Discretionary acts are reviewable under the "arbitrary/capricious/abuse of discretion standard. *See Dental Hygienists v. Board of Registration in Dentistry,* 404 Mass. 211, 217 (1989); *T.D.J. Development Corp. v. Conservation Comm'n of North Andover*, 36 Mass. App. Ct. 124, 128 (1994). The court determines whether the decision is legally erroneous or without factual support. *FIC Homes of Blackstone. Inc, v. Conservation Comm'n of Blackstone*, 41 Mass. App. Ct. 681, 684-85 (1996). "A decision is arbitrary or capricious . . . where it 'lacks any rational explanation that reasonable persons might support.'" *Perullo v. Advisory Committee on Personnel Standards*, 476 Mass. 829, 836 (2017), *quoting Frawlev v. Police Comm'r of Cambridge*, 473 Mass. 716, 729 (2016) and *Doe v. Superintendent of Schs. of Stoughton*, 437 Mass. 1, 5 (2002). "If the agency has acted for reasons that are extraneous to the prescriptions of the regulatory scheme, but are related, rather, to an *ad hoc* agenda, then that agency has acted arbitrarily" *Fafard,* 41 Mass. App. Ct. at 568.

The Board was forced to abandon, on an *ad hoc* basis, its state law duties, so it necessarily acted "extraneous to the prescriptions of the regulatory scheme."

The Board's decision to rescind the Emergency Order was not an act of discretion. It was coerced. Complaint ¶¶69-72. A decision made under coercion is not an act of discretion. The Board was forcibly required to accept Defendant Pagnotta's legally-erroneous preemption position. Even if not coerced this legal determination effectively became the Board's own and this Court has the power to decide whether the legal advice imposed on the Board constituted error of law or was arbitrary/capricious.[19] The City Defendants cannot "insulate" "incorrect legal advice" from judicial review, else "this court effectively would be left without the ability to assure that agencies comply with the mandate of" applicable law. *ATA Def. Indus. v. United States*, 38 Fed. Cl. 489, 502 n.7 (1997).

Mistakes of law are judicially reviewable under the "error of law" and arbitrary/capricious standard. *See, e.g., Barley Mill, LLC v. Save Our Cty., Inc.*, 89 A.3d 51, 64 (Del. 2014)(affirming reversal of city zoning action based on incorrect legal advice by staff). This Court can also determine whether there was unlawful procedure or improper outside interference that tainted the action and if substantial evidence supports the recission decision.

B. No Other Remedy

Defendants note that certiorari is available only when the plaintiff has no adequate alternative remedy. After trying to deny declaratory relief as a remedy, City

[19] *Picard v. Worcester*, 338 Mass. 644, 648 (1959), cited at Verizon 4-5, is not applicable. In that case it was "not alleged that in pursuance of that ruling any action has been taken by the board." Here, the Solicitor's opinion was in fact implemented by the city actors and forced on the Board. Verizon 6 so admits.

Defendants' Mem. @ 15 proffers only whimsical alternatives. None would get this matter back to the Board for resolution or offer any prospect of state-law based relief from the Plaintiffs current abhorrent situation. Each (restated below) is not a true remedy.

"(1) file a civil action for damages." The City Defendants do not indicate whom they believe the Plaintiffs could sue for damages. Surely they do not suggest a suit against any city official. But in any event this action is not about damages; it is an effort to have the proper authority that oversees nuisances and health matters perform its duties so that, hopefully soon, the Plaintiffs can live in their own homes in peace and without tortuous injury.

"(2) file a federal civil action seeking injunctive relief." Again, there is no hint of whom should be the object of any such suit, the federal claims that could be raised or the acts the City Defendants believe could be enjoined. Any such filing would quickly be met with a "City Defendants" plea for abstention or dismissal for failure to exhaust state administrative relief.

"(3) working with elected officials to amend the TCA." For what it is worth, the Plaintiffs are doing precisely that, but any statutory amendment would, like all laws or regulations, have only prospective effect and the statutory change would likely only constitute a requirement for further federal agency rulemaking that would also have only prospective effect.

"(4) and petitioning the FCC to amend the standards relative to RF emissions for PWSF, including cell towers." As City Defendants' Mem. @ 15 n.52 observes, the D.C. Circuit did remand the question of the propriety of the FCC's emissions guidelines back

to the agency. When (and if) the FCC decides to honor the remand and re-initiate the proceeding any potential changes would require a rulemaking that will take years to resolve and any new rules will only have prospective effect.

None of this has anything to do with the propriety of the City Defendants' actions and decisions during the Board's adjudication. The only remedy for the action below can come from this Court through certiorari and associated declaratory relief.

## V. Verizon Waived the Right to Raise Preemption as a Defense

As the Board correctly observed, Verizon's zoning permit "expressly requires compliance with the Massachusetts Sanitary Code and Pittsfield's health-related rules, regulations and requirements."[20] Verizon did not contest the permit by the applicable statutory deadlines. It accepted the permit, and is bound by its terms, including this condition. *See Gen. Outdoor Advert. Co. v. Dep't of Pub. Works*, 289 Mass. 149, 200-01 (1935).[21] The company cannot now raise preemption (or any other "hardship" claim) as a defense after it has been found to have violated a condition it voluntarily accepted. *See Miersma v. Zoning Bd. Of Appeals of Northbridge*, 19 Mass. L. Rep. 85 (2005). It is barred from claiming the condition is unenforceable by way of an affirmative defense. The Court should not allow Verizon to re-litigate the conditions in the local zoning permit.

The City Defendants are directly challenging the Board's findings and conclusions, in the guise of "representing" the Board. Counsel for the City should be

[20] Emergency Order pp. 13-14.

[21] "The request for a permit to build the sign and acceptance of the permit granted in accordance with the rules and regulations in substance and effect bound Brink by its terms. He cannot now assert a permanent right to maintain the sign contrary to the conditions on which he was permitted to erect it." (citations omitted)

enforcing the zoning permit condition and defending the Board's investigation. That is their job.

## VI. The Movants Have Not Shown That the Complaint's Well-Pleaded Facts Show With Certainty that Plaintiffs Have no Plausible Entitlement to Relief

### A. Movants Fail to Demonstrate Express, Field or Conflict preemption

#### 1. Preemption is an Affirmative Defense

Federal preemption is an affirmative defense. The defendant bears the burden of proof. *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668, 1678 (2019); *Bruesewitz v. Wyeth LLC*, 131 S.Ct. 1068, 1087 n.2 (2011). For purposes of Rule12(b)(6), a plaintiff is not required to plead facts sufficient to overcome an affirmative defense. *Gomez v. Toledo*, 446 U.S. 635, 640-641 (1980); *Fowles v. Lingos*, 30 Mass. App. Ct. 435, 438 n.6 (1991). A defendant may obtain dismissal of a complaint only by demonstrating that the facts pleaded establish a conclusive affirmative defense with such certainty that the plaintiff has no plausible entitlement to relief. *Nat.l Ass'n of the Deaf v. Harvard Univ.*, 377 F. Supp. 3d 49, 68 (D. Mass. 2019);[22] *Cavanagh v. Cavanagh*, 396 Mass. 836, 838 (1986); *Whitehouse v. Sherborn,* 11 Mass. App. Ct. 668, 676 (1981).

"To support a claim of preemption, the defendants are 'required to prove their case with hard evidence of conflict, and not merely with unsupported pronouncements as to [Federal] 'policy.'" *Roberts v. Sw. Bell Mobile Sys.*, 429 Mass. 478, 491 (1999), *citing Grocery Mfrs. of Am., Inc. v. Department of Pub. Health*, 379 Mass. 70, 81-82 (1979), *quoting Kargman v. Sullivan*, 552 F.2d 2, 6 (1st Cir. 1977); *Arthur D. Little v.*

[22] Facts establishing affirmative defense must: (1) be definitively ascertainable from the complaint and other allowable sources of information, and (2) suffice to establish the affirmative defense with certitude. (cleaned up, internal citations omitted).

*Commissioner of Health of Cambridge*, 395 Mass. 535, 545-552 (1985). The Motions do not demonstrate that the Plaintiffs' Complaint establishes a conclusive "preemption" affirmative defense with such certainty that Plaintiffs have no plausible entitlement to relief.

This is particularly so with regard to the City Defendants' bald assertion of conflict preemption without any showing that it is impossible for Verizon to comply with any federal obligation in light of as-yet undetermined state Board commands, or specifically how the Board's involvement erects an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. The same is so for express preemption. Even if 47 U.S.C. §332(c)(7)(B) applies to the Board, there are factual issues regarding whether Board involvement constitutes the type of "regulation" addressed in that sub-section.

2. Movants Ignore Binding State Law Precedent

Both Movants completely ignore binding state law precedent concerning federal preemption of state Health Board duties and powers. *Little*, 395 Mass. at 545-552 has never been overruled or limited, so this Court should heed its instruction that "[p]reemption is not favored, and State laws should be upheld unless a conflict with Federal law is clear." ... "The [one claiming preemption] is obligated to show preemption 'with hard evidence of conflict on the basis of the record evidence in this case." ... "This court, and the United States Supreme Court, have been particularly reluctant to overturn State laws which are 'deeply rooted in local feeling and responsibility.' This principle applies with special force to laws designed to protect the public health and welfare, a subject of 'particular, immediate, and perpetual concern' to any municipality.'" 395

Mass. at 545-546 (citations omitted). The Defendants bear the burden of proving that Congress "intended to preempt a field that would encompass the state law measures that they challenge." *Capron v. Office of the AG of Mass.*, 944 F.3d 9, 24, 26 (1st Cir. 2019).

3. Movants Confusingly Conflate Separate Preemption Concepts

It is hard to discern at times what kind of "preemption" the Movants are claiming. This is particularly so with respect to the City Defendants. *See, e.g.*, City Defendants' Mem. @ 9 (conflating "field" and "express" preemption). Nonetheless, City Defendants' Mem. @ 9-12, 14-15 appears to assert express, field and conflict preemption. Verizon asserts only "express" preemption through 47 U.S.C. §332(c)(7)(B)(ii), based on the contention that the Board was attempting to "regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions." Verizon Mem. @ 5-6.[23]

It is important to remember that the Board simply ordered Verizon to appear and show cause. The requirement to cease operation of the facility came into effect only if Verizon did not exhaust administrative remedies by appearing in response. It is entirely possible that some solution short of complete cessation could have been devised if Verizon had simply graced the Board with its presence and joined in the search for uniformly acceptable outcomes. The Court should await the administrative record and assess the extent to which the Board's efforts did in fact constitute "regulation" or would

[23] Verizon 5 misquotes the provision in issue by inserting "purported" before "basis." This was likely not a slip of the pen.

have actually created any conflicts, *e.g.*, that Verizon would have been unable to comply with both state and federal demands or there would be an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Assuming without admitting that express and conflict preemption are properly raised at this point (rather than at the summary judgment or motion for judgment on the pleadings stage when the Court has the record below and can assess the issues in light of the evidence) each argument fails.

4. The FCC has Expressly Blessed State-law Health and Safety Permit Conditions and Verizon Voluntarily Accepted Those in its Permit

The Board specifically addressed federal preemption and properly found there was none. It held:[24]

> ...this Board concludes that the FCC emissions guidelines do not prevent this Board, operating under State authority, from taking action to protect the health and safety of those specific individuals who have demonstrated that a continuously operating cell tower built adjacent to a densely populated residential neighborhood is injuring their health on a continuing basis, as well as the health of other neighborhood residents. The FCC has ruled that state and local zoning authorities can condition a land use permit on compliance with generally applicable state or local health and safety codes.[25] Verizon Wireless' permit for this facility does precisely that. Verizon Wireless' permit expressly requires compliance with the Massachusetts Sanitary Code and Pittsfield's health-related rules, regulations and requirements. By this Order, this Board finds the Verizon Wireless 877 South Street wireless facility to be in violation, and this Board requires Verizon Wireless and the property owner to bring their facility and the premises into compliance with Massachusetts' and Pittsfield's generally

[24] Emergency Order pp. 13-14.

[25] *Citing Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies, Regarding Public Rights of Way and Wireless Facilities Siting; 2012 Biennial Review of Telecommunications Regulations*, 29 FCC Rcd 12865, 122951, ¶202 (Oct. 17, 2014): ("Congress did not intend to exempt covered modifications from compliance with generally applicable laws related to public health and safety. We therefore conclude that States and localities may require a covered request to comply with generally applicable building, structural, electrical, and safety codes or with other laws codifying objective standards reasonably related to health and safety, and that they may condition approval on such compliance.")(emphasis added).

applicable health and safety codes, just as FCC precedent and the permit expressly allow.

The Board noted the FCC has directly held that local permitting authorities are not prohibited from requiring ongoing compliance with generally-applicable state and local health and safety codes as part of a land use/zoning wireless facilities permit.[26]

The Board – which oversees the state health laws – was merely enforcing a specific condition in Verizon's land use permit. The Board found Verizon to be in violation but gave it another chance to prove otherwise.[27] This alone should end any contentions that the Board has no lawful role in this area or with regard to the facility in issue, or that the relief it granted was *ultra vires* or preempted.

5. The Movants Fail to Demonstrate Express Preemption

The Defendants claim that 47 U.S.C.§ 332(c)(7)(B)(iv) expressly preempts the Board from exercising any role. What they fail to comprehend is that although the Board is a "State or local government or any instrumentality" it is not the type of local government entity Congress was addressing in this provision. The Board's action was not inconsistent with this subparagraph because the Board is not the type of state or local entity Congress was addressing in the statute.

47 U.S.C. §332(c)(7) is entitled "Preservation of Local Zoning Authority." Subparagraph (B) is captioned "Limitations," but it is clearly imposing "limitations" on a

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[26] Even if this condition was not present in the zoning permit, Verizon was still not exempt from state or local health and safety laws. *See, Lummis v. Lilly*, 385 Mass. 41, 46-47 (1982) ("It is settled that a license does not immunize the licensee from liability for negligence or nuisance which flows from the licensed activity. *See Ferriter v. Herlihy*, 287 Mass. 138, 143 (1934); *Hub Theatres, Inc. v. Massachusetts Port Auth.*, 370 Mass. 153, 156, *appeal dismissed*, 429 U.S. 891 (1976).").

[27] Verizon could have challenged the finding of violation but did not. Instead, it has collaterally attacked the condition requiring compliance with health laws by claiming preemption.

"local zoning authority." The Defendants argue that Board involvement is preempted by (c)(7)(B)(iv). But for (c)(7)(B)(iv) to apply at all, however, subparagraph (B) has to apply. Applicability of (c)(7)(B) turns on the scope of paragraph (7). Any legal claim of preemption under (c)(7)(B)(iv) can only be premised on "regulation based on the environmental effects of radio frequency emissions" imposed by the type of state or local body that is covered by paragraph (7).

i. The Board of Health is Not a "Local Zoning Authority."

The Pittsfield Board of Health is not a "local zoning authority." In Pittsfield zoning authority lies with the city Community Development Board and the Pittsfield Zoning Board of Appeals that, in combination, implement G.L., Ch. 40A in the city. *See*, Pittsfield Municipal Code, Ch. 2, Art. XIV, Section 2-73, (1)(f);[28] *See also*, Pittsfield Municipal Code Ch. 23, Art. Section 12.4.[29] Health Board action is not "local zoning" action. *P & D Svc. Co.*, 359 Mass. at 104 (Health Board nuisance order independent of land use permit); *Waltham*, 327 Mass. at 253; *Medford*, 319 Mass. at 282, 286 ("the fact that a trade or employment is permitted under such [zoning] laws does not mean that it need not also comply with valid orders and regulations of a board of health"); *Marshall*, 276 Mass. at 348. The Board of Health is a different agency than the Community Development Board and "neither board is bound by the decision of the other." *McLaughlin v. Town of Duxbury Zoning Bd. of Appeals*, 29 LCR 373, 375 (Mass. Land Ct. 2021)(citations omitted).

[28] Available at http://pittsfield-ma.elaws.us/code/coor_ptii_ch2_artxiv_2-73.

[29] Available at https://ecode360.com/attachment/PI1888/ZONING-SECTION%2012.pdf.

ii. The Board is an Independent Administrative Body that Enforces State Health Laws

This is not a "zoning" matter involving land use on a designated parcel of land. It is a public health case where there is a health board determination of both injury and direct causation. The Board is not exercising any "zoning" authority over things like setbacks, density or height limits. Indeed, the Emergency Order pages 13-14 recognize that Verizon has a valid land use permit issued by the Community Development Board. The Board of Health was exercising its independent, express authority to address and eliminate any "public nuisance, a cause of sickness, and a trade which may result in a nuisance or be dangerous to the public health" pursuant to Mass. G.L. Ch. 111 Secs. 122-125, 127-127I, 130, 143-150 and 152 and State Sanitary Code 410.750, 410831-832, 410.850-960. Emergency Order pp. 1, 13. These are not "zoning" matters. *P & D Svc. Co.*, 359 Mass. at 104; *Waltham*, 327 Mass. at 253; *Medford*, 319 Mass. at 282, 286; *Marshall*, 276 Mass. at 348.

"Health and safety" protection is part of long-standing and well-founded historical police powers that have always been reserved to the states under our federal form of government. The Massachusetts legislature has long granted boards of health wide authority and discretion in determining the activities and operations that present health or safety issues. *See, City of Salem v. Eastern Railroad Corporation*, 98 Mass. 431, 445 (1868) (mill pond without proper drainage); *Maynard v. Carey Construction Co.*, 302 Mass. 530, 531 (1939) (breeding ground for cockroaches); *Stone v. Heath*, 179 Mass. 385, 388 (1901) (water supply pollution); *Weltshe v. Graf*, 323 Mass. 498, 500 (1948) (trucking operation); *City of Worchester v. Eisenbeiser*, 7 Mass. App. Ct. 345, 348-49 (1979) (dilapidated building). The Supreme Court has affirmed the States' police power

"to protect the health and safety of [its] citizens," *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996), absent a clear showing of preemption. Strict limitation on preemption applies with special force to laws designed to protect the public health and welfare, a subject of 'particular, immediate, and perpetual concern' to any municipality." *Little*, 395 Mass. at 545-546.

"In preemption analysis, courts should assume that 'the historic police powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress.'" *Little,* 395 Mass. at 549, *citing Arizona v. United States*, 567 U.S. 387, 400 and *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). "That rule of construction rests on an assumption about congressional intent: that Congress does not exercise lightly the extraordinary power to legislate in areas traditionally regulated by the States." *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 13 (2013). "The States traditionally have had great latitude under their police powers to legislate as 'to the protection of the lives, limbs, health, comfort, and quiet of all persons.'" *Little*, 395 Mass. at 546. The preemptive scope of §332(c)(7(B)(iv) must be narrowly construed. The main guide is the "clear and manifest purpose of Congress" and, in this matter, there is a direct indication of Congress' intent to limit "zoning" and not state health laws protecting the lives, limbs, health, comfort, and quiet of all persons.

iii. Congress' Stated Intent Was to Impose "Limitations" Only on "Local Zoning Authority"

One indication of Congress' purpose is the caption to paragraph 7 – "preservation of local zoning authority." Subparagraph (A) provides that "Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a

State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities."

The Emergency Order does not address or control "placement, construction, and modification" of Verizon's facilities. The Board did not require removal, deconstruction or modification.[30] The Board found the "facility operated on the premises" "creates an access barrier that directly causes harm to certain individuals, and renders dwellings Unfit for Human Habitation or constitutes a Condition Which May Endanger or Materially Impair the Health or Safety and Well-Being of an Occupant as defined in State Sanitary Code 410.020 and 410.750(P)" and "creates conditions that impact occupants of a dwelling to the point that it renders a dwelling unfit for habitation for purposes of Sanitary Code 410.831." Order p. 14. Under Massachusetts law the Board is *obligated* to take action once it makes such findings. G.L. c. 111, s. 122. M.G.L ch. 111 s. 123.

Section 332(c)(7)(B) imposes "limitations" on local zoning boards performing zoning functions not state health boards overseeing generally-applicable health and safety laws. It and its dependent subparagraphs do not clearly and unambiguously reach outside the expressly stated scope of paragraph (7). But even if there is some ambiguity, when the text of a preemption clause is ambiguous or open to more than one plausible reading, courts "have a duty to accept the reading that disfavors pre-emption." *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005).

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[30] The Emergency Order required Verizon to cease "operations" (City Defendants 10) only as a result of Verizon's failure to exhaust administrative remedies by refusing to appear in response to the order to show cause. If Verizon had appeared it is entirely possible some other outcome could have been negotiated or devised. As Verizon Mem. @ 2, 6 & n.4 observes (citing Complaint ¶¶29, 67), the intended purpose of the Emergency Order was to "induce Verizon to meaningfully engage at the administrative level and collaborate with the parties to find a solution."

The "preemption" clause in issue is not, however, ambiguous or open to more than one plausible reading because the legislative history and caselaw confirm the limited intent of these provisions. *See* Telecommunications Act of 1996, H.R.Rep. No. 104-458, at 208-209 (1996) (Conf.Rep.)[31]; Sen.Rep. No. 104-230, at 207-208 (1996) (Conf.Rep.) (same text). The scope of paragraph 7 and its dependent subparagraph (B) is about, and only about, zoning and land use permitting matters.[32]

Circuit precedent confirms that paragraph (7) addresses only local zoning and not other traditional state police powers. *See, e.g., Glob. Tower Assets, LLC v. Town of Rome*, 810 F.3d 77, 85 (1st Cir. 2016) ("A key purpose of the TCA, after all, is to preserve state and local land use authority. Indeed, the very section of the TCA that creates the relevant cause of action is entitled 'Preservation of local zoning authority.' 47 U.S.C. § 332(c)(7)."") (citations omitted, emphasis added); *Nat'l Telecomm. Advisors v. City of Chicopee*, 16 F. Supp. 2d 117, 121 (D. Mass. 1998) ("Specifically, 47 U.S.C. § 332(c)(7) addresses the regulation, construction and modification of personal wireless service facilities and sets out specific requirements that state and local governments

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[31] "The conference agreement creates a new section 704 which prevents Commission preemption of local and State land use decisions and preserves the authority of State and local governments over zoning and land use matters except in the limited circumstances set forth in the conference agreement. The conference agreement also provides a mechanism for judicial relief from zoning decisions that fail to comply with the provisions of this section. ... The limitations on the role and powers of the Commission under this subparagraph relate to local land use regulations ..." (emphasis added)

[32] City Defendants Mem. @ 11-12 cites to the MAHB Handbook in support of their position. This document is likely not cognizable in the context of a Rule 12(b) motion since it is more "evidence" than law. Regardless, the City Defendants take the MAHB analysis out of context. The Handbook's discussion is clearly addressing "local zoning" and "placement of towers." Handbook at 159-160. Nowhere does the Handbook express an opinion on whether a health board's state law health and nuisance authority is preempted when injuries occur *after* placement.

must follow when considering requests to construct personal wireless service facilities.") (emphasis added).

The federal statute does not pertain to an state health board investigation that considers current science, medical records and testimony and then makes a finding of injury and causation. Section 332(c)(7)(B)(iv) does not expressly preempt in that situation.

iii. The Express Preemption Issue Requires Factual Inquiry Whether Board Involvement Involves the Type of "Regulation" Precluded by Section 332(c)(7)(B)

Even if 47 U.S.C. §332(c)(7)(B) applies to the Board, there are factual issues regarding whether Board involvement constitutes the type of "regulation" precluded by that sub-section. Conducting an investigation is not necessarily "regulation." The Court must first review the record before it can determine whether the Board was attempting to "regulate" in the sense intended by Congress.

6. The City Defendants Fail to Demonstrate Field Preemption

Verizon does not assert field preemption. The City Defendants do, although not in such clear terms. Regardless, field preemption is certainly not evident from the averments in the Complaint and there is none in any event.

The Communications Act has pertinent savings provisions. *See* Note to 47 U.S.C §152[33] (stating that the 1996 Telecommunications Act amendments "shall not be

[33] Pub. L. 104–104, title VI, § 601(c)(1), Feb. 8, 1996, 110 Stat. 143, provides:

(c) Federal, State, and Local Law.—

"(1) No implied effect.—

This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided"); 47 U.S.C. §414 ("Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."). Savings provisions are "fundamentally incompatible with complete field preemption; if Congress intended to preempt the entire field . . . there would be nothing . . . to 'save,' and the provision would be mere surplusage." *In re NOS Commc'ns*, 495 F.3d 1052, 1058 (9th Cir. 2007); *See also Holk v. Snapple Beverage Corp.*, 575 F.3d 329, 338 (3d Cir. 2009); *Time Warner Cable v. Doyle*, 66 F.3d 867, 878 (7th Cir. 1995). Given Congress's demonstrated hesitation to override all state law and recognition of a role for state regulation, one cannot conclude that federal law "so thoroughly occupies a legislative field" as to make reasonable the inference that Congress left no room for the States to supplement it.

7. The City Defendants Fail to Demonstrate Conflict Preemption

Verizon does not assert conflict preemption. The City Defendants do, although again in ambiguous terms. Regardless, conflict preemption is not evident from the averments in the Complaint and there is none in any event.

Conflict preemption exists (1) where it is impossible for a private party to comply with both state and federal mandates, or (2) where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. There is a "heavy presumption against preemption when Congress legislates in an area traditionally occupied by the States." *Little*, 395 Mass. at 546. In that connection, one should assume that "the historic police powers of the States are not superseded 'unless that was the clear and manifest purpose of Congress.'" *Id.*, 395 Mass. at 549, *quoting Arizona*, 567 U.S. at 400 and *Rice,* 331 U.S. at 230.

Conflict preemption has two variants: "impossibility" and "obstacle." Both require "clear evidence" of an "actual conflict." *Savage*, 225 U.S. at 533 (1912). Mere "possibility of inconvenience" is not a sufficient obstacle—the repugnance must be "so direct and positive that the two acts cannot be reconciled or consistently stand together." *See Goldstein v. California*, 412 U.S. 546, 554-55 (1973) (quoting The Federalist No. 32, p. 243 (B. Wright ed. 1961)); *Kelly v. Washington ex rel. Foss Co.*, 302 U.S. 1, 10 (1937).

A court conducting preemption analysis must consider "what the state law in fact does." *Wos v. E.M.A. ex rel. Johnson,* 133 S. Ct. 1391, 1398 (2013). Movants entirely failed to even address this aspect; they have not even identified the "state law" of concern. Are they saying that Verizon is exempt from all Massachusetts health and safety laws? Do they contend that the Communications Act entirely strips the Board of all jurisdiction, or do they contend only specific actions are prohibited? If the latter, what are the specific actions the Board cannot take?

For this reason they have not met the "high threshold" of showing that "under the circumstances of [the] particular case, [the state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Gustavsen v. Alcon Labs., Inc.*, 272 F. Supp. 3d 241, 249 (D. Mass. 2017), *citing Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) and *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000). There is certainly nothing evident from the face of the Complaint revealing any obstacle to Congressional objectives.

Nor have the Defendants proven that the Board has yet imposed a specific requirement that will make it "physically impossible" for Verizon to comply with a

specified federal mandate. *Little,* 395 Mass. at 550, *citing Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 204 (1983) and *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963).

The question for "physical impossibility" is whether the Verizon could independently do under federal law what state law requires of it." *Wyeth v. Levine,* 555 U.S. 555, 573 (2009). It is true that if Verizon "cannot satisfy its...duties" under a state law "without the Federal Government's special permission and assistance, which is dependent on the exercise of judgment by the federal agency, that party cannot independently satisfy those state duties for pre-emption purposes," and the state law is preempted. *Pliva v. Mensing*, 564 U.S. 604, 623-624 (2011). But if the party can obey both mandates then there is no "impossibility" problem.

The Defendants have not proven or even alleged that Verizon requires FCC permission to turn off a wireless facility or there is some FCC regulation that expressly prohibits Verizon from complying with Massachusetts' generally-applicable health and safety laws. They cannot do so because, as noted above, the FCC has expressly held that states can require compliance with generally-applicable health and safety laws.

Defendants have not offered any meaningful explanation for their assertion that the Board has put Verizon in an impossible situation or that participating in a Board problem-solving proceeding erects any obstacle to Congressional objectives. There is certainly nothing in the Complaint that reveals either obstacle or impossibility.

The preemption arguments fail. The Motions do not demonstrate that the Plaintiffs' Complaint establishes a conclusive "preemption" affirmative defense with such certainty that Plaintiffs have no plausible entitlement to relief.

## VII. Conclusion

The Defendants have not shown a lack of subject matter jurisdiction or that Plaintiffs' Complaint fails to state a claim for which relief may be granted. The motions to dismiss must be denied.

Respectfully Submitted,

/s/ Paul Revere, III
Law Offices of Paul Revere, III
226 River View Lane
Centerville, Massachusetts 02632
Email revereiii@aol.com

/s/ W. Scott McCollough
W. Scott McCollough
McCollough Law Firm PC
2290 Gatlin Creek Rd.
Dripping Springs, Texas 78620
Email wsmc@dotLAW.biz

Attorneys for Plaintiffs Date: December 9, 2022

## CERTIFICATE OF SERVICE

I, Paul Revere, III, Attorney for the Plaintiffs, hereby certify that on December 9, 2022, I have caused the foregoing document to be served on the parties to this matter by email and mailing a true copy, postage prepaid, to:

| | | |
|---|---|---|
| Buffy D. Lord, Esq.<br>Gregory P. Howard, Esq.<br>Donovan O'Connor & Dodig, LLP<br>1330 Mass MoCA Way<br>North Adams. MA 01247 | Mark J. Esposito, Esq.<br>Shatz, Schwartz & Fentin, P.C.<br>1441 Main Street, Suite 1100<br>Springfield, MA 01103 | Brian K. Lee, Esq.<br>Nutter, McClennen & Fish, LLP<br>15 5 Seaport Boulevard<br>Boston, MA 0221 |

/s/ Paul Revere, III
Paul Revere, III

COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

COURTNEY GILARDI, et als.,

Plaintiffs,

v.

LINDA TYER, et als.,

Defendants

DOCKET NO. 2276CV00127

REPLY TO PLAINTIFFS' OPPOSITION TO MOTIONS TO DISMISS

Pursuant to Mass. R. Super. Ct. 9A(a)(3), Defendant Pittsfield Cellular Telephone Company d/b/a Verizon Wireless ("Verizon") hereby submits this Reply to Plaintiffs' Opposition to Motions to Dismiss. This reply is limited to matters raised in the opposition that were not and could not reasonably have been anticipated and addressed in Verizon's initial memorandum. As more fully set forth below, none of Plaintiffs' arguments change the fact that their complaint fails to state a claim upon which relief may be granted and must be dismissed as a matter of law.

Verizon Did Not Waive the Right to Raise Preemption as a Defense.

Plaintiffs argue that Verizon's acceptance of a permit requiring compliance with state law requirements was a waiver of the right to raise a preemption claim. Plaintiffs' Opposition, p. 22. Verizon does not contest that it had (and continues to have) an obligation to comply with the Massachusetts Sanitary Code and Pittsfield's health-related rules, regulations, and requirements ("Local Mandates") where those Local Mandates are themselves valid and legally enforceable. Under the Supremacy Clause of the United States Constitution, federal law remains paramount at all times. U.S. Const. art. 6 ("This Constitution, and the laws of the United States . . . shall be the

supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.").

A Board of Health order seeking to regulate, on the basis of alleged health effects of radiofrequency emissions, the operation of a wireless tower that is in compliance with all Federal Communications Commission ("FCC") regulations is precisely the type of order which is expressly preempted by the Telecommunications Act of 1996 (the "TCA"), 47 U.S.C. § 332(c)(7)(B)(iv).[1] While the recipient of a special permit must comply with Local Mandates that are valid and legally enforceable, there is no such requirement for Local Mandates that run afoul of unambiguous federal law, as is the case here. When it accepted the terms of the special permit, Verizon had no way of knowing that the Board of Health would later issue an illegal and unenforceable order and cannot be bound thereby. To hold otherwise would engender exactly the kind of chaos that the TCA sought to avoid, with patchwork radiofrequency emissions standards varying from locality to locality, dependent upon the vicissitudes of local politics.

Together, the TCA and the FCC's regulations created a uniform national standard for radio frequency emissions. Verizon's wireless tower is fully compliant with that national standard, and any contrary order is preempted and unenforceable, whenever issued.

## Conclusion

For the foregoing reasons, and for the reasons set forth in Verizon's memorandum in support of its motion to dismiss, Plaintiffs' complaint fails to state a claim upon which relief could be granted and all counts of the complaint must be dismissed.

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[1] Due to an inadvertent scrivener's error, Verizon did not quote this provision of the TCA completely correctly in its original memorandum in support of its motion to dismiss. The undersigned apologizes to this Court for the error.

Respectfully submitted,
For the Defendant,
PITTSFIELD CELLULAR TELEPHONE COMPANY D/B/A VERIZON WIRELESS,
By its attorney,

Mark J. Esposito, BBO # 672638
Shatz, Schwartz and Fentin, P.C.
1441 Main Street, Suite 1100
Springfield, MA 01103
(413) 737-1131
(413) 736-0375 (f)
mesposito@ssfpc.com

Dated: December 19, 2022

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing document has been served upon:

Paul Revere, III, Esq.
Law Offices of Paul Revere, III
226 River View Lane
Centerville, MA 02632
revereiii@aol.com

W. Scott McCollough, Esq.
McCollough Law Firm PC
2290 Gatlin Creek Road
Dripping Springs, TX 78620
wsmc@dotlaw.biz

Buffy D. Lord, Esq.
Gregory P. Howard, Esq.
Donovan O'Connor & Dodig, LLP
1330 Mass MoCA Way
North Adams, MA 01247
ghoward@docatty.com
blord@docatty.com

Brian K. Lee, Esq.
Nutter McClennen & Fish LLP
155 Seaport Boulevard
Boston, MA 02210
blee@nutter.com

via first-class mail, postage prepaid, and via email, this 19th day of December, 2022.

Mark J. Esposito

15\0262\Board of Health\Reply to Plaintiffs' Opposition to Motions to Dismiss