



A project of Save the Pine Barrens, Inc.  
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January 19, 2023

Michael King, Chair  
Planning Board  
Town of Wareham  
Town Hall  
54 Marion Road  
Wareham MA 02571

Via email to:

Kenneth Buckland, Director of Planning and Community Development  
Sonia Raposo, Assistant to the Planning Department

Re:

**Extension Request from New Leaf/Borrogo Solar/AD Makepeace,  
Special Permit and Site Plan Review  
150 Tihonet Road  
Cases No.7-20 and 9-20**

Dear Chair King and Board Members,

This is to supplement the September 26, 2022 comments by Community Land & Water Coalition (CLWC) urging the Planning Board to deny the requests by New Leaf Energy for extensions in the above-cases.

There is a recent development in a lawsuit by Wareham residents challenging the Borrogo Solar-AD Makepeace 140 Tihonet Road solar project that is relevant to your decisions in Cases 7-20 and 9-20. The 140 Tihonet Road project will clear-cut 65 acres, remove at least 1 million

cubic yards of sand and gravel and install about 47,000 solar panels, all adjacent to the 150 and 27 solar projects. The battery storage status is not clear.

The 2021 lawsuit on the 140 Tihonet solar project challenges the Conservation Commission's April 25, 2021 wetlands Order of Conditions permit and claims it violates the Town's Wetlands Protective Bylaw. On January 11, 2023 the Superior Court issued a decision upholding the rights of Wareham residents to move forward to address the violations. A copy is attached. Borrego had moved to dismiss the case claiming the residents did not have legal standing to pursue the violations, but Superior Court judge disagreed and denied Borrego's motion to dismiss. The Court Decision is relevant to 150 Tihonet Road and 27 Charge Pond Road for several reasons.

First, the Court decision identifies the significant harm to wetlands and water quality and other wetland resource areas from the 140 Tihonet Road project. As you know, in 2020 the Planning Board approved the abutting 150 Tihonet Road solar project and the adjacent 27 Charge Pond Road solar project without first getting the wetlands order of conditions from the Conservation Commission. This violated the Zoning Bylaw. The Court's recent decision shows why it was important for the Planning Board to review the Conservation Commission orders of conditions for 150 and 27 **before** it approved the projects, which it did not do.

Second, the Court decision identifies the cumulative impacts of the proposed Borrego-Makepeace solar projects at 140 and 150 Tihonet and 27 Charge Pond Road and the **existing** project at 160 Tihonet Road as something to be considered under the Wetlands Protective Bylaw and this was not done. We urge the Board to also look at these cumulative impacts.

Finally, the Court relied on with comments by the Wareham Land Trust and Community Land & Water Coalition to the Conservation Commission which are relevant to the 150 and 27 projects – issues that still need to be addressed. **Now is the chance to require New Leaf to submit a new application to the Planning Board and for the Board to address all the issues.**

We urge you to deny the extensions.

Thank you for your consideration.

Very truly yours,

*Margaret Sheehan*

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COMMONWEALTH OF MASSACHUSETTS

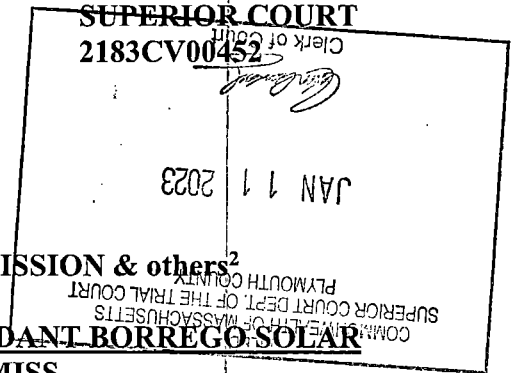
PLYMOUTH, ss.

WENDY OBRIEN & another<sup>1</sup>

vs.

TOWN OF WAREHAM CONSERVATION COMMISSION & others<sup>2</sup>

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT BORREGO SOLAR SYSTEMS, INC.'S MOTION TO DISMISS



Plaintiffs Wendy O'Brien and Matthew Buckingham filed this action seeking judicial review of the April 28, 2021 decision of the Wareham Conservation Commission granting Borrego Solar Systems, Inc.'s application for an order of conditions to build a dual-use solar energy facility at property located in Wareham. Plaintiffs also bring one declaratory judgment claim and two claims for injunctive relief. For the reasons discussed below, Defendant Borrego Solar Systems, Inc.'s Motion to Dismiss pursuant to Rule 12(b)(1) and 12(b)(6) is **DENIED IN PART AND ALLOWED IN PART.**

**BACKGROUND**

The following facts are taken from the administrative record. On June 2, 2020, Borrego Solar Systems, Inc. ("Borrego Solar") filed a Notice of Intent ("NOI") with the Wareham Conservation Commission ("the Commission") under both the Wetlands Protection Act, G.L. c. 131, § 40 ("WPA"), and the Wareham Wetlands Protection Bylaw ("the Bylaw") to build a dual-use solar energy project ("the Project") on property located at 140 Tihonet Road in Wareham ("the Property"). That NOI included the following information about the Property. The Property

<sup>1</sup> Matthew Buckingham.

<sup>2</sup> Sandra Slavin, Ronald Besse, Elissa Heard, Mary Taggart, Carol Malonson, Michael Mercer, and Kwame Bartie as members of the Wareham Conservation Commission, the Town of Wareham, and Borrego Solar Systems, Inc.

consists of wooded areas, active cranberry bogs, and associated sand track agricultural roads. It can be accessed by Tihonet Road, an existing sand track agricultural road running along the western edge of the Property. Tihonet Pond is located further west on the other side of Tihonet Road. The Property is also located to the southwest of a solar project previously approved by the Commission located at 160 Tihonet Road. Borrego Solar intends to build two new solar projects in addition to the Project. One of those projects will be situated to the north of the Project, and one will be located off of Charge Pond Road.

The NOI included the following information about resource areas protected by the WPA and the Bylaw that are located on the Property. First, the Property includes a portion of the buffer zone to the bank associated with Tihonet Pond. The Bank is a protected resource area under the WPA and the Bylaw, and the buffer zone to the bank is a protected resource area under the Bylaw. Second, the Property includes two areas of isolated vegetated wetlands (“IVW”) that are located in the western portion of the Property and to the immediate northeast of the area where Tihonet Road converges with a gravel access road. Those areas and their buffer zones are protected resource areas under the Bylaw. The northeasterly IVW was determined to be a potential vernal pool, a confined depression providing breeding habitat for vernal pool species and also a resource area protected under the Bylaw. The Bylaw protects the buffer zone to that pool as a resource area as well. The Project maintains a 100-foot offset from the boundaries of that potential vernal pool. The Bylaw also defines land within fifty feet of a resource area as a “no activity zone” for all new commercial and industrial development.

The NOI further included the following information. The Property is primarily wooded, and the Project will limit earthwork and vegetation clearing to the extent feasible for operation of a ground-mounted solar array. The Project is not located within areas identified by the Natural

Heritage and Endangered Species Program (“NHESP”) as Priority Habitats of Rare Species or Estimated Habitats of Rare Wildlife. Runoff from the Property partially drains toward Tihonet Pond. The NOI contains the following specific language: “The Property does not contain, nor is it tributary to any Critical Areas.” The site does not discharge to polluted waters. The NOI’s draft Endangered Species Certification included a habitat assessment for the Northern Long-Eared Bat and the Plymouth Red-Belly Turtle.

On July 12, 2020, the Wareham Land Trust Board of Directors sent a letter to the Commission in opposition to the Project. That letter stated that Borrego Solar planned to construct three solar projects that would be located at the Property, 150 Tihonet Road, and 27 Charge Pond Road and that construction for those projects would require clearing a total of 187 acres of mixed pine forest. The letter also stated that the forest provides a habitat for plants and animals as well as areas for recreation, and it also prevents flooding and stores carbon, thereby reducing the effects of climate change.

On February 1, 2021, the Community Land & Water Coalition (“CLWC”) sent a letter to the Commission in which it too urged the Commission to deny the NOI. The letter includes the following information. Borrego Solar did not thoroughly examine whether rare species exist on the Property before filing its NOI. Borrego Solar only indicated in the NOI that the Project is not located within areas identified by the NHESP as Priority Habitats of Rare Species or Estimated Habitats of Rare Wildlife, and the Bylaw does not limit protection of rare species to areas mapped as Priority Habitats of Rare Species or Estimated Habitats of Rare Wildlife by the NHESP. The Commission should therefore require Borrego Solar to conduct a biological survey to identify any rare species on the Property. CLWC asserted four reasons why rare species are likely to inhabit the Property. First, the Massachusetts Secretary of Energy and Environmental

Affairs has identified the Property as “undeveloped land considered ecologically significant due to the presence of BioMap Core Habitat, Priority Habitat for rare and endangered species, and the underlying sole source aquifer.” Second, current environmental designations on the Commonwealth’s OLIVER map database identify at least the following critical and core habitat features for the Property: BioMap2 Critical Natural Landscape and BioMap2 Core Habitat Vernal Pool. The adjacent 150 Tihonet Road project site is BioMap2 Core Habitat Forest Core and BioMap2 Critical Natural Landscape. Third, the Property and the 150 Tihonet Road site border each other and Tihonet Pond, and a fish ladder provides access to Tihonet Pond for river herring’s annual upstream migration from the ocean to Tihonet Pond for spawning. This significant fish run is just 330 feet from the edge of the Property, and river herring, including alewife, have been considered for listing on the federal Endangered Species Act list and should be considered rare under the Bylaw. This fishery was not identified in the NOI, and the NOI does not address potential impacts from the Project, such as discharge of sediment and pollutants, on the fishery. The Project may also impact species downstream. Although the NOI states that the “Property does not contain, nor is it tributary to any Critical Areas,” that is untrue because Tihonet Pond flows to the Agawam River listed by Massachusetts as Priority Habitat Area 486, and it is connected to the Wankinko River. The NOI should address how the Project will impact water quality and Priority Habitat Area 486. Fourth, the NOI’s draft Endangered Species Certification conducted a habitat assessment for the Northern Long-Eared Bat and the Plymouth Red-Belly Turtle. Borrego Solar did not provide this habitat assessment to the Commission and should do so before the Commission makes its decision.

CLWC also states that the Property and the sites for planned dual-use solar array projects at 150 Tihonet Road and 27 Charge Pond Road are all owned by AD Makepeace (“ADM”) and

will all be built and operated by Borrego Solar. Construction of those three projects will require the deforestation of a total of 174 acres of land that border on wetlands and waterways in the BioMap2 habitat. The land at 27 Charge Pond Road is designated as BioMap2 Core Habitat Species of Conservation Concern and is BioMap2 Core Habitat. The land at 160 Tihonet Road is also designated as BioMap2 "Priority Habitat" on the Frog Foot Reservoir. Frog Foot Brook is surrounded by Critical Natural Landscape, the highest level of Priority Natural Community identified by the state. CLWC maintains that comprehensive studies should be done to discern the cumulative environmental impacts of these four projects because there is a danger that the land will lose the ability to filter groundwater and will be unable to provide ecosystems services.

Finally, CLWC indicates that the NOI for the Project does not accurately describe how pollution will discharge from the activities at the Property to bodies of water. First, the NOI does not contain a final Stormwater Report and Stormwater Pollution Prevention Plan ("SWPPP"). Therefore, it is impossible to determine the actual pollutant discharges or the specific means that Borrego Solar proposes to control pollution discharges into nearby bodies of water. Second, the NOI misrepresents the Project's effects on the water quality in Tihonet Pond because it does not explain how altering surface water flows will impact interconnected ecosystems on or off site. Third, the NOI misrepresents the water quality of the receiving waters. It indicates that the site does not discharge to polluted water, but Tihonet Pond, as well as other bodies of water receiving discharge water from the Property, are designated as polluted. Fourth, the NOI states that there are no stormwater discharges to critical areas associated with the Project but the Property is actually adjacent to and upstream from such areas. The Property is adjacent to BioMap2 Critical Natural Landscape and upstream from BioMap2 Core Habitat



Species of Conservation Concern and a section of BioMap2 Core Habitat Species of Conservation Concern extends onto the Property.

On March 29, 2021, CLWC sent the Commission another letter. In that letter, it informed the Commission that Borrego Solar intended to conduct extensive and destructive gravel extraction operations so that the Property would reach the grades shown on the NOI, although the NOI did not include any information about gravel extraction operations.

On January 19, 2021, Borrego Solar revised and resubmitted the Stormwater Management Report.

Numerous public hearings concerning the NOI were held, beginning on July 1, 2020, and ending on April 7, 2021. At the April 7, 2021 hearing, the Commission voted to approve the order of conditions. On April 28, 2021, the Commission issued an order of conditions approving the Project.

On April 20, 2021, Plaintiff Buckingham filed an action in the Land Court. In that complaint, he alleged four counts. First, he requested a declaratory judgment that Borrego Solar and ADM should have applied for an earth removal permit before proceeding with the Project. Second, he argued that he had acquired prescriptive easement rights over portions of the Property. Third, he appealed the special permit and site plan under the zoning law G.L. c. 40A, § 17. Fourth and alternatively, he appealed the special permit and site plan under the certiorari statute, G.L. c. 249, § 4.

On May 12, 2021, Plaintiffs, as part of a ten-resident group from Wareham, filed a request for a Superseding Order of Conditions from the Massachusetts Department of Environmental Protection (“DEP”) asking the DEP to overrule the Commission’s decision and deny the Project. In that request, they made two arguments. First, they argued that Borrego

Solar's proposed activities did not comply with WPA performance standards for work in the buffer zone to the bank associated with Tihonet Pond and therefore the Commission should not have granted the NOI. Second, they argued that Borrego Solar should have applied for an earth removal permit before filing its NOI with the Commission. On October 6, 2021, the DEP issued an SOC upholding the order of conditions.

On June 7, 2021, Plaintiffs filed the Complaint in this case. The Complaint alleges the following facts. ADM owns the Property. Prior to installation of the Project, trees, vegetation, sand, and gravel will need to be removed from the Property, which will result in extensive truck traffic along Tihonet Road for many months, if not years. Removal of trees, vegetation, and topsoil has occurred or will occur at nearby properties located at 150 Tihonet Road, 160 Tihonet Road, and 27 Charge Pond Road. Those properties are also owned by ADM, and the projects on those properties are owned by Borrego Solar.

Plaintiff Wendy O'Brien and her husband own a home at 3 Red Pine Lane in Wareham in a residential subdivision, where she has lived since 2013 and which overlooks Tihonet Pond. She enjoys an easement to common land in her development that provides access to Tihonet Pond "[a]s part of her subdivision." She frequently walks along the shore of Tihonet Pond, and she kayaks on Tihonet Pond about a dozen times per year.

Plaintiff Matthew Buckingham owns a home in a subdivision development at 11 Crane Landing Road in Wareham, where he resides with his family. He enjoys rights to use Tihonet Pond and the land surrounding Tihonet Pond, including the land along Tihonet Road east of Tihonet Pond, "[a]s part of his subdivision development." He swims and fishes on Tihonet Pond and has been doing so for many years. He lived within about five miles of Tihonet Pond while

growing up and has walked, hiked, dirt biked, and otherwise traveled through and used much of the land around Tihonet Pond, including the Property.

The Property borders Tihonet Road which runs along the eastern shoreline of Tihonet Pond. The public does not have the right to use Tihonet Pond. A stream or canal runs from Tihonet Pond in a southeasterly direction to cranberry bogs just south of the Property. Water in the cranberry bogs eventually flows back to the Wankinko River. Stormwater runs off the Property to Tihonet Pond, either along the surface or through the ground and into the groundwater that flows to Tihonet Pond. The soils at and around the Property are sandy in nature, and the two IVWs and the bank of Tihonet Pond help to protect the water quality and fisheries of Tihonet Pond and the Wankinko River.

Resource areas protected by the Bylaw are located in or near the Property. Those areas are the bank associated with Tihonet Pond, the two IVWs, and the vernal pool. The Bylaw protects banks, IVWs, and vernal pools as protected resource areas. The Bylaw protects land within 100 feet of the boundaries of a protected resource area as another protected resource area. The Bylaw defines a vernal pool as “a confined basin depression which, at least in most years, holds water for a minimum of two continuous months during the spring and/or summer, and which is free of adult fish populations,” and it includes within that definition “the area within 100 feet of the mean annual boundaries of such depressions regardless of whether or not the Site has been certified by the Massachusetts Division of Fisheries and Wildlife.”

Borrego Solar proposes clearing trees, removing earth, grading land, construction of an infiltration basin, construction of an access roadway, and construction of a ground-mounted solar energy utility and infrastructure within the buffer zone to the vernal pool, if not within the vernal

pool itself. Further to the south and east on the Property, another stormwater basin and an access road are proposed within the buffer zone to the bank associated with Tihonet Pond.

Plaintiffs filed Count I of this action pursuant to G.L. c. 40A, § 17 seeking judicial review of the Commission's decision on April 28, 2021 to grant the order of conditions. In Count I, Plaintiffs contend that the Commission's decision to grant the order of conditions was arbitrary and capricious and unsupported by substantial evidence. They make the following claims. The Commission should have used the definition of a "vernal pool" found in the Bylaw, which includes the area within 100 feet of the mean annual boundaries of that depression, and measured the buffer zone from the edge of that area. Instead, the Commission measured the buffer zone from the edge of the vernal pool itself and therefore allowed commercial activity within fifty feet of the vernal pool in violation of the Bylaw. The activity that will occur within fifty feet of that vernal pool will have a significant effect on the ability of the vernal pool and the IVWs to protect the interests of the Bylaw. Those interests include but are not limited to protecting wildlife habitat, rare species habitat, water quality, water pollution control, fisheries, aesthetics, and recreation, both in the specific resource areas on the Property and also in adjoining land areas, as well as in Wareham's water resources such as Tihonet Pond. The comment letters from the Land Trust and CLWC also provided the Commission with substantial evidence that the Project would have a significant adverse effect on the interests protected by the Bylaw. The degradation of water quality could further lead to growth of undesirable aquatic plant species, rendering kayaking, swimming, and fishing more difficult and detracting from the aesthetics of the pond and the wetland resources to the east of the pond, including areas on the Property. The Commission also erred in failing to consider the impacts on Tihonet Pond from extensive truck traffic to and from the Property during Project construction before issuing the order of

conditions. Several months or years of trucking activity will result in dust from gravel roads covering resource areas including Tihonet Pond, the bank, the two IVWs, one of which encompasses a vernal pool, and the associated buffer zones under the Bylaw. The dust will cover vegetation and wildlife habitats and diminish water quality. The degradation in water quality will significantly impact Plaintiffs' rights to use and enjoy Tihonet Pond and Buckingham's right to use the land east of Tihonet Pond. It will also detract from the aesthetics of the pond. The Commission further erred in failing to consider the cumulative effects of this Project along with those of the nearby projects at 150 Tihonet Road, 27 Charge Pond Road, and 160 Tihonet Pond Road. The Bylaw protects resource areas from activity causing cumulative adverse effects.

In Counts II through IV, Plaintiffs bring one declaratory judgment claim and two claims for injunctive relief. In Count II, they ask the court for a declaration that the Commission may not ignore the Bylaw's definition of "vernal pool" that includes the area within one hundred feet of the mean annual boundaries of the confined basin. They also ask the court for a declaration that a vernal pool has a one-hundred-foot buffer zone and that both vernal pools and their buffer zones are protected resource areas under the Bylaw. In Count III, they request an injunction ordering that the Commission use the Bylaw's definition of "vernal pool." In Count IV, they request an injunction ordering the Commission to consider the cumulative effects of the Project and Borrego Solar's nearby projects at 150 Tihonet Road and 27 Charge Pond Road.

On March 10, 2022, the Land Court dismissed Buckingham's complaint for four reasons. First, Buckingham lacked standing to file the claim for declaratory judgment and failed to state a claim that an actual controversy existed with respect to compliance with the earth removal bylaw. Second, Buckingham failed to allege prescriptive easement rights over a particular trail

or route because he did not allege facts that would support a finding of open and notorious use of the Property. Third, Buckingham did not allege facts to support a finding that he was aggrieved by the Planning Board's decision under the zoning law. Fourth, Buckingham did not have a right to file a certiorari action because the zoning statute was the sole means to challenge the special permit and site plan approval.

### **DISCUSSION**

A defendant may properly challenge a plaintiff's standing to raise a claim by bringing a motion to dismiss under Mass. R. Civ. P. 12(b)(1) or (6). *Ginther v. Comm'r of Ins.*, 427 Mass. 319, 322 (1998). In ruling on a motion to dismiss under rule 12(b)(1) or (6), courts accept the factual allegations in the plaintiffs' complaint, as well as any favorable inferences reasonably drawn from them, as true. *Id.* While a complaint attacked by a 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of entitlement to relief requires more than labels and conclusions. *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008). Factual allegations must be enough to raise a right to relief above the speculative level based on the assumption that all the allegations in the complaint are true even if doubtful in fact. *Id.* The allegations must plausibly suggest, not be merely consistent with, an entitlement to relief in order to reflect the requirement that the plain statement possesses enough heft to show that the pleader is entitled to relief. *Id.*

#### **Count I**

Borrego Solar first argues that Count I of the Complaint should be dismissed for lack of subject matter jurisdiction because Plaintiffs have not sufficiently alleged a substantial injury or injustice such as would enable them to seek certiorari review of the order of conditions. Certiorari review may be available to persons, including abutters, who can establish that they

suffered injury to a protected legal interest. *Friedman v. Conservation Comm'n of Edgartown*, 62 Mass. App. Ct. 539, 543 (2004). To demonstrate standing to bring a certiorari claim, a plaintiff must make a requisite showing of a reasonable likelihood that the plaintiff has suffered injury to a protected legal right. *Hickey v. Conservation Comm'n of Dennis*, 93 Mass. App. Ct. 655, 657 (2018). That protected legal interest must be different in nature or magnitude from the interest of the general public. *Friedman v. Conservation Comm'n of Edgartown*, 62 Mass. App. Ct. at 543. The alleged injury must be within the area of concern of the statute or regulatory scheme under which the injurious action has occurred. *Enos v. Secretary of Env't Affs.*, 432 Mass. 132, 135 (2000)

Here, Plaintiffs have alleged legal rights different from those of the general public sufficient to survive a motion to dismiss. First, they each plausibly suggest that they possess a private property right related to their status as homeowners in a subdivision. *Iannacchino v. Ford Motor Co.*, 451 Mass. at 636 (a complaint need not contain detailed factual allegations to survive a motion to dismiss for failure to state a claim but must plead more than labels and conclusions; See also *Marr Equip. Co. v. I.T.O. Corp. of New England*, 14 Mass. App. Ct. 231, 235 (1982) (“A toehold ... is enough to survive a motion for summary judgment”). O’Brien alleges that she has an easement to common land in her development that provides access to Tihonet Pond “[a]s part of her subdivision” and that she frequently walks along the shore of Tihonet Pond and kayaks on Tihonet Pond about a dozen times per year. Buckingham alleges that he owns a home in a subdivision development at 11 Crane Landing Road in Wareham, where he resides with his family and that he enjoys rights to use Tihonet Pond and the land surrounding Tihonet Pond, including the land along Tihonet Road east of Tihonet Pond, “[a]s part of his subdivision development.” He also alleges that he swims and fishes on Tihonet Pond

and has been doing so for many years and that he lived within about five miles of Tihonet Pond while growing up and has walked, hiked, dirt biked, and otherwise traveled through and used much of the land around Tihonet Pond, including the Property. They also allege that the public does not have the right to use Tihonet Pond.

Likewise, the Plaintiffs have alleged injuries within areas of concern of the Bylaw sufficient to survive a motion to dismiss. In their Complaint, they plausibly suggest the ways in which specific activity relating to the Project will harm the water quality, fish, and aesthetics of Tihonet Pond and the surrounding areas. They allege that degradation in water quality and the negative impact on fish will significantly impact Plaintiffs' rights to use and enjoy Tihonet Pond as well as Buckingham's right to use the land east of Tihonet Pond and that the degradation in water quality will also detract from the aesthetics of the pond. See *Iannacchino v. Ford Motor Co.*, 451 Mass. at 636 (a complaint need not contain detailed factual allegations to survive a motion to dismiss for failure to state a claim but must plead more than labels and conclusions, and factual allegations must be enough to raise a right to relief above the speculative level based on the assumption that all allegations are true even if doubtful in fact); see also *Marr Equip. Co. v. I.T.O. Corp. of New England*, 14 Mass. App. Ct. at 235 ("A toehold ... is enough to survive a motion for summary judgment"). Plaintiffs have not, however, alleged an injury within the area of concern of the Bylaw with respect to the alleged recreational interests because the Bylaw protects public recreation but not private recreation. Bylaw, § III.1.

Next, Borrego Solar argues that Plaintiffs should have brought their claims before the DEP and that therefore their claims are moot and they do not have standing to file this action. Judicial review of a final agency decision is confined to the administrative record, but there is an exception when the court's jurisdiction is called into question. *Manguriu v. Lynch*, 794 F.3d



119, 120 (1st Cir. 2015). The court can look outside the administrative record when there is a colorable claim that some extrinsic action has rendered the case moot. *Id.* at 121. The court can take judicial notice of and consider a different agency determination for the purpose of resolving a claim of mootness. *Id.* Here, the SOC is material to the resolution of Borrego Solar's motion to dismiss because if the Bylaw is no more stringent than the WPA, the SOC controls the Project, rendering certiorari review moot. Accordingly, this Court will consider the SOC despite the fact that it was not entered into the administrative record. See *id.*; see also *Williams Bros., Inc. of Marshfield v. Conservation Comm'n of Carver*, 2012 WL 2135507 at \*2 n.4 (Mass. App. Ct. Rule 1:28) (noting that although record did not include documents from DEP process, the DEP superseding order of conditions is a matter of which the judge should have been informed).

The WPA establishes statewide minimum wetlands protection standards but permits local communities to impose more stringent requirements. *Oyster Creek Preservation, Inc. v. Conservation Comm'n of Harwich*, 449 Mass. 859, 866 (2007). Where a conservation commission's decision is based on the WPA or a local bylaw that applies the same standards as the WPA, DEP has the final word, and its decision preempts the local commission's decision. *Healer v. Department of Env't'l Prot.*, 73 Mass. App. Ct. 714, 719 (2009). In such a case, a claim for judicial review of the commission's decision is mooted by DEP's superseding order, which must be challenged under Chapter 30A. *DeGrace v. Conservation Comm'n of Harwich*, 31 Mass. App. Ct. 132, 136 (1991). However, where the conservation commission's decision rests on the provisions of a local bylaw that are more protective than the WPA, a superseding order of conditions issued by DEP cannot preempt the commission's bylaw-based determination. *Oyster Creek Preservation, Inc. v. Conservation Comm'n of Harwich*, 449 Mass. at 865; *FIC Homes of*

*Blackstone, Inc. v. Conservation Comm'n of Blackstone*, 41 Mass. App. Ct. 681, 686 (1996), rev. den., 424 Mass. 1104 (1997).

Here, the Bylaw is more stringent than the WPA in some regards, and so this court has jurisdiction to review the portions of the Commission's decision controlled by the more stringent provisions of the Bylaw. The Bylaw protects the buffer zone to the bank as a resource area, but the WPA does not, and the Bylaw also protects IVW and vernal pools, as well as the buffer zones to those areas as protected resource areas, while the WPA does not protect those areas. Bylaw § II. Therefore, the court will not dismiss Plaintiffs claims with respect to those more stringent provisions of the Bylaw.

**Counts II - IV**

The Court will, however, dismiss Counts II through IV. The declaratory judgment statute is not a substitute remedy for an action in the nature of a writ of certiorari to review the merits of a discretionary decision. *Bermant v. Board of Selectmen of Belchertown*, 425 Mass. 400, 404 (1997). Also, injunctive relief is a remedy and not an independent cause of action. *Mullins v. Corcoran*, 488 Mass. 275, 286 (2021).

**ORDER**

For the foregoing reasons, it is hereby **ORDERED** that Count I of Borrego Solar's Motion to Dismiss is **DENIED** and Counts II through IV of Borrego Solar's Motion to Dismiss are **ALLOWED**.

Buckley, J.  
Elaine M. Buckley  
Justice of the Superior Court  
Attest: Kevin M. Riordan,  
Asst. Clerk

DATED: January 11, 2023

CC.  
N.S. J.B.  
G.M. M.S.G.  
R.B. K.B.