

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2472CV00132

NEIGHBORS OF COTUIT NARROWS¹

vs.

BARNSTABLE TOWN COUNCIL & others²

**MEMORANDUM OF DECISION AND ORDER ON
CROSS MOTIONS FOR JUDGMENT ON THE PLEADINGS**

Plaintiffs the Neighbors of Cotuit Narrows initiated the present lawsuit on April 4, 2024. Through amended complaint, Plaintiffs allege one count for certiorari review under G. L. c. 249, § 4 (Count 1) and one count for declaratory relief under G. L. c. 231A, § 1 (Count 2), appealing decisions of Defendants the Barnstable Town Council, the Barnstable Town Manager, and the Barnstable Marine and Environmental Affairs Department to approve a municipal Shellfish Aquaculture License issued to Defendant Cotuit Oyster Co., Inc. ("Cotuit Oyster Company" or "COC"). Plaintiffs have moved for judgment on the pleadings. Paper No. 24.1. In response, Defendants Cotuit Oyster Company, the Barnstable Town Council, the Barnstable Town Manager, and the Barnstable Marine and Environmental Affairs Department filed cross-motions for judgment on the pleadings. Paper No. 24.3 and Paper No. 24.6, respectively. Plaintiffs have also moved to expand the administrative record. Paper No. 25. After hearing, and for the reasons that follow, Plaintiffs' motion for judgment on the pleadings (Paper No. 24.1) is **DENIED**,

¹ Barry C. Cosgrove as Trustee of the Barry C. Cosgrove Trust, Charles M. Daley, Janet M. Daley, Mark E. Donovan, Dawn C. Donovan, Robert Madden and Terry L. Madden as Trustees of the 2005 Oyster Harbors Nominee Trust, Shawn D. Martin as Trustee of the 310 North Bay Road Realty Trust, Keith Palumbo, Constance C. Tompkins as Trustee of the Constance Corby Tompkins Revocable Trust, Kevin T. Van Wart as Trustee of the Kevin T. Van Wart Trust, Leonard I. Zon, and Lynda C. Schneider, collectively referred to as the "Neighbors of Cotuit Narrows"

² Mark Ellis, in his capacity as Barnstable Town Manager, Barnstable Marine and Environmental Department, and Cotuit Oyster Co., Inc.

Plaintiffs' motion to expand the administrative record (Paper No. 25) is **DENIED**, and Defendants' cross motions for judgment on the pleadings (Paper No. 24.3 and Paper No. 24.6) are **ALLOWED**. Defendants' decision approving COC's aquaculture license renewal application is **AFFIRMED**.

BACKGROUND

Plaintiffs all own property abutting Cotuit Bay in Barnstable. Cotuit Oyster Company (COC) is an oyster farm operating out of Cotuit Bay. It is subject to certain permitting processes to conduct its oyster farming operations there. The Town of Barnstable regulates commercial aquaculture, including oyster farms, through its grant-conferring authority under G. L. c. 130, §§ 57-68 and the Barnstable Aquaculture License Regulations, Article IX, §§ 407-46 et seq. The central dispute in this matter is whether Barnstable properly approved of COC's aquaculture license application to conduct oyster farming activities in Cotuit Bay.

On November 16, 2023, COC submitted an aquaculture license renewal application requesting that the Town of Barnstable renew its ten-year license to cultivate shellfish in its existing aquaculture grant locations in Cotuit Bay—sites known to as “sg001,” “sg002,” “sg003,” “sg006, and “sg007”. See Administrative Record (“AR”), Exhibit 18. The Town of Barnstable determines whether to approve an aquaculture license through a multi-department review involving the Shellfish Committee and the Natural Resources Department, among other municipal departments. See Barnstable Aquaculture License Regulations, Article IX, § 407-51. Ultimately, the Town Manager may recommend approval of an aquaculture application, which then becomes final absent a vote by the Town Council disapproving the Town Manager's recommendation. See Barnstable Aquaculture License Regulations, Article IX, § 407-52.

COC has been in operation in Cotuit Bay for over one hundred years. It was last issued a ten-year aquaculture license—authorizing its oyster farming activities in Cotuit Bay—in 2014. With its municipal aquaculture license set to expire in February 2024, COC submitted an aquaculture license renewal application to the Town of Barnstable in November 2023.

The Barnstable Natural Resources Department held a hearing on COC's license renewal application on December 12, 2023. At that hearing, Plaintiffs presented their objections to COC's license renewal application. See AR, Exhibit 21; AR, Exhibit 22; AR, Exhibit 80 (hearing transcript). Plaintiffs argued that COC's operations had changed such that it is now using significantly more above-water oyster farming equipment than in decades past. Further they contend, COC's new reliance on above-water equipment has impacted their use and enjoyment of the water, boating, scenic vistas and views, and property values. Plaintiffs posit that COC's use of above-water equipment had blocked their access to the water in violation of G. L. c. 91, that it had impaired their private rights to navigable waters in violation of G. L. c. 130, § 57, that it was not authorized by a federal permit from the United States Army Corps of Engineers, and that it had diminished existing water-related activities in Cotuit Bay in violation of Barnstable regulations. On this last point, Plaintiffs supported their position with photographs of COC's above-water oyster equipment in the bay and around and near their boats and boat docks. Plaintiffs urged the Town to consider imposing conditions on COC's license renewal application to minimize COC's impact on residents abutting Cotuit Bay. Per the request of Plaintiffs' counsel, that December 12, 2023 hearing remained open and was continued to a later hearing date.

The Barnstable Shellfish Committee held a meeting on COC's application one day later, on December 13, 2024, the result of which was a recommendation that the Natural Resources

Department recommend that the Town Manager approve COC's application. See AR, Exhibit 24. The Shellfish Committee's recommendation was advisory.

The Natural Resources Department continued its hearing on COC's license renewal application on January 31, 2024. Plaintiffs reiterated their concerns about COC's activities at that meeting. See AR, Exhibit 81 (hearing transcript). They asserted that approval of COC's increased usage of above-water oyster farming equipment represented a significant change to COC's past operations and infringement on Plaintiffs' use and enjoyment of Cotuit Bay. They also asserted, for the first time, that the Barnstable Shellfish Constable, Amy Croteau, was biased in favor of COC, citing a text message exchange in which Constable Croteau commented that Plaintiffs were "NIMBY a-holes," among other communications. Plaintiffs argued that COC lacked required federal and state permits, rendering its license renewal application defective under Barnstable's own aquaculture regulations, which require compliance with all local, state, and federal law.

The Natural Resources Department approved COC's license renewal application as submitted without imposing the additional conditions proposed by Plaintiffs. The Natural Resources Department produced a written decision memorializing the events of its hearings and its recommendation. See AR, Exhibit 30. In reaching its decision, the hearing examiner, Chris Nappi, determined, "After hearing the applicant, neighbor group and all interest parties and recommendations from staff and Town officials and upon considering all written submittals and video presentations, I recommend approval of a ten year license renewal to Cotuit Oyster Company" AR, Exhibit 30.

The Town Manager then issued a recommendation that the Barnstable Town Council approve COC's license renewal application. When Plaintiffs learned that the Town Manager had

recommended that the Town Council approve COC's license renewal application, they requested that the Town Council place the matter on its agenda for its March 7, 2024 meeting. The Town Council declined to place the matter on its agenda. As the Town Council never called a vote to disapprove the Town Manager's recommendation, that recommendation went into effect thirty-days after the Town Manager's approval, on March 7, 2024.

COC asserts that it has historically utilized above-water floating oyster gear. It cites to a 2006 letter from COC's previous owner to the Barnstable Natural Resources Department inventorying its use of floating oyster bags—329 in total. Plaintiffs respond that COC's use of above-water oyster gear has significantly increased. They cite to a 2023 email from COC also including an inventory of COC's above-water floating oyster gear, apparently demonstrating an 1,100% increase in the use of above-water equipment. They also cite to a 2018 email from COC's principal, Christopher Gargiulo, to Constable Croteau in which he explains that due to excessive fouling of COC's oyster cages, he requested approval from Constable Croteau to begin using "Flow and Gro" plastic floats with his oyster cages, which was approved.

DISCUSSION³

"On certiorari review, the Superior Court's role is to examine the record . . . and to 'correct substantial errors of law apparent on the record adversely affecting material rights.'" *Doucette v. Massachusetts Parole Bd.*, 86 Mass. App. Ct. 531, 540-541 (2014), quoting *Firearms Records Bureau v. Simkin*, 466 Mass. 168, 180 (2013). The standard of review "var[ies] according to the nature of the action for which review is sought." *Forsyth Sch. for Dental*

³ Because this is an action in the nature of certiorari, the court need not address Plaintiffs' request for declaratory relief. See *Konstantopoulus v. Whately*, 384 Mass. 123, 129 (1981) ("[D]eclaratory relief under G.L. c. 231A, § 1, is not a substitute remedy for an action in the nature of a writ of certiorari to review the merits of a discretionary decision made by licensing authorities."); see also *Bermant v. Board of Selectmen of Belchertown*, 425 Mass. 400, 404 (1997) ("[A] civil action in the nature of certiorari is the sole relief available to a party aggrieved by a discretionary decision of a local licensing authority.").

Hygienists v. Board of Registration in Dentistry, 404 Mass. 211, 217 (1989). Where, as here, “the decision under review was not made in an adjudicatory proceeding” but rather is an “exercise of . . . administrative discretion,” the “arbitrary and capricious” standard applies. *Revere v. Massachusetts Gaming Comm’n*, 476 Mass. 591, 605 (2017) (citation omitted). A decision is arbitrary and capricious where it “it lacks any rational explanation that reasonable persons might support.” *Cambridge v. Civil Serv. Comm’n*, 43 Mass. App. Ct. 300, 303 (1997).

A. Balancing of Marine Uses

Plaintiffs argue that the Town unlawfully approved COC’s aquaculture license renewal application because COC’s increased usage of above-water oyster farming equipment has impeded Plaintiffs’ recreational use of Cotuit Bay, violating Barnstable Aquaculture License Regulations, Article IX, § 407-46. That regulation provides as follows:

The Town of Barnstable advocates the orderly development of aquaculture that is complementary to the continuing development of the Town’s shellfishery as it pertains to aquaculture licenses. In consideration of any aquaculture license the Town is obligated to protect and preserve the existing fisheries and to minimize the impact on other uses of the marine environment. The right of public navigation through a license shall not be infringed upon except in areas containing approved structures that are properly marked according to these regulations. The size and scope of the license shall co-exist with and not diminish the common property commercial and recreational shellfisheries or other existing water-related activities.

Barnstable Aquaculture License Regulations, Article IX, § 407-46.

Plaintiffs assert that COC’s increased usage of above-water oyster farming equipment has interfered with “existing water-related activities” and that the Town of Barnstable’s approval of COC’s license renewal application represents a failure to “minimize the impact on other uses of the marine environment,” and has caused a “diminish[ment of] . . . existing water-related activities.” See Barnstable Aquaculture License Regulations, Article IX, § 407-46. Plaintiffs cite to photographs in the administrative record depicting COC’s above-water oyster farming

equipment surrounding Plaintiffs' docks and boats. See AR, Exhibit 21; AR, Exhibit 22.

Plaintiffs further cite to information COC itself provided to the Town which demonstrates that COC's use of above-water oyster farming equipment has significantly increased over the past decades. See AR, Exhibit 21.

At the Natural Resource Department hearing concerning COC's aquaculture license renewal application—spanning December 12, 2024 and January 31, 2025—Plaintiffs forcefully presented their position that COC's above-water oyster farming equipment had impeded their use and enjoyment of Cotuit Bay. Throughout the hearing, the Natural Resources Department allowed thorough presentation of the issue from the parties.

The court is not persuaded that Plaintiffs have demonstrated that the Town acted arbitrarily and capriciously in approving COC's license renewal application on these grounds. Barnstable's regulations appear to contemplate some balancing of commercial aquaculture and "existing water-related activities" in Cotuit Bay. See Barnstable Aquaculture License Regulations, Article IX, § 407-46. The Town allowed presentation by Plaintiffs to the effect that COC's increased reliance upon above-water oyster farming equipment had disrupted this balance. However, clearly in approving COC's license renewal application, the Town plainly disagreed that COC's usage of above-water equipment violated the Barnstable Aquaculture License Regulations, Article IX, § 407-46. In connection with the hearing, the Town received a number of submissions from residents taking a position contrary to Plaintiffs'—that COC's activities in Cotuit Bay do not impede recreational uses or scenic views. See AR, Exhibits 28.a.-28.v. The evidence Plaintiffs presented was not so forceful as to demand a contrary conclusion, so the court cannot conclude that the Town's decision lacks any rational explanation. See *Cambridge*, 43 Mass. App. Ct. at 303. This argument fails.

Plaintiffs also rely on G. L. c. 130, § 57 to make a similar argument. That statute, the Massachusetts aquaculture licensing statute, provides as follows:

Licenses under this section shall be granted or denied in writing within sixty days after receipt of the written application and shall be issued upon forms supplied by such cities and towns and upon such terms and conditions and subject to such terms, conditions or regulations as the city council or selectmen issuing the same shall deem proper, *but not so as to impair the private rights of any person or to materially obstruct navigable waters*, and said license shall describe by metes and bounds the waters, flats or creeks covered thereby. Shellfish aquaculture licenses pursuant to this section shall be subject to any rules and regulations promulgated by the director, including those concerning the use and scope of predator controls in the intertidal zone, and said licenses may be further conditioned by the director as he deems necessary and appropriate, including species to be propagated and the source and movement of seed shellfish.

G. L. c. 130, § 57 (emphasis added). Here, too, it appears that through approving COC's license renewal application, the Town concluded that Plaintiffs had failed to demonstrate that COC's activities violate G. L. c. 130, § 57. The Town's decision on this point did not lack any rational explanation. See *Cambridge*, 43 Mass. App. Ct. at 303.

B. Required Permits

Plaintiffs next submit several permitting arguments in support of their motion. Plaintiffs argue that approval of COC's aquaculture license renewal application was unlawful because COC did not have all required state and federal permits, citing to a Barnstable regulation which requires compliance with "all federal, state and local laws." See Barnstable Aquaculture License Regulations, Article IX, Section 407-52.

Moorings Permit

Plaintiffs argue that COC has failed to comply with state mooring law, codified at G. L. c. 91, § 10A. That statute empowers the harbormaster of a town to authorize temporary mooring of floats or rafts anchored in the water. See G. L. c. 91, § 10A. It provides that floats or rafts held by anchors or bottom moorings installed without permission from a harbormaster "shall be

considered a public nuisance and may be removed by the harbormaster". G. L. c. 91, § 10A. Plaintiffs contend that because COC failed to obtain such mooring permits from the Town of Barnstable for its above-water oyster farming equipment, that above-water equipment is unlawful and a nuisance. COC responds that G. L. c. 91, § 10A does not intend "moorings" to include anchored above-water oyster farming equipment.

COC has the stronger argument on this point. The state mooring statute includes a definitions section, but that section is silent as to "floats or rafts". See G. L. c. 91, § 1. Plaintiffs argue that such a permit is required for all "structures," citing to 310 Code Mass. Regs. § 9.02, which defines a "structure" to include "aquaculture gear". But, the statutory language of G. L. c. 91, § 10A upon which Plaintiffs rely arguably requires a permit for "floats or rafts held by anchors," not "structures". Similarly, the definitions section of the statute states that, as used at G. L. c. 91, §§ 10, 12-22, 28, and 34, "structure" is defined to "include pipe lines, wires and cables" G. L. c. 91, § 1. It is not clear from the statutory and regulatory language that the Legislature intended for G. L. c. 91, § 10A to encompass aquaculture equipment. See G. L. c. 91, §§ 1, 10A; 310 Code Mass. Regs. § 9.02. Plaintiffs' argument on this point is not persuasive.

Wetlands Permit

Plaintiffs next argue that COC lacks a required state wetland permit. Plaintiffs read 310 Code Mass. Regs. § 10.25 to require a wetland permit (under G. L. c. 131, § 40) on any project which alters land under the ocean. That regulation provides, in relevant part, as follows: "When a proposed project involves the dredging, removing, filling or altering of a nearshore area of land under the ocean, the issuing authority shall presume that the area is significant to the interests specified above." 310 Code Mass. Regs. § 10.25. Plaintiffs contend that because COC's activities "alter" "land under the ocean" within the meaning of the regulations, it is subject to the

permitting requirements of G. L. c. 131, § 40. See 310 Code Mass. Regs. § 10.02(2)(a) (“Any activity proposed or undertaken within an area specified in 310 CMR 10.02(1) [including land under the ocean], which will remove, fill, dredge or alter that area, is subject to Regulation under M.G.L. c. 131, § 40 . . .”).

The wetlands regulations define “alter” broadly to include: “(a) the changing of pre-existing drainage characteristics, flushing characteristics, salinity distribution, sedimentation patterns, flow patterns and flood retention areas; (b) the lowering of the water level or water table; (c) the destruction of vegetation; (d) the changing of water temperature, biochemical oxygen demand (BOD), and other physical, biological or chemical characteristics of the receiving water.” 310 Code Mass. Regs. § 10.04 (definitions). The regulations also include a separate definition section dedicated to aquaculture activities, specifying that “Normal Maintenance or Improvement of land in aquaculture” is defined as aquaculture activities involving “draining, flooding, heating, cooling, removing, filling, grading, compacting, raking, tilling, fertilizing, seeding, harvesting, filtering, rafting, culverting or applying chemicals in conformance with all state and federal laws . . .” 310 Code Mass. Regs. § 10.04. The regulatory distinction between “altering” and “normal maintenance or improvement of land in aquaculture” suggests that COC’s oyster farming activities are not activities which “alter” “land under the ocean” within the meaning of the statutory and regulatory framework. See *Freiner v. Secretary of Exec. Off. of Health & Hum. Servs.*, 494 Mass. 198, 212 (2024) (“Accordingly, ‘words and phrases used in a statute [or regulation] should be construed by reference to their associated

terms in the statutory context.”), quoting *Morrison v. Lennett*, 415 Mass. 857, 863 (1993) (brackets in original).⁴

Plaintiffs next argue that 310 Code Mass. Regs. § 10.34 suggests that oyster farming activities require a state wetlands permit. That regulation regulates activities within land containing shellfish and outlines requirements for any project in a shellfish resource area. See 310 Code Mass. Regs. § 10.34. Plaintiffs cite to a line of the regulation which reads that “[a]quaculture projects approved by the appropriate local and state authority may also be permitted,” suggesting, Plaintiffs argue, that such aquaculture projects require a state wetlands permit. See *id.* It is not clear that this regulation intends such an impactful reorganization of aquaculture permitting, particularly given its use of permissive language and the existence of a distinct aquaculture permitting statutory scheme, G. L. c. 130, § 57. See *Green v. Board of Appeal of Norwood*, 358 Mass. 253, 258 (1970) (avoiding “absurd or unreasonable results” where statutory language “susceptible of a sensible meaning”).

Federal Permit

Next, Plaintiffs contend that COC lacks required federal approval to conduct oyster farming activities in navigable waters. In 1991, the United States Department of the Army issued a letter of permission allowing that COC use “buoys, rafts, trays, lines, and other equipment associated with the activity” to conduct “[t]he bottom and suspended culturing and harvesting of bivalve mollusks in the inter-tidal and immediate sub-tidal area of navigable waters.” Such authorization explicitly provided for the use of “[r]afts and other floating equipment” COC contends that that permit—which predates the Town’s license renewal application—remains in

⁴ Though, the court notes, Plaintiffs’ argument on this point fails for a separate reason. The extent to which COC’s aquaculture equipment has “altered” the “land under the ocean” within the meaning of 310 Code Mass. Regs. § 10.04, if at all, is not clear from the documents included within the administrative record.

effect in perpetuity. Plaintiffs respond that COC cannot rely on the letter of permission and must instead look to the actual federal permit, which has been lost or misplaced over the past decades.

In connection with their motion, Plaintiffs have moved to expand the administrative record to include new documents obtained from the United States Army Corps of Engineers. See Paper No. 25. Plaintiffs contend that they have obtained new documents from the United States Army Corps of Engineers which demonstrate that COC's use of above-water oyster farming equipment exceeds the scope of its 1991 letter of permission. See Paper No. 25. Thus, Plaintiffs argue, COC is not in compliance with applicable federal law, so the Town of Barnstable improperly approved COC's aquaculture license renewal application. See Paper No. 25.

The administrative record was filed with the court on February 10, 2025. See Paper No. 17. Plaintiffs moved to expand the administrative record on August 15, 2025, arguing that they received documents from the United States Army Corps of Engineers that same day which indicated that the United States Army Corps of Engineers had determined that COC was not in compliance with federal law. See Paper No. 25. COC responds that any such documents from the United States Army Corps of Engineers are irrelevant because they were not before the Town when it approved of COC's license renewal application. See Paper No. 26. Given the applicable legal standard, the court agrees with COC that the documents the United States Army Corps of Engineers produced are not relevant to the court's review at this stage. The documents themselves reflect a March 18, 2025 on-site inspection, post-dating the Town's approval. See Paper No. 26, Exhibit A. They are not relevant to this decision.

C. Bias

To succeed on a claim of administrative bias, a party must demonstrate that "the hearing was not fair and impartial." *Malone v. Civil Service Comm'n*, 38 Mass. App. Ct. 147, 153 (1995),

quoting *Associated Indus. of Mass., Inc. v. Commissioner of Ins.*, 403 Mass. 37, 46 (1988). Any such bias must be more than speculative and must have probably influenced the decision-making of the administrative body. See *Varga v. Board of Registration of Chiropractors*, 411 Mass. 302, 307 (1991), quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

Plaintiffs allege that the Town's decision approving COC's license renewal application was defective because the Town Shellfish Constable, Constable Croteau, was biased against Plaintiffs, thus depriving them of a fair and impartial hearing. In support thereof, Plaintiffs cite to communications from Constable Croteau in which she referred to Plaintiffs as "NIMBY a-holes," said that Plaintiffs' objections "disgust[ed]" her, and used "us" language suggesting that she was aligned with COC in communications with COC. See AR, Exhibit 29.

Here, the issue is whether Plaintiffs have demonstrated that Constable Croteau probably influenced the Town's decision making. The court is not persuaded that Constable Croteau likely influenced the Town's final decision. As previously determined, the grant or denial of an aquaculture application is not limited to one individual. Rather, each aquaculture license application is delivered to "Natural Resources, the Harbormaster, the Waterways Committee, the Recreation Department, the Conservation Commission, the Town Attorney, the Shellfish Committee, the precinct Councilor, civic association, and the village library" for review and comment. See Barnstable Aquaculture License Regulations, Article IX, § 407-51. Then, the Town Manager makes a written recommendation, which may be disapproved by the Town Council. See Barnstable Aquaculture License Regulations, Article IX, § 407-52. Constable Croteau is a member of the Natural Resources Department, and she participated at the Shellfish Committee meeting on COC's application. However, given the number of departments charged with reviewing COC's license renewal application, the effect of any bias on the part of Constable

Croteau was significantly diluted, so much so that it is difficult to see how any such bias could have probably influenced the Town's final decision. See *Varga*, 411 Mass. at 307.

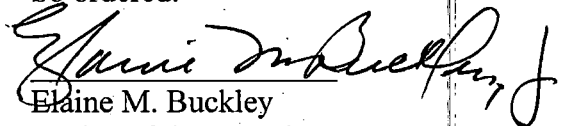
CONCLUSION

For the foregoing reasons, the court orders as follows:

1. Plaintiffs' motion (Paper No. 24.1) is **DENIED**.
2. Plaintiffs' motion to expand the administrative record (Paper No. 25) is **DENIED**.
3. Defendants the Barnstable Town Council, the Barnstable Town Manager, and the Barnstable Marine and Environmental Department's cross motion (Paper No. 24.6) is **ALLOWED**.
4. COC's cross motion (Paper No. 24.3) is **ALLOWED**.
5. The Town's March 7, 2024 approval of COC's aquaculture license renewal application is **AFFIRMED**.

Date: -October 2, 2025

So ordered.


Elaine M. Buckley
Justice of the Superior Court