SEAL

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

PLYMOUTH, ss

MISCELLANEOUS CASE
NO. 13 MISC 479028 (RBF)

CHRISTINE A. BOSTEK, DONNA BARRETT, DIANNE BUCKBEE, FREDERICK PARIS, AILEEN DECOLA, PATRICIA CARR, JOHN D. CARR, PHYLLIS TROIA, RICHARD WICKENDEN III, NORMAN PIERCE, PINE DUBOIS, SHARL HELLER, CAROL CRONE, STEPHANIE CRONE, ROBERT CRONE, VIRGINIA CURCIO, JACQUELINE HOCHSTIN, and ADAM AUGELLO,

Plaintiffs,

v.

ENTERGY NUCLEAR GENERATION COMPANY, PETER CONNOR, EDWARD CONROY, DAVID PECK, WILLIAM KEOHAN, and MICHAEL MAIN, in their capacity as Members of the Board of Appeals of the Town of Plymouth, PAUL MCAULIFFE, in his capacity as Director of Inspectional Services and Building Commissioner for the Town of Plymouth, and THEODORE BOSEN as Appellants Below,

Defendants.

ORDER ALLOWING IN PART AND DENYING IN PART DEFENDANT ENTERGY NUCLEAR GENERATION CO.'S MOTION FOR SUMMARY JUDGMENT

Eighteen residents of Plymouth and Kingston challenge a decision of the Zoning Board of Appeals of the Town of Plymouth, denying the appeal of a zoning permit issued

by the Plymouth Department of Inspectional Services to Entergy Nuclear Generation Company (Entergy) for the construction of a concrete pad on which to build an Independent Spent Fuel Storage Installation (ISFSI) at the Pilgrim Nuclear Power Station (Pilgrim). Entergy has moved for summary judgment, claiming that the Plaintiffs are not persons aggrieved under G.L. c. 40A, § 17. The Court finds that (1) although two of the Plaintiffs enjoy a presumption of standing as abutters, Entergy has successfully rebutted that presumption; (2) the Plaintiffs' claims based on nuclear health and safety implications of the ISFSI are preempted by federal law and cannot serve as the basis of standing under G.L. c. 40A, § 17 or the Town of Plymouth Zoning Bylaw; (3) the Plaintiffs' claims based on environmental harms do not confer standing because they are not based on harms protected by G.L. c. 40A or the Town of Plymouth Zoning Bylaw, or they are not special and different from the harms of the rest of the community; and (4) Plaintiffs Christine A. Bostek, Donna Barrett, Dianne Buckbee, Frederick Paris, Patricia Carr, John D. Carr, Carol Crone, Stephanie Crone, Robert Crone, Virginia Curcio, and Jacqueline Hochstin, whose properties lie within a two-mile radius of Pilgrim, have presented evidence supporting their allegations that the ISFSI will diminish their property values, thereby creating a genuine issue of material fact as to whether they have standing and rendering summary judgment inappropriate.

Procedural History

The Plaintiffs filed their Complaint on August 13, 2013. The Answer and Affirmative Defenses of Defendant Entergy Nuclear Generating Co. was filed on September 30, 2013. Entergy filed its Affidavit of Compliance with Notice Requirements of Chapter 40A, Sec. 17, on October 4, 2013. The Answer of Municipal Defendants was

filed on October 4, 2013. The case management conference was held on October 15, 2013, at which the Court ordered the defendant Entergy to give the Court 90-day notice before any nuclear materials are stored at the disputed site. The Plaintiffs filed their First Amended Complaint on November 18, 2013. The Answer to Affirmative Defenses of Defendant Entergy Nuclear Generating Co., Plaintiff's First Amended Complaint was filed on November 25, 2013.

On May 7, 2014, Entergy filed Defendant Entergy Nuclear Generation Co.'s Motion to Dismiss Plaintiffs' First Amended Complaint for Lack of Standing, its Memorandum in Support of Defendant Entergy Nuclear Generation Co.'s Motion to Dismiss Plaintiffs' Amended Complaint for Lack of Standing, Defendant Entergy Nuclear Generation Co.'s Statement of Material Facts in Support of its Motion to Dismiss Plaintiffs' First Amended Complaint for Lack of Standing, and the Affidavit of Donald D. Cooper in Support of Defendant Entergy's Motion to Dismiss Plaintiffs' First Amended Complaint for Lack of Standing. Entergy filed its Motion to Stay Discovery Pending a Ruling on its Motions to Dismiss for Lack of Standing on May 9, 2014. On June 9, 2014, the Plaintiffs filed Plaintiffs' Response to Defendant Entergy Nuclear Generation Co.'s Statement of Material Fact and Plaintiffs' Statement of Material Facts in Support of their Opposition to Entergy's Motion to Dismiss Plaintiffs' First Amended Complaint for Lack of Standing, the Affidavit of Christine Bostek in Support of Plaintiffs' Opposition to Defendant Entergy's Motion to Dismiss Plaintiffs' First Amended Complaint for Lack of Standing, and Plaintiffs' Opposition to Entergy's Motion to Stay Discovery and Plaintiffs' Cross Motion.

A motion hearing was held on June 10, 2014, at which the Court allowed Defendant's Motion to Stay Discovery pending a ruling on its Motion to Dismiss for Lack of Standing, except that, by agreement of the parties, the Town's responses to Plaintiffs' Request for Admissions were to be served by June 20, 2014. The Court ruled that if there was no decision rendered on the Motion to Dismiss by September 30, 2014, any party could move to lift the stay of discovery at that time. On June 16, 2014, Entergy filed Defendant Entergy Nuclear Generation Co.'s Reply in Support of its Motion to Dismiss Plaintiffs' First Amended Complaint for Lack of Standing; the Consolidated Statement of Facts Relating to Entergy's Motion to Dismiss, Plaintiffs' Opposition, and Entergy's Reply; and Defendant Entergy Nuclear Generation Co.'s Supplemental Appendix to its Reply in Further Support of its Motion to Dismiss Plaintiffs' First Amended Complaint for Lack of Standing.

Entergy's Motion to Dismiss was heard on June 20, 2014, and taken under advisement. Plaintiff's Post-Hearing Brief Regarding Preemption and Defendant Entergy Nuclear Generation Co.'s Supplemental Briefing Regarding Federal Preemption of Local Regulation of Nuclear Health and Safety Issues were filed on July 3, 2014.

On July 28, 2014, the Court received a letter from Entergy stating: "pursuant to the Court's Order of October 15, 2013 directing Entergy to give the Court ninety (90) days' notice 'before any nuclear materials are stored at the disputed site,' this is notice that Entergy currently plans to begin the process of transferring nuclear materials to dry cask storage containers and hence to the concrete slab which is the subject of the above-encaptioned matter at the Pilgrim Nuclear Power Station no earlier than October 27, 2014."

Summary Judgment Standard

Entergy's Motion is in the form of a motion to dismiss for lack of subject matter jurisdiction under Mass. R. Civ. P. 12(b)(1). Entergy has moved in the alternative for summary judgment pursuant to Mass. R. Civ. P. 56 in the event that this Court finds that the consideration of additional evidence requires conversion to a motion for summary judgment. Mem. in Supp. of Def.'s Mot to Dismiss, 3 n.1. Given the volume of additional evidence presented by the parties, the Court exercises its discretion and hereby treats the Motion to Dismiss as a motion for summary judgment pursuant to Mass. R. Civ. P. 56. *Bell v. Zoning Bd. of Appeals of Gloucester*, 429 Mass. 551, 555 (1999).

Generally, summary judgment may be entered if the "pleadings, depositions, answers to interrogatories, and responses to requests for admission . . . together with affidavits . . . show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Mass. R. Civ. P. 56(c). In viewing the factual record presented as part of the motion, the court is to draw "all logically permissible inferences" from the facts in favor of the non-moving party. *Willitts v. Roman Catholic Archbishop of Boston*, 411 Mass. 202, 203 (1991). "Summary judgment is appropriate when, 'viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law.'" *Regis Coll. v. Town of Weston*, 462 Mass. 280, 284 (2012), quoting *Augat, Inc. v. Liberty Mut. Ins. Co.*, 410 Mass. 117, 120 (1991).

Undisputed Facts

The court finds that the following facts are undisputed:

In this action under G.L. c. 40A, § 17, the Plaintiffs appeal the July 24, 2013, decision[1] (Decision) of the Plymouth Zoning Board of Appeals (the Board) upholding the March 27, 2013 zoning permit #Z20130196 (the Permit) issued by the Town of Plymouth Department of Inspection Services (DIS) to Entergy for construction of a concrete pad for a nuclear waste storage facility (the ISFSI) at Pilgrim, and the DIS's March 27, 2013 denial of a Request for Enforcement. Consolidated Statement of Facts (Cons. SOF) ¶ 1, Application Pl's. App. Ex. 23. The Plaintiffs also seek declaratory relief under G.L. c. 231A, §§ 1 and 2. Cons. SOF ¶ 1. Relief sought by the Plaintiffs includes annulling the Decision, a remand requiring Entergy to obtain a special permit under the Light Industrial district regulations of the Zoning Bylaw of the Town of Plymouth (Bylaw) before proceeding with the project, injunctive relief restraining construction until Entergy has obtained a special permit, and an order directing the Board and DIS to comply with the Bylaw's special permit provisions. First Am. Compl. at 2.

A 1967 letter from Entergy's predecessor, Boston Edison Company, to the Board states that the Pilgrim generating plant will "be built in accordance with . . . the Design and Analysis Report" (DAR) on file with the Plymouth Board of Selectmen. Cons. SOF ¶ 58. The DAR includes a diagram of the "Station Location and Site Plan," which identifies a boundary line identical to the 517-acre site identified in Entergy's 2006 U.S. Nuclear Regulatory Commission (NRC) license renewal application. Cons. SOF ¶ 59.

[1] The Decision's case number is 3712. The Decision references landowner: Entergy Nuclear Generation Company; Petitioner: Ecolaw for Appellants; Subject Property: 600 Rocky Hill Road; Parcel ID No.: 044-000-001B-000; Title Reference: Book 17658, Page 265; Date of Public Hearing: June 12, 2013, continued to July 10, 2013.

This site boundary is posted and a perimeter security fence provides a distinct security boundary for the protected area of the station. Cons. SOF ¶ 60. Maintenance of the protected area is required for the storage of spent nuclear fuel, and must be maintained for as long as the spent fuel remains stored on the Pilgrim site. Cons. SOF ¶ 61. Entergy's NRC License Renewal application states, "[t]he industrial facility encompasses approximately 140 acres. In addition, approximately 1,500 acres owned by Entergy is in a forest management trust." Cons. SOF ¶ 65.

After the Fukushima meltdown,[2] the NRC on March 12, 2012, issued an order modifying Pilgrim's operating license. SOF ¶ 103. NRC Order EA-12-049 states: "The events at Fukushima Dai-ichi highlight the possibility that extreme natural phenomena could challenge the prevention, mitigation and emergency preparedness" at commercial reactors like Pilgrim. Cons. SOF ¶ 104. NRC Order EA-12-049 further states that the "NRC's assessment of new insights from the events at Fukushima Dai-chi leads the staff to conclude that additional requirements must be imposed" on Pilgrim "to increase the capability of nuclear power plants to mitigate beyond-design-basis external events . . . to provide adequate protection to public health and safety." Cons. SOF ¶ 105. In 2012, citing post Fukushima concerns, the NRC required Pilgrim to provide updated information regarding the plant's ability to withstand site-specific flood hazards. Cons. SOF ¶ 102. This information must be submitted to the NRC by March 2015. Cons. SOF ¶ 102. The NRC has announced that Entergy is required to perform an additional analysis of Pilgrim's ability to withstand severe earthquakes. Cons. SOF ¶ 106. The NRC

[2] At Fukushima Daiichi, a nuclear complex in Japan, a meltdown occurred in 2011 after an earthquake and tsunami. Matthew W. Wald, *Assessing Fukushima Damage Without Eyes on the Inside*, N.Y. Times, June 17, 2014, http://www.nytimes.com/2014/06/18/world/asia/measuring-damage-at-fukushima-without-eyes-on-the-inside.html (last visited August 11, 2014).

identified Pilgrim as a high priority facility regarding this issue, one of only ten in the nation to receive this designation. Cons. SOF ¶ 106.

Pilgrim has operated since 1972, and is licensed by the NRC to operate until 2032. Cons. SOF ¶ 66. "After four to six years of use in a commercial nuclear reactor, nuclear fuel rods can no longer efficiently produce energy and are considered 'spent nuclear fuel.'" Cons. SOF ¶ 75, quoting *New York v. U.S. Nuclear Regulatory Comm'n*, 681 F.3d 471, 474 (D.C. Cir. 2012), citing Blue Ribbon Commission on America's Nuclear Future, *Report to the Secretary of Energy* 10-11 (2012). When fuel rods can no longer efficiently produce energy, they are transferred from the reactor core to racks within deep, water-filled pools for cooling. Cons. SOF ¶ 77, citing *New York*, 681 F.3d at 474. "Fuel rods are thermally hot when removed from reactors and emit great amounts of radiation—enough to be fatal in minutes to someone in the immediate vicinity." Cons. SOF ¶ 76, quoting *New York*, 681 F.3d at 474. After the spent nuclear fuel has cooled sufficiently in the water-filled pools, it may be transferred to dry storage, which consists of large concrete steel casks. Cons. SOF ¶ 78, citing *New York*, 681 F.3d at 474. Pilgrim generates spent nuclear fuel as a byproduct of nuclear power production. Cons. SOF ¶ 67. Pilgrim's nuclear waste must be stored on site until an off site interim or permanent repository is available. Cons. SOF ¶ 73. There is not now and has never been an off site permanent or interim spent nuclear fuel storage in the U.S. Cons. SOF ¶ 74.

The spent fuel pool at Pilgrim, where Pilgrim is currently storing its spent nuclear fuel, is so full that Entergy must build an ISFSI or other onsite storage system to have a place to store spent fuel in the future. Cons. SOF ¶ 70. Entergy plans to use a type of dry cask called HOLTEC Hi-Storm 100 (HOLTEC Cask) that is certified under NRC

regulations. Cons. SOF ¶ 87. The proposed ISFSI will not be covered and will not have a roof. Cons. SOF ¶ 96. On February 14, 2013, Entergy applied to the DIS for a zoning permit under the Bylaw for construction of a concrete pad at Pilgrim to accommodate modular dry cask fuel storage units as part of an ISFSI. Cons. SOF ¶ 3, Application Pl's. App. Ex. 23. On March 27, 2013, the DIS approved Entergy's application and issued zoning permit #Z20130196. Pl's. App. Ex. 23. Handwritten on the permit are the words "the construction of a concrete pad to accommodate dry cask storage units is an accessory use and structure subordinate to the principal use of power generation of Pilgrim Station subject to Conservation Comm. conditions." Pl's. App. Ex. 23. The DIS permit was appealed to and affirmed by the Board in the Decision. Cons. SOF ¶¶ 6, 7.

The concrete pad that is the subject of Entergy's Zoning Permit is one of several components of the ISFSI project. Cons. SOF ¶ 68. The construction and operation of the ISFSI is necessary for Pilgrim to continue to generate electricity. Cons. SOF ¶ 69. Spent nuclear fuel generated by Pilgrim will be transferred from the current location inside the reactor building to dry casks that will be placed on the concrete pad. Cons. SOF ¶ 71. The construction and presence of the ISFSI increases the total amount of spent nuclear fuel stored on-site at Pilgrim and the frequency of spent nuclear fuel handling, movement, and transportation at the site. Cons. SOF ¶ 115. The ISFSI casks may accommodate storage of spent nuclear fuel after the conclusion of power production operations at Pilgrim. Cons. SOF ¶ 72. Entergy has put forth no date upon which the spent nuclear fuel will be moved from Pilgrim. Cons. SOF ¶ 83.

The Pilgrim reactor facility is located on Lot 044-000-001B-000, as shown on the Town of Plymouth Assessor's Map (Lot 1B). Cons. SOF ¶ 38. Entergy owns

approximately 1,540 acres of land contiguous to Lot 1B, which consists of about 134 acres. Cons. SOF ¶ 42. All of the contiguous land surrounding the Pilgrim reactor and owned by Entergy was conveyed under the same 1999 Deed. Cons. SOF ¶ 43. The Town of Plymouth issued a special permit in 1967 for the construction of Pilgrim (1967 Special Permit). Cons. SOF ¶ 44. In its 2006 application to the NRC for a renewed operation license, Entergy identified the "Site Boundary" of the Pilgrim Nuclear Power Station as consisting of about 517 acres and included a map reflecting that. Cons. SOF ¶¶ 47, 57. Entergy has stated to the NRC that the "Pilgrim nuclear station is located on a 1,600 acre site about eight kilometers (five miles) east-southeast of the downtown area of Plymouth, Massachusetts," and regularly describes the Pilgrim site as encompassing 517 acres. Cons. SOF ¶¶ 55, 56.

In response to Requests for Admissions propounded by Entergy, each Plaintiff has admitted the following statement:

> Request No. 1
>
> No portion of any real property owned by You either abuts, lies directly opposite on any public or private street or way, or lies within three hundred feet of the property line of Lot No. 044-000-001B-000 in the Town on Plymouth, Massachusetts.

Cons. SOF ¶ 12.

Four Plaintiffs who abut some property owned by Entergy, but not Lot 1B, objected to this Request on the grounds that it implied that the only lot relevant to this action was Lot 1B, when Entergy owns other lots they are abutters to that are contiguous to Lot 1B. Cons. SOF ¶ 13. Plaintiff Dianne Buckbee abuts Entergy-owned property identified as Lot 11E on Plymouth Assessor's Map 43. Cons. SOF ¶ 40. Plaintiff Frederick Paris abuts Entergy-owned property identified as Lot 11 on Plymouth

Assessor's Map 43. Cons. SOF ¶ 41. Plaintiffs Virginia Curcio's and Jacqueline Hochstin's properties are on Rocky Hill Road and abut Entergy-owned property identified as Lot 525 on Plymouth's Assessor's Map 44. Cons. SOF ¶ 34.

The Town of Plymouth issued two certified abutters lists, one on April 2, 2013, and one on May 2, 2013. Cons. SOF ¶ 35. The May 2, 2013 Town of Plymouth Abutters List lists the following Entergy properties: Map 44, 1B, 1A, 2, 13, Map 44-6-527, 44-27, 44-6-545, Map 43, Lots B-124, 11, 11D, 1E, Map 76, Lots 3, 4, 5, and Map 94, Lots 001, 002, 003. Cons. SOF ¶ 36. Plaintiffs Curcio, Hochstin, and Paris appear on the May 2, 2013 Town of Plymouth's Certified Abutters List, which states "Entergy, Rocky Hill Rd + contiguous parcels." Cons. SOF ¶ 37. The site boundary, including the Entergy properties which Hochstin and Curcio abut, through which runs Power House Road, is currently posted with "No Trespassing" signs or has fencing along it. Cons. SOF ¶ 51. The general public is prohibited from entering this land, which includes the shoreline of Cape Cod Bay. Cons. SOF ¶ 52.

Discussion

Spent nuclear fuel is a byproduct of generating electricity through nuclear power, and difficulties associated with storage of spent nuclear fuel have created challenges for the Federal government and state and local governments throughout the nuclear age. The Atomic Energy Act of 1946[3] authorized civilian application of atomic power, and created the Atomic Energy Commission (AEC). *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 206-207 (1983). Until 1954, nuclear energy production was exclusively under federal control. *Id.* Out of a determination that the national interest would be best served if the government

[3] Act of Aug. 1, 1946, c. 724, 60 Stat. 755.

encouraged the private sector to become involved in the development of atomic energy for peaceful purposes, Congress passed the Atomic Energy Act of 1954 (AEA),[4] allowing the licensing of private construction, ownership, and operation of commercial nuclear power reactors. *Id.* at 206-207, citing *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 63 (1978). The AEA, however, left no jurisdiction to the states over the transfer, delivery, receipt, acquisition, possession, and use of nuclear materials. 42 U.S.C. §§ 2014 (e), (z), (aa), 2061–2064, 2071–2078, 2091–99, 2111–14 (1976 and Supp. IV 1980); *Pacific Gas*, 461 U.S. at 207.

In 1959, Congress amended the AEA in order to "'clarify the respective responsibilities . . . of the States and the [Federal government] with respect to the regulation of byproduct, source, and special nuclear materials,' 42 U.S.C. § 2021(a)(1) (1982 ed.), and generally to increase the States' role." *English v. General Elec. Co.*, 496 U.S. 72, 81 (1990). The 1959 amendments enabled state governors, by agreement with the AEC, to discontinue the Federal government's regulatory authority over certain nuclear materials under specified conditions. *Id.* The Energy Reorganization Act of 1974[5] abolished the AEC and transferred its regulatory and licensing authority to the NRC, 42 U.S.C. § 5841(f), while expanding the number and range of safety responsibilities under the NRC's charge. *English*, 496 U.S. at 81. "[T]he NRC promulgated regulations in 1980 for licensing onsite and away-from-reactor spent nuclear fuel storage facilities for private nuclear generators. See 10 C.F.R. Part 72." *Connecticut Coalition Against Millstone v. Connecticut Siting Council*, 286 Conn. 57, 73 (2008), citing *Bullcreek v. Nuclear Regulatory Comm'n*, 359 F.3d 536, 538 (D.C. Cir. 2004).

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[4] Act of Aug. 30, 1954, c. 1073, 68 Stat. 919, as amended, 42 U.S.C. §§ 2011–2281 (1976).
[5] 88 Stat. 1233, 42 U.S.C. §§ 5801 *et seq.* (1982 ed.).

"A nuclear reactor must be periodically refueled and the 'spent fuel' removed. This spent fuel is intensely radioactive and must be carefully stored." *Pacific Gas*, 461 U.S. at 195. Pilgrim, like most nuclear reactors, stores its spent fuel in a water-filled pool at the reactor site. *Id.*; Cons. SOF ¶ 70. This practice was adopted as a temporary measure under the expectation that the Federal government would ultimately provide "a 'geological repository,' in which [spent nuclear fuel] is stored deep within the earth, protected by a combination of natural and engineering barriers. Twenty years of work on establishing such a repository at Yucca Mountain was recently abandoned when the Department of Energy decided to withdraw its license application for the facility." *New York*, 681 F.3d at 474 (citation omitted). Government studies indicated as early as 1983 that "a number of reactors could be forced to shut down in the near future due to the inability to store spent fuel." *Pacific Gas*, 461 U.S. at 195. Today, "[d]etermining how to dispose of the growing volume of [spent nuclear fuel], which may reach 150,000 metric tons by the year 2050, is a serious problem." *New York*, 681 F.3d at 474.

The Board wrote in the Decision:

> Since 1973, spent fuel rods have been stored in a pool at Pilgrim Station. Spent fuel rods are a waste by-product of the energy generation process at this and all other nuclear facilities of which the Board has knowledge. Since the existing pool is now 83% full, Entergy is planning to provide a new spent fuel storage facility. . . . it is only because the federal government has not met its obligation to provide a long promised off-site storage facility for spent fuel rods that spent fuel rods must continue to be stored on-site at Pilgrim and at all other nuclear reactors.

Decision, at 3. The Plaintiffs have challenged the Decision under G.L. c. 40A, § 17, and Entergy has moved for summary judgment on the grounds that the Plaintiffs lack standing to challenge the Decision that affirmed their permit to build a concrete pad as part of an ISFSI to store spent nuclear fuel at the Pilgrim site.

In order to have standing to challenge the issuance of the Decision upholding Entergy's zoning permit, the Plaintiffs must be "person[s] aggrieved" by the Decision. G.L. c. 40A, § 17; *Kenner v. Zoning Bd. of Appeals of Chatham*, 459 Mass. 115, 117 (2011); *Planning Bd. of Marshfield v. Zoning Bd. of Appeals of Pembroke*, 427 Mass. 699, 702-703 (1998). Persons entitled to notice under G.L. c. 40A, § 11, including abutters to the subject property and abutters to abutters within 300 feet of the subject property, are entitled to a rebuttable presumption that they are aggrieved within the meaning of § 17. G.L. c. 40A, § 11. *81 Spooner Road, LLC v. Zoning Bd. of Appeals of Brookline*, 461 Mass. 692, 700 (2012); *Marashlian v. Zoning Bd. of Appeals of Newburyport*, 421 Mass. 719, 721 (1996); *Choate v. Zoning Bd. of Appeals of Mashpee*, 67 Mass. App. Ct. 376, 381 (2006).

In the zoning context, a defendant can rebut an abutter's presumption of standing at summary judgment in two ways. First, the defendant can show "that, as a matter of law, the claims of aggrievement raised by an abutter, either in the complaint or during discovery, are not interests that the Zoning Act is intended to protect." *81 Spooner Road, LLC*, 461 Mass. at 702, citing *Kenner*, 459 Mass. at 120. Second, "where an abutter *has* alleged harm to an interest protected by the zoning laws, a defendant can rebut the presumption of standing by coming forward with credible affirmative evidence that refutes the presumption." *Id.* at 703. As has Entergy in this case, "the defendant may present affidavits of experts establishing that an abutter's allegations of harm are unfounded or de minimis." *Id.*, citing *Kenner*, 459 Mass at 119–120, and *Standerwick v. Zoning Bd. of Appeals of Andover*, 447 Mass. 20, 23–24 (2006). A defendant need not present affirmative evidence that refutes a plaintiff's basis for standing; "it is enough that

the moving party demonstrate by reference to material described in Mass. R. Civ. P. 56(c), [365 Mass. 824 (1974),] unmet by countervailing materials, that the party opposing the motion has no reasonable expectation of proving a legally cognizable injury." *Id.*, quoting *Standerwick*, 447 Mass. at 35; *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991). "Once the presumption of standing has been rebutted successfully, the plaintiff [has] the burden of presenting credible evidence to substantiate the allegations of aggrievement, thereby creating a genuine issue of material fact whether the plaintiff has standing and rendering summary judgment inappropriate." *81 Spooner Road, LLC*, 461 Mass. at 703 n.15, citing *Marhefka v. Zoning Bd. of Appeals of Sutton*, 79 Mass. App. Ct. 515, 519–521 (2011).

The first question is whether any of the Plaintiffs are abutters. The proposed ISFSI pad is to be located on Lot 1B, owned by Entergy. See Decision at 1. Lot 1B consists of about 134 acres and is the locus of the Pilgrim reactor facility. Cons. SOF ¶¶ 38, 42. Entergy owns approximately 1,540 acres of land contiguous to Lot 1B, including lot 525. Plaintiffs Curcio and Hochstin own properties abutting Lot 525. They claim to be abutters within the meaning of G.L. c. 40A, § 11, even though their properties abut Lot 525 and not Lot 1B because, among other reasons, "[a]ll of the contiguous land surrounding the Pilgrim reactor and owned by Entergy [including Lot 525] was conveyed under the same 1999 deed," Cons. SOF ¶ 43; "Boston Edison's 1967 public hearing notice and special permit application for Pilgrim's construction identified the project site as covering more land area than Lot 1B, and provided public notice to abutters living at the same location as . . . Hochstin and Curcio," Cons. SOF ¶ 46; "[i]n its 2006 application to the U.S. Regulatory Commission (NRC) for a renewed operating license, Entergy

identified the 'Site Boundary' of the Pilgrim Nuclear Power Station as consisting of about 517 acres," Cons. SOF ¶ 47; "Entergy's predecessor, Boston Edison Co. identified the site boundary of the Pilgrim Nuclear Power Station as covering about 517 acres of land," Cons. SOF ¶ 48; "Entergy's real estate tax arrangement with the Town of Plymouth treats about 1,540 acres surrounding Lot 1B, including [Lot 525], as one," Pl.'s Mem. in Opp'n to Def.'s Mot. to Dismiss 9; and Entergy included Lots 1B and 525 in their description of the nuclear power plant site in their 2006 NRC license renewal application. Affidavit of William Maurer ¶ 6.

Entergy prohibits the general public from entering land around the power plant, including Lot 525 and Lot 1B, and has posted "No Trespassing" signs and fences around the area. SOF ¶ 51, 52, 53. Power House Road runs north/south across Lots 13, 525, 2, and 1B—lots all owned by Entergy. The 1967 Special Permit requires Boston Edison "to exclude the public from its private roads during hours when the roads are not required for the purposes of construction or operation of the plant." Notice of Special Permit, Pls.' Statement of Facts Exh. 17. The Plaintiffs cite Entergy's dominion over Power House Road as further support for their contention that Lot 525 is within the "Site Boundary" of Pilgrim, making Curcio and Hochstin abutters.

Curcio and Hochstin also claim to enjoy a presumption of aggrievement as abutters under the doctrine of merger. The merger doctrine reflects a "general principal that adjacent lots in common ownership will normally be treated as a single lot for zoning purposes so as to minimize nonconformities with the dimensional requirements of the zoning by-law or ordinance." *Seltzer v. Board of Appeals of Orleans*, 24 Mass. App. Ct. 521, 522 (1987). In *Holmes v. Sudbury Bd. of Appeals*, while not mentioning the merger

doctrine explicitly, the Appeals Court treated lots in common ownership as one for purposes of standing under G.L. c. 40A, § 17, where a defendant argued that plaintiffs were not abutters because "the particular parcel of land on which the activities objected to [were] taking place . . . [was] deep inside the locus." *Holmes v. Sudbury Bd. of Appeals*, No. 05-P-1574, 67 Mass. App. Ct. 1108 (Sept. 29, 2006) (decision under Appeals Court R. 1:28). "[I]t would be absurd," the Appeals Court held, "if [the defendant] could create arbitrary subdivisions within its property so as to exclude abutters from the presumption of aggrieved person status." *Id.* The Court need not decide whether it is appropriate to apply the merger doctrine in determining whether Curcio and Hochstin are abutters. The undisputed facts are that Lot 525 is within the site of its proposed ISFSI, and Curcio and Hochstin are abutters to Lot 525. They are therefore entitled to a presumption of standing.

As explained below, however, Entergy has rebutted their presumption of standing, and therefore Curcio and Hochstin must join the other non-abutting Plaintiffs in establishing that they are aggrieved. To qualify as "person[s] aggrieved," G.L. c. 40A, § 17, the Plaintiffs must establish that they will suffer some direct injury to a private right, private property interest, or private legal interest as a result of the Decision, and that the injured right or interest is one that G.L. c. 40A or the Bylaw is intended to protect, either explicitly or implicitly. *81 Spooner Road, LLC*, 461 Mass. at 700; *Kenner*, 459 Mass. at 120; *Standerwick*, 447 Mass. at 27-28. The harms the eighteen Plaintiffs claim they will suffer as result of Entergy's proposed ISFSI can be divided into three categories: (1) harm to the Plaintiffs' health and safety; (2) harm to the environment; and (3) diminution of the Plaintiffs' property values. Harm to the Plaintiffs' health and safety cannot serve as the basis for standing under G.L. c. 40A, § 17, because health and safety

concerns are preempted by federal law under the Supremacy Clause of the United States Constitution, U.S. Const. art. 6, cl. 2, *Pacific Gas*, 461 U.S. 211-212, and therefore are not interests protected by c. 40A or the Bylaw. The great majority of the harms the Plaintiffs allege they will suffer as result of the ISFSI's harm to the environment are either harms to interests that the Bylaw and c. 40A do not protect or are harms that are not "special and different from the concerns of the rest of the community," *Standerwick*, 447 Mass. at 33, quoting *Barvenik v. Alderman of Newton*, 33 Mass. App. Ct. 129, 132 (1992), and therefore cannot serve as the basis of standing under G.L. c. 40A, § 17. The Plaintiffs, including those who enjoy a presumption of aggrievement as abutters, contend that the ISFSI will reduce their property values. "[T]he presumption of aggrievement is destroyed upon the defendant's offer of evidence warranting a finding contrary to the presumed fact." *Watros v. Greater Lynn Mental Health & Retardation Ass'n, Inc.*, 421 Mass. 106, 111 (1995). Entergy rebuts Plaintiff Curcio and Hochstin's presumption of aggrievement upon its offer of some evidence, in the form of an expert's affidavit, that the ISFSI will not reduce the Plaintiffs' property values. However, at least some of the Plaintiffs have met their "burden of presenting credible evidence to substantiate [their] allegations of aggrievement, thereby creating a genuine issue of material fact whether [they have] standing and rendering summary judgment inappropriate." *81 Spooner Road, LLC*, 461 Mass. at 703 n.15.

1. Health and Safety Concerns are Preempted

Entergy argues that the Plaintiffs cannot base their claims for standing on health and safety concerns. State law is preempted under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, in three circumstances. *English*, 496 U.S. at 78. First, preemption occurs

where Congress explicitly defines the extent to which its enactments preempt state law. See *id.*, citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95-98 (1983). Second, preemption occurs where state law regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. *Id.* at 79, citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). And third, state law is preempted to the extent that it actually conflicts with federal law and it is impossible for a private party to comply with both state and federal requirements. *Id.*, citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

The AEA has been held to preempt state regulation of nuclear energy production for the purpose of health and safety. Under the AEA, "the federal government maintains complete control of the safety and 'nuclear' aspects of energy generation; the states exercise their traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like." *Pacific Gas*, 461 U.S. at 212. "Early on, it was decided that the states would continue their traditional role in the regulation of electricity production. The interrelationship of federal and state authority in the nuclear energy field has not been simple; the federal regulatory structure has been frequently amended to optimize the partnership." *Id.* at 194. Section 274(k) of the Act states: "[n]othing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards." 42 U.S.C. § 2021(k). "[S]tate laws supported by nonsafety rationales do not lie within the pre-empted field." *English*, 496 U.S. at 83.

"[N]ot every state law that in some remote way may affect the nuclear safety decisions made by those who build and run nuclear facilities can be said to fall within the pre-empted field. . . . Instead, for a state law to fall within the pre-empted zone, it must have some direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels." *Id.* at 85, citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984).

Entergy cites *Maine Yankee Atomic Power Co. v. Bonsey*, 107 F. Supp. 2d 47 (D. Me. 2000) and *Connecticut Coalition Against Millstone v. Connecticut Siting Council*, 286 Conn. 57 (2008), as examples of "courts considering the very type of spent fuel storage at issue in this case." Def.'s Suppl. Br. 6. In *Maine Yankee*, the owner of a decommissioned nuclear reactor planned to transfer "its spent radioactive fuel, currently held in a water-filled 'spent fuel pool' inside the plant, to an ISFSI employing a dry cask storage system." *Maine Yankee*, 107 F. Supp. 2d at 49. "Maine's Site Law require[d] approval by the [Maine Department of Environmental Protection (DEP)] before construction or operation of 'any development of state or regional significance that may substantially affect the environment.'" *Id.*, quoting Me. Rev. Stat. Ann. tit. 38, § 483-A. Maine Yankee filed suit seeking "(1) a declaratory judgment—holding that the regulation of nuclear fuel storage is a field entirely preempted by federal law; and (2) an injunction precluding [DEP] from requiring, issuing or enforcing any state permit or license related to Maine Yankee's ISFSI under Maine's Site Location of Development Act." *Id.* at 48-49.

In its preemption analysis, the *Maine Yankee* court considered 42 U.S.C. § 2021(b),[6] 10 C.F.R. §§ 72.1[7] and 72.8.[8] The power plant owner argued that Maine was expressly prohibited from licensing an ISFSI by 10 C.F.R. § 72.8, which provides that so-called "Agreement States may not issue licenses covering the storage of spent fuel in an ISFSI or the storage of spent fuel and highlevel radioactive waste in an MRS [Monitored Retrievable Storage Installation]." *Maine Yankee*, 107 F. Supp. 2d at 53, quoting 10 C.F.R. § 72.8. The court held that § 72.8 should not be read so broadly. *Id.* "[T]he real question," the *Maine Yankee* Court found, "is whether the state expects to impose 'site development criteria' in a manner that will frustrate or undermine the NRC's anticipated approval of the spent fuel storage transfer." *Id.* "[T]he Site Law permit at issue here," the court held, "properly construed, is not the type of license contemplated or prohibited by 10 C.F.R. § 72.8." *Id.* at 54. The court warned, however, that DEP could not, "under the guise of its radiation neutral Site Law and environmental regulations, interfere with those

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[6] 42 U.S.C. § 2021(b) provides: "Except as provided in subsection (c) of this section, the Commission is authorized to enter into agreements with the Governor of any State providing for discontinuance of the regulatory authority of the Commission under subchapters V, VI, and VII of this division, and section 2201 of this title, with respect to any one or more of the following materials within the State: (1) Byproduct materials (as defined in section 2014(e) of this title). (2) Source materials. (3) Special nuclear materials in quantities not sufficient to form a critical mass. During the duration of such an agreement it is recognized that the State shall have authority to regulate the materials covered by the agreement for the protection of the public health and safety from radiation hazards."

[7] 10 C.F.R. § 72.1 provides: "The regulations in this part establish requirements, procedures, and criteria for the issuance of licenses to receive, transfer, and possess power reactor spent fuel, power reactor-related Greater than Class C (GTCC) waste, and other radioactive materials associated with spent fuel storage in an independent spent fuel storage installation (ISFSI) and the terms and conditions under which the Commission will issue these licenses. The regulations in this part also establish requirements, procedures, and criteria for the issuance of licenses to the Department of Energy (DOE) to receive, transfer, package, and possess power reactor spent fuel, high-level radioactive waste, power reactor-related GTCC waste, and other radioactive materials associated with the storage of these materials in a monitored retrievable storage installation (MRS). The term Monitored Retrievable Storage Installation or MRS, as defined in § 72.3, is derived from the Nuclear Waste Policy Act (NWPA) and includes any installation that meets this definition. The regulations in this part also establish requirements, procedures, and criteria for the issuance of Certificates of Compliance approving spent fuel storage cask designs."

[8] 10 C.F.R. § 72.8 provides: "Agreement States may not issue licenses covering the storage of spent fuel and reactor-related GTCC waste in an ISFSI or the storage of spent fuel, high-level radioactive waste, and reactor-related GTCC waste in an MRS."

aspects of Maine Yankee's proposed ISFSI project that remain exclusively within the province of the NRC." *Id.* at 55. "[R]eluctant to prematurely speculate that defendants intend[ed] to use Maine's Site Law indirectly regulate what they concededly [could not] regulate directly," the court concluded that Maine's licensing requirement was not preempted. *Id.* at 55-56.

In *Connecticut Coalition Against Millstone*, the Connecticut Supreme Court addressed a challenge to a certificate issued by the Connecticut Siting Council to the Millstone Nuclear Power Plant to install forty-nine horizontal storage modules in a spent storage facility and to keep certain sections of the plant in operation. *Connecticut Coalition*, 286 Conn. at 62-63. A condition of the permit was that the spent storage facility would be temporary and the certificate holder would move the fuel to a national repository as soon as legally possible. *Id.* at 63. "The council . . . noted that, pursuant to the Nuclear Waste Policy Act of 1982, the federal government [was] preparing a license application for a facility at Yucca Mountain in Nevada where spent nuclear fuel ultimately [could] be stored on a permanent basis." *Id.* at 62.[9]

The plaintiffs contended that the decision to issue Millstone's certificate was illegal, arbitrary, and capricious. *Id.* at 64. The court found that in 1980, pursuant to the Atomic Energy Act, the NRC promulgated regulations for licensing onsite and away-from-reactor spent nuclear fuel storage facilities for private nuclear generators, including 10 C.F.R. § 72.210 (2007) (issuing a general license for the storage of spent fuel at power

[9] Funding for development of the Yucca Mountain waste site was terminated by an amendment to the Department of Defense and Full-Year Continuing Appropriations Act, passed by Congress on April 14, 2011. Hannah Northey, *GAO: Death of Yucca Mountain Caused by Political Maneuvering*, N.Y. Times, May 10, 2010, http://www.nytimes.com/gwire/2011/05/10/10greenwire-gao-death-of-yucca-mountain-caused-by-politica-36298.html (last visited August 12, 2014).

reactor sites to persons authorized to possess or operate nuclear power reactors); 10 C.F.R. § 72.214 (2007) (listing casks specifically approved for the storage of spent fuel, under conditions specified in applicable federally issued certificates of compliance); 10 C.F.R. § 72.212 (2007) (establishing conditions on the general licenses issued for spent storage facilities, such as the adoption of security measures); and 10 C.F.R. § 73.55 (2007) (setting forth requirements for physical protection of licensed activities in nuclear power reactors against radiological sabotage). *Connecticut Coalition*, 286 Conn. at 73-74. The court also considered that "the Atomic Energy Act expressly reserves some authority to the states, permitting them 'to regulate activities for purposes other than protection against radiation hazards.'" *Connecticut Coalition*, 286 Conn. at 74, quoting 42 U.S.C. § 2021(k).

Ultimately, the court determined that the jurisdiction of the Connecticut Siting Council was only partially preempted:

> [W]ith respect to environmental concerns, we conclude that the council's jurisdiction is limited to *nonnuclear* environmental effects. In the present case, the council made findings of fact limited to the following factors: the distance of the facility from residential areas, the flood zone, and tidal and inland wetlands; the impact of the facility on groundwater; the design of the facility; the impact on endangered, threatened or concerned species; and the impact on historic and archaeological resources. To the extent that these nonnuclear environmental factors were considered separately from any radiation hazards, the council acted within its jurisdiction.

Connecticut Coalition, 286 Conn. at 79.

The Plaintiffs submitted affidavits purporting to set forth the harms that they claim they will suffer as a result of the ISFSI. In their affidavits, they raise multiple health and safety concerns related to the storage of highly radioactive spent nuclear fuel in the proposed ISFSI. These concerns range from general health and safety concerns

connected to living near the ISFSI to specific concerns that proximity to the nuclear power plant may have already contributed to specific incidents of cancer, including incidents of brain cancer, leukemia, and a pet dog killed by unusual tumors. "[N]ot every state law that in some remote way may affect the nuclear safety decisions made by those who build and run nuclear facilities can be said to fall within the pre-empted field. . . . Instead, for a state law to fall within the pre-empted zone, it must have some direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels." *English*, 496 U.S. at 85. State and local laws regulating safety aspects of nuclear energy production that directly and substantially affect the construction and operation of ISFSIs facilities are preempted under the Supremacy Clause of the United States Constitution, U.S. Const. art. 6, cl. 2. *Maine Yankee*, 107 F. Supp. 2d at 53. These preempted state and local laws include zoning provisions such as c. 40A and the Bylaw to the extent that they regulate ISFSIs on the basis of the health and safety effects of radiation. As discussed, to qualify as persons aggrieved under G.L. c. 40A, § 17, the Plaintiffs must establish that they will suffer some direct injury to a private right, private property interest, or private legal interest as a result of the Decision, and that the injured right or interest is one that c. 40A or the Bylaw is intended to protect. Because c. 40A and the Bylaw cannot be held to protect the ISFSI-related health and safety concerns of the Plaintiffs, including the abutting Plaintiffs, those concerns cannot serve as the basis for the Plaintiffs' aggrievement—i.e., their standing.

2. Environmental Harms

Swimming, walking, and collecting shells and sea glass around Priscilla Beach and Cape Cod Bay, biking to Manomet Point Road, enjoying the local fish market, and

scuba diving and boating are among the interests the Plaintiffs claim the ISFSI will harm, giving them standing to challenge the Decision of the Board. Observing and photographing herons, red wing black birds, seagulls, plovers, various terns including the endangered Roseate tern, and sandpipers are ways the Plaintiffs enjoy the local environment around where the ISFSI will be built. In over twenty-five affidavits, the Plaintiffs set forth their environmental concerns. "I used to observe a healthy population of starfish, sand dollars, and horseshoe crabs along White Horse Beach. There was also dynamic fishing for cod, haddock, bluefish, tautog, skate, and we could always go out to catch dinner . . . There are now virtually no fish to be had in the near shore areas in Cape Cod Bay around White Horse Beach." Bostek Aff. § 28. The Plaintiffs express worry about the effects of Pilgrim's cooling water intake system (CWIS), citing *Entergy Nuclear Generation Co. v. Massachusetts DEP*, 459 Mass. 319 (2011). The Plaintiffs allege that a "thermal plume of pollution from Pilgrim covers about five square miles," that Pilgrim's operations "pollute the soil and groundwater . . . with radionuclides and other contaminants," and that the ISFSI will be above "a sole source drinking water aquifer, which Plaintiffs use as a source of drinking water." Pl.'s Mem. in Opp'n to Def's Mot. to Dismiss 23.

To establish standing predicated upon environmental harm, the Plaintiffs must individually establish that, as a result of the Decision, they will suffer a substantial likelihood of injury—special and different from the injury the ISFSI will cause to the community at large and greater than any injury created by the present uses of Pilgrim—to a private right, private property interest, or private legal interest and that the injured right or interest is one that the Zoning Enabling Act, G.L. c. 40A, or the Zoning Bylaw of the

Town of Plymouth (Bylaw) is intended to protect, either explicitly or implicitly. *81 Spooner Road*, 461 Mass. at 700; *Kenner*, 459 Mass. at 120; *Standerwick*, 447 Mass. at 27-28; *Marashlian*, 421 Mass. at 721; *Butler v. City of Waltham*, 63 Mass. App. Ct. 435, 440 (2005); *Barvenik*, 33 Mass. App. Ct. at 132-133. Entergy alleges that the claims of aggrievement based on environmental harms raised by abutters Hochstin and Curcio fail to prove standing in the most part because they are not special and different from the concerns of the rest of the community. Mem. in Supp. of Def.'s Mot. to Dismiss Am. Compl. at 15. The Court agrees. The alleged environmental degradation caused by Pilgrim affects the Plaintiffs no more acutely than it does the Plymouth community at large. The Plaintiffs challenge this conclusion by asserting that the "economic livelihood of Plaintiff Buckbee is directly linked to the health of the coastal waters that Pilgrim pollutes." Pl.'s Mem in Opp. 24. Buckbee, in her affidavit, states that she works as a marine naturalist on Captain John boats, and that her job is to "identify different species of whales and teach guests about all aspects of the whales' lifecycles, food sources, and habitats." Buckbee Aff. ¶ 12-18. Buckbee believes "a nuclear accident at Pilgrim that impacted the ecosystem of the Bay, or that caused the public to avoid coming to Plymouth and going out on the Bay to whale watch would directly impact her employment." Buckbee Aff. ¶ 12-18. The Court need not determine whether Buckbee's claims of harm are special and different from the concerns of the rest of the community and supported by direct facts and not by speculative personal opinion. See *Kenner*, 459 Mass. at 118; *Butler*, 63 Mass. App. Ct. at 440. Buckbee's alleged aggrievement does not confer standing under G.L. c. 40A, § 17, because Buckbee's economic livelihood is

not an interest the Bylaw is intended to protect. Harms to her economic livelihood alone do not give Buckbee standing to challenge the Decision of the Board.

Plaintiff Norman Pierce states that he draws his drinking water from a well on his property, which draws from the Plymouth Sole Source Aquifer. Pierce Aff. ¶ 26. The Plaintiffs allege that Entergy plans to build its ISFSI over the Plymouth Sole Source Aquifer. Def.'s App. in Supp. of Mot. to Dismiss, Ex. 7, ¶ 13. Preservation and protection of the groundwater resources of the Town of Plymouth are interests protected by the Zoning Bylaw. Bylaw, § 205-57. The Bylaw prohibits facilities that store hazardous waste in the Aquifer Protection District. Bylaw, § 205-57, Table 34. Under the Bylaw radioactive waste is categorized as a hazardous material. Bylaw § 205-57 (14). Pierce's aquifer contamination claims allege a likely injury to a private right protected by the Bylaw. However, these contamination claims directly concern the health and safety effects of radiation, a subject that, as discussed above, is preempted. Pierce's well water concerns cannot serve as a basis for his standing.

The various other claims of environmental harms asserted by the Plaintiffs either are not "special and different from the concerns of the rest of the community," or are not injurious to rights protected explicitly or implicitly by G.L. c. 40A, or the Bylaw. *81 Spooner Rd.*, 461 Mass. at 701; *Kenner*, 459 Mass. at 118, 120; *Standerwick*, 447 Mass. at 27-28. For these reasons even if the Court draws all inferences in their favor, the Plaintiffs fail to raise a genuine issue of material fact as to whether they have standing on the basis of environmental harms.

3. Diminution of Property Value

"I am concerned that the media attention that Pilgrim and the ISFSI project get will have a negative effect on the value of my home and property," writes Plaintiff Phyllis Troia in her affidavit. Troia Aff. ¶ 22. "[M]y property value is negatively impacted by the presence of Pilgrim and will be additionally impacted by the presence of the ISFSI itself," writes Hochstin. Hochstin Aff. ¶ 15. "[P]otential buyers are and will be dissuaded from purchasing real estate such as mine that is very close to Pilgrim, because now, not only would they be purchasing a home very near an operating nuclear plant, but also very near a long-term nuclear waste dump." Paris Aff. ¶ 14. "Under the Zoning Act, G.L. c. 40A, only a 'person aggrieved' has standing to challenge a decision of a zoning board of appeals." *81 Spooner Rd.*, 461 Mass. at 700, quoting G.L. c. 40A, § 17. The right or interest asserted by the plaintiff claiming aggrievement must be one that c. 40A or the Bylaw is intended to protect either, explicitly or implicitly. See *id.* Section 205-1 of the Bylaw, entitled Authority and Purpose, provides that among its purposes "[i]n pursuance of authority conferred by MGL c. 40A, §§ 1 to 17, inclusive," is "to conserve the value of land and buildings." Bylaw § 205-1. Preservation of real property values is an interest the Bylaw is intended to protect.

The Bylaw's protection of this interest is not preempted by the AEA and its accompanying regulations concerning ISFSIs. The protection of property interests in the Bylaw is a local law "supported by nonsafety rationales" that does "not lie within the pre-empted field." *English*, 496 U.S. at 83. Enforcing the Bylaw to protect property values does not constitute an attempt to regulate Pilgrim on the basis of the health and safety effects of radiation. Rather, it consists of the regulation of "[n]onradiological aspects of

spent fuel storage" that is not preempted. *Maine Yankee*, 107 F. Supp. 2d at 54. In other words, basing aggrievement on the harm to property values does not have a "direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological levels." *English*, 496 U.S. at 85.

Among the Plaintiffs who complain that the ISFSI will cause depreciation of their property values are the two abutters, Hochstin and Curcio. See Hochstin Aff. ¶ 16; Curcio Aff. ¶ 9. "[W]here an abutter *has* alleged harm to an interest protected by the zoning laws, a defendant can rebut the presumption of standing by coming forward with credible affirmative evidence that refutes the presumption. . . . For example, the defendant may present affidavits of experts establishing that an abutter's allegations of harm are unfounded or de minimis." *81 Spooner Rd.*, 461 Mass. at 702, citing *Kenner*, 459 Mass. at 119-120, and *Standerwick*, 447 Mass. at 23-24. In response to the Plaintiffs claims that the ISFSI will reduce the values of their properties, Entergy presents an affidavit of an expert, Dr. George S. Tolley (Tolley Aff.). In his affidavit, Dr. Tolley states that he is "President of RCF, a Professor Emeritus of Economics at the University of Chicago, and the author or co-author of 21 books and over 50 articles in professional journals." Tolley Aff. ¶ 1. He quotes a hedonic analysis study conducted by Metz and Clark on the effects on property values of ISFSIs on the site of both operating and non-operating nuclear power plants. Tolley Aff. ¶ 9. According to Dr. Tolley, the Metz and Clark study indicates that their "finding of no property value effect is the case regardless of whether a plant is operating or closed or whether the [High Level Waste] is to be placed in dry-cask storage facilities immediately or as part of a future action." *Id.* He explains that "the only study of ISFSIs on home prices in the presence of an operating power plant finds that

there is no impact of ISFSI on surrounding property values." *Id.* Dr. Tolley concludes that the "ISFSI is not an independent disamenity from Pilgrim." Tolley Aff. ¶ 34.

The Court finds that Dr. Tolley's affidavit would support a finding contrary to the presumed fact of aggrievement that the ISFSI will cause diminution of Hochstin's and Curcio's property's values. Thus, by presenting Dr. Tolley's affidavit, Entergy has rebutted Hochstin's and Curcio's presumption of standing. "Once the presumption of standing has been rebutted successfully, the [Plaintiffs] have the burden of presenting credible evidence to substantiate the allegations of aggrievement, thereby creating a genuine issue of material fact whether the [Plaintiffs have] standing and rendering summary judgment inappropriate." *81 Spooner Rd.*, 461 Mass. at 703, n.15, citing *Marhefka v. Zoning Bd. of Appeals of Sutton*, 79 Mass. App. Ct. 515, 519-521 (2011). This places Hochstin and Curcio into the same category as the sixteen other Plaintiffs, who, in order to establish standing, must establish that they will suffer some direct injury to a right or interest protected by the Bylaw or c. 40A. *81 Spooner Rd.*, 461 Mass. at 700.

In addition to their own affidavits, the Plaintiffs present the Affidavit of Dr. Stephen Sheppard (Sheppard Aff.). In his affidavit, Dr. Sheppard states that he is a Professor of Economics at Williams College. Sheppard Aff. ¶ 3. He contends that it "is likely that the increased volume of spent nuclear fuel stored, handled, moved, and transported at the Pilgrim site due to the ISFSI will increase the negative effects of proximity to Pilgrim on local residential property values," and that "[a]dverse effects on local residential property values will be most prominent in neighborhoods adjacent to Pilgrim." Sheppard Aff. ¶¶ 52-53. Dr. Sheppard states that "real estate located within 1 miles of Pilgrim . . . [is] very likely to suffer a reduced market value due to construction

and operation of the ISFSI at Pilgrim." Sheppard Aff. ¶ 58. He further contends that "real estate located within 2 miles of Pilgrim . . . [is] likely to suffer a reduced market value due to construction and operation of the ISFSI at Pilgrim." Sheppard Aff. ¶ 59. Dr. Sheppard's affidavit is evidence of the Plaintiffs' allegations that the ISFSI will diminish their property values, at least for those Plaintiffs within two miles of Pilgrim.

Dr. Tolley's affidavit assails the validity of Dr. Sheppard's affidavit, stating that "Dr. Sheppard has woefully misapplied hedonic results and made false inferences from supposedly-related hedonic studies," Tolley Aff. ¶ 8, "misleadingly tries to apply findings concerning hazardous waste transport to spent fuel storage," Tolley Aff. ¶ 17, and "inappropriately equates ISFSI storage with rail transport which has a substantially different risk profile." Tolley Aff. ¶ 18. Summary judgment may be entered if the "pleadings, depositions, answers to interrogatories, and responses to requests for admission . . . together with affidavits . . . show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Mass. R. Civ. P. 56(c). Dr. Sheppard's affidavit and Dr. Tolley's affidavit are at loggerheads. Between them there is a genuine issue of material fact as to whether, as a result of the Decision, Plaintiffs with property within two miles of Pilgrim will suffer a substantial likelihood of diminution of their property's values. This dispute of material facts makes summary judgment inappropriate with respect to those Plaintiffs. *81 Spooner Rd.*, 461 Mass. at 703 n.15. There is no genuine issue of material fact, however, that Plaintiffs who live beyond a two-mile radius of Pilgrim will not suffer a substantial likelihood of diminution of their property's values if the ISFSI is built. Dr. Sheppard identifies the Plaintiffs with real estate within one mile of Pilgrim as Buckbee, Paris, Hochstin, and Curcio, and the

Plaintiffs with real estate within two miles of Pilgrim as Bostek, Barrett, Carr, and Crone. Sheppard Aff. ¶¶ 58-59. Those Plaintiffs have presented evidence of standing based on the loss of property values sufficient to defeat summary judgment. The remaining Plaintiffs have not, and therefore cannot, as a matter of law, establish their standing.

Conclusion

For the foregoing reasons, Entergy's Motion for Summary Judgment is DENIED as to Plaintiffs Christine A. Bostek, Donna Barrett, Dianne Buckbee, Frederick Paris, Patricia Carr, John D. Carr, Carol Crone, Stephanie Crone, Robert Crone, Virginia Curcio, and Jacqueline Hochstin. Entergy's Motion for Summary Judgment is ALLOWED as to Plaintiffs Aileen DeCola, Phyllis Troia, Richard Wickenden III, Norman Pierce, Pine duBois, Sharl Heller, and Adam Augello, and their claims are DISMISSED WITH PREJUDICE.

SO ORDERED

By the Court (Foster, J.)

Attest:

Deborah J. Patterson, Recorder

Dated: August 14, 2014

A TRUE COPY
ATTEST:
Deborah J. Patterson
RECORDER