(59)

COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2276CV00127

COURTNEY GILARDI and others[1]

vs.

LINDA TYER[2] and others[3]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION TO DISMISS

The plaintiff, six residents of the City of Pittsfield ("City"), bring this action against Linda Tyer, as mayor of Pittsfield ("Mayer Tyer"), Stephen Pagnotta, as city solicitor ("Attorney Pagnotta"), and the Pittsfield Board of Health ("Board") (collectively, "City Defendants"); and against Pittsfield Cellular Telephone Company d/b/a Verizon Wireless ("Verizon") and Farley White South Street, LLC ("Farley White"). They seek judicial review of the Board's rescission of an order requiring Verizon to cease operation of a wireless tower (Count 1), a determination of the legality of Mayor Tyer's alleged refusal to enforce the Board's order (Count 2), a determination of the legality of Attorney Pagnotta's involvement in the Board's decision-making process (Count 3), and a declaration of the parties' rights and duties with respect to the rescinded order (Count 4). The City Defendants and Verizon[4] now move to dismiss, pursuant to Mass. R. Civ. P. 12(b)(6), on the ground that the plaintiffs have failed to state a claim for certiorari relief. The City Defendants also move to dismiss, pursuant to Mass. R. Civ. P. 12(b)(1), on the ground

[1] Charlie Herzig, Judy Herzig, Mark Markham, Angela Markham, and Elaine Ireland
[2] As Mayor of Pittsfield
[3] Stephen N. Pagnotta, as City Solicitor; Pittsfield Cellular Telephone Company d/b/a Verizon Wireless, Farley White South Street, LLC; and Roberta Orsi, Brad Gordon, Stephen Smith, Kimberly Loring, and Dr. Jeffrey Leppo, as they are members of and are collectively the Pittsfield Board of Health.
[4] Farley White joins in Verizon's motion and makes no independent argument.

that the Superior Court lacks subject matter jurisdiction over ethics complaints against municipal employees or attorneys. After a hearing and review of the parties' submissions,[5] the City Defendants' motion is **allowed in part** and Verizon's motion is **allowed**.

FACTUAL BACKGROUND

The following facts are taken from the allegations of the complaint and the exhibits attached thereto.

I. Board of Health Emergency Order

The plaintiffs are six residents of Pittsfield, who reside on various streets in the so-called "Shacktown" neighborhood. Verizon leased land at 877 South Street for the construction of a wireless tower and base station, and obtained a local land use permit issued by the City's Department of Community Development toward that purpose. Construction of the tower was completed and the facility began transmitting on August 21, 2020.

Shortly thereafter, the plaintiffs and other residents of the Shacktown neighborhood (approximately 17 identified individuals, in total) began reporting a range of symptoms including headaches, sleep problems, heart palpitations, tinnitus, dizziness, nausea, skin rashes, and memory and cognitive problems. The plaintiffs contend that these are symptoms of a condition called electromagnetic sensitivity ("EMS"), also known as electro-hypersensitivity ("EHS"), and that they result from exposure to radio frequency radiation coming from the Verizon tower.

The Pittsfield City Council asked the Board to look into and report on these complaints regarding the Verizon tower. The Board's investigation took approximately eighteen months, during which it reviewed over 1,000 studies and interviewed scientists and medical

[5] The court is in receipt of an *amicus curiae* letter from the Massachusetts Association of Health Boards which, while it addresses the merits of the plaintiffs' claims, is not relevant to the procedural issues at hand. The court is also in receipt of an *amicus curiae* brief and supplement from James Wilusz, R.S., on the issue of whether the Board's authority to act is preempted by Federal statute, which likewise is beyond the scope of the present motions.

professionals. Ultimately, it concluded that a number of individuals in the Shacktown neighborhood had suffered adverse health effects as a result of exposure to radio frequency radiation from the Verizon tower, and that they had been constructively evicted from their homes, which were rendered uninhabitable by the radiation.

On April 2, 2022, the Board issued a twenty-four page[6] emergency order ("Order"), requiring Verizon and Farley White to show cause why the Board should not issue a cease-and-desist order to discontinue operation of the Verizon tower, as a public health nuisance. The Order contains a detailed summary of the evidence presented to the Board regarding the negative health effects of radio frequency radiation, including evidence presented by Verizon and by an expert it retained to make a presentation to the Board (who the Board determined was not credible). It also contains specific factual findings by the Board, such as that "Shacktown residents have suffered, and are continuing to suffer, negative health effects from the continued operation of the [Verizon tower] since it was activated in August 2020."[7] Complaint, Exh. 1, p. 11. As a result, the Board found that the Verizon tower "is a public nuisance, a cause of sickness, and a trade which may result in a nuisance or be dangerous to the public health . . . ." Exh. 1, p. 14. It further found that the Verizon tower "creates conditions that impact occupants of a dwelling to the point that it renders a dwelling unfit for habitation . . . ." *Id.* The Order gave Verizon and Farley White seven days from the date of issuance of the Order to request a hearing, and provided that if they failed to do so, the Order would "become and constitute a notice of discontinuance requiring that [Verizon and Farley White] abate and eliminate all activities and operations leading to the

[6] The Order is comprised of slightly more than fourteen pages of discussion and findings, with a further nine pages of appendices listing examples of the evidence presented and links to the Board's video archive of its relevant meetings, and a signature page.

[7] The Board identified by name eleven Shacktown residents, including the plaintiffs, from whom it had received evidence and who it concluded "have been or are being injured by the continued operation of the [Verizon tower]." Exh. 1, pp. 12-13.

present and ongoing nuisance and violations of the State Sanitary Code at their own expense," within a further seven days after the expiration of the deadline to request a hearing (i.e., fourteen days after issuance of Order).[8]

Verizon did not request a hearing as set forth in the Order. On April 11, 2022, the Board issued a cease-and-desist order regarding operation of the Verizon tower.

II. Federal Suit

Before the Board issued the Order, the city solicitor, Attorney Pagnotta, told the Board that he lacked expertise in telecommunications law and that he had an ethical conflict that would prohibit him from representing the Board in any suit filed by Verizon. As a result, he advised the Board to seek outside counsel. He also advised the Board that any Federal litigation could potentially involve expensive discovery issues, beyond the Board's administrative record, and that the City could be liable for Verizon's attorney's fees and costs.

The Board requested Attorney Pagnotta's assistance in securing outside counsel. He explained what would be necessary in any contract with outside counsel, and advised the Board that the City Council would have to approve that contract, but did not provide any other assistance. The Board identified a potential firm and secured a proposal, which it provided to the City Council on April 26, 2022. The City Council tabled the matter until May 10, because it required an Executive Session.

On the afternoon of May 10, Verizon filed suit in Federal district court seeking a declaration that Board lacked authority to issue the Order because it was preempted by the

[8] At oral argument, the City Defendants asserted that the Order contained a provision stating that it could be withdrawn without prejudice if legal counsel was not retained prior to any judicial or administrative proceeding. However, no such provision appears in the copy of the Order attached as Exhibit 1 to the plaintiffs' complaint, and there is no record before the court of the Board adopting the Order subject to a separate provision or statement to that effect.

Federal Telecommunications Act of 1996 ("TCA"). Attorney Pagnotta attended the City Council Executive Session that day and advised them of the lawsuit. He also told them that the firm identified by the Board as potential outside counsel could not attend the meeting.[9]

Attorney Pagnotta also, at some unspecified time, advised the City Council that the Board's Order was in conflict with the land use permit issued by the City's Department of Community Development, and that it should not approve funds to hire outside counsel or otherwise defend against Verizon's Federal suit, because it would be an expensive lost cause. Specifically, the plaintiffs allege that Attorney Pagnotta "purposefully or negligently" failed to advice the City Council and the Board that "[under Massachusetts law] an activity or use with a zoning permit (as is the case here) may still be declared a nuisance and the health board can require that it be abated." Compl. ¶ 56(d). They further allege that Attorney Pagnotta "fail[e]d to provide recommendations for outside counsel" and "mischaracteriz[ed] the nature of the suit Verizon Wireless had brought, the relief available . . ., the process that would apply, the type of judicial review that would apply and the likely costs the City would incur . . . ." Compl. ¶ 57. They characterize the legal advice Attorney Pagnotta allegedly provided as "fearmonger[ing]," Compl. ¶58, and "threaten[ing]," Compl. ¶ 59. Ultimately, the plaintiffs declare, Attorney Pagnotta "improperly used his role as general counsel for the city to undercut and frustrate the Board's independent authority" and "convinced the City Council that it should not approve fund for outside counsel or incur any cost for a legal defense . . . ." Compl. ¶ 60. The court wishes to emphasize that while, for purposes of the present motion, it takes the allegations of the complaint as true insofar as they make factual assertions that Attorney Pagnotta improperly interfered in the

[9] It is unclear from the allegations of the complaint whether Attorney Pagnotta represented to the Board that potential outside counsel was prohibited from attending an Executive Session of the City Council, or whether they were merely unavailable.

Board's decision-making process, the court does not accept the plaintiff's legal conclusions regarding the viability, practicality, or cost of defending the Board's Order against Verizon's Federal lawsuit.

Ultimately, the City Council took no action on the Board's request for approval of outside counsel. It advised the Board to instead seek a resolution that would not involve litigation. The Board made various efforts to engage Verizon in negotiations, but Verizon maintained that the Board lacked legal authority to issue the Order.[10] The Board held its next meeting on June 1, 2022, which Attorney Pagnotta again attended. At that meeting, the Board voted to rescind the Order.

The court notes that the complaint contains no information about the rescission process: whether the Board had any record before it of Attorney Pagnotta's advice or other factors relevant to that decision; whether it made factual findings or stated its reasons for the rescission, either in the record of proceedings or in a written decision; whether the plaintiffs or other members of the public were able to speak or contribute to the record; or even whether the vote was taken in public or in a closed session. However, there is at least some evidence that the rescission was done in accordance with a preexisting condition or stipulation that the Order could be rescinded if outside counsel was not obtained prior to any administrative or legal challenge to the Order's validity.

III. Additional Allegations Regarding Mayor and City Solicitor

[10] The complaint does not specify how, when, or in what form the Board reached out to Verizon. The court infers that it did so in some capacity, reading the allegations of the complaint as generously as possible. See, e.g., Complaint, ¶ 72 ("The Board tried to get Verizon Wireless to engage in a collaborative effort to resolve the problem and entered the Emergency Order only because Verizon Wireless refused all entreaties to do so and stood its ground solely on the proposition that the Board of Health lacked the authority to [take action]").

Mayor Tyer's husband is on the board of a non-profit entity, the Pittsfield Economic Revitalization Corporation ("PERC") and, in his role as treasurer, is responsible for custody and distribution of funds received by PERC from the City (among other sources).

Another PERC board member, Deanna Ruffer, is a co-director of the City's project team for administration of Federal funds received by the City under the American Rescue Plan Act ("ARPA"), and in that capacity participated in the decision to award approximately $350,000 in ARPA funds to PERC. Ruffer was also, until December 2021, head of the Department of Community Development, the body that issued the land use permit for the Verizon tower. The Department of Community Development is currently involved in separate litigation regarding that permit, which abutters (including the Markhams, plaintiffs in this suit) contend was issued without adequate notice. In March of 2022, Mayor Tyer assigned Ruffer to respond to inquiries from the Board regarding the Order. Mayor Tyer also refused to meet, or delayed meeting with the Board, regarding the Order both before and after its issuance.

Attorney Pagnotta, in addition to his position as city solicitor, is a managing partner at the law firm of Donovan, O'Connor, and Dodig, which is also counsel for the City Defendants in this case.[11] The firm has previously served as counsel for North Adams Tower Company, as well as for two app development companies. In addition, one attorney at the firm has served as trademark counsel for two app development companies.

DISCUSSION

I. Count 1 - Certiorari Review

In deciding a motion to dismiss for failure to state a claim, the court must "look beyond the conclusory allegations in the complaint," *Curtis* v. *Herb Chambers I-95 Inc.*, 458 Mass. 674,

[11] The plaintiffs previously moved to disqualify the firm due to alleged conflicts of interest, which was denied.

675 (2011), and determine if the nonmoving party has pleaded "factual allegations plausibly suggesting (not merely consistent with) an entitlement to relief" (citation omitted). *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623, 636 (2008). In doing so, the court accepts as true "all facts pleaded by the nonmoving party." *Jarosz* v. *Palmer*, 436 Mass. 526, 529 (2002) (citation omitted). It also accepts "such inferences as may be drawn [from those facts] in the [nonmoving party's] favor." *Blank* v. *Chelmsford Ob/Gyn, P.C.*, 420 Mass. 404, 407 (1995).

The court construes Count 1 of the complaint, styled, "Appeal of Decision," as a claim against the Board for certiorari review of its decision to rescind the Order, pursuant to G.L. c. 249, § 4. "The function of a civil action in the nature of certiorari . . . is 'to relieve aggrieved parties from the injustice arising from errors of law committed in proceedings affecting their justiciable rights when no other means of relief are open.'" *Figgs* v. *Boston Hous. Auth.*, 469 Mass. 354, 361 (2014), quoting *Swan* v. *Justices of the Superior Court*, 222 Mass. 542, 544 (1916). It is "a limited procedure reserved for correction of substantial errors of law apparent on the record created before a judicial or quasi-judicial tribunal." *School Comm. of Hudson* v. *Bd. of Educ.*, 448 Mass. 565, 575-576 (2007). "[T]he requisite elements for availability of certiorari are (1) a judicial or quasi-judicial proceeding; (2) a lack of all other reasonably adequate remedies; and (3) a substantial injury or injustice arising from the proceeding under review." *Boston Edison Co.* v. *Bd. of Selectmen of Concord*, 355 Mass. 79, 83 (1968).

"When distinguishing a quasi-judicial agency proceeding from a legislative or purely administrative one, we have looked generally to the form of the proceeding and examined the extent to which it resembles judicial action." *City of Revere* v. *Massachusetts Gaming Comm'n*, 476 Mass. 591, 600 (2017). Relevant factors include:

> "(1) whether the proceeding is preceded by specific charges; (2) whether the proceeding involves sworn testimony by witnesses subject to cross-

> examination, or a party attesting to certain facts, as opposed to unsworn statements by interested persons advocating for or against a proposed new policy; (3) whether the agency conducts an investigation into the veracity of attested-to facts; (4) whether the proceeding culminates in an individualized determination of a party's entitlement to some benefit, or an individualized course of discipline, as opposed to culminating in the adoption of a rule of general applicability; and (5) whether the proceeding is followed by the adoption of formal findings of fact" (internal citations omitted).

Id. at 600-601.

This case presents a close question, on the facts alleged in the complaint. On the one hand, the first and third factors weigh in favor of an administrative proceeding: there were no specific charges made, and the Board did not conduct an investigation into the veracity of the facts attested to by the plaintiffs (and others). On the other, the fourth and fifth factors weigh in favor of a quasi-judicial one: the ultimate outcome of the proceeding was an individualized determination with respect to the continued operation of the Verizon tower, and the Order contained numerous factual findings by the Board. The second factor also weighs somewhat in favor of a quasi-judicial proceeding: although no cross examination was conducted, the Board did not merely hear from parties with various interests in the continuation or cessation of the Verizon tower's operations, but rather took evidence (including, notably, expert testimony from an expert retained by Verizon) regarding specific facts, such as the injuries suffered by the plaintiffs and whether radio frequency radiation was capable of causing such injuries. Importantly, although the decision to rescind the Order was made at a later date, even the defendants argue that it was done in accordance with conditions or stipulations made at the time the Order was originally drafted and issued, based on the Board's consideration of all the evidence at that time. On balance, "the category of quasi-judicial proceedings is flexible enough" to include the proceedings before the Board of Health in this case, including its determination of

the conditions under which it might rescind the Order. *City of Revere*, 476 Mass. at 602. The first factor for availability of certiorari review is, therefore, satisfied.

Second, the plaintiffs must show they lack any other "reasonably adequate" remedy. *Boston Edison Co.*, 355 Mass. at 83. This is a straightforward question, as there is no vehicle other than certiorari review by which the plaintiffs may challenge the Board's decision. The City Defendants effectively conceded as much, as they identify judicial review under G.L. c. 30A, § 14, or any other review mechanism, as an available alternative; rather, they argue that the plaintiffs have other ways of attempting to redress the harms they allegedly have suffered from radio frequency radiation, such as filing a civil suit (presumably against Verizon) for damages, or advocating for changes to the TCA or to the radiation emissions standards set by the FCC. These are not the types of remedies that constitute adequate alternatives to certiorari review, which is concerned with the propriety of the Board's action. See *City of Revere*, 476 Mass. at 602 ("the point at which ordinary avenues *of review* vanish . . . is precisely where the extraordinary remedy of certiorari may come into play" (emphasis added)). Compare *Hoffer* v. *Bd. of Reg. in Medicine*, 461 Mass. 451, 457 (2012) (plaintiff challenging revocation of license lacked other reasonably adequate remedy, where review not available under G.L. c. 30A, § 14, or G.L. c. 112, §64) with *Cumberland Farms, Inc.* v. *Planning Bd. of Burne*, 56 Mass. App. Ct. 605, 608 (2002) (plaintiff challenging zoning decision had other reasonably adequate remedy, in form of review under G.L. c. 40A, § 17).

Third, and finally, the plaintiffs must show that they have suffered a "substantial injury or injustice from the proceeding under review." *Boston Edison Co.*, 355 Mass. at 83. "The injury requirement has been interpreted as requiring (1) a justiciable injury, (2) that is particular to the plaintiff rather than common to the public or a segment thereof, and (3) that is more than

'hypothetical.'" *Hoffer*, 461 Mass. at 457 n.8, quoting *Fiske* v. *Selectmen of Hopkinton*, 354 Mass. 269, 271 (1968). See *Frawley* v. *Police Comm'r of Cambridge*, 473 Mass. 716, 727 (2016) (same). The existence of a "justiciable injury" is not limited to constitutional or statutory rights, but may be located in, for example, "a legitimate expectation, backed up by substantial investments of resources in the application process, that the [agency whose action is being challenged] would follow the law . . . ." *City of Revere*, 476 Mass. at 604 (holding injury requirement met). The plaintiffs here, all of whom gave evidence before the Board regarding the negative health effects they attribute to the Verizon tower, similarly had a legitimate expectation that the Board would exercise its discretion to issue or rescind the Order based on appropriate factors, and not act arbitrarily or capriciously.

The second and third requirements, however, are more problematic. This is not a case in which the plaintiffs challenge some government action that directly impacts their rights, such as in *City of Revere* (challenging denial of a gaming license) or *Hoffer* (challenging denial of medical license) or *Frawley* (challenging denial of identification card). The plaintiffs' injury is more remote: they contend that the Order was supported by substantial evidence (including their own testimony) regarding the danger to public health posed by the Verizon tower; that its rescission was therefore arbitrary, capricious, and *not* supported by substantial evidence; and thus that they have continued to suffer negative health effects attributable to the Verizon tower, from which the Board should have protected them. Some analogy, however, is to be found in *Fiske*, in which the court considered that town residents seeking certiorari review of a permit for "earth removal operations" lacked any particularized injury, since there was no evidence that their homes lay particularly close to the work site and the harms they alleged (such as devaluation of property, traffic hazards, and further undesirable land development) were both

hypothetical and shared with the public at large (i.e., other residents). 354 Mass. at 271. Here, by contrast, the injuries alleged by the plaintiffs are both specific and concrete; they are not hypothetical, general statements about quality of life, but – taking as true the allegations of the complaint – consist of identifiable, negative health effects the plaintiffs have actually suffered since, and which are attributable to, the operation of the Verizon tower in proximity to their homes in the Shacktown neighborhood, as distinct from other areas of Pittsfield. They have therefore sufficiently alleged a substantial injury. As a result, all three factors bearing on the availability of certiorari review are met, and Count 1 may not be dismissed.

In the alternative, the City Defendants and Verizon argue that even if the three-factor test for availability of certiorari review is met, such review should resolve in their favor because the TCA preempts any state or local regulation of the Verizon tower, and the Board therefore exceeded its authority in issuing the Order, making rescission of the Order a decision supported by substantial evidence that was not arbitrary or capricious. These arguments are not appropriate for resolution on a motion to dismiss; to resolve them would require the court to do exactly that which the plaintiffs seek, in Count 1, to have it do: conduct a judicial review of the Board's decision. Should the parties file motions for judgment on the pleadings or for summary judgment, and the question is fully briefed and argued, the court will take it up at that time.

II. Count 2 – Cancellation Pursuant to G.L. c. 268A, § 21(a) (Mayor)

Count 2, styled "Mayor Refusal to Enforce Board Order," is difficult to parse. On the one hand, it seems to assert a claim against Mayor Tyer directly, insofar as she is named as a defendant and Count 2 specifically alleges that she violated her official duty under the Pittsfield City Charter to "cause the . . . orders of the city government to be enforced," and that her "actions in relation to the [Verizon tower], either directly or indirectly through subordinates,"

violated her ethical obligations under G.L. c. 268A, §§ 19 and 23. On the other hand, Count 2 seeks the same relief as Count 1: a judicial determination that rescission of the Order was unlawful, and an order vacating that rescission and remanding the matter to the Board. That is, it does not seek any remedy against Mayor Tyer directly.

Reading the complaint as generously as possibly, therefore, the court construes Count 2 as a claim against the Board seeking cancellation of the Board's decision to rescind the Order, pursuant to G.L. c. 268A, § 21(a). Section 21(a) provides:

> "a finding by the [State Ethics Commission] pursuant to an adjudicatory proceeding that there has been any violation of sections 2, 3, 8, 17 to 20, inclusive, or section 23, which has substantially influenced the action taken by any municipal agency in any particular matter, shall be grounds for avoiding, rescinding or canceling the action of said municipal agency upon request by said municipal agency on such terms as the interests of the municipality and innocent third persons require."

Under this statute, however, "a finding of a violation . . . by the commission after an adjudicatory proceeding and a request for rescission by the municipal agency are both prerequisites to the filing of a complaint seeking rescission . . . ." *Leder* v. *Superintendent of Sch. of Concord & Concord-Carlyle Reg'l Sch. Dist.*, 465 Mass. 305, 306 (2013). There has been no such proceeding before the State Ethics Board regarding Mayor Tyer's conduct, much less a finding that she in fact committed an ethics violation.[12] Because the statutory prerequisites have not been met, the plaintiffs have failed to state a claim for relief as to Mayor Tyer's alleged violations of §19 and § 23. See *Vasys* v. *Metropolitan Dist. Comm'n*, 387 Mass. 51, 56 (1982) (failure to comply with statutory prerequisite to suit is grounds for Rule 12(b)(6) dismissal). As to Mayor Tyer's alleged breach of her obligations under the Pittsfield City Charter, any such breach does not constitute a basis for relief under § 21(a), which is limited to specific statutory violations.

[12] Nor has there been a request by the Board for rescission of the allegedly tainted action (i.e., a request to rescind or cancel the rescission of the Order).

The nature of the claim set forth in Count 2 is obliquely confirmed by the plaintiffs' argument regarding why subject matter jurisdiction exists: "the claim is that the Mayor and Town Counsel improperly interfered with the [Board's] decision-making process . . . . As such, the allegations regarding potential violations of ethical obligations are similar to a court establishing a breach of a 'standard of care' through the alleging violations [*sic*] of ethical obligations." Opp. at 17. In other words, Counts 2 and 3 seek a determination as to whether Mayor Tyer or Attorney Pagnotta committed ethical violations that tainted an action by the Board (rescission of the Order), so as to justify vacating that action. If § 21(a) is not the appropriate vehicle for such relief, the court is at a loss to discern what is. The plaintiffs cannot simply plead around the statutory prerequisites by invoking the substance of the statute without citing it explicitly. Therefore, Count 2 must be dismissed.[13]

III. Count 3 – Cancellation Pursuant to G.L. c. 268A, § 21(a) (City Solicitor)

Count 3, styled "City Solicitor Conflict, Improper Coercion," must be dismissed for the same reasons as Count 2. Like Count 2, Count 3 appears to state a claim against Attorney Pagnotta, asserting that he violated "the rules of legal ethics" and § 23, but in fact seeks the same relief as Count 1, in the form of an order vacating the Board's rescission of the Order. It does not seek any remedy against Attorney Pagnotta directly.

As with Count 2, therefore, the court construes Count 3 as a claim against the Board seeking cancellation of the Board's decision to rescind the Order, pursuant to G.L. c. 268A, § 21(a). For the same reasons set forth in Section II, *supra*, Count 3 is subject to dismissal

[13] The plaintiffs argue that "[a] a ruling by [the commission] and a request by the municipal agency is at most a **prerequisite for *relief*** based on an ethics violation" (emphasis in original). Opp. at 16. Counsel, however, does not state clearly (or at all) what relief Count 2 could possibly be seeking, distinct from the certiorari review sought in Count 1, if not "relief based on an ethics violation" by Mayor Tyer. Insofar as the plaintiffs argue that the Supreme Judicial Court left open "whether a private cause of action exists under c. 268A," Opp. at 16. that is a misreading of *Leder* -- the footnote in question concerns the issue of the plaintiff's standing to invoke § 21(a) as a private citizen, not the existence of some free-floating remedy under c. 268A generally. 465 Mass. at 313 n.13,

insofar as it is based on Attorney Pagnotta's alleged violations of § 23, because there has been no proceeding before the State Ethics Board regarding his conduct. Likewise, as with Mayor Tyer's alleged breach of her obligations under the Pittsfield City Charter, Attorney Pagnotta's alleged violations of "legal ethics" fall outside the scope of relief available under § 21(a). Count 3 must therefore also be dismissed.

IV. Count 4 – Declaratory Judgment

As set forth above, Counts 1, 2, and 3 assert claims only against the Board. Count 4, styled "Declaratory Judgment," asserts that "[t]here exists an actual controversy as to whether the Board properly decided to rescind the Emergency Order" and purports to "seek a declaration of the rights and obligations regarding the issues raised in Counts 1, 2, and 3." Compl. ¶¶ 92-93. The court addresses the declarations sought pertaining to each defendant in turn.

A. Mayor Tyer and Attorney Pagnotta

Insofar as Count 4 seeks a declaration that the Board's rescission of the Order was invalid due to ethical violations by Mayor Tyer and Attorney Pagnotta,[14] it simply reformulates the claims in Counts 2 and 3, and must be dismissed on the same basis. To the extent that it seeks freestanding declarations that Mayor Tyer or Attorney Pagnotta behaved unethically, or that the Board is "exempt from the Mayor's direction and control,"[15] such declarations would not resolve any "actual controversy" and are therefore not appropriate subjects for a declaratory judgment action. See *Massachusetts Ass'n of Indep. Ins. Agents & Brokers, Inc.* v. *Comm'r of Ins.*, 373 Mass. 290, 292 (1977) ("the declaration issued is intended to have an immediate impact on the rights of the parties").

[14] Compl. ¶ 94(e)-(f), (h).
[15] Compl. ¶ 94(b)-(d), (g).

Moreover, such a declaration would fall outside the scope of the declaratory judgment statute where nothing in the facts suggests a repeated pattern of conduct by Mayor Tyer or Attorney Pagnotta. See *Grady* v. *Comm'r of Correction*, 83 Mass. App. Ct. 126, 137 n.9 (2013), quoting G.L. c. 213A, §3 (to maintain declaratory judgment action, plaintiff must "demonstrate that the [alleged] violation extends beyond the plaintiff's individual case and is 'consistently repeated' by the administrative agency").

B. Verizon and Farley White

Count 4 does not appear to seek any declaration pertaining to the rights or duties of Verizon or Farley White, and the court cannot discern any basis for one from the facts set forth in the complaint. The complaint does not, for instance, allege that Verizon or Farley White improperly interfered in the Board's decision-making process, whether directly or indirectly. Its allegations pertaining to Verizon and/or Farley White's conduct are limited to (1) Verizon's operation of the tower and (2) Verizon's filing of a Federal lawsuit challenging the Order. While these actions are part of the factual background underlying this lawsuit, they are only tangentially related to the propriety of the Board's action. Nor do the plaintiffs directly seek to compel Verizon to do, or enjoin Verizon from doing, anything; at most, they seek reinstatement of the Order, which might in turn lead to the *Board* seeking to compel Verizon to take some action or otherwise comply with the Order. Therefore, although not for the reasons set forth in Verizon's memorandum, Count 4 is dismissed insofar as it purports to state a claim against Verizon or Farley White.

C. The Board

Finally, Count 4 seeks a declaration that the Board's rescission of the Order was improper, for a plethora of reasons.[16] Notably although the City Defendants assert that the complaint "should be dismissed in its entirety," Memo. (Paper #33) at 16, their arguments are confined to the unavailability of certiorari review generally (as to Count 1) and the lack of any other claim against Mayor Tyer and Attorney Pagnotta (as to Counts 2 and 3). They do not address the plaintiffs' separate declaratory judgment claim. The plaintiffs, on the other hand, argue that once the Board determined that the Verizon tower constituted (among other things), a "nuisance[] . . . and cause[] of sickness within its town . . . which [was], in its opinion, . . . injurious to the public health," it had a statutory duty under G.L. c. 111, § 122, to "destroy, prevent, or remove" the Verizon tower – and that rescission of the Order breached this duty, and was therefore unlawful. Insofar as the defendants make no specific argument for dismissal of Count 4 as against the Board, and insofar as the declaration sought by the plaintiffs largely tracks the relief sought in Count 1 for certiorari review, it therefore survives. See *Town of Marion* v. *Massachusetts Hous. Fin. Agency*, 68 Mass. App. Ct. 208, 210 (2007) (plaintiff town challenged housing eligibility determination through action for both certiorari and declaratory judgment).

ORDER

For the foregoing reasons:

1) The City Defendants' Motion to Dismiss (Paper # 32) is **ALLOWED IN PART**, as to Counts 2 and 3, which lie solely against the Pittsfield Board of Public Health, and

[16]Compl. ¶ 94(a)

as to so much of Count 4 as asserts a claim against Mayor Tyer or Attorney Pagnotta.

2) The City Defendants' motion is otherwise **DENIED**, as to Count 1, which lies solely against the Board, and as to so much of Count 4 as asserts a claim against the Board.

3) Verizon's Motion to Dismiss (Paper #46), in which Farley White joins (Paper #41), is **ALLOWED**. Count 4 is dismissed insofar as it purports to state a claim against Verizon or Farley White, and no other claims lie against those defendants.

Francis E. Flannery
Justice of the Superior Court

DATED: June 8, 2023

THE COMMONWEALTH OF MASSACHUSETTS
BERKSHIRE S.S. SUPERIOR COURT
FILED JUN 08 2023 FILED