

COMMONWEALTH OF MASSACHUSETTS

NANTUCKET, ss.

SUPERIOR COURT
2175CV00004JAMES BARROS & another¹vs.NANTUCKET SELECT BOARD & others²**MEMORANDUM OF DECISION AND ORDER ON
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Plaintiffs James Barros and Rose Marie Samuels filed this action alleging violation of their right to free speech by the Nantucket Select Board, the Nantucket Chief of Police, and the Nantucket Town Manager. For the reasons discussed below, the Defendants' Motion For Summary Judgment is **ALLOWED**.

BACKGROUND

The summary judgment record reveals the following facts. The African Meeting House on Nantucket is a place of public accommodation that has been an important civic symbol for the island's small Black community. During the evening or overnight hours of March 10 or 11, 2018, the African Meeting House was vandalized when someone spray-painted racist and sexually explicit graffiti on the outside of the building. The Nantucket Police Department labeled the incident a hate crime and investigated it until June 19, 2020, when it turned over the investigation to the State Police and Cape & Islands District Attorney. James Barros ("Barros") and Rose Marie Samuels ("Samuels") are Black residents of Nantucket. Samuels and Barros felt threatened and intimidated by the words "N----s leave!" spray painted on the doors of the

¹Rose Marie Samuels

²Dawn Hill Holdgate, Elizabeth Gibson, William Pittman, Dylan Ponce, and John Doe

African Meeting House. After this incident, they questioned their safety in public places on the island, especially at night.

Nantucket Police Detective Sergeant Clinger led the African Meeting House investigation. In October of 2018, Barros saw Clinger off duty at Island Lumber, and asked him how the hate crime investigation was going. Sergeant Clinger stated that people were talking shit about “N----s leave” and “brothers and sisters talking shit.” Barros did not know what Clinger was thinking when he stated this and was unsure whether it was a reference to what was spray-painted on the African Meeting House. He told Clinger to grow some balls and do his job.

Barros had heard rumors that several high school students were involved: Alex Gibson, Michael Sarnie, and John Sayle. Sergeant Clinger told Nantucket Police Chief William Pittman (“Chief Pittman”) that Barros might know the identity of the suspect. Chief Pittman asked Clinger to interview Barros so that the police could properly investigate his information. On November 9, 2018, Sergeant Clinger asked Barros to come to the police station for an interview and Barros agreed. However, Barros did not show up for an interview.

On November 19, 2018, Barros handed Clinger a letter stating:

You expressed displeasure regarding my efforts to discover and bring to justice whomever defiled the African Meeting House last March. When I left this chance meeting I was concerned about your remarks and the hostility that you expressed.

The second time we spoke was on November 8, 2018 when you called me. You requested that I meet with you. I initially told you that I was willing to meet and you said that you would set the meeting up.

However, upon reflection I do not think that such a meeting would be productive unless the following conditions and assurances are agreed to before the meeting. They are as follows:

1. That the meeting be recorded and that I be provided with a copy of the recording with the understanding that the recording’s content shall not be disclosed by me

unless the content becomes relevant in litigation regarding the African Meeting House incident. I would provide reasonable notice of my intention to disclose the content.

2. That you, the Nantucket Police Department, the State Police and the District Attorney for Barnstable County and the Islands disclose in advance of the meeting whether or not I am the subject, target or a potential witness in any civil or criminal litigation contemplated by you or the above-referenced agencies.

These conditions are hardly burdensome and do not breach any privileges surrounding any investigation. In fact, these conditions would reflect the good faith of all participants.

Barros had been told by different people to watch his back because he was a “shit stirrer.”

The Nantucket Select Board (“the Board”) is comprised of five elected members whose powers and authority are set forth in the Nantucket Town Charter. The Board has the authority to adopt rules for the conduct of business and fix times and places for meetings. The Board’s public comment policy in effect in March of 2020 stated: “[p]ublic comment is for bringing matters of public interest to the attention of the board. The board welcomes concise statements on matters that are within the purview of the Board of Selectman.” The policy also stated: “Any personal remarks or interrogation or any matter that appears on the regular agenda are not appropriate for Public Comment.” In addition, the policy stated: “public comment is not to be used to present charges or complaints against any specifically named individual, public or private.”³

On December 11, 2018, Barros submitted a letter to the Board entitled: “Letter and Request to the Board of Selectmen and the Citizens of Nantucket Regarding the Racist Incident at the African Meeting House” in which he suggested that the perpetrators be banished from the island and expressed the opinion that the Nantucket Police Department was unhelpful and

³Effective February 17, 2021, the Board adopted a new Agenda Protocol that does not prohibit charges or complaints against a specifically named individual, or personal remarks or interrogation.

unsuccessful in solving the crime. Barros's letter referenced statements made by Chief Pittman and Sergeant Clinger in a news article and questioned whether police had knocked on hundreds of doors and spent hundreds of hours investigating the incident. Barros's cousin had a tenant directly across from the Meeting House and police had not knocked there. Barros's letter demanded documentation of the neighborhood canvass and the fifteen people interviewed by police. In the letter, Barros requested that the Board place the matter on its agenda.

By letter dated December 12, 2018, Chief Pittman wrote to Barros, stating that he had a copy of Barros's letter to the Board and agreed that the crime had to be solved to make residents feel safe. However, Pittman stated: "What I disagree with you about is your assertion that the NPD has been unhelpful. We have put a lot of effort into solving this crime. But, without witnesses, physical evidence or reliable third hand information that can be used to identify a suspect we have not been successful in solving it." Pittman's letter stated that police had been following up on tips and rumors and he did not understand social media posts suggesting a police cover up. Pittman's letter continued:

Det. Sgt. Clinger has tried to make contact with you to schedule an interview so that you could let us know who you believe is responsible for this reprehensible act . . . However, after being requested to come in for an interview you hand delivered a letter to Det. Sgt. Clinger setting conditions for sitting down for an interview. . . Requests such as this are not normal and not the way it usually works. But, that being said, as far as I know at this point you are not considered a suspect but you are possibly a person with information regarding the crime. Whether that turns into something else depends on what information you possess and how you came into possession of it. To my knowledge the State Police and the Cape and Islands District Attorney's Office are not conducting any independent investigation into this crime so they would not be in a position to make any determination about your status in relation to it. Why you won't share the information that you think you have with the NPD is baffling.

Pittman's letter then noted that Sergeant Clinger had tried to reach Barros on four different dates to schedule an interview and concluded:

I think it is fair to say that Det. Sgt. Clinger has made a good and reasonable attempt to get the information that you led him to believe that you possess. However, you are not obligated to come in for this voluntary interview. I do however encourage you to provide whatever information you have that might be helpful in getting this case solved. That would be the right thing to do for the entire community.

Barros did not find Chief Pittman's letter to be threatening but he did not trust the Nantucket police. Nor did he understand why police refused to interview him somewhere other than the police station, when he requested that any interview take place at his house, his lawyer's office, or the office of a civil rights representative. Barros did not have information about the perpetrator of the hate crime other than rumors he had heard. However, he wanted a list of names police had interviewed because he was concerned about the pace of the investigation. Curtis Barnes, Rick Appleton, and Linda Williams told Barros to watch his back because one suspect was the son of Town Manager Elizabeth Gibson ("Gibson").

The Board held a meeting on December 19, 2018.⁴ During the public comment period, Barros spoke and stated that he wanted to know the status of the investigation. The Board responded that the matter was under investigation. Barros told those in attendance that Sergeant Clinger was going to set up an interview but had not yet spoken to him. Barros stated that he asked Clinger to come to his house where he feels safe and Clinger gave him a letter stating that he had refused to come in for an interview. Barros stated that he did not refuse but wants police to come to him.

During the January 23, 2019 Board meeting,⁵ Board member Jason Bridges stated that the Board, Gibson, and Chief Pittman had met in an executive session about the investigation. He

⁴The Court viewed a recording of this meeting provided by the parties on a USB drive.

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then read a summary of what the Board learned, which was that the Nantucket Police Department knocked on 52 doors, talked to 42 people who might have information, conducted seven formal interviews, and prepared nineteen separate reports. In addition, the Nantucket Police Department had received technical assistance from the FBI and was keeping the Attorney General and the Cape and Islands District Attorney updated. Chief Pittman told the Board the investigation was active and the case was still open. During the public comment period, Barros told the Board, “Your silence discloses your guilt and lack of leadership.” Barros opined that the investigation had been dragging on too long and “shame on them” for not doing more. He noted that several names were circulating on the island and he had asked police to meet with him at his uncle’s house in Marion because his uncle was a civil rights activist who had questions. Barros stated that he never heard back and concluded by remarking, “Something is wrong with this picture.”

During the public comment period of the March 27, 2019 Board meeting,⁶ Barros noted that he had requested a response from the Board about the lack of progress in the African Meeting House investigation but had yet to get one.

At the June 19, 2019 Board meeting,⁷ Chief Pittman commended Sergeant Clinger for his diligence in the investigation and following up leads. Pittman stated that he was disturbed by the rumors on Facebook and social media. He stated that the Nantucket Police had decided to turn the investigation over to the State Police and Cape and Islands District Attorney because a fresh set of eyes was needed. Chief Pittman stated that the rumors of a police cover up were untrue but because the community has no confidence in the Nantucket Police Department, he

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turned over the investigation to the State Police. During the public comment portion, a white woman spoke briefly, expressing support for the police department and denouncing the “rumor mill” that might affect the futures of young people going off to college. No member of the Board interrupted her public remarks.

In February of 2020, Sergeant Clinger told Barros not to worry because police had a suspect and within 24 hours there would be an arrest and the whole island would know who did it. However, no arrest was made at that time.

Samuels attended a Board meeting on March 4, 2020.⁸ During the public comment period, she asked whether there was any update on the African Meeting House investigation. The Board Chair, Dawn Holdgate (“Holdgate”), responded that the entire matter had been referred to the State Police. Samuels asked, “After all this time, nobody knows who did it.” Holdgate responded, “Apparently not.” Samuels then commented, “Strange” and walked away from the microphone. Chief Pittman then stated that he could not give the Board an update from the State Police because the reason the investigation was referred to State Police was the implication in the community that someone from the Nantucket Police Department may have been involved. He explained that the State Police were not sharing information with the Nantucket Police Department to avoid any appearance of influencing the investigation. Chief Pittman then urged people not to speculate and stated: “I have to point out that the individual who made these allegations has not yet talked to the State Police.”

The Board held a meeting on March 11, 2020.⁹ During the public comment period, Samuels spoke about the fact that while riding his bicycle in 2018, her middle school son was

⁸The Court viewed a recording of this meeting provided by the parties on a USB drive.

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injured by a hit and run driver in a pedestrian crossing. Despite frequent inquiries, police never contacted her to update her on the investigation. Samuels noted that people told her nothing would be done because it was a Black kid.

Samuels then stated that she had asked Gibson yesterday why the African Meeting House investigation had taken two years and Gibson and Chief Pittman did not answer her truthfully. Samuels believed that Gibson was being dishonest because there were rumors that Gibson's son and nephew were involved. Gibson interrupted Samuels, stating, "Excuse me, Madame Chair, this is not the forum for this." Gibson again loudly interrupted Samuels to state, "Don't you dare say I did not speak truthfully, madame!" Samuels continued to speak, stating that residents of the community know who did it. Holdgate then interrupted, stating, "Rose Marie, we've got to end this." Samuels responded, "No, I am going to speak. If residents know ---" Gibson then interrupted, "No you are not going to speak!" As Samuels continued speaking, Gibson interrupted again, stating, "This is against the Board's regulations." Samuels felt threatened and intimidated by Gibson, backed away from the microphone, and sat down in her seat. She continued to speak from her seat, stating, "I can speak when I want to speak because my community is still suffering."

Gibson then interrupted Samuels, stating, "Madame Chair I would like to go on record to publicly state that I am completely dismayed and angry that someone would stand up at this meeting and say that I was untruthful about something. You can come to the Board at a later time if you have a charge to bring forward, but there is absolutely nothing I was untruthful about last week." From her seat, Samuels stated: "Everyone in the community knows the names." Gibson responded: "Then why don't they go to the police and tell them." As Samuels began to speak, Holdgate interrupted, stating that people need to take any information to the police. As Samuels

continued talking about the police failure to investigate her son's hit and run, Gibson turned to Board member Jason Bridges and asked, "Am I allowed to get up and leave?" She then got up and walked out of the room.

As Gibson walked down the aisle by Samuels, Gibson glared and pointed at Samuels and yelled, "Are you calling me a liar? Are you calling me a liar?" Samuels responded, "Yes."¹⁰ Gibson slammed the door on her way out of the meeting.

As Samuels continued speaking from her seat, Holdgate interrupted her and stated, "Rose Marie, you are not on the microphone. Maybe the Chief can get you some information about your son's accident. If you are going to keep talking, you have to come to the microphone, but I think we should probably end this conversation for tonight." Samuels then returned to the microphone and asked Chief Pittman to answer some questions. Holdgate stated, "I need to get control of this. You need to ask the questions through me and put them on the record and ask them through me." Samuels then asked Chief Pittman to disclose the identity of the person not cooperating with the investigation and the officers accused of covering up for their child. Chief Pittman stated from the audience that he would answer those questions, then took the microphone across the room from Samuels.

Chief Pittman stated: "This is an improper forum for this" and opined, "This is an improper inquisition." He then pointed to Barros and stated: "the individual who has made allegations, without naming names, is sitting right there in the room and you guys have entertained his speeches two or three times before you. . . . He implies that police officers or families of police officers . . . have been involved in this, yet he has refused to come forward and talk to the police . . . or the State Police . . . to give us the information he knows . . . Now we

¹⁰This exchange is not shown or heard on the recording but Samuels testified about it.

understand if he thinks we did it why he wouldn't want to tell us, that's why the case was handed over to the State Police so that they could do the investigation."

Barros testified that Pittman had a pistol under his vest when he pointed and Barros felt terrified. The pistol is not visible when viewing the recording. Barros was embarrassed and felt that Pittman was attempting to silence him for criticizing the police department's investigation. No member of the Board interrupted Chief Pittman's speech.

Chief Pittman stated that police could not guess who did it and if people had a name, tell them and they would pass it on to the State Police, but nobody had given them a name. He stated: "They just say everybody knows; well, everybody but us." Samuels then spoke again, stating that she had heard that three high school students were involved. Holdgate interrupted and told Samuels, "Please don't say names." Holdgate repeated that Samuels and others should go to the State Police and tell them what they know. Samuels then spoke for another twenty seconds, stating that after what her son went through, she cannot trust the Nantucket Police Department anymore. Samuels then sat down.

Barros then stepped up to the microphone and stated, "I cannot sit here and listen to the Police Chief tell a lie." Barros insisted that he would cooperate with the police if they came to his office or his uncle's office to talk but he had received a letter from the police stating that they do not do business like that. Barros stated that he had received an update from police two weeks earlier stating that the matter was going to be resolved because they know who it is. Barros opined that he does not trust this police department. Chief Pittman did not interrupt Barros when he spoke at the meeting. Holdgate interrupted to remind Barros that the investigation had been turned over to the State Police. Barros finished his comments, thanked the Board, and stated that his group was not going away.

Barros felt that the Board cut him and Samuels off when speaking because they are Black, but did not cut off Pittman, Gibson, or others who spoke at the meeting. After the March 11, 2020 meeting, Barros continued to speak publicly about the incident at the African Meeting House, and neither Chief Pittman nor Gibson ever told Barros not to speak about it. Neither Chief Pittman nor Gibson did anything after the March 11, 2020 meeting that threatened Barros. However, Barros began to lock his doors and stay home at night, and he began to have high blood pressure and difficulty sleeping. He was nervous because various people were suggesting that he should watch himself because he was pressing too hard on the investigation. In May or June of 2020, members of the State Police spoke to Barros about the investigation.

Samuels felt hurt and disrespected by the way she was spoken to at the March 11, 2020 meeting. However, she did not believe that Chief Pittman threatened or intimidated her during that meeting. Nor did Pittman do anything outside the March 11, 2020 meeting that made Samuels feel threatened or intimidated. Thereafter, Board meetings switched to Zoom because of the COVID-19 pandemic. Samuels attended several meetings by Zoom but did not speak during them. Several members of the Board reached out to her by text, including Holdgate, but she did not respond to their requests to meet.

During the Board's June 17, 2020 meeting,¹¹ Gibson appeared by Zoom during the public comment period and stated that she wanted to apologize to Samuels, the community, and the Board. Gibson stated that her actions during Samuels's public comments on March 11 were inappropriate. Gibson extended a "heartfelt apology" to Samuels, the Nantucket community, and the Board for overstepping the bounds of her position. She then stated that she and others in the Town administration were committed to concrete steps for positive racial equity change in Town

¹¹The Court viewed a recording of the meeting provided by the parties on a USB drive.

government. Gibson never apologized directly to Samuels. During discovery in this lawsuit, Samuels saw a Facebook post that was not written by Gibson, although Gibson was on the thread. The thread called Samuels a homophobic bitch and suggested that town officials should check Barros's criminal record.

In October of 2020, the Grand Jury indicted Jeffrey Sayle for misleading law enforcement in connection with the African Meeting House investigation. Sayle is the brother-in-law of Nantucket Deputy Police Charles Gibson and Town Manager Libby Gibson.

Barros and Samuels filed this action on January 26, 2021. Count I of the Third Amended Complaint seeks a declaratory judgment that the Town defendants violated Barros's and Samuels's right to free speech under art. 16 of the Declaration of Rights by silencing them at the March 11, 2020 Board meeting. Count II alleges that the Town defendants violated the Massachusetts Civil Rights Act, G.L. c. 12, §§ 11H and 11I ("MCRA"), by interrupting and attempting to silence Barros and Samuels during that Board meeting.¹² Count III alleges that Dylan Ponce and John Doe violated MCRA by spray painting a racial epithet on the doors of the African Meeting House.¹³

DISCUSSION

Summary judgment shall be granted where there are no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56. The moving party bears the burden of affirmatively demonstrating the absence of a triable issue and that the summary judgment record entitles it to judgment as a matter of law. Scholz v. Delp, 473

¹²On May 28, 2021, the Court (Wilkins, J.) dismissed Count II against Holdgate.

¹³On June 9, 2021, the Court (Wilkins, J.) severed Count III from Counts I and II for all purposes except discovery. On June 6, 2022, the Court (Gildea, J.) entered summary judgment in favor of Barros and Samuels against Ponce.

Mass. 242, 249 (2015), cert. den., 136 S.Ct. 2411 (2016). The moving party may satisfy this burden either by submitting affirmative evidence that negates an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of her case at trial. Id.

Count I

Count I of the plaintiffs' complaint seeks a declaratory judgment that the Board, Gibson, and Chief Pittman violated the plaintiffs' free speech rights at the March 11, 2020 meeting. The Town defendants first contend that they are entitled to judgment as a matter of law because Barros and Samuels lack standing to seek a declaratory judgment. Chapter 231A, the declaratory judgment statute, does not independently grant standing to a litigant; rather, the plaintiff must have standing based on some property interest, violation of a duty owed to him, or special injury within the area of concern of the statutory or regulatory scheme at issue. *Sudbury v. Massachusetts Bay Transp. Auth.*, 485 Mass. 774, 779 (2020); *Pishev v. Somerville*, 95 Mass. App. Ct. 678, 683 (2019). See also *Bonan v. Boston*, 398 Mass. 315, 320 (1986) (standing requires that plaintiff has definite interest in matters in contention in sense that his rights will be significantly affected by resolution of issue). The standing requirement is liberally construed to effectuate the broad remedial purpose of the declaratory judgment statute. *Kligler v. Attorney Gen.*, 491 Mass. 38, 45 (2022). Barros and Samuels allege infringement by the Town of their personal art. 16 rights to free speech; this constitutes sufficient standing to seek a declaratory judgment. See *Doe No. 1 v. Secretary of Educ.*, 479 Mass. 375, 386-387 (2018).

The Court is not persuaded by the defendants' argument that Barros and Samuels lack standing because they had no right to speak about the African Meeting House investigation, a

topic outside the Board's jurisdiction under the Town Charter.¹⁴ See *Madison Joint Sch. Dist. No. 8 v. Wisconsin Employ. Relations Comm'n*, 429 U.S. 167, 175 n.8 (1976) (public bodies may confine meetings to specified subject matter). Under Article III, § 3.5 of the Town Charter, the Board is authorized to establish general Town priorities, goals, and policies. Under Article IV, § 4.1(b), the Board has general executive policy setting and investigative powers. The summary judgment record reveals that between 2018 and 2022, the Board repeatedly discussed the African Meeting House hate crime, the status of the investigation by Nantucket Police and the State Police, and the need for the Board to take an active leadership role with respect to the investigation and more generally, issues of race relations on the island. Thus, the defendants have not established that Barros's and Samuels's speech was not entitled to constitutional protection because it involved matters outside the Board's jurisdiction. Barros and Samuels have standing under Chapter 231A to seek a declaratory judgment.

The defendants contend that Barros and Samuels have no reasonable expectation of proving interference with their right to free speech.¹⁵ Under art. 16 of the Declaration of Rights, any attempt by the government to restrict speech because of its message, ideas, subject matter, or content is presumptively invalid and the government bears the burden to establish its constitutionality. *Commonwealth v. Lucas*, 472 Mass. 387, 392 (2015). Although art. 16 may in

¹⁴See Town of Nantucket Charter Article III, § 3.3 (Board has power to acquire real estate); § 3.4 (Board has power to appoint and remove town officers and employees); § 3.5 (Board has power to establish advisory committees, approve town contracts, decide license applications, and decide appeals from other town bodies).

¹⁵The plaintiffs argue in their brief that summary judgment should be denied because they have not yet completed discovery. However, the conclusory statement in the plaintiffs' affidavits that they have not yet taken the depositions of Gibson or Chief Pittman does not meet the Rule 56(f) requirements for a continuance. See *The Alphas Co., Inc. v. Kilduff*, 72 Mass. App. Ct. 104, 109-110, rev. den., 452 Mass. 1105 (2008) (plaintiff must show plausible basis, beyond mere speculation, to believe that specific information sought exists and would raise material factual question sufficient to influence outcome of summary judgment motion).

some circumstances be more protective than the First Amendment,¹⁶ the court may look to First Amendment jurisprudence when instructive. *Id.* at 398 n.11. The Supreme Judicial Court has applied the First Amendment public forum doctrine to claims under art. 16. See *Roman v. Trustees of Tufts Coll.*, 461 Mass. 707, 713 (2012). See also *Massachusetts Coalition for the Homeless v. Fall River*, 486 Mass. 437, 440 (2020).

Free speech rights depend on the type of public forum at issue. *Roman v. Trustees of Tufts Coll.*, 461 Mass. at 713. A limited public forum is one limited to use by certain groups or dedicated solely to the discussion of certain subjects. *Id.* at 714; *Lu v. Hulme*, 133 F. Supp.3d 312, 324-325 (D. Mass. 2015). In a limited public forum, government restrictions on the exercise of free speech must only be reasonable and viewpoint neutral. *Roman v. Trustees of Tufts Coll.*, 461 Mass. at 714-715.¹⁷ The Court concludes that Select Board meetings constitute a limited public forum. See *Norse v. Santa Cruz*, 629 F.3d 966, 975 (9th Cir. 2010), cert. den., 565 U.S. 823 (2011) (entire city council meeting is limited public forum for First Amendment purposes); *Fairchild v. Liberty Indep. Sch. Dist.*, 597 F.3d 747, 759 (5th Cir. 2010) (school board meeting is limited public forum).¹⁸

¹⁶For example, the Supreme Judicial Court has concluded that art. 16 provides more protection for nude dancing than the First Amendment. See *Massachusetts Coalition for the Homeless v. Fall River*, 486 Mass. 437, 440 (2020).

¹⁷A policy that limits expression is viewpoint neutral if it serves purposes unrelated to the content of expression even if it has an incidental effect on some speakers or messages but not others. *Roman v. Trustees of Tufts Coll.*, 461 Mass. at 715. The reasonableness of a particular limitation may be gauged in part by the alternatives that remain available for exercising free speech. *Id.* A limitation is not neutral if it reflects a judgment by government officials about the substance of speech or excludes certain people based on their convictions. *Id.* at 716.

¹⁸In a pending case, *Barron v. Board of Selectmen of Southborough*, SJC-13284, the Supreme Judicial Court has accepted amicus briefs on the issue of whether the public comment segment of the board's meeting is a traditional, designated or limited public forum and whether the board's "Public Participation at Public Meetings" policy, which provides that "[a]ll remarks must be respectful and courteous, free of rude, personal or slanderous remarks," is on its face a constitutional, permissible prohibition on speech. The SJC heard oral argument in the case on November 2, 2022 and has not yet issued a ruling.

Barros and Samuels contend that the defendants infringed on their right to speak during the public comment period by interrupting and intimidating them as they spoke about the African Meeting House investigation. The summary judgment record reveals that Gibson interrupted Samuels after Samuels accused her of lying about the investigation the day before. Gibson protested that she is not a liar, it was not the proper forum for that accusation, and Samuels was violating the Board's regulations. Gibson then stood up and stormed out of the meeting. Holdgate interrupted Samuels to state that names should not be mentioned and people should take any information to the police. Holdgate also instructed Samuels to come to the microphone to speak and to direct questions for Chief Pittman to the Board. At one point, she suggested that the Board should end the conversation about the hate crime investigation. None of these brief interruptions curtailed Samuels's speech and the Board afforded her more than ten minutes of public speaking time. Nonetheless, Samuels argues that these interruptions violated her art. 16 rights because the Board did not interrupt Chief Pittman when he spoke about the investigation; thus, the interruptions were an attempt to curtail her speech based on her viewpoint. See *Roman v. Trustees of Tufts Coll.*, 461 Mass. at 714-716 (restrictions on exercise of free speech must be viewpoint neutral and claim may be based on discriminatory application of neutral policy).

Viewing the record in the light most favorable to the plaintiffs, no reasonable jury could find that the defendants curtailed or attempted to curtail Samuels's speech based on viewpoint in violation of art. 16. Rather, it is apparent that Holdgate was attempting to maintain decorum and enforce reasonable time limits to avoid redundant speech. Chief Pittman spoke about the investigation in response to questions raised by Samuels, in his role as a town official, and for a shorter period of time than Samuels spoke. No reasonable factfinder could conclude that the brief interruptions of Samuels, coupled with the failure to interrupt Pittman, represents an

attempt by Town officials to give one side an advantage in expressing views about the investigation. See *Curnin v. Egremont*, 510 F.3d 26, 32 (1st Cir. 2007), cert. den., 554 U.S. 903 (2008). See also *Norse v. Santa Cruz*, 629 F.3d at 1425-1426 (upholding city council policy that allows public speakers to be restricted if their speech impedes orderly conduct of meeting, which includes irrelevant or repetitious speech); *Ribakoff v. Long Beach*, 27 Cal. App. 5th 150, 176 (2018), rev. den., (Dec. 19, 2018), cert. den., 139 S.Ct. 2640 (2019) (concluding that time limits for public speakers at town board meeting were constitutionally permissible, even where town staff were not so limited in their presentations).

In addition, the summary judgment record reveals that the only interruption of Barros's speech at the March 11, 2020 meeting was Holdgate's reminder that the hate crime investigation had been turned over to State Police. Barros finished his remarks uninterrupted, thanked the Board, and sat down, insisting that he was not going to go away. Nonetheless, Barros contends that his art. 16 rights were infringed by Chief Pittman's pointing at him and accusing him of noncooperation with the investigation. That conduct was in response to Samuels's request that Chief Pittman identify the person spreading rumors but refusing to talk to police. After Chief Pittman concluded his remarks, Barros took the microphone, accused Pittman of lying, and proceeded to rebut the accusations of non-cooperation. Objectively viewed, Pittman's actions were not an attempt to curtail Barros's speech about the African Meeting House investigation based on Barros's viewpoint. Thus, the plaintiffs have no reasonable expectation of proving an art. 16 violation at the March 11, 2020 Board meeting.

Count I of the complaint also requests a declaratory judgment that the Board cannot regulate speech during the public comment period of its meeting other than in compliance with a constitutional written policy that includes definite, objective standards regulating speech.

However, the parties did not address a facial challenge to the Board's former policy in their briefs or at oral argument. See *Schoeller v. Board of Reg. of Funeral Directors and Embalmers*, 463 Mass. 605, 611-612 (2012) (enactment is vague where it does not provide fair notice of what it requires and is facially overbroad where it prohibits substantial amount of constitutionally protected speech). Accordingly, the Court will not address that aspect of Count I at this time.

Count II

Count II alleges that the Town defendants violated the Massachusetts Civil Rights Act, G.L. c. 12, §§ 11H and 11I ("MCRA"), by attempting to silence Barros and Samuels during the March 11, 2020 Board meeting. The defendants contend that Barros and Samuels have no reasonable expectation of proving this claim. To establish a MCRA violation, the plaintiffs must prove that the defendants interfered with or attempted to interfere with their exercise or enjoyment of rights secured by the constitution or laws of the Commonwealth, by threats, intimidation, or coercion. *Roman v. Trustees of Tufts Coll.*, 461 Mass. at 710; *Kennie v. Natural Resource Dept. of Dennis*, 451 Mass. 754, 760 (2008). As discussed, *supra*, Barros and Samuels cannot establish that the Board, Gibson, and Chief Pittman interfered with or attempted to interfere with their art. 16 right to free speech at the March 11, 2020 meeting. Moreover, the Board is not a "person" within the meaning of MCRA who can be sued for a civil rights violation. See *Howcroft v. Peabody*, 51 Mass. App. Ct. 573, 592 (2001) (municipalities and their subdivisions are not liable under MCRA).

In addition, the plaintiffs have no reasonable expectation of proving that the defendants employed threats, intimidation, or coercion to attempt to curtail their speech. See *Kennie v. Natural Resource Dept. of Dennis*, 451 Mass. at 763 (noting that statute does not create vast constitutional tort); *Planned Parenthood League of Mass, Inc. v. Blake*, 417 Mass. 467, 473, cert.

den., 513 U.S. 868 (1994) (direct interference with plaintiff's rights does not violate statute). Barros contends that Chief Pittman's conduct in pointing to him and identifying him as the person not cooperating was a threat or intimidation designed to discourage him from criticizing the hate crime investigation. Barros emphasizes that Pittman had a pistol on his side as he spoke.¹⁹ For purposes of MCRA, a threat is the intentional exertion of pressure to make another fearful or apprehensive of injury or harm. *Kennie v. Natural Resource Dept. of Dennis*, 451 Mass. at 763; *Planned Parenthood League of Mass, Inc. v. Blake*, 417 Mass. at 474. Intimidation involves putting another in fear for the purpose of compelling or deterring conduct. *Id.* Threats and intimidation need not be overtly harmful or frightening to violate MCRA. *Reproductive Rights Network v. President of the Univ. of Mass.*, 45 Mass. App. Ct. 495, 507 (1998). Coercion is the application of physical or economic force to another to constrain him to do against his will something he otherwise would not have done. *Kennie v. Natural Resource Dept. of Dennis*, 451 Mass. at 763; *Planned Parenthood League of Mass, Inc. v. Blake*, 417 Mass. at 474.

The court applies an objective reasonable person standard in determining whether a defendant's conduct constitutes threats, intimidation, or coercion. *Currier v. National Bd. of Medical Examiners*, 462 Mass. 1, 13 (2012); *Haufler v. Zotos*, 446 Mass. 489, 505 (2006). The recording of the March 11, 2020 Board meeting reveals that Chief Pittman pointed at Barros in response to Samuels's request that he identify the person not cooperating, spoke in a calm tone of voice throughout his remarks, and did not express or imply any intent to take official action against Barros due to his non-cooperation or his criticism of the investigation. Although Barros

¹⁹Although no weapon is visible in the recording of the meeting, Barros testified at deposition that he saw one and this Court must view the record in the light most favorable to him.

testified that he was terrified when Chief Pittman pointed at him, no reasonable jury could find that Pittman's conduct was objectively threatening or intimidating. See *Glovsky v. Roche Bros. Supermarkets, Inc.*, 469 Mass. 752, 764 (2014) (fact that plaintiff subjectively felt threatened or intimidated does not suffice to establish MCRA violation). Cf. *Batchelder v. Allied Stores Corp.*, 393 Mass. 819, 823 (1985) (uniformed security guard's ordering plaintiff to stop distributing political handbills at mall was threat or intimidation); *Reproductive Rights Network v. President of the Univ. of Mass.*, 45 Mass. App. Ct. at 507 (posting of seventeen uniformed officers outside locked university building was show of force designed to deter plaintiffs from holding meeting); *Vacca v. Barletta*, 753 F. Supp. 400, 405 (D. Mass. 1990), aff'd, 933 F.2d 31 (1st Cir. 1991), cert. den., 502 U.S. 866 (1991) (school board chair's calling police to have other board member removed from meeting could constitute threat, intimidation, or coercion). Accordingly, Barros has no reasonable expectation of proving a MCRA violation.

Samuels contends that Gibson attempted to interfere with her free speech rights by interrupting her, raising her voice, storming out of the meeting, and glaring and pointing at Samuels as she walked by, yelling, "Are you calling me a liar?"²⁰ Although Gibson's interruptions were perhaps rude, no reasonable jury could interpret her comments about not being untruthful and following the Board's regulations as threats or intimidation. Moreover, her raising her voice and glaring and pointing at Samuels in response to the accusation of being a liar, although a heated exchange, did not imply any intent to take official action against Samuels to prevent her from speaking. See *Kennie v. Natural Resource Dept. of Dennis*, 451 Mass. at 765 (not every intemperate exclamation rises to level of threat or intimidation); *Boston Outdoor Ventures, LLC v. Aikens*, 2011 WL 1601539 at *4 (Mass. Land Ct.) (Sands, J.) (verbal posturing

²⁰The recording does not show this exchange, but Samuels testified about it in her deposition.

by mayor and city counselor at city council meeting was typical of neighborhood disputes and did not constitute threats, intimidation, or coercion); *Maslow v. O'Connor*, 2021 WL 5979640 at *3 (Mass. App. Ct. Rule 23.0), rev. den., 489 Mass. 1103 (2022) (defendant's glaring at neighbor who attempted to use disputed strip of land was not enough under reasonable person standard to constitute threat, intimidation, or coercion). Cf. *Haufler v. Zotos*, 446 Mass. at 507 (neighbor's repeated trespass onto plaintiffs' land and aggressive and belligerent verbal harassment of plaintiffs and their contractors constituted threats and intimidation); *Kennie v. Natural Resource Dept. of Dennis*, 451 Mass. at 763-765 (town official's threat to "get" plaintiff and planting false evidence to skew shellfish survey constituted coercion in attempt to force plaintiff to drop application for permit to develop pier). Thus, Samuels has no reasonable expectation of proving a MCRA violation and the Town defendants are entitled to judgment as a matter of law.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the Defendants' Motion For Summary Judgment be **ALLOWED** on Count I of the Third Amended Complaint to the extent that it is **DECLARED** and **ADJUDGED** that the Town defendants did not violate Barros's and Samuels's right to free speech under art. 16 of the Declaration of Rights at the March 11, 2020 Board meeting. It is further **ORDERED** that the Defendants' Motion For Summary Judgment be **ALLOWED** on Count II of the Third Amended Complaint.

Mark C. Gildea

February 11, 2023

Mark C. Gildea
Justice of the Superior Court