COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

Appeals Court No. 2018-P-1092

ROBERT AND ALISON MURCHISON,

Plaintiffs-Appellants,

v.

ZONING BOARD OF APPEALS OF SHERBORN, ET AL.,

Defendants-Appellees.

DEFENDANTS-APPELLEES MERRIANN M. PANARELLA AND DAVID H. ERICHSEN'S APPLICATION FOR FURTHER APPELLATE REVIEW

Daniel P. Dain (BBO#632411)
Michael J. McDermott (BBO#685223)
Dain, Torpy, Le Ray, Wiest & Garner, P.C.
745 Atlantic Avenue, Suite 500
Boston, MA 02111
(617) 542-4800
ddain@daintorpy.com
mmcdermott@daintorpy.com

Merriann M. Panarella (BBO#388280)
David H. Erichsen (BBO#155600)

Dated: October 21, 2019

REQUEST FOR FURTHER APPELLATE REVIEW

In a case in which the Land Court, after a four day trial, found that the plaintiffs had presented no evidence of injury from the proposed construction of a single family home, the Appeals Court reversed, reasoning that injury can be inferred from an alleged zoning violation alone. Such a novel approach to evaluating standing, if let to stand, would disrupt over 40 years of standing jurisprudence, directly contravene established standing precedent from this Court in cases like *Kenner v. Zoning Bd. of Appeals of Chatham*, 459 Mass. 115 (2011), and *Sweenie v. A.L. Prime Energy Consultants*, 451 Mass. 539 (2008), create confusion for the real estate bar, turn the courts into super-zoning bodies, and make development across the Commonwealth more expensive and slower, at a time when the Commonwealth is in a housing crisis. For these reasons, the property owners Merriann Panarella and David Erichsen seek further appellate review of the decision in *Murchison v. Sherborn Zoning Board of Appeals* (Tab A).

STATEMENT OF PRIOR PROCEEDINGS

In a narrow sense this case concerns a challenge by a neighbor to the issuance of a foundation permit

for the construction of a single family residence on a three-acre lot in Sherborn, but more broadly, this case is about the ground rules under which someone opposed to a land-use entitlement may challenge that decision in court. Here, the plaintiffs, the Murchisons, appealed the foundation permit to the Sherborn Zoning Board of Appeals ("ZBA") arguing that the Sherborn Zoning Enforcement Officer had used an incorrect methodology for calculating lot width. The ZBA affirmed the officer's interpretation of the width requirement (the specifics of which are not important to this application for FAR), and confirmed that the proposed single-family home complied with zoning (*e.g.,* lot size, height, all setbacks, frontage).

The Murchisons, who live across the street on a 13-acre lot, appealed to the Land Court under G.L. c. 40A, § 17. The Land Court (Scheier, J.) conducted a view of both properties, and then held a four-day trial, principally on the issue of standing. Over the four-day trial, the Land Court heard from eight witnesses and took into evidence 30 exhibits, including photographs.

In its detailed decision (Tab B) with 15 findings of fact, the Land Court found that the plaintiffs had

not met their burden of persuasion to establish standing, and therefore dismissed the lawsuit. The Land Court did not reach the merits of the correct interpretation of the lot-width provision in Sherborn's zoning bylaws.

The Murchisons appealed to the Appeals Court, which, on September 30, 2019, reversed, finding that the Murchisons have standing, and remanded for a decision on the merits.

STATEMENT OF FACTS RELEVANT TO THE APPEAL

Based on the view, trial testimony, exhibits, and the parties' stipulations, the Land Court had found that Panarella/Erichsen had presented sufficient evidence to rebut the Murchisons' presumption of standing, and that "Plaintiffs did not thereafter establish any aggrievement." The project for which the as-of-right foundation permit (meaning the building inspector determined it did not require any zoning relief) had issued was for a single-family home on three acres, across the street from the plaintiffs' 13-acre lot and 180 feet away from plaintiffs' garage, in a wooded section of Sherborn. The Land Court wrote, "Plaintiffs' allegations of harm from noise, lighting, traffic and overall density of the neighborhood

amounts to speculation and conjecture. Defendants, relying on the testimony of Mr. Murchison, have demonstrated that any harm is, at most, *de minimis*, which cannot serve as a basis for standing." On the question of property value, the Land Court noted that the plaintiffs offered no expert testimony and did not try to tie their claim of diminished value to any particular interest protected by zoning. Finally, the Land Court found that the construction of the single-family home across the street would not cause run-off problems to the Murchisons.

The Appeals Court did not reject any of the factual findings by the Land Court, and did not otherwise recite any facts in support of its decision.

STATEMENT OF THE POINTS FOR FURTHER APPELLATE REVIEW

There is only one issue for further appellate review: whether, despite not overturning the Land Court's conclusion that plaintiffs had not offered sufficient evidence of any injury from the decision being challenged, the Appeals Court was correct that an injury for purposes of establishing standing can be inferred from an alleged zoning violation alone. That conclusion, as will be addressed below, eliminated the standing burden of persuasion as articulated in every

other standing case to the present and instead adopted an unprecedented approach. It is this new approach that merits consideration, and we will argue rejection, by this Court.

Here is the Appeals Court's new approach to the standing analysis: The plaintiffs in the case had challenged the ZBA's finding that the project complied with the ZBA's and the inspector's consistent interpretation of lot width. Lot width is one way that municipalities regulate the overcrowding of land, the Appeals Court noted. Even though these were big lots across the street from each other, in the woods, the Appeals Court observed that, "There is no platonic ideal of overcrowding against which the plaintiffs' claim is to be measured." Decision at 12. Rather, what counts is that "cities and towns are free to make legislative judgments about what level of density constitutes harm in various zoning districts and to codify those judgments in bylaws." Decision at 12-13. In other words, the Appeals Court inferred that by adopting its lot-width dimensional requirement, Sherborn's Town Meeting had determined that a violation of that requirement would exact a "harm" on a neighbor. Therefore, in deference to this supposed

municipal determination, any alleged violation of the dimensional requirement would, in the eyes of the municipality, constitute a harm. The Court recognized that there had been no determination yet that the lot-width dimensional requirement had been violated – that was the merits determination that the Land Court had not decided below – but, *if there were* such a violation, then the plaintiffs would be "entitled to enforce those provisions." Decision at 13.

The Appeals Court realized that its reasoning opened it up to criticism that it was devising harm from the existence of an alleged zoning violation itself. The Appeals Court added a footnote, number 5, to say not so. It is not the zoning violation itself that would cause the harm, but rather the house across the street that could be built because of the assumed zoning violation that would cause the harm. Despite no support in the record, the Appeals Court noted, "[i]t is the fact of the placement of the house on the lot across the street from the plaintiffs that demonstrates particularized harm to the plaintiffs, not the mere violation standing alone." Decision at 12, n.5.

STATEMENT WHY FURTHER APPELLATE REVIEW IS NECESSARY

The Appeals Court decision, if left to stand, would disturb over 40 years of standing jurisprudence under G.L. c. 40A, § 17. The decision would have even broader effect because appeals under Boston's Zoning Act, G.L. c. 40B, G.L. c. 30A, and others, analogize to c. 40A, § 17 standing decisions.

The fundamental problem with the Appeals Court's standing methodology is that it finds standing without requiring the plaintiff to actually prove an injury, or even an impact, or really anything. While the Appeals Court protested that it was not finding standing from an alleged zoning violation alone, that is precisely what it did in this case. The methodology amounts to a conflation of the merits and the standing analysis, and results in *per se* standing from the *allegation* of a zoning violation, which is every case.

This Court should take this case on further appellate review for two reasons: to avoid great confusion as to the law of standing by the real estate bar and the lower courts; and to avoid the courts becoming flooded with zoning appeals, adding to the cost and time of any development project that anyone objects to, at a time when we are in a housing crisis.

1. The Appeals Court's decision contradicts long-established standing precedent.

The Appeals Court decision is irreconcilable with every other standing decision by this and every other court of this Commonwealth; leaving it in place would create confusion among the bar and among the lower courts tasked with acting as a gatekeeper on standing in zoning cases. *See Butler v. City of Waltham,* 63 Mass. App. Ct. 435, 441 (2005) ("Standing is the gateway through which one must pass en route to an inquiry on the merits."). The fundamental requirement that a plaintiff must prove an actual injury was articulated by this Court in *Kenner*, 459 Mass. at 122: "[T]he analysis is whether the plaintiffs have put forth credible evidence to show that they will be **injured or harmed** by proposed changes to an abutting property, **not** whether they simply will be '**impacted**' by such changes." (emphasis added)

In order to prove such an actual injury, it is not enough for a plaintiff to simply identify the zoning interest threatened by the decision being appealed. This Court wrote in *Sweenie*, 451 Mass. at 545, that, "**The language of a bylaw cannot be sufficient in itself to confer standing**: the creation

of a protected interest (by statute, ordinance, bylaw, or otherwise) cannot be conflated with the additional, individualized requirements that establish standing." (emphasis added) To conclude otherwise, this Court wrote, would effectively "eliminate[] the requirement" that the plaintiff prove an injury.

In perhaps its most-often cited decision on the law of standing in zoning appeals, the Appeals Court in *Butler*, 63 Mass. App. Ct. at 441, explained the plaintiff's burden to offer actual evidence of injury. A plaintiff must offer evidence of sufficient quantity and quality. "Quantitatively, the evidence must provide specific factual support for each of the claims of particularized injury the plaintiff has made. Qualitatively, the evidence must be of a type on which a reasonable person could rely to conclude that the claimed injury likely will flow from the board's action." *Id*. *See also Denneny v. Zoning Bd. of Seekonk*, 59 Mass. App. Ct. 208, 214 (2003) (rejecting argument that proximity of permitted structure to plaintiff's property created a *per se* injury). Indeed, the Appeals Court made this point just a month before its decision in *Murchison*: "[Plaintiff] first argues that 'density-based claims of harm' have a 'talismanic

quality, such that when ‘density’ is invoked an abutter invariably and almost per se has standing.’ We disagree. [Plaintiff’s] claims regarding ‘density,’ like any other claim of harm, must be supported by credible qualitative and quantitative evidence.” *Porter v. Brighton Gardner Props. LLC*, 95 Mass. App. Ct. 1124, *4-5 (Aug. 16, 2019)(Rule 1:28 Decision) (Tab C). (In *Murchison*, the Appeals Court simply declared that the intent of the lot-width requirement was to prevent “overcrowding” of land, a density control).

In sum, this Court observed in *Kenner* that “[s]tanding becomes a question of fact for the judge…. The judge’s ultimate findings on this issue will not be overturned unless shown to be clearly erroneous.” 459 Mass. at 119.

That is why it was a total departure from established standing law when the Appeals Court ignored the trial judge’s factual findings on what is a factual inquiry, and instead adopted a methodology under which injury could be inferred from the purported intent of Sherborn Town Meeting in adopting the lot-width requirement. Yet the Appeals Court did not even consider any evidence of Town Meeting intent,

let alone evidence of injury. A single Appeals Court panel should not effectively nullify the entire law of standing without review by the state's highest court. For this reason alone, this Court should accept this case on further appellate review (and thereafter reject the Appeals Court's approach).

2. In practice, the Appeals Court's decision does not work.

As discussed, the Appeals Court looked to legislative (Town Meeting) intent to infer injury from an alleged violation of the lot-width requirement. But there is nothing about the Appeals Court's reasoning that limits it to just lot-width requirements: "cities and towns are free to make legislative judgments about what level of density constitutes **harm** in various zoning districts and to codify those judgments in bylaws." Decision at 12-13 (emphasis added) But that is not how courts evaluate standing. For example, in cases in which a plaintiff alleges a height violation, courts require plaintiffs to prove an injury due to, for example, shadows or loss of view, and measure the quality and quantity of the evidence per *Butler*.

The Appeals Court also makes an unsupportable assumption about legislative intent in the adoption of

dimensional requirements in zoning codes. The Appeals Court assumes that the purpose of such requirements is to protect neighbors from *particularized harm*. But no such assumption can be made.

There is generally no “legislative history” when dimensional controls are adopted as part of zoning bylaws, particularly at Town Meeting. Certainly, there was no “legislative history” in the record. But apart from the lack of evidence, the assumption is wrong. There are many reasons why municipalities adopt dimensional requirements that may have little to do with protecting immediate abutters from injury: frontage requirements ensure access, setback may preserve a neighborhood-wide aesthetic, and density controls, to the extent that they are thought about, often are adopted out of consideration for municipal resources (schools, waters supply, etc.).

It is particularly hard to see how one can infer that the municipal adoption of a lot-width requirement was intended to prevent harm to someone across the street, normally addressed by front-line setback (with which the Panarella-Erichsen proposal indisputably complies).

No Massachusetts court has ever, in the past, found standing based on an inferred legislative intent to prevent harm to a particular neighbor from the adoption of a dimensional control alone. Again, such a radical reimagining of how zoning codes are adopted should not be left to the Appeals Court without review (and rejection) by this Court.

3. The Appeals Court's decision would end the distinction between standing and the merits.

The Appeals Court's new approach to the standing inquiry departs from precedence in another way: it conflates the standing analysis with the merits determination, something current standing jurisprudence has kept separate. *See, e.g., Butler*, 63 Mass. App. Ct. at 440-41. We see this in the concluding paragraph of the Appeals Court's analysis, again, "What matters is what the town has determined. If the plaintiffs' interpretation of the bylaws is correct – the merits issue of the case, on which we express no opinion – then the proposed development would be closer to their house directly across the street than the bylaws' provisions permit, and, given that particularized harm, they are entitled to enforce those provisions." Decision at 13.

This paragraph seems to say that if a plaintiff alleges a zoning violation, then they have the right to try to prove the violation. If they do, then they have standing. If they are not able to prove their merits case, that there is a zoning violation, then presumably the plaintiff would lack standing. But one could not be determined without the other; the distinction between standing and the merits would end. Further, the determination on standing could never be made until after trial on the merits, ending it as any kind of pretrial hurdle for plaintiffs with limited claim to injury.

It would also have the effect of shifting the burden of proof on standing in variance cases. Since the recipient of a variance has the burden of establishing entitlement thereto on the merits, if standing became part of the merits analysis, then it would effectively change the burden on standing to the defendant project-proponent.

4. The Appeals Court's decision would threaten to overwhelm the courts.

In considering this case for further appellate review, this Court should be mindful of our present housing crisis. Land, labor, and material costs are

all very high right now. But permitting costs are too and contribute materially to the cost of housing. We all should be on guard against embracing procedures that add to the time and expense of adding much needed housing supply.

The standing approach embraced by the Appeals Court would do just that. In essence, if standing could be established by inferring an intent to prevent harm to neighbors by the adoption of dimensional requirements, then any plaintiff alleging a zoning violation would have standing – which is every zoning appeal. It would be the end of standing as a limiting factor in zoning appeals. Every project that anyone objected to could be subject to years of litigation uncertainty, cost, and delay.

This Court has warned: "We think [G.L. c. 40A, § 17] must be construed narrowly so as to minimize the class of parties who have suffered no legal harm, yet 'can compel the courts to assume the difficult and delicate duty of passing upon the validity of the acts of a coordinate branch of government'." *Planning Bd. of Marshfield v. Zoning Bd. of Appeals of Pembroke*, 427 Mass. 699, 702 (1998). This Court observed further in *Ginther v. Comm'r of Ins.,* 427 Mass. 319, 322

(1998) that "[t]he question of standing is one of critical significance," and only those who "themselves suffered, or who are in danger of suffering, legal harm" can establish standing. And: "To conclude otherwise would choke the courts with litigation over myriad zoning board decisions where individual plaintiffs have not been, objectively speaking, truly and measurably harmed." *Kenner*, 459 Mass. at 122.

This Court should grant further appellate review to make sure that does not happen. It is not the role of the courts to sit as super-zoning boards. Making land-use determinations is generally the province of local boards who are closest to the issues and can make the critical cost-benefit determinations for their communities. Courts have a role to provide remedies when local decisions threaten to cause injuries to specific individuals, while local boards are best at considering community-wide impacts. That balance would be disrupted by the Appeals Court's reasoning in this case. It demands review by this Court. Panarella/Erichsen ask that this Court grant their application for further appellate review.

Respectfully submitted,

MERRIANN PANARELLA and DAVID ERICHSEN,

By their attorneys,

/s/ Daniel P. Dain

Daniel P. Dain (BBO# 632411)
Michael J. McDermott (BBO# 685223)
Dain, Torpy, Le Ray, Wiest & Garner
745 Atlantic Avenue, Suite 500
Boston, MA 02111
Tel: (617) 542-4800
Fax: (617) 542-4808
ddain@daintorpy.com
mmcdermott@daintorpy.com

October 21, 2019

Certificate of Compliance

I hereby certify, under the pains and penalties of perjury, that this Application complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of applications for further appellate review, including but not limited to: Rule 27.1(c); Rule 20(a)(4)(B); Rule 20(a); and Rule 16(k).

Pursuant to Rule 27.1(b), I certify that the brief has been prepared in Courier New font, size 12, resulting in 10 characters per inch, and 10 non-excluded pages of text under Rule 27.1(b)(5).

/s/ Daniel P. Dain_____
Daniel P. Dain

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

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ROBERT AND ALISON MURCHISON

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v.

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Defendants-Appellees.

CERTIFICATE OF SERVICE

I, Daniel P. Dain, counsel for Appellees Merriann M. Panarella and David H. Erichsen, hereby certify that I have made service of this Application upon attorney of record for each party by the Electronic Filing System/email and regular mail on:

James W. Murphy
P.O. Box 1327
Sherborn, MA 01770
Attorney for plaintiffs

Amy E. Kwesell
KP Law, P.C.
101 Arch Street, 12th Floor
Boston, MA 02110
Attorney for defendant Sherborn Zoning Board

/s/ Daniel P. Dain_____
Daniel P. Dain

TAB A

18-P-1092 Appeals Court

ROBERT MURCHISON & another[1] vs. ZONING BOARD OF APPEALS OF SHERBORN & others.[2]

No. 18-P-1092.

Suffolk. February 12, 2019. - September 30, 2019.

Present: Rubin, Sullivan, & Neyman, JJ.

Land Court. Zoning, Appeal, By-law, Building permit, Lot size, Setback, Person aggrieved. Practice, Civil, Standing.

Civil action commenced in the Land Court Department on November 9, 2016.

The case was heard by Karyn F. Scheier, J.

James W. Murphy for the plaintiffs.
Merriann M. Panarella, pro se.
David H. Erichsen, pro se, was present but did not argue.

RUBIN, J. This is an appeal from a judgment of the Land Court dismissing the claims asserted by the plaintiffs, Robert and Alison Murchison (plaintiffs), for lack of standing to

[1] Alison Murchison.

[2] Merriann M. Panarella and David H. Erichsen.

challenge the grant of a foundation permit to Merriann M. Panarella and David H. Erichsen (defendants) for a single-family home in Sherborn. Because we conclude the plaintiffs could establish standing on the basis of alleged harm resulting from the violation of a density-related bylaw, we reverse the judgment of the Land Court and remand for further proceedings.

Background. The following facts are taken from the Land Court judge's findings of fact and rulings of law. The plaintiffs own a single-family home in Sherborn. The defendants own a vacant three-acre lot across the street from the plaintiffs' property. Both lots are in Sherborn's Residence C zoning district. Sherborn's bylaws impose a requirement that each lot in this district have a minimum lot width of 250 feet.

On June 29, 2016, Sherborn's zoning enforcement office (ZEO) issued a foundation permit for a single-family residence on the defendants' property (proposed development). On July 19, 2016, the plaintiffs filed a timely notice of appeal to the Sherborn zoning board of appeals (board), which held a public hearing on the matter on September 14, 2016. On October 5, 2016, the board upheld the ZEO's issuance of the permit. The plaintiffs then appealed the board's ruling to the Land Court under G. L. c. 40A, § 17.

In the Land Court, the plaintiffs argued among other things that the proposed development violated the bylaws because the

lot had insufficient width. The bylaws state that "minimum lot width" is to be "[m]easured both at front setback line and at building line. At no point between the required frontage and the building line shall lot width be reduced to less than [fifty] feet, without an exception from the Planning Board." The bylaws define "Width, Lot" as "[a] line which is the shortest distance from one side line of a lot to any other side line of such lot, provided that the extension of such line diverges less than [forty five degrees] from a line, or extension thereof, which connects the end points of the side lot lines where such lines intersect the street right-of-way." There is no definition of "front setback line." The definition of "building line" is "[a] line which is the shortest distance from one side line of the lot to any other side line of the lot and which passes through any portion of the principal building and which differs by less than [forty five degrees] from a line which connects the end points of the side lot lines at the point at which they intersect the street right-of-way." The plaintiffs argued that, applying these definitions, the lot widths were 209.56 feet and 192.42 feet at the front setback line and building line respectively, neither of which satisfied the minimum lot width requirement of 250 feet. The defendants argued that their proposed development satisfied the minimum lot width requirement. After a four-day trial, the Land Court judge

issued a judgment that did not reach the merits of the case, and instead dismissed it for lack of standing. This appeal followed.

Discussion. General Laws c. 40A, § 17, allows any "person aggrieved by a decision of the board of appeals" to challenge that decision in the Land Court. "A 'person aggrieved' is one who 'suffers some infringement of his legal rights.'" Sweenie v. A.L. Prime Energy Consultants, 451 Mass. 539, 543 (2008), quoting Marashlian v. Zoning Bd. of Appeals of Newburyport, 421 Mass. 719, 721 (1996). Our courts grant a rebuttable "presumption of standing" to all parties satisfying the definition of "parties in interest" in G. L. c. 40A, § 11. See 81 Spooner Rd., LLC v. Zoning Bd. of Appeals of Brookline, 461 Mass. 692, 700 (2012). This definition includes "owners of land directly opposite on any public or private street or way." G. L. c. 40A, § 11. Since the plaintiffs are owners of land directly opposite the lot in question, they satisfy the definition of "parties in interest" and are therefore entitled to a rebuttable presumption of standing. This rebuttable presumption does not displace the general rule that a plaintiff has the burden to prove aggrievement under the statute. The rebuttable presumption of standing merely "places on the adverse party the initial burden of going forward with evidence." 81 Spooner Rd., supra at 701.

Defendants can rebut the presumption of standing in two ways. First, they 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[, G. L. c. 40A,] is intended to protect," 81 Spooner Rd., 461 Mass. at 702, or that these claims are not "within the legal scope of the protected interest created by the bylaw." Sweenie, 451 Mass. at 545. "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," by, for example, "establishing that an abutter's allegations of harm are unfounded or de minimis," 81 Spooner Rd., supra, "or by showing that the plaintiff has no reasonable expectation of proving a cognizable harm." Picard v. Zoning Bd. of Appeals of Westminster, 474 Mass. 570, 573 (2016). If the defendants rebut the presumption, the burden shifts to the plaintiffs. "[T]he plaintiff must prove standing by putting forth credible evidence to substantiate the allegations. . . . This requires that the plaintiff establish -- by direct facts and not by speculative personal opinion -- that his injury is special and different from the concerns of the rest of the community" (quotation omitted). 81 Spooner Rd., supra at 701. "A review of standing based on 'all the evidence' does not require that the factfinder

ultimately find a plaintiff's allegations meritorious. To do so would be to deny standing, after the fact, to any unsuccessful plaintiff. Rather, the plaintiff must put forth credible evidence to substantiate his allegations." Kenner v. Zoning Bd. of Appeals of Chatham, 459 Mass. 115, 118 (2011), quoting Marashlian, 421 Mass. at 721.

The plaintiffs in this case claim that they are aggrieved because the lot width requirement protects their interest in preventing the overcrowding of their neighborhood and that this interest would be harmed by the proposed development.[3] We will assume without deciding that the defendants here offered enough evidence to warrant a finding contrary to the presumed fact of aggrievement, and turn to the question whether the plaintiffs have introduced sufficient evidence of aggrievement to give them standing. We review the judge's determination on standing for clear error. See Cornell v. Michaud, 79 Mass. App. Ct. 607, 615 (2011).

1. The interest in preventing overcrowding. To begin with, we must assess the claimed legal interest whose invasion is alleged to cause injury to the plaintiffs, in this case, the interest against overcrowding.

[3] The plaintiffs raised several other bases for standing both in the Land Court and on appeal, which, in light of our disposition of the case, we need not and do not address.

As a general matter, "[t]he right or interest asserted" to be invaded "by a plaintiff claiming aggrievement must be one that G. L. c. 40A is intended to protect." Kenner, 459 Mass. at 120. This prevents no obstacle to the plaintiffs' claim. Many cases hold that the prevention of overcrowding (sometimes referred to as "density") is an interest protected by the Zoning Act. See, e.g., Picard, 474 Mass. at 574 (referring to "density" as "typical zoning concern[]"); Aiello v. Planning Bd. of Braintree, 91 Mass. App. Ct. 354, 364 (2017), quoting Sheppard v. Zoning Bd. of Appeal of Boston, 74 Mass. App. Ct. 8, 12 (2009) ("crowding of an abutter's residential property by violation of the density provisions of the zoning by-law will generally constitute harm sufficiently perceptible and personal to qualify the abutter as aggrieved and thereby confer standing to maintain a zoning appeal"); Dwyer v. Gallo, 73 Mass. App. Ct. 292, 297 (2008) (same). The defendants do not argue that the Zoning Act does not protect the prevention of overcrowding.

A plaintiff can also independently "establish standing based on the impairment of an interest protected by [a town's] zoning bylaw." Kenner, 459 Mass. at 121. And, contrary to the defendants' contention that Sherborn "does . . . not . . . purport to regulate density," Sherborn's zoning bylaws also protect the plaintiffs' interest against overcrowding. Sherborn's zoning bylaws contain dimensional requirements that

protect neighbors from overcrowding. The minimum lot width requirement at issue here is a prime example. That aspect of the bylaws requiring that lots be of a certain minimum width as measured in a specific way at two defined points, ensures that buildings are not constructed within a certain distance of one another. This puts a limit on the neighborhood's maximum possible density. See O'Connell v. Vainisi, 82 Mass. App. Ct. 688, 692 (2012) (holding that "setback requirement serves to address concerns about crowding," and that plaintiffs had therefore "identified a legally cognizable injury"). Both the Zoning Act and Sherborn's bylaws, then, protect the interest against overcrowding, and its invasion may suffice to give the plaintiffs standing.

2. Evidence of particularized injury to that interest. The plaintiffs assert that if the proposed development goes forward, they will suffer a particularized injury to their protected interest against overcrowding as a result of the development's alleged violation of the lot-width bylaw provisions. We address each of the arguments of the defendants and the trial judge to the contrary.

First, the defendants suggest that the plaintiffs cannot as a matter of law be aggrieved by a violation of the density provisions of the bylaws because existing development is not "already more dense than the applicable zoning regulations

allow." Dwyer, 73 Mass. App. Ct. at 296, quoting Standerwick v. Zoning Bd. of Appeals of Andover, 447 Mass. 20, 31 (2006).

Although the plaintiffs introduced no evidence that development was already more dense than allowed, we disagree that they needed to. In support of their argument, the defendants cite several cases in which standing was found based on overcrowding, and in which the neighborhoods were already overcrowded. See, e.g., O'Connell, 82 Mass. App. Ct. at 692 n.9, quoting Sheppard, 74 Mass. App. Ct. at 11 n.7 ("a person whose property is in a district that is already more dense and overcrowded than applicable regulations would allow suffers additional injury when [the municipal board's actions] allow her to be further boxed in"); Dwyer, 73 Mass. App. Ct. at 296, quoting Standerwick, supra ("We have recognized an abutter's legal interest in 'preventing further construction in a district in which the existing development is already more dense than the applicable zoning regulations allow'").

But neither this court nor the Supreme Judicial Court has ever held that being in an already-overcrowded neighborhood is a prerequisite for a density-based harm sufficient to confer standing. Indeed, we have suggested the opposite. See, e.g., Dwyer, 73 Mass. App. Ct. at 297 ("crowding of an abutter's residential property by violation of the density provisions of the zoning by-law will generally constitute harm sufficiently

perceptible and personal to qualify the abutter as aggrieved and thereby confer standing to maintain a zoning appeal"). See also Sheppard, 74 Mass. App. Ct. at 11 n.7 (referring to increased density in area "that is already more dense and overcrowded than applicable regulations would allow" as "additional injury" [emphasis added]).

Nor would a rule requiring an already-overcrowded neighborhood make sense. There is no reason the first neighbor to violate a density regulation should have a free bite at the apple if that violation causes particularized harm to another property owner. The question for standing purposes is whether there is a particularized non-de minimis harm resulting from the unlawful overcrowding. Such harm can be caused by a first violation as well as a second or subsequent one.

Next, although it is not an argument on which the defendants rely, the judge concluded there was no particularized harm because, she said, the alleged bylaw violations would not render the defendants' lot unbuildable, but would merely affect the placement of the house. Assuming without deciding that this is true,[4] and also assuming without deciding that, for purposes

[4] It is unclear why the judge concluded that a bylaw violation would not render the lot unbuildable. The judge stated that the proposed development would comply with "all dimensional requirements of a residential zoning district, as well as with the three-acre minimum lot size, with the only possible exception being the issue of whether 'the lot width at

of determining whether there is standing, the judge was right to compare the proposed development with the hypothetical scenario in which there is a house elsewhere on the property (as opposed to another hypothetical scenario in which the lot remains vacant), it remains true that, if the plaintiffs' arguments on the merits are correct, then the alleged bylaw violations would allow a house to be built closer to the plaintiffs' house than the density provisions of the bylaws permit. The plaintiffs have shown that they are across the street from the proposed development. The harm to a property owner from having a house across the street closer to his or her own than is permitted by the density-protective bylaws is different in kind from that suffered in an undifferentiated fashion by all the residents of the neighborhood. It is sufficiently particularized to support a claim of standing to challenge the alleged violation.[5]

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the building line' was interpreted correctly in accordance with the By-Laws." We interpret this to mean that, given the dimensions of the lot, even if the lot is insufficiently wide at the proposed building line, it could be sufficiently wide at some other hypothetical building line. We express no opinion on whether this is true, but observe that this reasoning does not address the plaintiffs' argument regarding the lot width at the front setback line. We do not interpret the judge to have implicitly found this bylaw to be complied with. The judge did not analyze it, and she explicitly stated that she was not reaching the merits of the case, of which the minimum lot width at the building line was a component.

[5] Contrary to the defendants' assertion, for this reason the plaintiffs do not derive their standing from the mere fact of the alleged bylaw violation. See Sweenie, 451 Mass. at 545,

Finally, the defendants argue that any harm is at most de minimis due to the large size of the lots at issue, pushing against what they describe as "the absurdity of arguing that homes on [three]-acres (or [thirteen]-acres as is Plaintiffs[']) can be too close together."

This argument is without merit. There is no platonic ideal of overcrowding against which the plaintiffs' claim is to be measured. Although the distance between the houses might not amount to overcrowding in an urban area, absent some constitutional concern, which the defendants do not argue exists in this case, cities and towns are free to make legislative

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quoting Standerwick, 447 Mass. at 30 ("the creation of a protected interest [by statute, ordinance, bylaw, or otherwise] cannot be conflated with the additional, individualized requirements that establish standing. To conclude that a plaintiff can derive standing to challenge the issuance of a special permit from the language of a relevant bylaw, without more, eliminates the requirement that a plaintiff 'plausibly demonstrate' a cognizable interest in order to establish that he is 'aggrieved'"). It is the fact of the placement of the house on the lot across the street from the plaintiffs that demonstrates particularized harm to the plaintiffs, not the mere violation standing alone. In arguing that the harm alleged is too speculative, the defendants point to plaintiff Robert Murchison's admission at trial that he had not "engaged any engineer or other professional to do any form of study or analysis in an attempt to substantiate [Murchison's belief that the proposed development would cause harm to the light, air, open space, and area of separation between building lots]." But Murchison did not need an expert to determine that, if the proposed development violated the bylaws, then it would be too close to his house. This is simply a function of the language of the bylaws and the fact that his house is across the street from the vacant lot.

judgments about what level of density constitutes harm in various zoning districts and to codify those judgments in bylaws. It does not matter whether we, or a trial judge, or the defendants, or their counsel, would consider the district "overcrowded." What matters is what the town has determined. If the plaintiffs' interpretation of the bylaws is correct -- the merits issue of the case, on which we express no opinion -- then the proposed development would be closer to their house directly across the street than the bylaws' provisions permit, and, given that particularized harm, they are entitled to enforce those provisions.

Conclusion. The plaintiffs have put forth "credible evidence to bring themselves within the legal scope of the protected interest created by the bylaw." Sweenie, 451 Mass. at 545. While we express no view on the merits of this case, this means that the judge's determination that the plaintiffs lack standing was clear error. We therefore reverse the judgment of dismissal and remand the case for further proceedings consistent with this opinion.

So ordered.

TAB B

2018 WL 2769307
Only the Westlaw citation is currently available.
Massachusetts Land Court,
Department of the Trial Court,.
Middlesex County.

Robert MURCHISON and
Alison Murchison, Plaintiffs
v.
Richard NOVAK, et al., as they are Members of the Town of Sherborn Zoning Board of Appeals
and
Merriann M. Panarella and
David H. Erichsen, Defendants

16 MISC 000676 (KFS)
|
June 5, 2018

DECISION

Karyn F. Scheier, Justice

***1** In this action, Plaintiffs challenge the affirmance by the Town of Sherborn Zoning Board of Appeals (Board), whose members are Defendants, of a permit issued by the town's Zoning Enforcement Officer (ZEO). The permit allows the construction of a single-family residence on a vacant lot (Lot 69F) owned by Defendants. Plaintiffs live directly across the street from Lot 69F. They allege it is not buildable under the Sherborn Zoning By–Laws and the Board erred in upholding the permit by incorrectly interpreting the By–Laws' method of determining lot width. By agreement of the parties, the correct determination of "minimum lot width" was the only issue at trial, as the parties agreed Lot 69F complies with all other use and dimensional requirements of the By–Laws. This court does not reach the merits of Plaintiffs' appeal pursuant to G. L. c. 40A, § 17, finding and ruling, after trial, that Plaintiffs do not have standing to challenge the Board's decision.

Prior to trial, the court took a view of and walked throughout the parties' properties. Four days of trial took place in January 2018.[1] Michael Penney, a licensed professional engineer, Emily Pilotte, a potential buyer of Lot 69F, Sue McPherson, a realtor, and Daniel A. O'Driscoll, a professional land surveyor, testified for Defendants. David Humphrey, a professional land surveyor, and Paul Hutnak, a professional engineer, testified for Plaintiffs. Plaintiff Robert Murchison and Defendant Merriann Panarella also testified.[2] Thirty Exhibits were entered in evidence, including photographs. As discussed below, this court finds and rules Plaintiffs are not "person[s] aggrieved" and do not have standing to maintain this zoning appeal.[3] This action will be **DISMISSED**.

1 As previously agreed to by the non-municipal parties, counsel for the Board members did not participate at trial. In this decision, "Defendants" refers to the owners of Lot 69F.

2 Before trial, the court issued an order on motions in limine filed by both parties, specifically Plaintiffs' "Motion to Preclude Testimony of Past Building Inspector and/or Evidence of Issuance of Prior Building Permits, or in the Alternative, Motion to Take Deposition of Current Building Inspector and to Preclude Introduction of Town Counsel's Opinion" and Defendants' "Motion to Exclude Deposition of Expert Witness." The court precluded town counsel and members of the Planning Board from giving opinions as to their interpretations of the By–Laws. The court also precluded past and the current building inspector from testifying as to the past or current practice of applying the By–Laws when issuing building permits, and did not allow a deposition of the current building inspector. The court ordered it would allow testimony from David Humphrey or another surveyor opining on the proposed location of the structure on Lot 69F and whether it complies with the By–Laws.

3 Ruling that Plaintiffs lack standing, the court need not, and does not, reach the merits of the case. Specifically, Plaintiffs contends that Lot 69F lacked the minimum lot width required in the Residence C zoning district at both the front setback line and building line (see fact paragraphs 3–8), and that the Board erred in its calculation method.

***2** Based on an agreed statement of facts, stipulations, exhibits, and the credible testimony introduced at trial, and the reasonable inferences drawn therefrom, this court finds the following facts:

The Parties' Properties

1. Plaintiffs' property, Lot 69F, is a vacant three-acre parcel of land, with 251 feet of continuous frontage on Lake Street, a public way designated as a "scenic road."[4] Lot 69F is currently undeveloped, and has

been cleared in anticipation of construction of a single-family residence.

2. Plaintiffs live at 177 Lake Street, which is located across the street from Lot 69F (Plaintiffs' Property). Both properties are located in a "Residence C" zoning district.

4 See G. L. c. 40, § 15C for definition of "scenic roads."

Relevant Provisions of the By–Laws

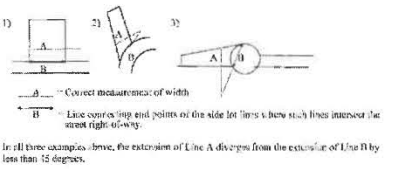
3. Under By–Laws Section 4.2, titled "Schedule of Dimensional Requirements," lots in a Residence C zoning district require, among other things, the following dimensional requirements: 1) a three-acre minimum lot size; 2) minimum continuous frontage of 250 feet; 3) a minimum lot width of 250 feet; 4) minimum front setback of sixty feet; 5) minimum side setback of forty feet; and 6) a minimum rear setback of thirty feet.

4. An asterisk in Section 4.2 notes that "minimum lot width" is to be "[m]easured both at front setback line and at building line. At no point between the required frontage and the building line shall lot width be reduced to less than 50 feet, without an exception from the Planning Board."

5. Section 1.5 of the By–Laws, "Definitions," defines "building line" as "[a] line which is the shortest distance from one side line of the lot to any other side line of the lot and which passes through any portion of the principal building and which differs by less than 45° from a line which connects the end points of the side lot lines at the point at which they intersect the street right-of-way."

6. The By–Laws do not contain a definition of "front setback line."

7. Section 1.5 defines "Width, Lot" as "[a] line which is the shortest distance from one side line of a lot to any other side line of such lot, provided that the extension of such line diverges less than 45° from a line, or extension thereof, which connects the end points of the side lot lines where such lines intersect the street right-of-way." The definition also includes the following illustration and commentary:



8. None of the proposed lines put forth by Plaintiffs or Defendants to support their respective interpretations of "lot width" diverge more than 45°.

Administrative Process

9. The ZEO issued a foundation permit for a single-family residential structure on Lot 69F on June 29, 2016. Plaintiffs timely filed a notice of appeal on July 19, 2016. The Board held a duly noticed and advertised public hearing on Plaintiffs' appeal of the ZEO's issuance of a foundation permit on September 14, 2016, and October 5, 2016, and issued its decision unanimously upholding the ZEO's issuance of the permit.

Plaintiffs' Standing

10. Section 1.2 of the By–Laws, "Purpose," states that the purpose of the By–Laws is "to promote the health, convenience and welfare of the inhabitants and to accomplish all other objects of zoning."

*3 11. By–Laws Section 1.3, "Basic Requirements," provides "[n]otwithstanding any other provision of these By–Laws, any building or structure or any use of any building, structure or premises is prohibited if it is injurious, obnoxious, offensive, dangerous, or a

nuisance to the community or to the neighborhood, by reason of the following:

Noise	Gases
Vibrations	Dust
Concussion	Harmful fluids or substances
Odors	Danger of fire or explosion
Fumes	Smoke
Electronic interference	Excessive drawdown of groundwater
Debris/refuse	Lighting

or if it discharges into the air, soil water or groundwater any industrial, commercial or other kinds of waste, petroleum products, chemicals ... or pollutants ... or has any other objectionable features detrimental to the neighborhood health, safety, groundwater, convenience, morals or welfare."

12. The By–Laws' only references to "storm water" are in reference to "Wireless Communications Facilities," in Section 5.8, and "Large–Scale Ground Mounted Solar Photovoltaic Facilities" in Section 5.10.

13. The proposed development of Lot 69F for use as a single-family residence will not cause a diminution of value of Plaintiffs' Property, nor will it cause a harmful increase in storm water runoff, or otherwise cause damage to Plaintiffs' Property.

14. Due to existing drainage patterns on Plaintiffs' Property, the elevation of Plaintiffs' house and the existing grading of Plaintiffs' lot, it is not likely that water would enter Plaintiffs' basement, absent a crack or flaw in their foundation. It also is unlikely that stormwater will encroach on Plaintiffs' southern driveway even during a one-hundred year storm with the existing catch basins partially blocked.

15. Plaintiffs' claims that the construction of a single-family residence on Lot 69F will negatively impact them in terms of noise,[5] light,[6] air, open space and density of the neighborhood,[7] and that the construction of a house will cause a harmful increase in traffic[8] are either speculative or, at most, de minimis. In addition, Plaintiff will not suffer any particularized harm from any increase in traffic on Lake Street.[9]

5 See, e.g., Tr. vol. 2, 19: 22–20: 14:
Q [y]ou concede that the noise you're referring to is only the noise associated with someone living on the property in a developed home on a day-to-day basis?
A: Well, I would say that would be the case, but I also would add construction noise to that.
Q: [A]fter a house is there, after a family is living there, the only noise you're referring to is noise associated with their living there and day-to-day activities?
A: And potential traffic ....
Q: [The] allegation of additional noise is simply a matter of speculation, is it not?
A No. I'd say it's a matter of knowledge and experience of having cars driving on the road and having people in houses and play music and such; it's experience.

6 See Tr. vol. 2, 21: 1–12:
Q: [W]hat you meant by lighting was simply the light that would come from the house on the lot and perhaps some outdoor lighting, correct?
A: Yes, that sounds right .... I've had experience living in houses over the course of my life where I can see the light coming into my house from their house[.]

7 See Tr. vol. 2, 23: 3–13:
Q: You have not engaged any engineer or other professional to do any form of study or analysis in an attempt to substantiate [beliefs of harm from air, open space and density]?
A: I have not, no.

8 See Tr. vol. 2, 21: 23–22: 4:
Q: You allege that increased traffic might result from the development of [L]ot 69F and thereby cause you harm, is that correct?

A: Yes ... again, I have experienced traffic coming from increased development.

9 Generally, Mr. Murchison's testimony as to harms was speculative, not supported by evidence, and not credible.

* * * * *

Plaintiffs Do Not Have Standing

*4 Under G. L. c. 40A, § 17, only a "person aggrieved" has standing to challenge a decision by a zoning board of appeals. 81 Spooner Rd., LLC v. Zoning Bd. of Appeals of Brookline, 461 Mass. 692, 700 (2012). A person aggrieved must suffer "some infringement of legal rights." Marashlian v. Zoning Bd. of Appeals of Newburyport, 421 Mass. 719, 721 (1996). Aggrievement requires more than "minimal or slightly appreciable harm," and the "right or interest asserted by the party claiming aggrievement must be one that G. L. c. 40A intended to protect." Kenner v. Zoning Bd. of Appeals of Chatham, 459 Mass. 115, 121 (2011). [10]

10 Protected interests can be stated expressly in a zoning bylaw, and can also arise implicitly from the intent of the by-law's provisions. See, e.g., Sheppard v. Zoning Bd. of Appeal of Boston, 74 Mass. App. Ct. 8, 12 (2009).

Under G. L. c. 40A, § 11, "abutters, owners of land directly opposite on any public or private street or way, and abutters to the abutters within three hundred feet of the property line of the petitioner," are entitled to notice of zoning board hearings and "enjoy a rebuttable presumption that they are 'persons aggrieved' " by a decision concerning another property. Marashlian, 421 Mass. at 721. Here, there is no dispute that Plaintiffs, as "owners of land directly opposite on any public or private street or way" to Lot 69F, are "parties in interest" under G. L. c. 40A, § 11, and benefit from a rebuttable presumption that they have standing. 81 Spooner Road, LLC, 461 Mass. at 700; Marashlian, 421 Mass. at 721.

"A defendant, however, can rebut a party's presumptive standing by showing that, as a matter of law, their claims of aggrievement, either in the complaint or during discovery, are not interests that [G. L. c. 40A] is intended to protect .... Alternatively, the defendant can rebut the presumption by coming forward with credible affirmative evidence that refutes the presumption, that is, evidence that warrant[s] a finding contrary to the presumed fact of aggrievement, or by showing that the plaintiff has no reasonable expectation of proving a cognizable harm." Picard v. Zoning Bd. of Appeals of Westminster, 474 Mass. 570, 573 (2016), quoting Standerwick v. Zoning Bd. of Appeals of Andover, 447 Mass. 20, 33 (2006). A defendant may also rely on the plaintiff's lack of evidence in order to rebut a claimed basis for standing. Standerwick, 447 Mass. at 35 (stating a developer was not required to provide affidavits on each of the plaintiff's claimed aggrievements, but could rely on plaintiff's lack of evidence as to those claims, obtained through discovery).

If sufficiently rebutted, plaintiffs then must " 'establish—by direct facts and not speculative personal opinion—that [their] injury is special and different from the concerns of the rest of the community[.]' " 81 Spooner Road, LLC, 461 Mass. at 701, quoting Standerwick, 447 Mass. at 32. [11] The question is "whether plaintiffs have put forth credible evidence to show they will be injured or harmed by the proposed changes to an abutting property, not whether they will simply be 'impacted' by such changes." Kenner, 459 Mass. at 121. Credible evidence is composed of both qualitative and quantitative components: "quantitatively, the evidence must provide specific factual support for each of the claims of particularized injury," and "[q]ualitatively, the evidence must be of a type on which a reasonable person could rely to conclude that the claimed injury likely will flow from the board's action." Butler v. Waltham, 63 Mass. App. Ct. 435, 441 (2005) (internal citations omitted). Conjecture and personal opinion are insufficient. Id. As discussed below, Plaintiffs' presumptive standing was rebutted at trial by Defendants and Plaintiffs did not thereafter establish any aggrievement.

11 The plaintiff always bears the burden of proof on the issue of standing. The rebuttable presumption simply shifts the burden of going forward with rebuttal evidence to the defendant. Standerwick, 447 Mass. at 32 n.20.

Alleged Harm Due to Noise, Lighting, Increased Traffic, and Increased Density

*5 Plaintiffs allege they are aggrieved by the Board's decision because the proposed development of Lot 69F will negatively impact their light, air, open space and density of the neighborhood, and will cause an increase in noise and traffic. Plaintiffs also allege the proposed development will negatively affect their property value and will direct harmful stormwater runoff onto their property.

Plaintiffs' allegations of harm from noise, lighting, traffic and overall density of the neighborhood amounts to speculation and conjecture. Defendants, relying on the testimony of Mr. Murchison, have demonstrated that any harm is, at most,

de minimis, which cannot serve as a basis for standing. See Kenner, 459 Mass. at 124. Further, evidence offered by Plaintiffs in support of these alleged aggrievements failed to show how the alleged harms are "special and different from the concerns of the rest of the community." Kenner, 459 Mass. at 118. The aggrievement must be particular to Plaintiffs themselves, and not merely to the community at large. Standerwick, 447 Mass. at 33. Mr. Murchison's testimony that he expects an increase in lighting, traffic and noise as a result of a new house being built across the street on a three-acre lot was insufficient to establish standing to challenge the Board's decision upholding the ZEO.

Plaintiffs also alleged harm due to overcrowding, or an increase in the density of the neighborhood. The proposed structure for Lot 69F, however, complies with all dimensional requirements of a residential zoning district, as well as with the three-acre minimum lot size, with the only possible exception being the issue of whether the "lot width at the building line" was interpreted correctly in accordance with the By–Laws. While this interpretation question was the issue tried on the merits (which this court does not reach in this decision), the effect of interpreting the By–Laws as urged by Plaintiffs would not render Lot 69F unbuildable, it would affect only the placement and size of the house that could be built. Plaintiffs cite several cases in support of the argument that density-based claims of harm can confer standing. This court does not take issue with the theoretical premise but the cases cited have significantly different factual contexts and largely present challenges to construction on undersized lots which have merged with adjacent lots in areas where "existing development is already more dense than the applicable zoning regulations allow." Dwyer v. Gallo, 73 Mass. App. Ct. 292, 296 (2008); see also, e.g., Mauri v. Zoning Bd. of Appeals of Newton, 83 Mass. App. Ct. 336, 340 (2013); Marhefka v. Zoning Bd. of Appeals of Sutton, 79 Mass. App. Ct. 515, 519 (2011). While the cases cited by Plaintiffs might allow, they certainly do not compel a ruling in this case that Plaintiff has established particularized harm to them by the proposed construction based on increased density. Based on Mr. Murchison's testimony, this court finds Plaintiffs simply do not want any construction on Lot 69F.

Diminution in Property Value

Plaintiffs allege a diminution in the value of their property as a result of the Defendants' proposed single-family residence. Diminution in value is not, in and of itself, an interest protected under G. L. c. 40A. Kenner, 459 Mass. at 123. It is a sufficient basis for standing only where it derives from or relates to cognizable interests protected by the applicable zoning bylaws. Standerwick, 447 Mass. at 31–32.

***6** Defendants presented testimony from Ms. McPherson, listing broker for Lot 69F, who works for Century 21 Commonwealth. Ms. McPherson opined that the addition of a single-family residence on Lot 69F would cause no diminution in the value of Plaintiffs' Property. To the contrary, she opined that a single-family residence is the "best and highest use" for the lot and the proposed house, complete with landscaping, would constitute an improvement in the neighborhood as opposed to its current condition as a vacant, cleared lot. Even taking into consideration Ms. McPherson's self–interest as the salesperson for Lot 69F, the court found this testimony sufficiently credible to rebut Plaintiffs' presumption of standing on the issue of diminution of value, shifting the burden to Plaintiffs to demonstrate through direct facts, and not speculation, that the development of Lot 69F will cause them a particular and personal harm resulting in diminution of value. Plaintiffs did not meet that challenge.

No expert testimony was proffered by Plaintiffs on the issue. Mr. Murchison testified that, in his opinion, Plaintiffs' Property is worth an estimated five million dollars. The court allowed his testimony as a lay owner of residential property and not as an expert witness.[12] "A nonexpert owner of property may testify to its value upon the basis of 'his familiarity with the characteristics of the property, his knowledge or acquaintance with its uses, and his experience in dealing with it." Epstein v. Board of Appeal of Boston, 77 Mass. App. Ct. 752, 759 (2010), quoting Winthrop Prods. Corp. v. Elroth Co., 331 Mass. 83, 85 (1954).[13] Plaintiffs failed to provide anything other than speculation and conjecture as to the perceived harm to their property value. Even if Plaintiffs had provided sufficient evidence of potential diminution of value, the decreased value was not tied to any particularized harm Plaintiffs proved they would suffer.

12 See Canepari v. Pascale, 70 Mass. App. Ct. 840, 847 (2011) (stating "whether an owner, or any other witness, is sufficiently qualified to offer an opinion as to the value of real property is a question committed to the judge's sound discretion").

13 See Tr. Vol.2 163–164.

Storm Water Runoff

Defendants asserted a legal position that Plaintiffs' concerns about stormwater runoff is not an interest protected by the By–

Laws, because stormwater is not listed in By–Laws Section 1.3 (see fact 11 above.) Defendants nonetheless produced sufficient evidence, primarily through expert testimony from Michael C. Penney, a licensed professional engineer, to rebut Plaintiffs' claims of harm caused by increased stormwater runoff and potential for increased flooding.

Mr. Penney testified that, in his opinion, Plaintiffs will not suffer any harm due to stormwater runoff, or increased flooding. Based on his review of Lot 69F and the proposed development, he credibly testified that any stormwater runoff will not be significantly greater than any runoff that occurs with the lot in its current undeveloped state. He reviewed the topography of the lot and Lake Street, and included in his analysis the effect of nearby roadside ditches, catch basins and piping. As part of his analysis, he relied on a survey of Lake Street (see Exhibit 59A) to identify the street's lowest points, and to locate three catch basins used in his calculations. This was needed to accurately calculate the volume of water the lowest spot—on the survey, the northernmost catch basin—could accommodate in a storm.

Mr. Penney's analysis also incorporated mitigation measures which are part of the proposed development, such as a foundation drain, infiltration swale, erosion control barrier and other measures aimed at reducing or directing runoff. He used his data to create different models. One model focused solely on Lot 69F, analyzing the peak flow and total volume of runoff from the lot in a natural, cleared or developed state, the potential for ponding on Lake Street, and the potential for ponding if a catch basin was fifty percent blocked. In recognition of the fact that lots other than Lot 69F may contribute runoff to Lake Street, Mr. Penney created a model for the potential runoff from all lots contributing stormwater to the lowest point in the street (called the "full contributory area"). Mr. Penney further explained his model was "conservative" because he used a category of soil less permeable than what is actually found at Lot 69F and enlarged the full contributory area to include more runoff water as a cautionary measure.

*7 When analyzing the model limited to just Lot 69F, Mr. Penney determined that, while runoff from the lot in a developed state increased during a fifty year storm and a one hundred year storm, runoff was significantly less than it would have been from a cleared lot. Based on his models, Mr. Penney also testified that he found no scenario, whether Lot 69F was cleared or developed, in which runoff could crest Lake Street or reach Plaintiffs' southern driveway, even if the three catch basins shown on the Lake Street survey were partially obstructed during a one hundred year storm. To reach this conclusion, Mr. Penney modeled runoff for two, ten, twenty-five, fifty and one hundred year storms for each of the lot's potential states (natural, cleared or developed) to see whether runoff would reach Plaintiffs' Property. Given the existing drainage patterns and elevation of Plaintiffs' house, Mr. Penney found it was impossible for water to penetrate Plaintiffs' foundation, absent a crack or other flaw.

Mr. Penney's testimony provided credible evidence that Plaintiffs will not be aggrieved by increased runoff or flooding, and that their property likely will not suffer adverse effects from runoff as a result of the Board's Decision.

Plaintiffs attempted to rebut Mr. Penney's opinion by testimony from their expert, Paul Hutnak, a professional engineer and licensed soil evaluator, who stated that the peak rate of runoff from Lot 69F will increase by approximately ten to fifteen percent following construction of a single-family house on it. The court finds that, compared to the methodology and findings of Mr. Penney, the testimony of Mr. Hutnak was insufficient to establish Plaintiffs' standing based on harm from stormwater runoff. Mr. Penney analyzed runoff from Lot 69F in natural, cleared, and developed states, whereas Mr. Hutnak only compared the runoff from Lot 69F's natural state and its proposed developed state.

Plaintiffs also failed to sufficiently rebut Mr. Penney's testimony that runoff from the developed lot would be significantly less than runoff from a cleared lot, during a fifty or one hundred year storm due to the proposed mitigation. Mr. Hutnak agreed with Mr. Penney's assessment that a cleared lot would lead to more runoff than one in a natural state. He did not contradict Mr. Penney's claim that runoff from the full contributory area would not flow onto Plaintiffs' Property and cause damage. Mr. Hutnak's testimony omits any assertions or opinion that runoff from Lot 69F will cause actual damage to Plaintiff's Property. He did not challenge the majority of Mr. Penney's analyses and conclusions, and the court, as noted above, found Mr. Penney's opinion testimony well-supported and credible.

Conclusion

Having found that Plaintiffs are not aggrieved by the Decision, the court need not, and does not, reach the merits of their appeal. Plaintiffs lack standing, and the case will be dismissed.

Judgment to enter accordingly.

All Citations

Not Reported in N.E. Rptr., 2018 WL 2769307

2018 WL 2729175
Only the Westlaw citation is currently available.
Massachusetts Land Court,
Department of the Trial Court,.
Middlesex County.

Robert MURCHISON and
Alison Murchison, Plaintiffs
v.
Richard NOVAK, et al., as they are Members of the Town of Sherborn Zoning Board of Appeals
and
Merriann M. Panarella and
David H. Erichsen, Defendants

16 MISC 000676 (KFS)

June 5, 2018

JUDGMENT

By the Court. (Scheier, J.)

*1 Plaintiffs initiated this action pursuant to G. L. c. 40A, § 17, challenging the affirmance by the Town of Sherborn Zoning Board of Appeals, whose members are Defendants, of a permit issued by the town's Zoning Enforcement Officer. The permit allows the construction of a single-family residence on a vacant lot (Lot 69F) owned by Defendants.

Four days of trial took place in January 2018. Prior to trial, the court took a view of and conducted a walk-through of the parties' properties. A decision of today's date has issued. In accordance with that decision, it is hereby:

ADJUDGED and ORDERED that the claims asserted by Plaintiffs are **DISMISSED** for lack of standing.

All Citations

Not Reported in N.E. Rptr., 2018 WL 2729175

End of Document

TAB C

95 Mass.App.Ct. 1124
Unpublished Disposition
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN THE REPORTER.
NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).
Appeals Court of Massachusetts.

Eric PORTER & others. [1]
v.
BRIGHTON GARDNER PROPERTIES, LLC, & another. [2]

1 Kelli Alvarez and Kevin Arsenault.

2 Board of Appeal of Boston.

18-P-1416
|
Entered: August 16, 2019.

By the Court (Hanlon, Desmond & Shin, JJ. [3]),

3 The panelists are listed in order of seniority.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

*1 Plaintiff Eric Porter appeals from the judgment dismissing his complaint. The motion judge determined that Porter and the other plaintiffs lacked standing under the Boston zoning enabling act (Act), St. 1956, c. 665, § 11, as amended through St. 1993, c. 461, § 5, to contest a variance allowing defendant Brighton Gardner Properties, LLC (Brighton Gardner), to build a 129-unit mixed-use building in Allston. [4] We affirm.

4 Only Porter and Brighton Gardner have participated in this appeal.

Background. The summary judgment record reveals the following facts. Porter owns a three-story home at 80 Linden Street in Allston (Porter property). He resides there on the first floor. The top two floors are rented out. In 2016, Porter began mobilizing opposition to a proposed development project at 89-95 Brighton Avenue and 41 Gardner Street (locus), which is separated from 80 Linden Street by Brighton Avenue, a three-story house, and an eight-pump gas station. The development plans for the locus call for replacing a Budget Rent-A-Truck office, a vacant three-story commercial building, and a multi-family dwelling with a 129-unit, six-story apartment complex with retail space on the first floor and seventy-nine parking spots.

The plaintiffs filed their complaint in Superior Court on July 5, 2017, challenging Brighton Gardner's zoning variance. On January 19, 2018, Brighton Gardner filed a motion for summary judgment on the basis of insufficient standing. Following a hearing, the motion judge issued a thoughtful thirteen-page memorandum allowing Brighton Gardner's motion. Porter timely appealed. [5]

5 Porter filed a separate notice of appeal from a different judge's postjudgment order pursuant to G. L. c. 231, § 117, requiring him to file a bond in the amount of $25,000. Porter's brief does not contain any argument regarding the propriety of the bond order, and thus, he has waived his appeal from that order. See Mass. R. A. P. 16 (a) (4), as amended, 367 Mass. 921 (1975) ("The appellate court need not pass upon questions or issues not argued in the brief"). We note that we cite to the Massachusetts Rules of Appellate Procedure in effect during the relevant time. The rules were wholly revised, effective March 1, 2019, and the provision quoted supra is now found at Mass. R. A. P. 16 (a) (9) (A), as appearing in 481 Mass. 1630 (2019).

Discussion. Porter argues that he is afforded standing as a "person aggrieved" because he will be injured by (1) the project's density, (2) increased traffic and decreased parking in his neighborhood, (3) negative impacts on the neighborhood's quality of life, including views, light, air, and privacy, and (4) a diminution in value of his property. We review de novo the allowance of Brighton Gardner's motion for summary judgment. See 81 Spooner Road, LLC v. Zoning

Bd. of Appeals of Brookline, 461 Mass. 692, 699 (2012). The evidence is viewed in the light most favorable to the opposing party, and we ask whether "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law based on the undisputed facts" (quotation and citation omitted). Premier Capital, LLC v. KMZ, Inc., 464 Mass. 467, 474 (2013).

***2** Under the Act, only a "person aggrieved" can challenge a decision of Boston's zoning board of appeal. See St. 1956, c. 665, § 11, as amended through St. 1993, c. 461, § 5. See also Sheppard v. Zoning Bd. of Appeal of Boston, 74 Mass. App. Ct. 8, 11 (2009). Because § 11 of the Act resembles § 17 of G. L. c. 40A, we "import the teachings of decisions under G. L. c. 40A to cases arising under the [A]ct and the [Boston zoning] code." McGee v. Board of Appeal of Boston, 62 Mass. App. Ct. 930, 930 (2004). To be aggrieved, a person "must assert a plausible claim of a definite violation of a private right, a private property interest, or a private legal interest" (quotation omitted). Kenner v. Zoning Bd. of Appeals of Chatham, 459 Mass. 115, 120 (2011).[6] To establish standing as an aggrieved person, Porter was required to "put forth credible evidence to substantiate his allegations." Marashlian v. Zoning Bd. of Appeals of Newburyport, 421 Mass. 719, 721 (1996). Toward this end, evidence is credible only when it is both quantitatively and qualitatively sufficient. Butler v. Waltham, 63 Mass. App. Ct. 435, 441-442 (2005).

> "Quantitatively, the evidence must provide specific factual support for each of the claims of particularized injury the plaintiff has made. ... Qualitatively, the evidence must be of a type on which a reasonable person could rely to conclude that the claimed injury likely will flow from the board's action. Conjecture, personal opinion, and hypothesis are therefore insufficient."

Id. at 441. Based on these principles, we conclude that Porter's evidence, submitted at the summary judgment stage, was quantitatively and qualitatively insufficient. Each of his four claims is addressed in turn.

6 The motion judge avoided the question whether Porter is entitled to a presumption of standing under the Act, determining that even if a presumption applies it was effectively rebutted by Brighton Gardner. See 81 Spooner Rd., 461 Mass. at 700-701. We adopt the same approach. As described infra, to the extent Porter was entitled to any presumption of standing, Brighton Gardner effectively rebutted that presumption by "coming forward with credible affirmative evidence" refuting it. Id. at 702.

1. Density. Porter makes two arguments regarding density. He first argues that "density-based claims of harm" have a "talismanic quality, such that when 'density' is invoked an abutter invariably and almost per se has standing." We disagree. Porter's claims regarding "density," like any other claim of harm, must be supported by credible qualitative and quantitative evidence. See id. Here, Porter offered no evidence beyond his empty invocation. There is, thus, no specific factual support or basis to conclude that the claimed injury likely will flow from the board's action. See id. Accordingly, this argument fails. Second, Porter claims that there will be overcrowding on public transportation and a negative impact on his "personal enjoyment of outdoor spaces." These claims are not, as they must be, particularized or unique. See id. As such, they fail to adequately assert a "harm specific to [Porter's] property." Schiffenhaus v. Kline, 79 Mass. App. Ct. 600, 603 (2011). Porter's density theory of standing fails.

2. Traffic and parking impacts. Next, Porter asserts that the proposed development will create traffic and cause increased competition for parking spots in the neighborhood. In support of his position, he offered the testimony of transportation expert Kim Eric Hazavartian, who offered an incomplete review of the relevant documents[7] and only vague conclusions as to the impact on the plaintiffs – determining, for example, that the development "would be likely to harm nearby residents or owners." Again, there was no showing of a particularized harm specific to the Porter property.

7 Hazavartian did not consider or review the "Transportation Access Plan Agreement" created through collaboration between Brighton Gardner and the Boston transportation department.

***3** In opposition, Brighton Gardner offered an affidavit on traffic impacts from expert traffic engineer David A. Bohn. Based upon original data and analysis, Bohn stated that the project would increase car trips surrounding the development by less than three percent, and that this minimal increase would not impact the Porter property because of documented traffic patterns on Linden Street and Brighton Avenue. In the end, Porter again failed to show that the harm regarding traffic and parking, if any, was particularized to him. See Butler, 63 Mass. App. Ct. at 440 ("the plaintiff must show that the injury ... is special and different from the injury the action

will cause the community at large"). Relying on traffic and parking impacts, Porter again failed to establish the requisite standing.

3. Quality of life. Next, Porter claims that the development will negatively impact his access to light, air, views, and privacy. These naked allegations were completely unsupported by evidence. Additionally, Brighton Gardner, in opposition, offered photographs establishing that the locus will be difficult to see from the Porter property, that it will not overshadow or reduce light or air flow at the Porter property, and that it is a significant distance away from the Porter property. Again, Porter offers only conclusory statements and makes no showing of particularized harm. See Butler, 63 Mass. App. Ct. at 440. Hence, Porter's quality of life argument in support of standing must fail.

4. Diminution in value. Finally, Porter argues that the value of the Porter property will be negatively impacted by the proposed development. Specifically, he claims that the project's additional 129 rental units in the neighborhood will drive the rent down in the rental unit Porter owns. We echo the trial court in reciting that business competition is not a legally cognizable harm for zoning purposes. See Circle Lounge & Grille, Inc. v. Board of Appeal of Boston, 324 Mass. 427, 429-431 (1949). See also 81 Spooner Rd., 461 Mass. at 702 (lack of standing can be shown where plaintiff's claims of aggrievement "are not interests that the Zoning Act is intended to protect"). [8]

8 Regardless, Porter points to no sworn statement or other admissible evidence submitted to the motion judge that could support his claim of diminution in value. See Mass. R. Civ. P. 56 (c), as amended, 436 Mass. 1404 (2002) (nonmoving party may not rest on allegations or denials). See also Chokel v. Genzyme Corp., 449 Mass. 272, 279 (2007) (party has duty to include in record appendix any document upon which he relies).

We discern no error in the allowance of the summary judgment motion or in the judgment of dismissal for lack of standing that followed.

Judgment affirmed.

Postjudgment order requiring bond affirmed.

All Citations

Slip Copy, 95 Mass.App.Ct. 1124, 2019 WL 3852536 (Table)

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