SJC-12867

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

Suffolk. March 5, 2020. - July 16, 2020.

Present: Gants, C.J., Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.

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

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

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

After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review.

James W. Murphy for the plaintiffs.

Daniel P. Dain (Merriann M. Panarella also present) for David H. Erichsen & another.

Amy E. Kwesell, for zoning board of appeals of Sherborn, was present but did not argue.

The following submitted briefs for amici curiae:

Benjamin Fierro, III, for Home Builders and Remodelers Association of Massachusetts, Inc.

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[1] Alison Murchison.

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

Alana V. Rusin & Gary M. Ronan for NAIOP Massachusetts, Inc.

Nicholas P. Shapiro & Robert K. Hopkins for Real Estate Bar Association for Massachusetts, Inc., & another.

LENK, J. We consider in this case whether abutting property owners have standing to challenge a dimensional zoning requirement without establishing particularized injury. Concluding that they do not, on March 6, 2020, we issued an order affirming the judgment of the Land Court dismissing the complaint.[3]

The plaintiffs challenge the right of their neighbors, Merriann M. Panarella and David H. Erichsen (defendants), to construct a single-family residence on property directly across the street from the plaintiffs' home. Although the defendants' irregularly shaped property is sufficiently wide at the street and meets setback requirements, the plaintiffs contend that the property is too narrow at the location where the home would be built. The zoning board of appeals of Sherborn (board) upheld the issuance of the foundation permit, and the plaintiffs challenged the issuance by filing a complaint in the Land Court. After a trial, a Land Court judge dismissed the plaintiffs' appeal for lack of standing; the judge concluded that the

[3] We acknowledge the amicus briefs submitted by Real Estate Bar Association for Massachusetts, Inc., and The Abstract Club; Home Builders and Remodelers Association of Massachusetts, Inc.; and NAIOP Massachusetts, Inc.

plaintiffs were not "aggrieved" by the board's decision within the meaning of G. L. c. 40A, § 17. The Appeals Court reversed. See Murchison v. Zoning Bd. of Appeals of Sherborn, 96 Mass. App. Ct. 158 (2019). The Appeals Court concluded that noncompliance with the dimensional limits itself was sufficient to establish harm. We granted the defendants' application for further appellate review.

After oral argument in this case, we issued an order affirming the Land Court judgment dismissing the plaintiffs' complaint, with an opinion to follow. This opinion states the reasons for our conclusion that the plaintiffs are not "person[s] aggrieved" for purposes of G. L. c. 40A, § 17, and therefore lack standing to challenge the board's decision.

1. Background. The plaintiffs, Robert and Alison Murchison, own a thirteen-acre property on the east side of Lake Street, directly abutting Farm Pond, in the town of Sherborn.[4] It is within walking distance of the town beach. Although the property initially was comprised of four potentially buildable lots, the plaintiffs constructed their residence such that the part nearest to Lake Street is sixty feet, the minimum setback required by the town's bylaws. The plaintiffs' home is oriented with its front view toward Farm Pond, and was constructed with a

[4] Lake Street has been designated a "scenic road." See G. L. c. 40, § 15C.

very substantial drainage system around its entire perimeter. Storm water catch basins are located on both sides of their southern driveway; this is the only place where the plaintiffs allege that water has entered. A third catch basin is located on the opposite side of Lake Street. While there are other structures in the immediate vicinity, the plaintiffs' home is far larger than those.

The defendants own an irregularly shaped three-acre parcel (referred to as lot 69F) on the west side of Lake Street, directly across from the plaintiffs' property. Lot 69F does not abut Farm Pond; the plaintiffs' property is between the east side of Lake Street and the pond. Although currently undeveloped, lot 69F has been partially cleared in anticipation of construction of a single-family residence. There are existing houses on either side of lot 69F, at 172 and 180 Lake Street. Lot 69F, which exceeds the required 250-foot frontage on Lake Street, is wider in the front and rear portions than it is in the center. It has a moderate slope above the plaintiffs' property. The defendants' proposed residence would be set back more than ninety feet from Lake Street, well in excess of the sixty-foot minimum setback. It would be a distance of approximately 180 feet from the plaintiffs' garage, and further from the plaintiffs' main house. The area is wooded, and a

buffer of trees, both on the plaintiffs' property and the defendants' property, lies along Lake Street.

On June 29, 2016, Sherborn's zoning enforcement officer issued a foundation permit to the defendants with respect to construction of a single-family home on lot 69F. On July 19, 2016, the plaintiffs timely noticed their appeal to the board; they asserted that the lot lacked sufficient width to be buildable.[5] The board held a public hearing on September 14, 2016. On October 5, 2016, it unanimously upheld the zoning enforcement officer's issuance of the permit. Pursuant to G. L. c. 40A, § 17, the plaintiffs appealed from the board's ruling to the Land Court.

In the Land Court, the defendants challenged the plaintiffs' standing to contest the board's foundation permit decision under G. L. c. 40A, § 17. The judge acknowledged that, as owners of land directly opposite the defendants on Lake Street, the plaintiffs were presumed to be "persons aggrieved" with standing to seek judicial review of the board's decision.

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[5] Both properties are located within Sherborn's Residence C zoning district. In that district, the applicable zoning bylaws require (1) three-acre minimum lot size; (2) minimum continuous frontage of 250 feet; (3) minimum lot width of 250 feet; (4) minimum front setback of sixty feet; (5) minimum side setback of forty feet; and (6) minimum rear setback of thirty feet. Other than minimum lot width, there is no dispute that the defendants' proposed project complies with applicable zoning requirements, including those pertaining to lot frontage and front yard setback requirements.

Because the defendants challenged that presumptive standing, the judge considered the evidence, after a four-day trial and a view, as to the plaintiffs' claims of harm to their legal rights. Those concerns generally related to density and overcrowding of the neighborhood, diminution of property value, and storm water runoff.

With respect to the plaintiffs' claim that the construction of the defendants' home would have a negative impact on density, including light, air, and open space in the neighborhood, or would cause an increase in noise and traffic, the judge found the concerns either were generalized and not particular to the defendants, or amounted to speculation and conjecture. At most, she concluded, the evidence demonstrated that any harm was de minimis. As to the plaintiffs' claim that the defendants' residence would diminish the value of the plaintiffs' property, the judge found that construction of a single-family home on the vacant, cleared lot would constitute an improvement in the neighborhood, and that the plaintiffs failed to demonstrate a nonspeculative particular and personal harm resulting in diminution of value. Finally, the judge considered expert testimony and found that any storm water runoff and potential for flooding of the plaintiffs' property would not be significantly greater than runoff that occurs with lot 69F in its current undeveloped state.

In short, the judge found that the plaintiffs' concerns were, in various aspects, speculative, unsupported by evidence, de minimis, or not credible. She concluded that the plaintiffs' presumptive standing as abutters had been rebutted, and that they had not marshalled evidence to demonstrate standing. We agree.

2. Discussion. Standing to challenge a decision by a zoning board of appeals is limited to persons who are "aggrieved by [the] decision." G. L. c. 40A, § 17. See 81 Spooner Rd., LLC v. Zoning Bd. of Appeals of Brookline, 461 Mass. 692, 700 (2012). We conclude that the Land Court judge's findings as to standing are not clearly erroneous, and affirm the judgment of dismissal. See Kenner v. Zoning Bd. of Appeals of Chatham, 459 Mass. 115, 119 (2011); Marashlian v. Zoning Bd. of Appeals of Newburyport, 421 Mass. 719, 722 (1996); Bates v. Cohasset, 280 Mass. 142, 155 (1932).

To be "aggrieved" for these purposes, a person must suffer "some infringement of his legal rights." Sweenie v. A.L. Prime Energy Consultants, 451 Mass. 539, 543 (2008), quoting Marashlian, 421 Mass. at 721. The aggrievement must be more than "minimal or slightly appreciable," and the right or interest asserted must be "one that G. L. c. 40A is intended to protect." Kenner, 459 Mass. at 120-121. See 81 Spooner Rd., LLC, 461 Mass. at 700. While a plaintiff ultimately bears the

burden of establishing standing, see Standerwick v. Zoning Bd. of Appeals of Andover, 447 Mass. 20, 34 n.20 (2006), he or she may be assisted in that burden by a rebuttable presumption of standing granted to parties qualifying as "parties in interest." G. L. c. 40A, § 11.

Applying those principles here, the plaintiffs own property that is directly opposite lot 69F on Lake Street. As abutters, they are entitled to notice of board hearings under G. L. c. 40A, § 11, and qualify as "parties in interest" under the statute,[6] id. There is no dispute, as the judge correctly observed, that the plaintiffs "enjoy a rebuttable presumption [that] they are 'persons aggrieved'" by the board's decision affirming the grant of a foundation permit to the defendants. Marashlian, 421 Mass. at 721-722. See 81 Spooner Rd., LLC, 461 Mass. at 700. Because that presumptive standing has been challenged, the question becomes whether the evidence supports the plaintiffs' claims of aggrievement. We consider each of those claims.

a. Standing based on density and overcrowding. With the exception of the minimum lot width requirement, the parties do not dispute that lot 69F otherwise complies with applicable

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[6] "Parties in interest" is defined to include "owners of land directly opposite on any public or private street or way." G. L. c. 40A, § 11.

zoning bylaws, including dimensional requirements. In the parties' Sherborn neighborhood, the bylaws require a minimum lot size of three acres. Lot 69F meets that requirement, has more than the necessary 250 feet of continuous frontage on Lake Street, and has the requisite setback from Lake Street (and from all other sides). See note 5, supra. The plaintiffs -- from their vantage directly across the street -- contend that Sherborn's bylaws, properly construed, nonetheless preclude construction of the defendants' single-family home because lot 69F lacks the minimum lot width. They claim they are aggrieved because the town's minimum lot width bylaw "protects their interest in preventing the overcrowding of their neighborhood and that this interest would be harmed by the proposed development." Murchison, 96 Mass. App. Ct. at 161. We reject the argument for two reasons.

First, while the plaintiffs have presumptive standing, the presumption may be rebutted by a showing that, as a matter of law, the plaintiffs' "claims of aggrievement are not within the interests protected by the applicable zoning scheme." Picard v. Zoning Bd. of Appeals of Westminster, 474 Mass. 570, 574 (2016). See 81 Spooner Rd., LLC, 461 Mass. at 702. While "density, traffic, parking availability, [and] noise" have been denoted "typical" interests protected by G. L. c. 40A and zoning bylaws, Picard, supra; see Kenner, 459 Mass. at 120, there is nothing to

demonstrate that the purpose of Sherborn's dimensional lot width zoning requirement is to control density or overcrowding generally, or to protect an abutter's interests in particular. As stated, the project complies with lot size and setback requirements. Contrast O'Connell v. Vainisi, 82 Mass. App. Ct. 688, 692 (2012) ("setback requirement serves to address concerns about crowding"); Sheppard v. Zoning Bd. of Appeal of Boston, 74 Mass. App. Ct. 8, 12 (2009) (violation of density provision of bylaw generally constitutes aggrievement). Certainly, there is no claim that the neighborhood is "already more dense than the applicable zoning regulations allow." Standerwick, 447 Mass. at 31.

Second, establishing standing requires a plaintiff to do more than merely allege a zoning violation. See Sweenie, 451 Mass. at 545. "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." Id. See Denneny v. Zoning Bd. of Appeals of Seekonk, 59 Mass. App. Ct. 208, 213-214 (2003) (rejecting claim that proximity constituted per se injury). Standing as an "aggrieved" person requires evidence of an injury particular to the plaintiffs, as opposed to the neighborhood in general, the injury must be causally related to violation of zoning laws, and

it must be more than de minimis. See Kenner, 459 Mass. at 117 (emphasizing distinction between impact and injury); Standerwick, 447 Mass. at 35; Marotta v. Board of Appeals of Revere, 336 Mass. 199, 203-204 (1957) ("status of the property or of the plaintiffs may be such that the plaintiffs are not aggrieved even though the property is very near"). None of those elements is present here.

Although, as abutters, the plaintiffs enjoy presumptive standing, such standing may be rebutted by demonstrating the insufficiency of the evidence upon which it rests. See Standerwick, 447 Mass. at 35. Here, the judge's findings, after trial, support her conclusion that the plaintiffs are not aggrieved for density-related reasons. There was no evidence, for example, that the defendants' project would "shut[] off a view," 81 Spooner Rd., LLC, 461 Mass. at 704; materially affect the plaintiffs' privacy in relation to their home, Dwyer v. Gallo, 73 Mass. App. Ct. 292, 296-297 (2008); or significantly reduce light or air, McGee v. Board of Appeal of Boston, 62 Mass. App. Ct. 930, 930-931 (2004). The evidence did not demonstrate harm particular to the plaintiffs, different from general concerns shared by the rest of the neighborhood. See Kenner, 459 Mass. at 118; Standerwick, 447 Mass. at 30. Moreover, as the judge observed, "[Robert] 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. Speculation and conjecture are not evidence, and in any event, more than a "minimal or slightly appreciable" harm is required.

To demonstrate standing, it fell to the plaintiffs to "put forth credible evidence to substantiate [their] allegations" of aggrievement, Marashlian, 421 Mass. at 721, both from a qualitative and quantitative perspective. "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). See Kenner, 459 Mass. at 118. Although we do not view claims of aggrievement narrowly, Marashlian, supra at 722, we do require that the plaintiffs "establish -- by direct facts and not by speculative personal opinion -- that [their] injury is special and different from the concerns of the rest of the community." 81 Spooner Rd., LLC, 461 Mass. at 701, quoting Standerwick, 447 Mass. at 33. Neither conjecture nor speculative personal opinion substitutes for proof. In this case, and on the evidence before her, the judge correctly

determined that the plaintiffs were not aggrieved, for purposes of G. L. c. 40A, § 17, by density-based considerations.

b. Standing based on diminution in property value. The plaintiffs additionally assert a concern that the value of their property will be diminished as a result of the defendants' proposed development of lot 69F. It is well established, however, that that diminution in value itself is not an interest protected under G. L. c. 40A. See Kenner, 459 Mass. at 123. Unless diminution in value is "derivative of or related to cognizable interests protected by" Sherborn's minimum lot width requirement, it does not provide a basis on which to assert standing. See Standerwick, 447 Mass. at 31-32. There is nothing to suggest that that is the case here. "Zoning legislation 'is not designed for the preservation of the economic value of property, except in so far as that end is served by making the community a safe and healthy place in which to live.'" Kenner, 459 Mass. at 123-124, quoting Tranfaglia v. Building Comm'r of Winchester, 306 Mass. 495, 503-504 (1940).

Although diminution in property value is not an interest protected by Sherborn's minimum lot width bylaw, the judge concluded, in any event, that construction of the defendants' home would not diminish the plaintiffs' property value. The realtor who listed lot 69F for sale was permitted to testify that, in her expert opinion, the addition of a single-family

residence on lot 69F would in no way diminish the value of the plaintiffs' property. Rather, it was her opinion that a single-family residence is the "best and highest use" of lot 69F, and that such a residence, accompanied by landscaping, would improve the lot as compared with its current condition as a vacant cleared lot. The judge credited the broker's testimony, and found it sufficient to rebut any presumption of standing as to the diminution claim.

In response, the plaintiffs did not demonstrate, with credible supporting evidence, a substantial basis for their claims. See Marashlian, 421 Mass. at 721. They neither rebutted the defense expert's testimony nor established that development of lot 69F would cause them a particular and personal harm different from the concerns of the rest of the general community. See Butler, 63 Mass. App. Ct. at 441. They did not present any expert testimony on the issue. Robert Murchison, as a nonexpert owner of the residential property, was permitted to testify as to his personal opinion. See Winthrop Prods. Corp. v. Elroth Co., 331 Mass. 83, 85 (1954); Epstein v. Board of Appeal of Boston, 77 Mass. App. Ct. 752, 759 (2010). See also Canepari v. Pascale, 78 Mass. App. Ct. 840, 847 (2011). Based on "his familiarity with the characteristics of the property, his knowledge or acquaintance with its uses, and his experience in dealing with it," Winthrop Prods. Corp., supra,

Murchison testified that, in his personal opinion, the value of the plaintiffs' property would decrease as a result of the development of lot 69F. Murchison's testimony was, as the judge found, wholly speculative and conjectural, and insufficient to establish aggrievement.

Because the plaintiffs did not establish that the minimum lot width bylaw was intended to protect the value of their property and, in any event, the judge found that development of lot 69F would not diminish the value of their property, we discern no error in the judge's finding that the plaintiffs were not aggrieved persons on the basis of diminution in value.

c. Standing based on storm water runoff. Finally, the plaintiffs claim that they have standing to challenge the issuance of a foundation permit to the defendants based on concerns about increased storm water runoff and potential for flooding. As the judge found, however, possible storm water runoff is not an interest specifically protected by Sherborn's bylaws. See Picard, 474 Mass. at 574. Nonetheless, the judge determined that the evidence did not establish that the plaintiffs will be harmed by increased runoff or flooding, and that they are not aggrieved by the board's decision on that basis. We agree.

At trial, the defendants offered the testimony of a licensed professional engineer. He testified that he considered

a survey of the area and the topography of lot 69F and Lake Street. He identified the street's lowest points, and located three storm water catch basins. He reviewed the proposed construction on lot 69F, including various mitigation measures, such as a foundation drain, an infiltration swale, an erosion control barrier, and other measures directed to reducing or directing runoff. He constructed different models. The expert testified that any storm water runoff after the proposed development would not be significantly greater than any runoff from the property in its current undeveloped state. The judge found that the testimony was well supported and credible.

The plaintiffs also offered expert testimony on this issue. The judge compared the testimony of the two experts and found that the testimony of the plaintiffs' expert failed to rebut the defense expert's testimony that runoff from lot 69F in its proposed developed state would be less than runoff from lot 69F in its current cleared state, and that runoff from the full area would not flow onto the plaintiffs' property and cause damage. Among other things, the judge recognized that the plaintiffs' expert compared storm water runoff from lot 69F in a natural state and a developed state, while the defendant's expert compared natural, cleared, and developed states. As stated, lot 69F already has been partially cleared. Further, the

plaintiffs' expert did not opine that runoff from lot 69F would cause damage to the plaintiffs' property.

The judge found that, when the methodologies and findings of the two experts were compared, the testimony of the plaintiffs' expert was insufficient to establish the plaintiffs' standing based on harm from increased runoff or flooding. Discerning no error, we accept the findings.

3. Conclusion. For the foregoing reasons, there was no error in the judge's decision that the plaintiffs are not aggrieved by the board's decision, and therefore lack standing to pursue the appeal. On March 6, 2020, therefore, we ordered dismissal of the appeal without reaching the merits.