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COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

WORCESTER, SS. CIVIL ACTION NO. 16-1359B

YAN HUANG, et al.,
Plaintiffs

v.

LEO F. BARTOLINI, JR., DAVID EAGLE, AND PAUL DREPANOS, as members of the TOWN OF SOUTHBOROUGH BOARD OF APPEALS, and PARK CENTRAL, LLC AND WILLIAM A. DEPIETRI,
Defendants

FILED
JUN 07 2021
ATTEST: CLERK

DEFENDANTS' REQUEST for LEGAL CONCLUSIONS and RULINGS OF LAW

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The Defendants Park Central, LLC, William A. Depietri and the Board of Appeals hereby submit the following post-trial Request for Legal Conclusions and Rulings of Law.

1. I find and therefore rule that Park Central, LLC is a Massachusetts Limited Liability Company qualified to submit an application for Comprehensive Permit to the Southborough Board of Appeals pursuant to M. G. L. c. 40B.

2. I find and therefore rule that the Southborough Board of Appeals was the duly authorized local comprehensive permit granting authority.

3. I rule that the granting of the Comprehensive Permit to Park Central, LLC on August 24, 2016 was within to the Board's authority. M. G. L. c.40B §21 requires a simple majority of the Board to approve a Comprehensive Permit.

4. I find and accordingly rule that each of the three voting members on the Board on August 24, 2016 that signed the Decision approving the Comprehensive Permit, constituted a simple majority of the Board and were qualified to serve and vote. I rule, notwithstanding Plaintiffs' failure to properly or otherwise plead a claim of disqualification due to residency, material bias or conflict, that there was no material conflict of interest or other fact that operated to prevent each voting member of the Board from lawfully serving or voting.

5. I find and therefore rule that the explicit language of M. G. L. c. 40A §17 requires Plaintiffs to set forth the specific factual predicate and substance of the basis of the appeal in the Complaint and that Defendants have the right to rely on the Complaint in presenting a defense to the appeal. I further rule that the Plaintiffs' claims are limited to those factual allegations set forth in the Complaint, which at bar were (1) that the Use Variance had expired, was invalid and thereby fatally infected the Decision; and (2) that the Decision resulted in "demonstrable public health and safety issues including project and access and egress and other traffic related concerns." I rule that any other factual or legal basis for annulment of the Decision, including, without limitation, deficiency of procedure, flawed application of rule or law, bias, prejudice or conflict of interest was

waived by the Plaintiffs' failure to factually plead the same or is otherwise not cognizable under c. 40A § 17.

6. I further rule that c. 40A § 17 strictly limits this Court's jurisdiction to determining if a person who is truly and measurably aggrieved by the Board's Decision, is entitled to annulment of the Decision, upon a *de novo* review of the facts, that the Decision was arbitrary, capricious or based on legally untenable grounds. I also determine and rule that Plaintiffs were under no constraints from seeking relief beyond that allowed and limited by § 17 through other causes of action which did not limit the Court's jurisdiction.

7. I find and therefore rule that an appeal of a comprehensive permit granted pursuant to M. G. L. c. 40B must be brought in compliance with the specific procedures set forth in M. G. L. c. 40A § 17. The Complaint filed with this Court by twenty-one plaintiffs on September 13, 2016 was a single count complaint and only sought that relief available under M. G. L. c. 40A §17. I further rule that §17 only authorizes the granting of relief that addresses a *personal* legal or property injury *to an individual* Plaintiff *caused* by the Decision and which harm is special and different from the concerns of the rest of the community. *Standerwick v. Zoning Bd. of Appeals of Andover*, 447 Mass. 20, 23-24 (2006).

8. M. G. L. c. 40A §17 requires a Plaintiff to set forth all facts in support of their appeal in the Complaint. Specifically, § 17 mandates that "[t]he complaint shall allege

that the decision exceeds the authority of the board or authority, and any facts pertinent to the issue, and shall contain a prayer that the decision be annulled".

9. M. G. L. c. 40A §17 is a statute which specifically limits the jurisdiction of the Court to the adjudication of only specified substantive claims advanced and maintained by a restricted class of plaintiffs, namely those "persons aggrieved" by the *Decision* of the Board.

10. In order to have standing to file an appeal to challenge a comprehensive permit, a plaintiff must be a "person aggrieved by a decision of the board of appeals." M.G.L. c. 40A, § 17; *Kenner v. Zoning Bd. of Appeals of Chatham*, 459 Mass. 115, 117 (2011). *Standerwick v. Zoning Bd. of Appeals of Andover*, 447 Mass. 20, 23-24 (2006).

11. A person defined as a "party in interest" entitled to notice under G.L. c. 40A, § 11 has a rebuttable presumption that he or she is aggrieved within the meaning of §17. See G.L. c. 40A, § 11. *81 Spooner Road, LLC v. Zoning Bd. of Appeals of Brookline*, 461 Mass. 692, 700 (2012).

12. A defendant can rebut a party in interest's presumption of standing in two ways. First, the defendant can show "that, as a matter of law, the claims of aggrievement raised by an abutter, either in the complaint or during discovery, are not interests that the Zoning Act is intended to protect." *81 Spooner Road, LLC*, 461 Mass. at 702, citing *Kenner*, 459 Mass. at 120. Second, if an abutter "has alleged harm to an interest protected

by the zoning laws, a defendant can rebut the presumption of standing by coming forward with credible affirmative evidence that refutes the presumption." *Id.* at 703.

13. A Defendant can rebut the presumption if the Defendant presents "experts establishing that an abutter's allegations of harm are unfounded or de minimis." *Id*, citing *Kenner*, 459 Mass at 119-120, and *Standerwick v. Zoning Bd. of Appeals of Andover*, 447 Mass. 20, 23-24 (2006).

14. It is enough that the party claiming standing has no reasonable expectation of proving a legally cognizable injury. *Id.*, quoting *Standerwick*, 447 Mass. at 35; *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991).

15. A plaintiff challenging a Board's Decision action " ... must have suffered an 'injury in fact' - an invasion of a legally-protected interest which is (a) concrete and particularized ... and (b) 'actual or imminent, not "conjectural" or "hypothetical,"' *Barvenik v. Board of Newton*, 33 Mass. App. Ct. 129, 132 n.9 (1992).

16. "Once the presumption of standing has been rebutted successfully, the plaintiff [has] the burden of presenting credible evidence to substantiate the allegations of aggrievement..." *81 Spooner Road, LLC*, 461 Mass. at 703 n. 15, citing *Marhefka v. Zoning Bd of Appeals of Sutton, 79 Mass.App.Ct. 515, 519-521 (2011).*

17. Satisfaction of this burden requires both that the Plaintiff must "demonstrate, not merely speculate, that there has been some infringement of [her] legal rights" *Denneny v. Zoning Board of Appeals of Seekonk, 59 Mass.App.Ct. Ct 208, 211 (2003)* and that [her] injury is special and different from the concerns of the rest of the community." *Standerwick, 447 Mass. at 33 quoting Barvenik v. Board of Newton, 33 Mass. App. Ct. 129 at 132.* The harm must be a direct injury to a private right, private property interest, or private legal interest resulting from the Board's decision. *81 Spooner Road, LLC*, 461 Mass. at 700; *Kenner*, 459 Mass. at 120; *Standerwick*, 447 Mass. 20 (2006).

18. As standing is jurisdictional, lack of standing may be raised at any point in a litigation, including after adjudication on the merits and during appeal, if the record shows lack of standing as matter of law. *Barvenik v. Board of Newton*, 33 Mass. App. Ct. 129 (1992) at fn. 6 citing *Marotta v. Board of Appeals of Revere,* 336 Mass. at 203, 143; *Litton Bus. Sys., Inc. v. Commissioner of Revenue,* 383 Mass. 619, 622 (1981); *Bonan v. Boston,* 398 Mass. 315, 320-322, (1986). Once standing is successfully dissipated the Court is without authority to adjudicate the merits of the Complaint brought under M.G.L. c. 40A, § 17. In the absence of aggrievement the court is without the requisite subject matter jurisdiction and cannot reach the substantive issues presented in plaintiffs' claim. *Twardowski v. Ukstins, Massachusetts Land Court No. 09 MISC 412041 HMG, August 15, 2011; 2011 WL 3569272,* citing *Marrotta v. Bd. of Appeals of Revere, 336 Mass. 199, 202-203 (1957).*

19. A determination of standing only allows the plaintiff to proceed in Court on the merits of the claim advanced in the Complaint. It is not a determination on the merits.

The Plaintiff bears the burden of establishing that the Decision appealed from was based on legally untenable grounds or was unreasonable, whimsical, capricious or arbitrary. *MacGibbon v. Bd. of Appeals of Duxbury 356 Mass. 635, 639 (1970)*

20. The interests protected by M. G. L. c. 40B are not identical as those protected by c. 40A. *Standerwick*, 447 Mass. 20 (2006). The interests protected by M.G.L. c. 40B differ from, and in some respects are inconsistent with, those protected by M.G.L. c. 40A. Although the Legislature chose in M.G.L. c. 40B, § 21, to incorporate the judicial review procedure established in M.G.L. c. 40A, § 17, the substantive standing requirements of M.G.L. c. 40A are neither the same as nor incorporated into M.G.L. c. 40B. The comprehensive permit process under M.G.L. c. 40B is designed to override local opposition to low-income housing. *Zoning Bd. of Appeals of Wellesley v. Ardemore Apartments Ltd. Partnership,* 436 Mass. 811, 822, (2002) and "to provide relief from exclusionary zoning practices which prevented construction of badly needed low- and moderate-income housing." *Standerwick, supra at 28-29.* On the other hand, the purpose of zoning law is "to stabilize property uses in the specified districts in the interests of the public health and safety and the general welfare, and not to permit changes, exceptions or relaxations except after such full notice as shall enable all those interested to know what is projected and to have opportunity to protest." *Kane v. Board of Appeals of Medford,* 273 Mass. 97, 104, (1930). Among the purposes of c. 40A, is to "preserve the integrity of the district from the intrusion of multi-family housing" *Murray v. Board of Appeals of Barnstable,* 22 Mass.App.Ct. 473, 476, (1986).

21. The reference in M. G. L. c. 40B, § 21, to G.L. c. 40A, § 17, must be construed in a manner that effectuates the intent of the act. *Standerwick v. Zoning Bd. of Appeals of Andover*, 447 Mass. 20, 23-24 (2006).

22. Concerns about traffic and safety only suffice to confer standing when the quality and quantity of evidence is sufficient to demonstrate individualized harm. *Marashalian v. Zoning Bd. Of Appeals of Newburyport, 421 Mass 719, 722 (1996).* In order for a Plaintiff to demonstrate, in adequate fashion a traffic based aggrievement, he/she is obligated to present credible evidence demonstrating that the alleged traffic concerns will cause a specific, particularized injury to her person or property. *Twardowski v. Ukstins, Massachusetts Land Court No. 09 MISC 412041 HMG, August 15, 2011; 2011 WL 3569272,* citing *Barvenik v. Board of Newton*, 33 Mass. App. Ct. 129 (1992).

23. In order to confer standing challenging a comprehensive permit predicated on traffic concerns a Plaintiff must demonstrate that the Decision of the Board failed to adequately address the specific mandate of M. G. L. c. 40B § 21 and the regulations promulgated thereunder resulting in an actual personal harm. Unlike decisions under c. 40A, the Board, in considering an application for, and in fashioning a Decision on a Comprehensive Permit, is specifically constrained by these regulations which serve to codify and elucidate the interests protected by the statute, and which specifically dictate the permissible basis and scope of the Board's Decision in the event of a denial or approval with conditions. Pertinent sections of the Regulations by which the Board's

Decision is controlled, and which the Board must be cognizant of, include the following definitions and mandates (emphasis supplied):

"760 CMR 56.02: Definitions

Local Concern "means the need to protect the health or safety of the occupants of a proposed Project or of the residents of the municipality, to protect the natural environment, to promote better site and building design in relation to the surroundings and municipal and regional planning, or to preserve Open Spaces."

760 CMR 56.05 Local Hearings (8) Board Decisions (d) Uneconomic Decisions.

"The Board shall not issue any order or *impose any condition* that would cause the building or operation of the Project to be Uneconomic, including a requirement imposed by the Board on the Applicant:

1. *to incur costs of public infrastructure or improvements off the project site* that:
   a. are not generally imposed by a Local Board on unsubsidized housing;
   b. *address a pre-existing condition affecting the municipality generally*; or
   c. are disproportionate to the impacts reasonably attributable to the Project."

760 CMR 56.07: Criteria for Housing Appeals Committee Decisions

"(2) Burden of Proof

b) Board's Case.

2. In the case of denial, the Board shall have the burden of proving, first, that there is a valid health, safety, environmental, design, open space, or other Local Concern which supports such denial, and then, that such Local Concern outweighs the Housing Need.

3. In the case of an approval with conditions, relative to which the Applicant has presented evidence that the conditions make the Project Uneconomic, the Board shall have the burden of proving, first, that there is a valid health, safety, environmental, design, open space, or other Local Concern which supports such conditions, and then, that such Local Concern outweighs the Housing Need.

4. In the case of either a denial or an approval with conditions, if the denial or conditions are based upon the inadequacy of existing municipal services or infrastructure, the Board

shall have the burden of proving that the installation of services adequate to meet local needs is not technically or financially feasible. Financial feasibility may be considered only where there is evidence of unusual topographical, environmental, or other physical circumstances which make the installation of the needed service prohibitively costly.

(3) Evidence

(b) Balancing.

2. the weight of the Local Concern will be commensurate with the degree *to which the health and safety of occupants or municipal residents is imperiled,* the degree to which the natural environment is endangered, the degree to which the design of the site and the proposed housing is seriously deficient, the degree to which additional Open Spaces are critically needed in the municipality, and the degree to which the Local Requirements and Regulations bear a direct and substantial relationship to the protection of such Local Concerns;

(d) Health. Safety, and the Environment. The Committee may receive evidence of the following matters:

1. Structural soundness of the proposed building(s);
2. Adequacy of sewage arrangements;
3. Adequacy of water drainage arrangements;
4. Adequacy of fire protection;
5. Adequacy of the Applicants proposed arrangements for dealing with the traffic circulation within the site, *and feasibility of arrangements which could be made* ***by the municipality*** *for dealing with traffic generated by the Project on adjacent streets."*

24. The trial court possesses broad discretion in determining those issues requiring expert testimony. The need for expert testimony depends, as in all cases, upon the trial judge's discretionary determination whether or not the subject matter is beyond the scope of the common knowledge, experience and understanding of the trier of fact without expert assistance. *Barvenik v. Board of Newton*, 33 Mass. App. Ct. 129 (1992) at fn. 13

citing, Commonwealth v. Francis, *390 Mass. 89, 98, 453 N.E.2d 1204 (1983)*; Reed v. Canada Dry Corp., *5 Mass.App.Ct. 164, 165, 360 N.E.2d 655 (1977)*. I rule the forecasting of traffic volumes, trip generation and trip distribution as well as the impact of increased traffic on roadway safety and the necessity of roadway mitigation is beyond the scope of the common knowledge, experience and understanding of the Court as trier of fact, without expert assistance.

25. I rule that the collective TIAS, Peer Review and Safety Study by which Defendants' experts scrutinized existing conditions and forecast increased traffic impacts, trip distribution and safety concerns was predicated on accepted industry standards, incorporated rational analysis and provided a reasonable scientific and factual predicate upon which the Board and this Court could rely. I rule that the Plaintiffs failed to rebut or discredit the studies, analysis and conclusion reached by the Defendants' experts which were presented to the Board and this Court.

26. I accept and credit the opinions and factual conclusions of Defendants' experts and rule that the traffic impacts forecasted by Defendants will not imperil the future residents of the Project or the residents of Southborough. I rule that although certain off-site traffic calming mitigation on local roads is feasible, the determination to implement same is within the jurisdiction of the Board of Selectmen and not the Applicant or the Board. I rule that even absent suggested off-site mitigation, post-build use of the local roadways will not imperil local residents. I rule that it was not unreasonable or arbitrary for the Board not to require sidewalks, speed humps, road widening or other traffic

calming measures as a condition of its Decision as the Town can reasonably address these matters.

27. The Court should disturb a decision of a Board of Appeals *only* when no rational view of the facts to support the decision are found. *AL Prime Energy Consultants, Inc. v. Woburn 81 Mass. App. Ct 1124 (unpublished 2012).*

28. Upon judicial review, the decision of a Board of Appeals is entitled to a high degree of deference to local control and community planning unless the reasoning given by the Board lacks substantial basis in fact and in reality, are mere pretexts for arbitrary action or veils for reasons not related to the purpose of the zoning law. *Shirley Wayside LTD v. Zoning Board of Appeals. 416 Mass 469 (2012).* I rule that the Board's Decision was not pretextual or made for reasons unrelated to the purposes of c. 40B. I further rule that the Decision was carefully reasoned, prudently conditioned and based on substantial and rational facts.

29. I rule that the Decision of the Board explicitly and implicitly incorporated and embraced the requirements of c. 40B and the Regulations promulgated thereunder.

30. I rule that there was no material conflict of interest or other fact that operated to disqualify or prevent each voting member of the Board from lawfully serving or voting.

31. I rule that the specific language of M. G. L. c. 40A §17 requires Plaintiffs to set forth specific the *factual* predicate and substance of the basis of the appeal in the Complaint and that Defendants have the right to rely on the Complaint in presenting a defense to the appeal. I further rule that the Plaintiffs' claims are limited to those factual allegations set forth in the Complaint namely (1) that the Use Variance had expired, was invalid and thereby fatally infected the Decision; (2) that the Decision resulted in "demonstrable public health and safety issues including project and access and egress and other traffic related concerns." I rule that any other factual or legal basis for annulment of the Decision, including, without limitation, deficiency or process, bias, prejudice or conflict of interest was waived by the Plaintiffs' failure to factually plead the same. *Tuttle v. Planning Bd. Of City of Leominster,* 18 Mass. L. Rptr. 381 (2004).

32. I rule and adjudicate that the Decision properly incorporated the townhouse project approved by the Use Variance as that was a final, valid, un-appealed permit and that integration of infrastructure was fully engineered, reviewed by Town Consultants and was reasonable and practical. *Jepson v. Zoning Bd. of Appeals of Ipswich*, 450 Mass. 81, 876 N.E.2d 820 (2007).

33. I rule that the primary interest protected by c. 40B is the advancement of the availability of affordable housing in the Town in a manner that does not imperil the public and not to protect the aesthetic, fiscal or density character of the zoning district or neighborhood in which the affordable housing is to be located. I rule that the Decision properly addressed and protected this interest. I further rule that the Decision was not

arbitrary, capricious or based on legally untenable grounds. *Jepson v. Zoning Bd. of Appeals of Ipswich*, 450 Mass. 81 (2007).

34. I rule that the issue of standing was timely raised by the Defendants initially in the Answers filed by the parties, and thereafter through evidence challenging the plaintiffs' standing both before trial (provided to this Court during summary judgment) and during trial, as the subject of cross-examination and the presentation of exhibits and expert and other testimony. *Bell v. Zoning Bd. of Appeals of Gloucester, 429 Mass 551, 554 (1999); Cohn v. Zoning Bd. of Appeals of Plymouth, 35 Mass. App. Ct 619, 622 (1993).*

35. I rule that the Plaintiffs' claim of standing was predicated solely on concerns of increased traffic to be created by the Applicant's project.

36. I rule that the Plaintiffs, and each of them, failed to substantiate by credible evidence allegations of aggrievement, both qualitatively and quantitatively, that the increased traffic forecasted by Defendants experts would cause a specific particularized injury to their individual person or property. *Murchison v. Zoning Bd. of Appeals of Sherborn*, 485 Mass. 209 (2020).

37. I rule that the that the increased traffic forecasted by Defendants experts, which Plaintiffs failed to controvert, will only present, at worse, a *de minimus* impact to Flagg Road during peak travel hours and does not outweigh the need for Affordable Housing.

38. I rule that the Plaintiffs have failed to establish their standing and that this Court is without the jurisdiction to address any of the claims alleged by the Plaintiffs, including deficiency of procedure, disqualification due to residency, flawed application of local rule, bias, prejudice or conflict of interest or to grant the requested relief of annulment.

39. I ORDER, RULE and ADJUDICATE that the Complaint be and is hereby dismissed.

Date: June 4, 2021

THE DEFENDANTS,
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