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

96 Mass. App. Ct. 158

February 12, 2019 - September 30, 2019

Court Below: Land Court

Present: Rubin, Sullivan, & Neyman, JJ.

Supplemented January 10, 2020.

Further appellate review granted, 483 Mass. 1107 .

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

In a civil action brought in the Land Court, the judge erred in concluding that the plaintiff property owners lacked standing to challenge the grant of a foundation permit to the defendants for a single-family home on property across the street from the plaintiffs' property, where the plaintiffs introduced sufficient evidence of a particularized injury to their interest in preventing the overcrowding of their neighborhood from the defendants' proposed development in violation of the lot width requirement of the town's zoning bylaw. [159-165]

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 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

Page 159

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

Page 160

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. [Note 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.

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

Page 162

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

Page 163

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, [Note 4] and also assuming without deciding that, for purposes 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

Page 164

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. [Note 5]

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 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

Page 165

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.

FOOTNOTES

[Note 1] Alison Murchison.

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

[Note 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.

[Note 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 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.

[Note 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, 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.

Home/Search Table of Cases by Citation Table of Cases by Name