19-P-1701 Appeals Court

ERIC PORTER vs. BOARD OF APPEAL OF BOSTON & others.[1]

No. 19-P-1701.

Suffolk. December 1, 2020. - February 24, 2021.

Present: Rubin, Singh, & Hand, JJ.

Zoning, Appeal, Person aggrieved, Variance. Practice, Civil, Motion to dismiss, Zoning appeal, Standing, Presumptions and burden of proof. Statute, Construction. Words, "Party in interest."

Civil action commenced in the Superior Court Department on May 22, 2018.

A motion to dismiss was heard by Debra A. Squires-Lee, J.

Eric Porter, pro se.
David R. Suny for Bidabadi Family Ltd. Partnership.

HAND, J. This case stems from the grant by the board of appeal of Boston (board) of certain zoning variances to the Bidabadi Family Ltd. Partnership (partnership) permitting the

[1] Alireza Hakimi, Bidabadi Family Ltd. Partnership, and Next Phase Studios. Of these defendants, only Bidabadi Family Ltd. Partnership participated in this appeal.

partnership to convert a mixed-use commercial and residential property on Cambridge Street in the Allston section of Boston into six residential units. Porter, who owned a property on the same street, appealed from the board's decision to the Superior Court; a judge of that court determined Porter had failed to demonstrate either presumptive standing as a "party in interest" for the purposes of the Boston zoning enabling act, St. 1956, c. 665, § 11, as amended through St. 1993, c. 461, § 2 (enabling act), or standing as a "person aggrieved" under the enabling act, and dismissed Porter's complaint. See Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974). Judgment entered, and Porter filed a timely notice of appeal. Concluding that, at this early stage, Porter demonstrated that he was a party in interest for the purposes of the applicable zoning law, we vacate the judgment of dismissal and remand the matter to the Superior Court for further proceedings.

Standing under the enabling act. "Section 11 of the enabling act confers standing on '[a]ny person aggrieved by a decision' of the board." Epstein v. Board of Appeal of Boston, 77 Mass. App. Ct. 752, 756 (2010). This language is identical to that in G. L. c. 40A, § 17, and is subject to the same interpretation. See id. See also Murrow v. Esh Circus Arts, LLC, 93 Mass. App. Ct. 233, 234–235 (2018), citing G. L. c. 40A, § 17 ("To have standing [under G. L. c. 40A, § 17,] to challenge

the decision of a municipal zoning authority, a plaintiff must be a person aggrieved"); McGee v. Board of Appeal of Boston, 62 Mass. App. Ct. 930, 930 (2004), and cases cited ("import[ing] the teachings of decisions under G. L. c. 40A to cases arising under the [enabling act]").

Under G. L. c. 40A, § 11, "parties in interest," including "the petitioner, 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," enjoy a rebuttable presumption that they are "persons aggrieved."[2] Denneny v. Zoning Bd. of Appeals of Seekonk, 59 Mass. App. Ct. 208, 212 (2003). As the presumption may be rebutted only by "offering evidence 'warranting a finding contrary to the presumed fact,'" 81 Spooner Rd., LLC v. Zoning Bd. of Appeals of Brookline, 461 Mass. 692, 700-701 (2012), quoting Marinelli v. Board of Appeals of Stoughton, 440 Mass. 255, 258 (2003), where the facts alleged in the complaint and any other materials properly considered in evaluating a motion to dismiss suffice to demonstrate a plaintiff is a party in interest, a claim cannot be disposed of on the ground of lack of standing at the motion to dismiss stage. If a plaintiff "fails

[2] The presumption also applies to "the planning board of the city or town, and the planning board of every abutting city or town." G. L. c. 40A, § 11.

to meet the 'party in interest' designation, [the plaintiff] may nevertheless have standing if [the plaintiff] is a person aggrieved, in other words, if the 'permit causes, or threatens with reasonable likelihood, a tangible and particularized injury to a private property or legal interest protected by zoning law.'" Murrow, 93 Mass. App. Ct. at 237, quoting Standerwick v. Zoning Bd. of Appeals of Andover, 64 Mass. App. Ct. 337, 340 (2005), S.C., 447 Mass. 20 (2006). The plaintiff ultimately bears the burden of proving aggrievement. Murrow, supra at 238. See 81 Spooner Rd., LLC, supra at 700, quoting G. L. c. 40A, § 17 ("Under the Zoning Act, G. L. c. 40A, only a 'person aggrieved' has standing to challenge a decision of a zoning board of appeals"). And, again, if the facts alleged suffice to demonstrate that the plaintiff is a person aggrieved, the case cannot be disposed of at the motion to dismiss stage for lack of standing.

Background. At the times relevant to this appeal, Porter owned a property at 604 Cambridge Street in Allston. The partnership's property, to which the disputed variances related, was located at 599 Cambridge Street. In his pro se amended complaint, Porter challenged the board's grant of the variances in his capacity as "an abutter to [the partnership's property]."[3]

[3] He also alleged, somewhat inconsistently, that his property "abuts [the partnership's property] by less than three

He alleged, inter alia, that the board's decision did not make the specific findings required for the variances, did not contain a sufficient factual basis for the board's findings, and was legally and factually erroneous.[4]

The partnership[5] moved to dismiss Porter's amended complaint for failure to state a claim. See Mass. R. Civ. P. 12 (b) (6). In doing so, the partnership argued that Porter was not "an aggrieved party" for the purposes of the enabling act, and thus lacked standing to challenge the board's decision.[6]

In opposing the partnership's motion to dismiss, Porter took the position that his standing as an "abutter" derived from his property being "directly across the street from or possibly

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hundred feet." See Murrow, 93 Mass. App. Ct. at 235 ("abutters," "abutters to the abutters within three hundred feet of the property line," and "owners of land directly opposite on any public or private street or way" are distinct categories of parties in interest under G. L. c. 40A, § 11).

[4] Porter alleged that the variances worsened "the density and overcrowding of land in an already overcrowded neighborhood," had ill effects on "[his] quality of life," allowed "structure(s) on the [partnership's] property [to] be in close proximity to [Porter's] property," and "increased traffic and a disruption in traffic flow."

[5] The motion was filed by the partnership and another defendant, Alireza Hakimi. The board later joined in that motion.

[6] The partnership's argument addressed both Porter's claim to presumptive standing as a "party in interest," and his showing of standing as a "person aggrieved" by the board's ruling.

overlapping" the partnership's property. His opposition papers incorporated a map depicting the relative locations of the parties' properties at 599 and 604 Cambridge Street, along with corresponding lot lines for each property; according to the map, the two properties were on opposite sides of Cambridge Street. When considering the motion to dismiss, the judge took judicial notice of the map,[7] see Federal Nat'l Mtge. Ass'n v. Therrian, 42 Mass. App. Ct. 523, 525 (1997) (judicial notice appropriate for "facts which . . . are verifiably true"), and, relying on it, concluded that, because Porter's property was on the other side of Cambridge Street from the partnership's property, he was not an "abutter," and was, "[a]t most, . . . an abutter to land that is directly opposite the [partnership's property]." See G. L. c. 40A, § 11; Murrow, 93 Mass. App. Ct. at 234–235. The judge thus concluded that Porter had failed to establish that he was entitled to presumptive standing as a party in interest; the judge also determined that, in the absence of a presumption, Porter had failed to allege the particularized harm required to establish his status as a person aggrieved. See 81 Spooner Rd., LLC, 461 Mass. at 700, quoting Marashlian v. Zoning Bd. of Appeals of Newburyport, 421 Mass. 719, 721 (1996) ("A 'person aggrieved' is one who 'suffers some infringement of his legal

[7] The partnership concedes the propriety of the judge's doing so.

rights'"). The judge dismissed Porter's amended complaint and judgment entered in favor of the partnership and all other defendants.

Discussion. 1. Standard of review. "We review the allowance of a motion to dismiss de novo." Curtis v. Herb Chambers I-95, Inc., 458 Mass. 674, 676 (2011). We limit our consideration to the factual allegations in the plaintiff's complaint, taking them as true and drawing all reasonable inferences in the plaintiff's favor. See Blank v. Chelmsford Ob/Gyn, P.C., 420 Mass. 404, 407 (1995). Where, as here, the plaintiff relies on documents to frame the complaint, we, like the judge, may also consider those documents in reviewing the motion to dismiss without converting the motion to one for summary judgment.[8] See Galiastro v. Mortgage Elec. Registration Sys., Inc., 467 Mass. 160, 165 n.11 (2014). "To survive a motion to dismiss, the factual allegations must plausibly suggest that the plaintiff is entitled to relief[, and] they must 'raise a right to relief above the speculative level . . . .'" Harrington v. Costello, 467 Mass. 720, 724 (2014), quoting Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008).

[8] The partnership does not argue otherwise and, in fact, has provided us with a map of the area in which the parties' properties lie. See Mass. R. A. P. 16 (a) (13) (E), as appearing in 481 Mass. 1628 (2019).

2. Presumptive standing. The map, which depicted Porter's property and the partnership's property with their corresponding lot lines, showed that the parcels were on opposite sides of Cambridge Street. The judge concluded that Porter's property neither abutted the partnership's property nor was "directly across the street," and that, as a result, Porter was not entitled to a rebuttable presumption of standing under G. L. c. 40A, § 11.

On appeal, Porter argues that he is entitled to presumptive standing as an abutter. We need not and do not reach that precise question, however, as we conclude, based on the map, that Porter's property was "directly across the street" from the partnership's property, and that Porter was entitled to a rebuttable presumption of standing on that basis.[9]

Understanding that Porter's and the partnership's ownership in the properties extended to the center line of Cambridge Street, which runs between the parcels,[10] see G. L. c. 183, § 58 (ownership of property abutting public way extends to way's

[9] In doing so, we express no opinion about whether a property owner might be entitled to the presumption both as an abutter and based on the position of property "directly across the street," or whether, instead, those categories are mutually exclusive.

[10] As we have noted, Porter's complaint incorporated his map of the lots by reference, including the lot lines drawn there.

center line), the extended lot lines on the map demonstrated that, at their opposite corners, small portions of the Porter property and the partnership property were "directly opposite on [a] public or private street."[11] G. L. c. 40A, § 11. This showing was enough to establish Porter's presumptive standing to challenge the board's grant of the variances as an "[owner] directly across the street." Murchison v. Zoning Bd. of Appeals of Sherborn, 485 Mass. 209, 210, 213 (2020) (owners of property across street as "parties in interest" entitled to rebuttable presumption of standing).

To the extent that the partnership argues that there is a limit on the number of properties that may be considered as "directly opposite" a given parcel, or that there is a threshold minimum portion of each property that must be opposite the other to qualify as "directly opposite," we are not persuaded. "In interpreting the meaning of a statute, we look first to the plain statutory language." Worcester v. College Hill Props., LLC, 465 Mass. 134, 138 (2013). "Where the language of a statute is clear and unambiguous, it is conclusive as to legislative intent . . . and the courts enforce the statute according to its plain wording . . . so long as its application would not lead to an absurd result" (quotations and citation

[11] The map does not include a scale or other means of determining the extent of the overlap more precisely.

omitted). Id. Although G. L. c. 40A, § 11, defines "parties in interest" to include only four categories of parties -- "the petitioner, abutters, owners of land directly opposite on any public or private street or way, . . . abutters to the abutters within three hundred feet of the property line of the petitioner" -- and certain town planning boards, it limits neither the number of potential "parties in interest" in each category nor the number of "owners of land directly opposite," and it does not articulate any minimum portion of the properties at issue that must abut or be "directly opposite" one another. See G. L. c. 40A, § 11. "We will not add words to a statute that the Legislature did not put there, either by inadvertent omission or by design." Retirement Bd. of Somerville v. Buonomo, 467 Mass. 662, 672 (2014). Mindful of "the principle that 'person aggrieved' should not be construed narrowly," Marashlian, 421 Mass. at 722, quoting Marotta v. Board of Appeals of Revere, 336 Mass. 199, 204 (1957), we conclude that Porter's showing of presumptive standing to challenge the board's decision was sufficient to defeat the partnership's motion to dismiss. Having reached this conclusion, we need not and do not consider whether Porter's amended complaint made the necessary showing of specific, cognizable harm necessary to establish aggrievement, absent the presumption to which we conclude Porter is entitled here.

Conclusion. Porter made the necessary showing of presumptive standing to survive the partnership's motion to dismiss. Accordingly, we vacate the judgment of dismissal and remand the matter to the Superior Court for further proceedings consistent with this opinion.[12]

So ordered.

[12] In doing so, we express no opinion on Porter's likelihood of success on the merits.