RECENT DEVELOPMENTS IN ZONING AND LAND USE LITIGATION:

"STANDING" REVISITED

The Massachusetts Zoning Act provides that "any person aggrieved" by a decision of a permit or special permit granting authority may appeal the decision by bringing an action in an appropriate court.[1] Since 1992, judicial determination of whether an abutter (who is presumed to be "aggrieved") may proceed to a full hearing on the merits as "a person aggrieved" has been extensively litigated in Massachusetts trial and appellate courts. Appeals from the decisions of zoning and planning boards and other special permit granting authorities (e.g. city councils sitting as permit granting authorities) are taken to the Superior Court in which the land concerned is situated and the Massachusetts Land Court under M.G.L. ch. 40A §17. This article reviews the current standards and recent case law related to the determination of whether an appellant is "aggrieved" ("has standing") as that term has been construed.

The purposes and application of the Law of Standing have been well reviewed in recent law review articles and treatises. see e.g. Bobrowski, *The Zoning Act's "Person Aggrieved" Standard: From Barvenik to Marashlian*, 18 Western New England Law Review 385 (1996). In Federal jurisprudence, the doctrine of 'standing' is a "threshold jurisdictional requirement for would-be plaintiffs; in order to gain access to [a Federal] court in an administrative dispute, the plaintiff must demonstrate the existence of a case or controversy. A key aspect of the "case or controversy" requirement is a demonstration of injury in fact. see Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Bobrowski at 390. The Massachusetts constitution does not contain a clause analogous to Article III of the Federal Constitution. As described by Professor Bobrowski, the doctrine of standing has evolved in our courts in land use and other litigation as a means of accomplishing "the orderly administration of justice." Id. at 394; Save the Bay, Inc. v. Dept. of Pub. Util., 366 Mass. 667 (1975). Nonetheless, Massachusetts courts have determined that a demonstration of standing – in zoning and chapter 40B appeals – is a jurisdictional prerequisite for a court's review of a decision made by a permit granting authority under G.L. ch. 40A and 40B. see e.g. Barvenik v. Board of Aldermen; 33 Mass. App. Ct. 129 (1992); Marashlian v. Zoning Bd. of Appeals of Newburyport, 421 Mass. 719 (1996); Standerwick v. Andover ZBA, 447 Mass. 20 (2006).

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[1] G.L. ch. 40A §17: Any person aggrieved by a decision of the board of appeals or any special permit granting authority or by the failure of the board of appeals to take final action concerning any appeal, application or petition within the required time or by the failure of any special permit granting authority to take final action concerning any application for a special permit within the required time, whether or not previously a party to the proceeding, or any municipal officer or board may appeal to the land court department, the superior court department in which the land concerned is situated …. Notice of the action with a copy of the complaint shall be given to such city or town clerk so as to be received within such twenty days. The 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. There shall be attached to the complaint a copy of the decision appealed from, bearing the date of filing thereof, certified by the city or town clerk with whom the decision was filed.

As zoning appeals and land use controversies continued to flood the courts through the 1990s and early 21st Century, Massachusetts trial and appellate court have repeatedly revisited and refined the evidentiary requirements to establish a Plaintiff's standing in a zoning appeal. In a practical sense, the trial courts have used the doctrine of standing as an "acid test" to determine the 'legitimacy' of appeals from local permit granting authorities. The reported cases make it clear that many recent zoning appeals do not pass "standing" muster and are dismissed prior to trial. As predicted by Professor Bobrowski, the emphasis on addressing standing issues has "front loaded" and "accelerated" zoning and appeals under GL ch 40A considerably. For counsel representing developers and permit holders this result has generally been seen as a positive development.

The majority of reported trial court cases regarding the standing issue have been decided on motions for summary judgment. In recent years, the majority of reported cases have dismissed abutter appeals when (1) the standing issue has been raised and (2) evidence of lack of standing presented by the party seeking zoning relief (i.e. by the permit holder).[2] As a consequence, the prompt development or refutation of evidence of standing in zoning appeal cases has become necessary. However, an open question remains as to whether the courts have trekked beyond the statutory scheme leaving certain legitimate claimants with no judicial remedy for inappropriately granted relief. For example, consider a zoning board that permits an expansion of a nonconforming use pursuant to GL ch. 40A §6. Unless an abutter chooses to and can demonstrate the type of harm contemplated by the Zoning Act and/or the bylaw/ordinance and that the harm especially affects the abutter (as opposed to being a town-wide nuisance), *no* judicial review or relief may be available of this local administrative decision. In light of the very variable quality of local administrative decisions, a traditional 'check and balance' to local decision making is lost. On the other hand, there is little question that many zoning appeals are generated as a result of 'NIMBY' and resistance to development and change at the municipal level. The loss of a judicial remedy is, perhaps, more acute with respect to appeals of zoning variances (where the standard for relief is high) and less so for grants of special permits, subdivision approvals and the like (where the standards to be met provide considerably more discretion to the permit granting authority).

In Titanium Group, LLC, v. Zoning Board of Appeals of Brockton, Land Court No. 348898 decided January 16, 2009, Land Court Judge Grossman recaptured what is now the 'black letter law and test' for determining standing (the internal citations and references are omitted to ease review):

> "… Only persons aggrieved by a decision of the special permit granting authority may bring suit seeking judicial review of that determination under G.L. c. 40A, § 17. Without aggrievement, this court lacks subject matter jurisdiction, and cannot reach the substantive issues presented in a claim ('aggrieved person' status is a jurisdictional prerequisite" for § 17 review)…

[2] A selection of cases detailing various standards and fact patterns is attached as an appendix

"Although the words "person aggrieved" have a comprehensive meaning and are not constricted to a narrow signification, the party appealing [must have] some pecuniary interest, or some personal right, which is immediately or remotely affected or concluded by the decree appealed from." ("a person aggrieved ... must assert a plausible claim of a definite violation of a private right, a private property interest, or private legal interest".) …

"Ultimately, "standing to challenge a zoning decision is conferred only on those who can plausibly demonstrate that a proposed project will injure their own personal legal interests *and* that the injury is to a specific interest that the applicable zoning statute, ordinance, or bylaw at issue is intended to protect…"

"As "parties in interest" deserving notice of ZBA proceedings under, plaintiffs are entitled to a rebuttable presumption of standing…. This presumption, however, "does not shift the burden of proof; it is a rule of evidence that aids the party bearing the burden of proof in sustaining that burden by throw[ing] upon his adversary the burden of going forward with evidence." (… the "presumption recedes when defendant challenges a plaintiff's status as an aggrieved person *and offers evidence supporting his or her challenge…* ") …

"Legal arguments and mere allegations are not sufficient to rebut the plaintiffs' presumed standing… It is not enough simply to raise the issue of standing in a proceeding under § 17. The challenge must be supported with evidence"…

"That said, evidence adduced through discovery may rebut the plaintiff's presumed standing, such as depositions, answers to interrogatories, and expert affidavits, if they shed doubt on plaintiff's bases for asserting aggrievement…. In this way, the defendant may rebut the plaintiff's presumption of aggrievement either by providing affirmative evidence- that a basis for aggrievement is not well founded by showing, in the negative, that the plaintiff lacks any factual foundation for asserting a claim of aggrievement…

"…[T]he defendant rebutted the plaintiff's presumption of standing by submitting an expert affidavit…. Having rebutted the plaintiffs' presumption of standing, by contesting their bases for aggrievement with competent evidence, the "presumption recedes" and "the point of jurisdiction" will be determined on all the evidence with no benefit to the plaintiffs from the presumption as such. At this point, the burden of persuasion rests squarely with the plaintiff to demonstrate, not merely speculate, that there has been some infringement of [its] legal rights," and "that [its] injury is special and different from the concerns of the rest of the community." … Finally, … establishing that a ZBA decision harms the plaintiff in a perceptible way is not sufficient alone to confer standing; plaintiff must also show the injury complained of is to "an interest the zoning scheme seeks to protect ." …

> "Although plaintiff bears the burden of proving aggrievement, because "[s]tanding is a gateway through which one must pass en route to an inquiry on the merits ..., a plaintiff is not required to prove by a preponderance of the evidence that [their] claims of particularized or special injury are true." Instead, plaintiff must come forward with "credible evidence to substantiate [their] allegations." To qualify as credible evidence, a proffer "must be of the type on which a reasonable person could rely to conclude that the claimed injury likely will flow from the board's decision…."

Remarking on the "quality and quantity" of credible evidence a plaintiff must present, the Appeals Court stated in Michaels v. Conlon:

> "…. When making a judgment on the merits, assessment of the comparative weight of expert testimony is appropriate in determining whether the party with the burden of proof has met that burden. The question of standing, however, is a gate keeping question and requires consideration solely of the quantity and quality of evidence the plaintiffs have presented, not the comparative weight of the plaintiffs' testimony and the defendants'. (standing is established by "a plausible claim" that the proposed action will violate a private right the plaintiff possesses."). When the judge determines that the evidence is both quantitatively and qualitatively sufficient, however, the plaintiff has established standing and the inquiry stops.... [T]he plaintiffs are not required to persuade the judge that their claims of particularized injury are, more likely than not, true." 71 Mass. App. Ct. 449 (2008).

Most (but not all) of the recent trial and appeals court cases have been hostile to the proposition that 'standing' may be maintained (after challenge) solely through the testimony of a Plaintiff/Abutter. As the Standerwick court explained:

> "As abutters, the plaintiffs are entitled to a rebuttable presumption that they are "persons aggrieved" under the act. This presumption originates in our jurisprudence concerning G.L. c. 40A …. Once the presumption is rebutted, the burden rests with the plaintiff to prove standing, which 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." Standerwick v. Andover ZBA, 447 Mass. 20, 33 (2006) (emphasis added)

In light of the current standards, when preparing or being faced with a zoning appeal, practitioners should be prepared to, as quickly as possible, determine: (1) the Plaintiff's theory of aggrievement; (2) whether or not the purported harm is the type of harm intended to be protected by the relevant zoning code; (3) whether the harm complained of is unique to the Plaintiff (or a more generalized harm that afflicts the community) and (4) to enlist the assistance of an expert to provide "credible testimony" regarding the party's case (either supporting or rebutting the case for aggrievement). A trial court's determination regarding the "credibility of an expert witness" or the determination of whether or not the harm is within the scope of the applicable zoning code will not be

disturbed unless it is "clearly erroneous." see e.g. Michaels at 450; Titanium Group, 2009 WL 117989 (Mass. Land Ct.).

As a result of the recent jurisprudence in this area of the law, there may be little time and opportunity to develop and present evidence beyond the creation of affidavits of experts and the parties and related exhibits. For example, in Titanium Group a motion "for judgment on the pleadings" was made less than five (5) months after commencement of the litigation - prior to the commencement of discovery. The court treated the MRP Rule 12(b)(1) motion as a Motion for Summary Judgment under Rule 12(b)(6) and permitted the parties to file Memoranda and Affidavits in Support and Opposition to the Motion.

The developer's motion forced the Plaintiff/Appellant to retain an expert witness just months after the inception of the case. And, of course, the appeal must be made and perfected within 20 days of the filing of the decision with the municipal clerk. G.L. ch. 40A §17. The affidavits of the developer's expert and the abutter's expert in Titanium Group are attached for reference. The "heft" of each affidavit reflects, in part, the information available to each expert, the time to prepare and the availability of funding. I leave it to the reader to determine whether the trial judge utilized an appropriate standard when determining whether the Plaintiff/Appellant satisfied his burden of coming forward with evidence of standing at this relatively early stage of the litigation.

One may compare the arguably high standard of proof in Titanium Group with the arguably more 'relaxed' approach of Jepson v. ZBA of Ipswich, 450 Mass. 81 (2007). In Jepson, the court was satisfied with evidence of the potential for flooding which was derived from information developed by the Town Conservation Commission. One may rightly ponder how a physical *trespass* of automobiles on the Plaintiff's land in Titanium Group (which was observed and recorded in the Plaintiff's expert's affidavit) may be distinguished from speculative "flooding" (i.e. intrusion by water resulting from the proposed development) in Jepson. A note of caution: however difficult it may be to harmonize the decisions, the advocacy for or against standing must be related not only to alleged harm but also to whether the harm is the type intended to be mitigated or prevented by the zoning code. "An examination of the record establishes that Jepson sufficiently demonstrated that he has standing to challenge the grant of the comprehensive permit based on flooding to his property because, under Standerwick, *flooding constitutes an injury to an interest that G.L. c. 40B was intended to protect*." Jepson at 89. (emphasis added). The harm alleged in Titanium Group was characterized by the Plaintiff as the overburdening of an easement and the prevention of "trespassing" – harms arguably outside the 'scope of harms' the zoning ordinance was intended to protect. On the other hand, if the same harm (intrusion of motor vehicles into private property and occupying parking spaces) was characterized as "lessening the congestion of traffic" or "conserving the value of land and buildings" perhaps a trespass could or should be the type of harm intended to be addressed by the Ordinance (see the Brockton Ordinance Zoning Ordinance attached as an exhibit).

Jepson teaches each party to thoroughly review the "purposes" section of the local zoning code and of GL 40A or 40B to determine if these resources provide a 'hook' upon which

to hang or remove an aggrievement 'hat.' "…[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… Jepson put forth credible evidence to substantiate his allegations of flooding to his property, including reliance on the expertise and findings of the conservation commission." Jepson at 91 (internal citations omitted); Marashlian, 421 Mass. at 721. A second lesson of Jepson may be to direct a practitioner representing a Plaintiff/Appellant to *any* available "credible" or "authoritative" source of proof regarding the client's standing, to provide such evidence in a form acceptable to the trial court and, through a Memorandum of Law, to firmly link such evidence to an applicable bylaw provision.

Assuming that discovery is undertaken and a motion for summary judgment made, a permit holder can be successful in bringing the litigation to a swift end. As the SJC explained in Standerwick: "…In a summary judgment context, a defendant is not required to present affirmative evidence that *refutes* a plaintiff's basis for standing. see Kourouvacilis v. General Motors Corp., 410 Mass. 706, 714 (1991), citing Celotex Corp. v. Catrett, 477 U.S. 317, 328 (1986) (material supporting motion for summary judgment "need not negate, that is, disprove, an essential element of the claim of the party on whom the burden of proof at trial will rest" but "must demonstrate that proof of that element at trial is unlikely to be forthcoming"). *It is enough that the moving party demonstrate … unmet by countervailing materials, that the party opposing the motion has no reasonable expectation of proving" a legally cognizable injury*. Kourouvacilis v. General Motors Corp., supra at 716." Standerwick, 447 Mass. at 35 (summary judgment granted on pleadings, depositions, answers to interrogatories, responses to requests for admission, or affidavits). As noted, the countervailing materials necessary to resist summary judgment must be more than 'personal speculation or concerns' on the Plaintiff's part. The evidence must be "credible" and, in most cases, come from an expert witness. As Michaels and Titanium Group demonstrate, even expert-provided evidence may be insufficient if determined by the court to be "not credible" or "not related to an interest protected by the applicable zoning code."

SUMMARY

In light of Standerwick, Michaels and Titanium Group, the zoning practitioner is well advised to review carefully her theory of aggrievement with the client's expert(s) as the affidavit(s) is (are) drafted, to include appropriate exhibits as appendices and to develop a compelling presentation within the time and page limit constraints permitted by the Land Court and Superior Court Rules. It is vital to be prepared to develop 'credible evidence' (i.e. expert testimony through affidavits or other admissible evidence) to rebut or establish standing from the inception of the case.

From the Materials of Diane Tillotson, Esq., Hemenway & Barnes, Boston

The *Standerwick* decision provides a clear road map for *developers and other permit holders* seeking to avoid the expense and delay of trial through a motion for summary judgment challenging the standing of the plaintiffs. The necessary steps can be summarized as follows:

- Identify and confirm the specific grounds of the plaintiff's aggrievement. This can be done through discovery specifically focused on the nature of the aggrievement.

- Determine whether the plaintiff has any factual support for the aggrievement. Again, this can be determined through focused discovery, both interrogatories and depositions.

- Determine whether the plaintiff has retained experts to support his/her case. Analyze the responses to discovery and deposition transcripts.

- Determine whether the claimed aggrievement is an interest protected by the statute or bylaw in question and whether the plaintiff has any factual support for the claimed aggrievement or is relying on conjecture and speculation.

- The summary judgment motion, if warranted, should be supported by affidavits affirmatively challenging one or more of plaintiff's grounds for standing. For example, if one of the plaintiff's grounds is based on alleged harm as a result of increased traffic, as in *Standerwick*, the affidavit of a traffic expert, likely the same expert who testified at the hearing, and which demonstrates both personal knowledge and competency to testify provides evidence sufficient to support the challenge.

- Once some competent, affirmative evidence challenging plaintiff's standing is in the record through affidavit or otherwise, the permit holding moving party must demonstrate the absence of a triable issue by showing, through plaintiff's answers to interrogatories or deposition(s) that plaintiff will he unable to establish standing - one of the jurisdictional prerequisites to a maintaining a zoning appeal.

- The moving party must insure that each of the supporting grounds for standing claimed by plaintiff is rebutted by some evidence which may be the plaintiff's own admission of lack of factual support, that the plaintiff will be unable to establish a factual basis for the ground at trial.

- The permit holder's counsel should be sure that all evidence relevant to the motion, including the zoning bylaw, where applicable, is included in the review appendix submitted with the motion.

A *Plaintiff* faced with a motion for summary judgment must establish the following in order to avoid a dismissal of his or her appeal:

- Clearly articulate a basis for aggrievement that is among the interests protected by the statute or bylaw pursuant to which the permit was issued.

- Support the claim of aggrievement by concrete evidence that is relevant and admissible. If the claims of aggrievement are related to traffic, drainage or potential loss in the value of their real estate, this will likely require the affidavit of an expert who can demonstrate both personal knowledge of the project in question and the expertise and qualifications necessary to provide testimony in the areas in question.

- Certain claims of aggrievement may not require expert testimony but will nevertheless require specific facts in support of the claim. For example, if "views" are protected by the bylaw in question and the permit that has been appealed provides relief from a height restriction, an affidavit from the plaintiff as to impact, supported by facts from the applicant's application and the abutter's knowledge of the height and setback of his own home may suffice. Even under those circumstances, however, it would be advisable to secure the affidavit of a qualified landscape architect.

Reprinted from Land Use Litigation – Tactics and Trials (MCLE, Inc. 2007)

Exhibits:

1. Standerwick v. Andover ZBA, 447 Mass. 20 (2006)

2. Titanium Group, LLC, v. Zoning Board of Appeals of Brockton, Land Court No. 348898 (2009 WL 117989)

3. Affidavit of John T. Gillon, P.E. in support of Motion to Dismiss (Titanium)

4. Affidavit of Jennifer Conley, P.E. in opposition to Motion to Dismiss (Titanium)

5. Jepson v. Zoning Bd. of Appeals of Ipswich, 450 Mass. 81 (2007)

6. Sweenie v. Prime Energy, Inc., 451 Mass. 539 (2008)

7. Land Court Rule 4

8. Superior Court Rule 9A

9. Table of Recent Cases

10. Section 808 of the Acts of 1975 [Preamble to Zoning Act]

11. Sample Zoning Bylaws (Brockton, Chatham, Groton, Ipswich, Rockport)

12. Rockport Chamber Music Festival – 'Shadow Study' and Narrative