Town of Chelmsford, et al. v. Newport Materials, LLC, et al. (Lawyers Weekly No. 12-126-17)

By: Tom Egan in Fulltext Opinion, Real Estate Law, Superior Court September 8, 2017

COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX, ss. SUPERIOR COURT
CIVIL ACTION
No. 1681CV03455
TOWN OF CHELMSFORD1 & another2
vs.
NEWPORT MATERIALS, LLC & others3
MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS NEWPORT MATERIALS, LLC AND 540 GROTON ROAD, LLC'S MOTION TO DISMISS

The Town of Chelmsford ("Chelmsford") and its fire chief, Gary Ryan ("Chief Ryan"), bring this appeal pursuant to G. L. c. 40A, § 17, challenging a decision by the Town of Westford ("Westford") and the Westford Planning Board (the "Board") granting defendants Newport Materials, LLC and 540 Groton Road, LLC (collectively, the "Newport Parties") special permits for the construction and operation of an asphalt manufacturing plant (the "Project") on a piece of property located in Westford, near the Chelmsford line (the "Property"). The matter is now before the court on the Newport Parties' motion to dismiss pursuant to Mass. R. Civ. P. 12(b)(1) based on the plaintiffs' alleged lack of standing, as well as Mass. R. Civ. P. 12(b)(6). Because the court agrees that the plaintiffs lack standing to bring this appeal, the Newport Parties' motion to dismiss is ALLOWED.4

1 By and through its Board of Selectmen

2 Gary Ryan, in his capacity as Chief of the Chelmsford Fire Department

3 540 Groton Road, LLC; Dennis J. Galvin, Mathew Lewin, Darrin Wizst, Michael J. Green, and Kate Hollister, as members of the Westford Planning Board; and the Town of Westford, by and through its Board of Selectmen

4 Because the court allows the motion to dismiss pursuant to Mass. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, the court does not reach the Newport Parties' arguments that the plaintiffs' complaint must be dismissed pursuant to Mass. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted.

BACKGROUND

The Newport Parties own the Property, which is located at 540 Groton Road, in Westford, Massachusetts. The Property is an industrially-zoned, 115.52 acre lot. Ninety-two of those acres are in Westford, while the remaining twenty-three are in Chelmsford. The location of the proposed Project is entirely within the Westford portion of the Property. The Newport Parties do not propose to alter any portion of the Property located in Chelmsford.

There is no allegation that Chelmsford itself owns land abutting the Property. The Property is abutted on the west by the Fletcher Quarry, an active and operational quarry since the 1800s that has no objection to the Project; on the south by Route 40; on the north by vacant industrial land; and on the east by U.S. Route 3, industrial properties and a single residence located at 263 Groton Road in Chelmsford. None of the abutting industrial properties, nor the owner of the single residence, is a party to any litigation involving the Project.

In 2009, the Newport Parties filed applications with the Board seeking the special permits necessary to operate an asphalt manufacturing plant on the Property. Seven years of administrative proceedings and litigation between the Newport Parties, Westford, and the Board followed. The central issue in dispute was whether the Project qualified as "light manufacturing" as defined by the Westford Zoning Bylaw (the `Bylaw"). 5 After the Board denied their initial applications, the Newport Parties appealed to the Land Court, which remanded the matter back to the Board. After further unfavorable proceedings before the Board

5 The Bylaw defines "light manufacturing" as: "fabrication, assembly, processing or packaging operations employing only electric or other substantially noiseless and inoffensive motor power, utilizing hand labor or quiet machinery and processes, but subject, however, to the following conditions: any light manufacturing business, the conduct of which may be detrimental to the health, safety or welfare of persons working in or living near the proposed location of such manufacturing, including, without limiting the generality of the foregoing, special danger of fire or explosion, pollution of waterways, corrosive or toxic fumes, gas, smoke, soot, dust or foul odors and offensive noise and vibrations, is expressly prohibited."

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and the Westford Zoning Board of Appeals, the Newport Parties appealed again to the Land Court. This time, the Newport Parties, Westford, and the Board entered into mediation and were

able to reach a settlement. The settlement resolved the litigation and required the issuance of a Special Permit for Major Commercial Project ("MCP special permit"), which the Board had previously voted against, subject to numerous conditions. On September 27, 2016, the Newport Parties, Westford, and the Board signed a settlement agreement and filed an Agreement for Judgment with the Land Court that incorporated an MPC special permit for the proposed project and the settlement agreement. The Land Court issued an Order Allowing the Agreement for Judgment to Enter subject to certain modifications on October 24, 20156, and issued a Revised Order which entered the Agreement for Judgment as originally filed by the parties on November 9, 2016. As required by the Revised Order, Westford filed the MCP special permit with the Westford Town Clerk on November 14, 2016.

The MCP special permit states that the project will include "a hot mix asphalt (HMA) drum mix plant, a hot oil heater, oil and asphalt storage tanks and a rock crushing plant." According to the MCP special permit, components of the asphalt plant operation will include, among other things: four 200-ton silos (sixty-eight feet in height) that allow the hot asphalt to load into trucks that pull underneath; a tank farm with two 30,000-gallon indirect fired asphalt cement vertical tanks with unloading pumps (thirty-six feet in height); a HYCGO Gencor 100 hot oil heater with expansion tank stand; two 31,000-gallon fire cisterns; and one 10,000-gallon above-ground storage tank for Number 2 fuel oil.

Condition 5 of the MCP special permit, entitled "Fire and Life Safety and Hazardous Materials," imposes twenty-one specific safety-related conditions on the Newport Parties. Among other things, it requires the Newport Parties to provide: a foam cart on the Property throughout the lifetime of the operation of the plant, for firefighting purposes; "OSHA's confined space training for the Westford and Chelmsford Fire Department staff on an annual basis and … re-certification for Westford and Chelmsford employees as needed over the lifetime of the asphalt plant's operation;" "a detailed briefing to representatives of the Westford and Chelmsford Fire Departments, as designated by the respective Fire Chiefs, with regard to spill containment procedures;" and access for the Westford and Chelmsford fire chiefs to "conduct an inspection of the plant on an annual basis" relating to such spill containment procedures. The plaintiffs' complaint alleges that neither Chelmsford nor its fire department was contacted by the defendants regarding either the imposition of the condition requiring briefings on spill containment procedures or the additional training. Condition 5 does not, however, unilaterally impose obligations on the Chelmsford Fire Department (which was not a party the settlement) to attend these trainings and briefings; it only imposes obligations on the Newport Parties to "provide" them.

The plaintiffs allege that the Project is inherently dangerous and poses a risk of fire because it will involve the use and storage of highly flammable and explosive materials, and that Chelmsford may be called to provide emergency aid to Westford should a fire occur. Chelmsford and Westford, along with sixteen other communities, are signatories to the District 6 Fire Chiefs Association Mutual Aid Agreement for Joint Fire, Rescue and Ambulance Service (the "Mutual Aid Agreement"), dated July 1, 2008. While the plaintiffs' complaint alleges that the Mutual Aid Agreement "requires Chelmsford to provide support as needed" in emergencies, the Mutual Aid Agreement itself is not so explicit. It does not specifically state the circumstances under which Chelmsford would be called to assist Westford or whether Chelmsford is the first of the seventeen other signatories to be called when Westford needs

assistance. The Mutual Aid Agreement provides that "[a]ssistance shall be rendered according to the procedures set forth in the Operational Plan developed and agreed to by all parties to this agreement," but the Operational Plan is not included in the exhibits before the court and its terms are not otherwise described in the pleadings. According to the complaint, mutual aid responses by the Chelmsford Fire Department to Westford have increased significantly in the past two years, with five responses in 2013, two in 2014, thirteen in 2015, and at least thirteen in 2016. Although the allegations of the complaint are not entitled to a presumption of truth or even to be viewed in the light most favorable to the plaintiffs (see infra), for purposes of this motion, the court assumes that Chelmsford has provided assistance to Westford pursuant to the Mutual Aid Agreement as described in the complaint and will continue to do so in the future.

DISCUSSION

A. Standard of Review

A motion to dismiss pursuant to Mass. R. Civ. P. 12(b)(1) for lack of standing (or other lack of subject matter jurisdiction) may be based solely on the facts alleged in the complaint or on additional evidence submitted by the moving party. If the motion is not supported by additional evidence, it "presents a `facial attack' based solely on the allegations of the complaint" and the court must assume the truth of those allegations for the purpose of deciding whether it has subject matter jurisdiction to hear the plaintiffs claim. Callahan v. First Congregational Church of Haverhill, 441 Mass. 699, 709 (2004), quoting Hiles v. Episcopal Diocese of Massachusetts, 437 Mass. 505, 516 n.13 (2002). If, however, the moving party submits "documents and other materials outside the pleadings" in an attempt to "contest the accuracy (rather than the sufficiency) of the jurisdictional facts pleaded by the plaintiff," the court must "address the merits of the jurisdictional claim by resolving the factual disputes

between the plaintiff and the defendants." Id. at 710-711. Where the defendant makes such a
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"factual challenge," the factual allegations in the complaint are not presumed to be true, id. at 711, and the evidence submitted regarding subject matter jurisdiction is "not viewed in the light most favorable to the non-moving party." Wooten v. Crayton, 66 Mass. App. Ct. 187, 190 n.6 (2006).

Here, the defendants attach several exhibits to their motion, thus presenting a "factual challenge" to the plaintiffs' jurisdictional allegations. As a result, the allegations of the complaint are not entitled to a presumption of truth and the evidence submitted in connection with the motion need not be viewed in the light most favorable to the plaintiffs. In this case, however, even if the court were to limit its analysis to the allegations of the complaint and presume them to be true, the court would reach the same conclusion that the plaintiffs lack standing to pursue their claims. 6

B. Standing under G. L. c. 40A, § 17

Standing is a jurisdictional prerequisite to proceeding with an appeal under G. L. c. 40A, § 17. 81 Spooner Road, LLC v. Zoning Bd. of Appeals of Brookline, 461 Mass. 692, 700 (2012). A plaintiff may demonstrate standing in one of two ways: by establishing that they are a "person aggrieved" by a decision of a zoning board of appeals or special permitting authority; or (2) by demonstrating that they are a "municipal officer or board" with "duties relating to the building code or zoning within the same town as the subject land. "7 G. L. c. 40A, § 17; Planning Bd. of

6 The plaintiffs' reliance on Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008), for the proposition that, in defending the motion to dismiss, they need only show "factual allegations enough to raise a right to relief above the speculative level," is misplaced, as the Iannacchino standard applies to motions brought pursuant to Mass. R. Civ. P. 12(b)(6) for failure to state a claim, not motions brought pursuant to Mass. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction.

7 Because the plaintiffs do not own land either abutting the Property or directly across the street from the Property, they are not entitled to a presumption that they are persons aggrieved. See Marashlian, 421 Mass. at 721-722. See also G. L. c. 40A, § 11 (defining "parties in interest" Marshfield v. ZoningBd. of Appeals of Pembroke, 427 Mass. 699, 703 (1998). The plaintiffs bear the burden of proving standing. 81 Spooner Road, LLC, 461 Mass. at 701, citing Standerwick v. Zoning Bd. of Appeals of Andover, 447 Mass. 20, 34-35 (2006). For the reasons explained below, the court concludes that the plaintiffs have no standing as either "person[s] aggrieved" or "municipal officer[s] or board[s]" under G. L. c. 40A, § 17.

C. Plaintiffs Are Not "Persons Aggrieved"

"A plaintiff is a `person aggrieved' if he suffers some infringement of his legal rights." Marashlian v. Zoning 13d. of Appeals of Newburyport, 421 Mass. 719, 721 (1996), citing Circle Lounge & Grille, Inc. v. Board of Appeal of Boston, 324 Mass. 427, 430 (1949). "Of particular importance, the right or interest asserted by a plaintiff claiming aggrievement must be one that the Zoning Act is intended to protect, either explicitly or implicitly." 81 Spooner Road, LLC, 461 Mass. at 700. See Dwyer v. Gallo, 73 Mass. App. Ct. 292, 295 (2008) ("To succeed, the [plaintiffs] must show that the zoning relief granted adversely affected them directly and that their injury is related to a cognizable interest protected by the applicable zoning law. "). "[T]he term `person aggrieved' should not be read narrowly," Marashlian, 421 Mass. at 721, but "[a]ggrievement requires a showing of more than minimal or slightly appreciable harm." Kenner v. Zoning Bd. of Appeals of Chatham, 459 Mass. 115, 120 (2011). "The injury must be more than speculative." Marashlian, 421 Mass. at 721. "The adverse effect on a plaintiff must be substantial enough to constitute actual aggrievement such that there can be no question that the plaintiff should be afforded the opportunity to seek a remedy. To conclude otherwise would entitled to notice of public hearing under zoning law as including "owners of land directly opposite [subject property] on any public or private street").

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choke the courts with litigation over myriad zoning board decisions where individual plaintiffs have not been, objectively speaking, truly and measurably harmed." Kenner, 459 Mass. at 122. The plaintiffs contend they "have alleged harms to their legal interests relating to the dangers inherent in the use and storage of the highly flammable and explosive materials that will be used by the [Newport Parties] in the operation of the proposed asphalt plant." They claim this is an interest the Bylaw is intended to protect because the Bylaw states that the purpose of its restriction of "light manufacturing" uses is to protect the "health, safety or welfare of persons working in or living near the proposed location of such manufacturing." The plaintiffs argue that if there is a fire on the Property, the Chelmsford Fire Department may be called to assist pursuant to the Mutual Aid Agreement, putting Chelmsford firefighters within the class of persons working at the Property which the Bylaw intends to protect. They claim they have a legal interest in protecting the health and safety of Chelmsford's firefighters and that "[t]his legal interest is directly tied to the interests the Bylaw seeks to protect."

As evidence of the risk of fire, explosion and chemical contamination associated with the Project, the plaintiffs point to several of the safety requirements imposed by the MCP special permit, including that the Newport Parties must have a foam cart on the Property for firefighting

purposes, and must provide OSHA confined space training and briefings on spill containment procedures to the Westford and Chelmsford fire departments. The fact that the MCP special permit conditions address fire and contaminant risks posed to the Westford and Chelmsford fire departments, they argue, is evidence that "such risk is inherent and obvious in the operation of an asphalt manufacturing facility, and is not in any way speculative."

The court disagrees, and concludes that the plaintiffs' alleged harms to their legal interests are too speculative and remote to qualify them as "aggrieved parties" with standing to 8

pursue an appeal under G. L. c. 40A, § 17. 8 See Sweenie v. A.L. Prime Energy Consultants, 451 Mass. 539, 545-546 (2008) (plaintiff abutters were not "persons aggrieved" with standing to challenge gas station's removal and replacement of underground storage tanks where alleged aggrievement was based on "purely speculative" fear that removal of tanks could potentially contaminate their drinking water wells); DaRosa v. Ackerman, 2011 WL 6210377 (Mass. Land Ct. Dec. 5, 2011) (plaintiff abutters were not "persons aggrieved" with standing to challenge defendants' plan to build addition to home where plaintiffs' concerns that building addition close to plaintiffs' home would pose greater risk of spreading hypothetical fire were "purely speculative"); Brooks v. Board of Appeals of Chelmsford, 2010 WL 2681956, *5 (Mass. Land Ct. July 7, 2010) (plaintiff abutters whose property was used for industrial purposes were not "persons aggrieved" with standing to challenge zoning decision approving affordable residential housing development where plaintiffs' alleged "harms" that project's residents would object to ongoing industrial use on plaintiffs' properties and generalized harms of public safety were "speculative at best"); Bullen v. Velarde, 2009 WL 1843616 (Mass. Land Ct. June 29, 2009) . (plaintiff neighbors were not "persons aggrieved" with standing to challenge neighbor's installation of septic system where argument that proposed septic tank might fail due to improper use, overuse, or improper maintenance was too speculative). The fact that Chelmsford and Westford are parties to a Mutual Aid Agreement that may result in Chelmsford assisting Westford if there is a fire at the Project does not confer standing on Chelmsford to challenge Westford's decision to issue the MCP special permit and allow the Project to move forward. The defendants have submitted as Exhibit 18 to their motion an affidavit from Thomas J. Klem, a fire

8 For purposes of this ruling, the court assumes, without deciding, that the plaintiffs have alleged a right or interest G. L. c. 40A and the Bylaw are intended to protect.

protection engineer, in which Mr. Klem avers that the Project poses no special or unique danger of fire or explosion, will meet or exceed Massachusetts code requirements, and will have

adequate fire protection. The plaintiffs, meanwhile, have failed to put forth evidence that the Project poses a special risk of fire or contamination, pointing only to the MCP special permit conditions specifically aimed at safety and fire prevention. The existence of these conditions does not lead to the conclusion that the Project is inherently dangerous or poses a unique risk of fire or.spill of contaminants. If anything, the myriad of conditions imposed by the MCP special permit support the conclusion that the Project, as permitted, is as safe as any "light manufacturing" use permitted by the Bylaw.

Even if the court accepted as true the plaintiffs' allegations that the Project poses a special risk of fire or contaminant spill, the plaintiffs would still lack standing. To grant the plaintiffs standing on grounds that the Chelmsford Fire Department might have to provide emergency aid to Westford if a fire occurs at the Project would impermissibly broaden and dilute the meaning of "person aggrieved." While the term "person aggrieved" is not to be construed narrowly, Marashlian, 421 Mass. at 721, it must be construed in a way that requires a real, nonspeculative injury, so as to avoid "chok[ing] the courts with litigation over myriad zoning board decisions where individual plaintiffs have not been, objectively speaking, truly and measurably harmed." Kenner, 459 Mass. at 122. Sixteen other communities are signatories to the Mutual Aid Agreement involved here and there are, presumably, many more such agreements between other communities in the Commonwealth. See G. L. c. 48, § 59A (permitting cities, towns and fire districts throughout Commonwealth to authorize their fire departments to go to aid of other communities for extinguishing fires and rendering other emergency assistance). To conclude that the plaintiffs have standing here would be to grant any

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community that is a party to a mutual aid agreement the right to challenge another signatory community's decision to allow any number of potential uses within its borders, e.g., a large wood-framed apartment building, that might catch fire and result in the need for support pursuant to the mutual aid agreement. Such a result would be inconsistent with how Massachusetts court have defined the term "person aggrieved." See Kenner, 459 Mass. at 120-122; Marashlian, 421 Mass. at 721; Dwyer. 73 Mass. App. Ct. at 295.

D. Plaintiffs Do Not Have Standing as Municipal Officers or Boards

Section 17 of G. L. c. 40A grants standing only to municipal officers or boards "that have duties relating to the building code or zoning within the same town as the subject land." Planning Bd. of Marshfield v. Zoning Bd. of Appeals of Pembroke, 427 Mass. 699, 703 (1998) ("Marshfield"). Marshfield, which considered whether the planning board of one town had standing to challenge a zoning decision regarding land in an adjacent town, is controlling. Id. at

702. In that case, Marshfield's planning board sought to challenge a Pembroke zoning decision allowing a cinema complex to be built along the main access route between Marshfield and the principal highway. Id. at 700. Despite its observation that the project would "have a greater impact on the health, safety, and general welfare of the inhabitants of Marshfield than on their counterparts on Pembroke," the Supreme Judicial Court held that Marshfield's planning board had no standing to challenge the decision. Id. The Court concluded that for a municipal officer or board to have standing, it not only must have duties to perform in relation to the building code or zoning, but those duties must relate to the same town as the land at issue. Id. at 703. Observing that the "§ 17 grant of standing to municipal officers and boards is exceptional in that it does not require any showing of injury to a legally protected interest," the Court reasoned that "the provision must be construed narrowly so as to minimize the class of parties who have

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suffered no legal harm, yet `can compel the court to assume the difficult and delicate duty of passing upon the validity of the acts of a coordinate branch of government." Id. at 702, quoting Ginther v. Commissioner of Ins., 427,Mass. 319, 322 (1998). As a result, the Court concluded that the Legislature had not intended G. L. c. 40A, § 17 "to grant standing to the planning board of one town to challenge a decision of another town's zoning board." Id.

Here, neither Chief Ryan nor Chelmsford's Selectmen "have duties relating to the building code or zoning within the same town as the subject land." Id. at 703. The Mutual Aid Agreement solely provides for fire departments to aid each other in extinguishing fires and rendering other emergency assistance. It does not provide for a fire chief or department in one community to have any rights or duties with respect to the building code or zoning in any of the other signatory communities. If Marshfield's planning board (the primary duties of which relate to zoning) has no standing as a municipal board to challenge a neighboring town's decision to allow significant development along the main road between Marshfield and the highway, a fire chief (whose primary duties are unrelated to zoning) cannot have standing as a municipal officer to challenge the decision of Westford and the Board to allow the Newport Parties' Project to go forward. See id. Construing the statute narrowly, as Marshfield requires, compels the conclusion that G. L. c. 40A, § 17's grant of standing to municipal officers and boards does not confer standing to the plaintiffs here to pursue the claims raised in their complaint.

ORDER

For the foregoing reasons, the Newport Parties' motion to dismiss pursuant to Mass. R. Civ. P. 12(b)(1) is ALLOWED.

Dated: September 6, 2017 Kathe M. Tuttman

Justice of the Superior Court
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