

BANKER & TRADESMAN

THE
WARREN
GROUP
Since 1872
Real Estate & Financial Information

THE FINANCIAL SERVICES AND REAL ESTATE WEEKLY FOR MASSACHUSETTS

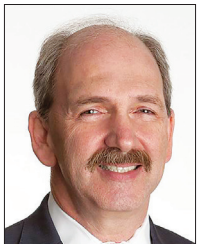
LEGAL ISSUES

Potential Expansion of Abutter Rights Turned Back

Alleged Violation of Zoning Likely Won't Support Standing to Appeal

BY SANDER A. RIKLEEN
AND AMY L. HAHN

SPECIAL TO BANKER & TRADESMAN



Sander A. Rikleen



Amy L. Hahn

On March 6, the Massachusetts Supreme Judicial Court announced the outcome of a zoning appeal, *Murchison v. Sherborn Zoning Bd. of Appeals*, prior to issuance of an opinion, and just one day after oral arguments were heard. The SJC reversed an Appeals Court decision and affirmed the Land Court's dismissal of an abutters' appeal because the abutters lacked standing. The endorsement on the docket reads: "[t]he judgment of the Land Court dated June 5, 2018, dismissing the plaintiffs' complaint for lack of standing, is hereby affirmed. Opinion to follow." In many land use cases, the threshold question is whether the appealing party has standing to object to the action of the local building inspector or zoning board.

On June 29, 2016, the defendants, Merriann Panarella and David Erichsen, were issued a foundation permit to build a single-family home on a vacant 3-acre parcel in Sherborn that met frontage, lot size and front yard setback requirements. This permit was appealed by the plaintiffs, Robert and Alison Murchison, who lived across the street from the vacant parcel, citing an alleged violation of the lot width zoning requirement.

After the Sherborn Zoning Board of Appeals upheld the foundation permit, the plaintiffs appealed to the Land Court under G.L.c. 40A, §17. The Land Court dismissed the case following trial, holding that plaintiffs lacked standing, and

on June 5, 2018, entered judgment for the defendants. The plaintiffs then appealed to the Appeals Court, and the Appeals Court accepted the plaintiffs' argument that they were aggrieved, and therefore had standing to appeal, 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." The Appeals Court expressed no view on the merits of the case, and remanded to the Land Court for further proceedings, ruling that it was clear error to conclude that the plaintiffs did not have standing.

The Appeals Court's ruling threatened to give standing to parties who merely alleged a zoning violation, which is present in virtually all zoning appeals.

Standing is an essential issue in zoning appeals because only persons "aggrieved" may pursue their complaints about a neighbor's project through the courts. Massachusetts Courts have typically required a perceptible injury, and more than the theoretical violation of a zoning provision, to support standing, as outlined in *Kenner v. Zoning Bd. of Appeals of Chatham*. The Appeals Court's ruling threatened to give standing to parties who merely alleged a zoning violation, which is present in virtually all such zoning appeals.

Actual Injury Required

The defendants' request for further appellate review by the SJC was supported by the Real Estate Bar Association for Massachusetts, The Abstract Club and the Home Builders and Remod-

elers Association of Massachusetts. On Dec. 23, 2019, further appellate review was granted, and the date for oral argument was established almost immediately. At the SJC, NAIOP-MA, the Real Estate Bar Association for Massachusetts, The Abstract Club and the Home Builders and Remodelers Association of Massachusetts filed briefs supporting reversal of the Appeals Court decision.

During oral argument on March 5, the SJC grappled with how the plaintiffs had a perceptible injury, sufficient to establish standing.

The following day, the SJC ruled that the plaintiffs do not have standing to appeal their neighbors' foundation permit. Although the court's reasoned opinion has not yet been issued, it is likely that the forthcoming SJC decision will clarify that standing to pursue a zoning appeal requires more than the mere allegation of a zoning violation – to establish standing there must be evidence of an actual injury to the plaintiff affecting one of the values zoning is meant to protect against, such as an impact on traffic, noise or property values, and not merely an alleged violation of a zoning requirement.

Despite the positive outcome for the defendants, the Land Court case delayed their project for more than three years. Their foundation permit was issued on June 29, 2016, and the Land Court case commenced on Nov. 9, 2016. Although the neighbor who appealed the permit was ultimately held to lack standing to object to their project, the impacts of such delays are necessary considerations for landowners. All project proponents should consult with an experienced land use lawyer about the challenges and potential challenges to their land use permits, and especially whether the objecting neighbor has standing to appeal. ◀

Sander A. Rikleen is a partner in the litigation department and Amy L. Hahn is a law clerk at the Boston-based law firm of Sherin and Lodgen.