

No 'standing' over blocked view of ocean

by Christina Pazzanese

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Homeowners lacked standing to challenge a special zoning permit issued to their neighbors as the potential impact of the proposed construction was negligible or speculative, the Supreme Judicial Court has ruled.

The plaintiffs argued that the permit would harm them by allowing a structure that would diminish their ocean views and increase traffic in the neighborhood.

But the SJC disagreed.

Justice Francis X. Spina, writing for the court, found that the plaintiff homeowners were not "persons aggrieved" by the zoning board's decision to allow the defendant neighbors to raze and rebuild their cottage because the plaintiffs failed to substantiate that such changes would seriously harm their property rights.

"Aggrievement requires a showing of more than minimal or slightly appreciable harm," Spina said, overturning an Appeals Court ruling and affirming a Land Court judgment.

"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 choke the courts with litigation over myriad zoning board decisions where individual plaintiffs have not been, objectively speaking, truly and measurably harmed," Spina said.

The 17-page decision is *Kenner, et al. v. Zoning Board of Appeals of Chatham, et al.*, Lawyers Weekly No. 10-035-11. [The full text of the ruling can be found by clicking here.](#)

Battleground issue

Boston lawyer Daniel P. Dain, who defended Chatham's Zoning Board of Appeals, said standing is now at the heart of almost every zoning appeal.

"Standing is the battleground in zoning appeals," said Dain, who practices at Brennan, Dain, Le Ray, Wiest, Torpy & Garner.

There has been wide discrepancy over what is required to actually have standing, he said, noting that the "courts have been all over the map as to what quantum of injury was necessary to establish standing."

In *Kenner*, the SJC clarified for the first time the specific distinction between harm and impact in standing cases, where views, noise and traffic are central, Dain said. "It has to be harm, not just impact. All impact is not harm."

Chatham attorney William F. Riley, who represented the defendant neighbors, said disputes over view diminution arise all the time on Cape Cod, where water views are considered a valuable property asset.

Riley said *Kenner* tightens up the standard and will help smooth the way for proposals going through the zoning appeals process that might otherwise be slowed by appeals brought solely to thwart disagreeable projects.

Because the Land Court tends to be consistent and "more intellectually rigorous" than other courts on standing matters, Riley said, the SJC's stance in *Kenner* telegraphs a message that trial judges are to be given greater deference on standing issues.

"That's going to make it more difficult when a trial judge says, 'They lack standing,' for the Appeals Court to overturn the issue," the Toabe & Riley attorney said.

Dain added that the ruling is also important for municipalities in that it reaffirms the authority local zoning boards have to issue or deny permits without worrying that opponents will try to overturn their decisions.

Boston attorney Donald R. Pinto Jr., who was not involved in the case, said while there may be some significance to the fact that the SJC issued what is a "fairly comprehensive analysis," the decision does not break new ground or appear to show that the court is suddenly tightening the standard.

Pinto said it does, however, serve as a reminder to lawyers and the courts that "you don't always have standing and can't bring in speculative or thin evidence of harm and get in the door."

West Harwich attorney Jeffrey M. Ford, who represented the plaintiff homeowners, did not return calls requesting comment.

De minimis and speculative

In 2006, the zoning board in Chatham issued a special permit to Louis and Ellen Hieb, who planned to raze their 660-square-foot cottage in order to correct water-related problems in their basement that occurred as a result of the home's proximity to the ocean.

The plans called for the home to be rebuilt on the same footprint, but raised seven feet.

Neighbors Brian and Carol Kenner, who live directly across the street from the Hieb house, objected to the permit on the grounds that the new home would block the light and ocean breezes to their deck and would lead to an increase in traffic in the neighborhood.

They filed a complaint in Land Court against the zoning board and the Hiebs, asserting that the project would have a negative impact on their property, separate from the general concerns of the entire neighborhood.

But after visiting the property, Judge Charles W. Trombly found that the Kenners failed to provide credible evidence that they would be harmed by the project. Their contention that the increased height would block light and ocean breezes or add to traffic were

speculative or generalized opinions, the judge said.

While Trombly agreed that blocking ocean views is a legitimate claim that merits review under a town's protective bylaw when a board considers such permits, the Kenners' lost view was de minimis and not sufficient to confer standing.

Particularized harm

Citing a number of key decisions on standing, including *Standerwick v. Zoning Bd. of Appeals of Andover* and *Martin v. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, Spina said that unless a town's zoning bylaw specifically provides that a board should take into account the proposed structure's visual impact on abutters, aesthetic view concerns "are not a basis for standing."

Chatham's zoning bylaw indicates standing can be demonstrated if the plaintiff shows both "a particularized harm to the plaintiff's own property and a detrimental impact on the visual character of the neighborhood as a whole," Spina wrote.

In *Kenner*, the plaintiffs demonstrated neither, he said.

"[T]he Kenners did not put forth credible facts to support their allegation that the increased height of the Hiebs' new house will block their view of the ocean," he wrote.

Moreover, he said, "apart from the Kenners' unsubstantiated claims and personal opinions, there was no evidence that the increased height of the Hiebs' new house would have a detrimental impact on the visual character of their neighborhood."

For more information about the judges mentioned in this story, visit the Judge Center at www.judgecenter.com.

CASE: *Kenner, et al. v. Zoning Board of Appeals of Chatham, et al.*, Lawyers Weekly No. 10-035-11

COURT: Supreme Judicial Court

ISSUE: Did homeowners lack standing to object to a special zoning permit

granted to neighbors for the demolition, reconstruction and expansion of their house?

DECISION: Yes

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