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ZONING LAW

New SJC standing decision raises bar for abutter zoning appeals

BY DANIEL P. DAIN

Every three to four years, the Supreme Judicial Court addresses the issue of project-opponent standing in zoning appeals under General Law chapter 40A, section 17, each time adding to the jurisprudence on the issue. The March 2011 *Kenner v. Zoning Board of Appeals of Chatham* decision is the most recent addition. In it, the SJC worried that an overly permissive standing threshold would threaten to "choke the courts with litigation over myriad zoning board decisions" and therefore articulated a standard that would allow the Superior Court and Land Court to act as legitimate gatekeepers to zoning litigation. In doing so, however, the SJC left several questions unanswered, providing issues likely to be addressed the next time the SJC addresses standing.

Dan Dain

The lightning-rod issues concerning standing arise out of language in the Zoning Act that limits appeals to the courts from local zoning determinations only to those persons "aggrieved" by such decisions. In providing such a limitation on zoning appeals, the Legislature made a policy decision that the courts should not be available as a quasi-super-zoning body, there to ensure that local boards "get it right" in every instance. In general, local boards are in the best position to weigh the costs and benefits on the community of zoning determinations. Only when a zoning entitlement risks injuring particular citizens in ways "special and different" from harm of a project to the community in general is it appropriate for a court to step in and review the local decision.

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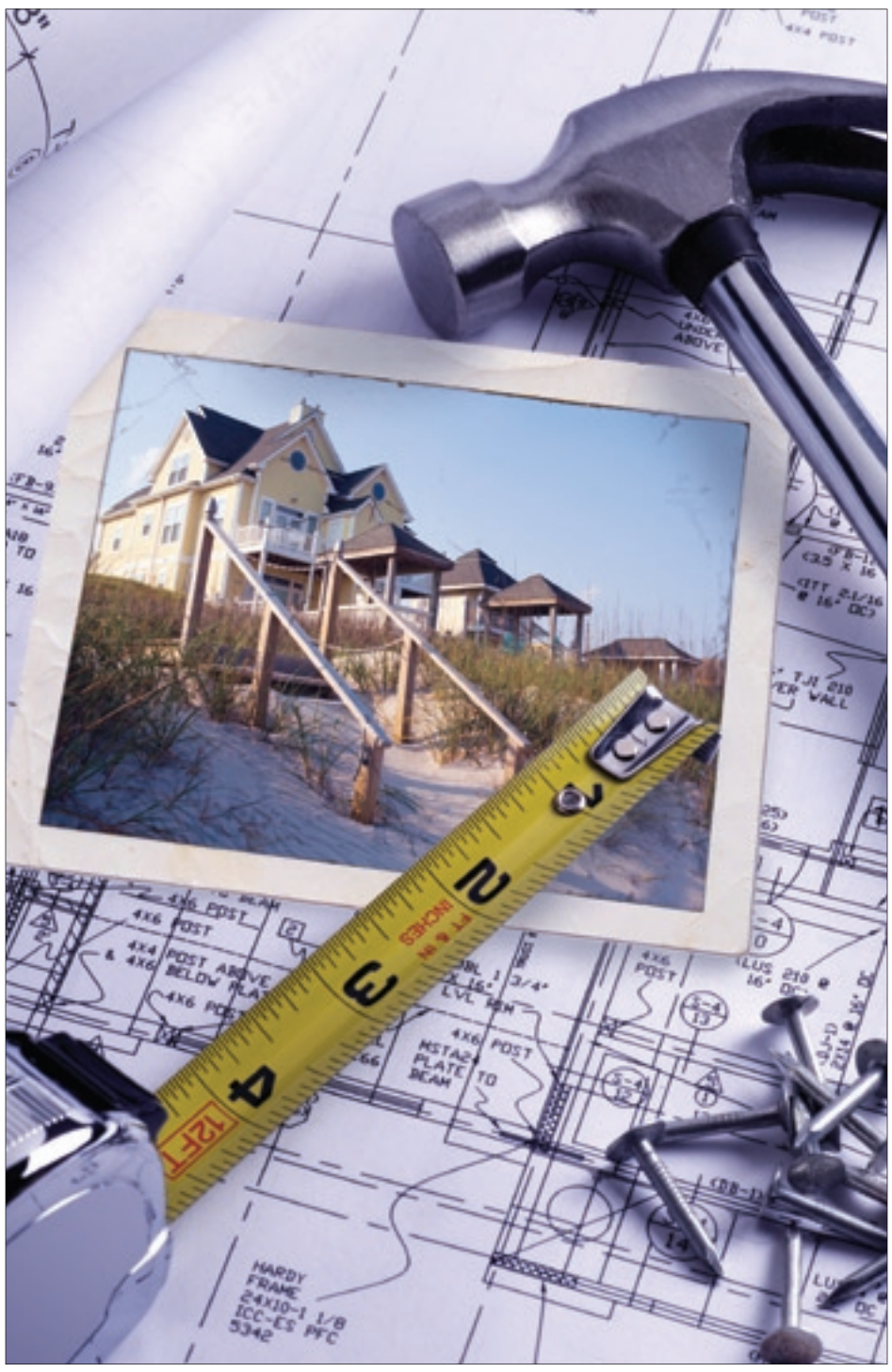

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The jury's still out on the determination of whether the protection of views from private property is a zoning interest.

COMMENTARY

Is this the new reality?

PAUL F. ALPHEN

I hope you had a happy Father's Day. Father's Day reminds me of going to baseball games with my sons. There is nothing like spending a warm evening in a major league park with your kid (regardless of his or her age). When at a game, you know that for the next three hours you will be surrounded by the timeless sights, sounds and smells of America's favorite pastime. Nobody will ask you any difficult questions, nor request that you perform any heavy lifting. My cell provider has also cooperated by providing lousy cell and web service at Fenway. At the ballpark, the world slows down and you can take time to appreciate the simple things in life, just as our fathers and grandfathers did during the past 100 years.

Paul Alphen

Life is not so relaxing during the workday, however. These days when I ask fellow practitioners "How are things?" I usually get fairly similar answers. I hear stories of commercial lease negotiations wherein weeks go by from the time tenant's counsel sent his/her redline of the lease to the time landlord's counsel responds. I hear stories of purchase and sale agreements with multiple extensions of the closing dates; stories of "short sale" agreements that never close; and stories of commercial P&S negotiations that end at an impasse over miniscule issues. I also hear about clients that are interested in pursuing a particular development, but just cannot pull the trigger. As attorneys we are used to playing the role of "expediter," but nobody seems to be in much of a hurry these days.

We got used to operating at 100 miles per hour. A few years ago it was routine

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Title insurance agents facing increased regulation across nation

BY JOEL A. STEIN

In 2010, the National Association of Insurance Commissioners (NAIC) initiated plans to develop an agent data call. Reacting to claims by the U.S. Government Accountability Office (GAO) that it could not properly analyze title insurance premium costs, the NAIC, working through its statistical plan working group, created a data call that it believes will provide regulators with the information they require, without creating an unreasonable burden for title agents.

Joel Stein

The NAIC will provide guidance to state commissioners on how to implement the plan, and a current version of the guidelines includes sections that should be included in any regulation adopted by a state. However, approval of the plan by the NAIC will not necessarily result in the regulations being adopted by the State Insurance Department of the Commonwealth of Massachusetts.

The American Land Title Association (ALTA) was actively involved with the process and has encouraged that data collection be on a "go-forward" basis and that reporting be "simple and achievable." However, it is acknowledged that the more data available, the better, so the question of whether the data will be collected only on a go forward basis has not been decided.

Agents in Texas and New Mexico are already required to report data, and in those states, the data is used to promulgate title insurance rates. Frank Pellegrini of ALTA does not believe that the proposed data call needs the same level of information, although the information sought is extensive, including number of policies issued, number of canceled orders, amount of premium, premium split, salaries, rent, title plan costs, claims losses and deductibles to insurers.

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SJC: Abutters must prove harm

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Thus, over time, the courts have adopted rules for when a project-opponent can be considered "aggrieved" by a local zoning decision so as to give the courts jurisdiction over objections to the grant of a zoning entitlement. (Note that when a project-proponent is denied a zoning entitlement, the applicant is always considered a person "aggrieved" by the denial). Standing law, as developed, entails essentially a two-step analysis, the first step requiring an inquiry into whether the nature of the harm alleged is a concern of zoning laws, and, if so, the second then looking at the quality and quantity of the evidence of actual harm presented by the project-opponent. It is on the second of these two inquiries that the SJC's decision in *Kenner* broke the most ground.

In that case, a family proposed reconstructing their house along the waterfront in Chatham on pilings to lift it above the flood plain and to comply with FEMA regulations. The proposed new house would be seven feet taller than the existing house. Neighbors who lived inland and up an incline appealed the permits, arguing that the new house would block their view over the existing house. After visiting the properties, the Land Court ruled that any impact on the neighbors of the additional seven feet would be minimal and therefore they lacked standing. The Appeals Court reversed, concluding that the Land Court should have stopped its analysis once the neighbor-plaintiffs articulated a claim of aggrievement. The SJC took the case on further appellate review and reinstated the Land Court's decision.

On the neighbors' claim of diminished view as a basis for standing, the SJC addressed the quantum of injury necessary to establish standing. The SJC distinguished between an "impact" from a project and a "harm" from a project. The neighbors had claimed at trial only that they would be impacted by the proposed new house, but had not demonstrated a risk of actual injury. That a proposed project may block a view is an impact from the project, but more is needed to establish an injury. The plaintiffs had failed to offer any such evidence.

Furthermore, even if there had been some injury from the diminished view, the Land Court's finding that any such injury that the plaintiffs might have claimed would be minimal meant that such injury was not sufficient to establish standing. The SJC explained that to prove actual injury, a plaintiff must introduce "objective" evidence that it will be "truly and measurably harmed." How much harm? "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." (Emphasis added.) Clearly, this standard raised the bar for plaintiffs to establish standing in zoning litigation. However, the newly articulated standard does raise some questions, such as what it means for there to be "no question" that the plaintiff should be afforded the opportunity to be in court.

The SJC decision raised additional questions with respect to the first step in the standing analysis, the issue of whether the nature of an articulated harm is zoning-related in the first place and thus can provide a basis for standing. In the *Kenner* case, the nature of the alleged harm was diminished view (of the ocean). The extent to which diminished views can provide a basis for standing is a battleground issue in zoning litigation, particularly on Cape Cod, where homeowners are seeking to update old waterfront cottages. In general, courts have held that aesthetic or view-based harms are not the concern of zoning and hence cannot provide a basis for standing. The SJC, in the 2001 case *Martin v. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, involving a challenge to a proposed new Mormon Temple in Belmont, recognized an exception to the general rule, where the local zoning code specifically recognizes the protection of views as a zoning interest.

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The SJC did not, however, enunciate a rule as to what exactly a local zone must say in order to transform the protection of views into a local zoning concern sufficient to provide a basis for standing. In the *Martin* case, the Belmont zoning code directed the Special Permit Granting Authority to take into account "views from … developed properties," language, the SJC held, which was sufficient to permit neighbors to use diminished views from their home as the articulated harm in step one of the standing analysis. In the *Kenner* case, by contrast, the Chatham zoning code did not mention views from private homes, but rather spoke about "neighborhood visual character, including views, vistas, and streetscapes." At first, the SJC seemed to allow that the diminished views could be considered a zoning concern under Chatham's zoning code, observing that under the relevant language, a plaintiff seeking to use views as the nature of the harm in the standing analysis, would need to show harm to *both* private views and to the "neighborhood visual character." It is a little hard to discern the SJC's reasoning on this point in *Kenner*. The Chatham zoning code says nothing about protecting private views (something the Land Court has found necessary in other cases, such as in *Saylor v. Chatham ZBA*.

Further, requiring a plaintiff to show harm to a neighborhood's visual character in order to establish standing would seem to conflict with another standing principle – that the alleged harm must be "special and different" from any harm that may be felt by the community in general. Perhaps with these issues in mind, the SJC later in its *Kenner* decision seemed to reverse course and conclude that Chatham zoning code did not protect private views: "the Kenners' view of the ocean is not an interest protected by the town of Chatham's zoning bylaw…"

Since *Kenner* was decided, there have already been two Appeals Court standing decisions concerning views that demonstrate that further guidance from the SJC may be needed. In the May 2011 decision in *Marhefka v. ZBA of Sutton*, the Appeals Court reversed a Land Court decision that had found that the Town of Sutton's zoning code did not recognize diminished views as a zoning interest. The Appeals Court reasoned that the intent to protect views from private property is inferable from the Sutton zoning code's regulation of density and dimensions, even if such protection is not explicitly spelled out. This analysis does not make sense. The SJC has long held that the protection of views is not, in general, a zoning concern under the Zoning Act. As such, the protection of views cannot be inferable, as a matter of logic, from general zoning regulations that arise out of the Zoning Act, such as controls on density and dimensions. Only where the local zoning code specifically calls out the protection of private views, as the code did in Belmont in the *Martin* case, can one conclude that there is an intent to make private views a zoning concern in a particular municipality.

The neighbors had claimed at trial only that they would be impacted by the proposed new house, but had not demonstrated a risk of actual injury.

A different panel of the Appeals Court, two weeks later in the May 2011 case of *Schiffenhaus v. Kline*, took up whether views can be the basis under Truro's zoning code. The Appeals Court noted that Truro's zoning code itself was silent on the issue, but incorporated by reference the town's comprehensive plan. That plan noted that "long and broad vistas, sights of harmonious and distinctive architecture, and views of historic and culturally important sites" were "part of the heritage of Truro." The Appeals Court compared this language to the language about considering neighborhood visual character in Chatham from the *Kenner* case and observed that to establish standing based on views in Truro, a project-opponent would need to establish harm to both private views and the types of "broad vistas" that were part of Truro's "heritage."

It is hard to discern guidelines for trial courts to follow in determining whether a local zoning code reflects an intent by a municipality to make the protection of views from private properties a zoning interest. Should courts look for language that directly protects private views as in the *Martin* case, that may impliedly do so from the regulation of density and dimensions as in the *Marhefka* case, or that speaks only about broad community concerns, such as in *Schiffenhaus*? It will be interesting to see if the SJC takes either *Marhefka* or *Schiffenhaus* up on further appellate review. In light of the frequency with which these types of disputes arise, the lower courts would benefit from the SJC articulating a clear rule for them to follow.

Dan Dain is the chairman of the real estate development boutique law firm Brennan, Dain, Le Ray, Wiest, Torpy & Garner, P.C. in Boston. Dan is a litigator with a focus on zoning appeals, and a member of the REBA Litigation Committee. He represented the Chatham Zoning Board of Appeals in the *Kenner v. Chatham* ZBA case. He can be reached via email at ddain@bdlwtg.com.