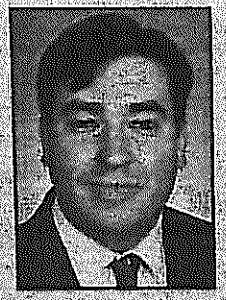
Massachusetts courts continue to narrow standing for claims based on traffic impact

By Daniel P. Dain



The Massachusetts Appeals Court in *Nickerson v. Zoning Board of Appeals of Raynham*, 53 Mass. App. Ct. 680 (2002), ruled that the plaintiff lacked standing under G.L. c. 40A, §17 based *only* on his use of a road where increased traffic could be expected.

Since that ruling, trial court judges in Massachusetts have continued to limit the standing of individuals claiming traffic negatively impacts them.

In *Nickerson*, the Raynham Zoning Board of Appeals granted Wal-Mart a special permit. The plaintiff – who lived a mile from the proposed development site – on appeal argued that construction of the Wal-Mart would exacerbate traffic on Route 44, which he used frequently.

But the Appeals Court ruled that "the plaintiff's interest is not substantially different from that of all of the other members of the community who are frustrated and inconvenienced by heavy traffic on Route 44." *Id.* at 683-84.

The court quoted *Boston Edison Co. v. Boston Redev. Auth.*, 374 Mass. 37, 63 n.17 (1977) where the Supreme Judicial Court stated that it had "grave doubts about granting standing" to a non-abutter located one-third of a mile from the development site.

This article looks at how Massachusetts courts since *Nickerson* have treated the use of feared traffic impacts as a basis to establish standing in zoning appeal cases.

Pre-*Nickerson* cases

The right to appeal under Chapter 40A is limited to those persons "aggrieved" by a zoning board decision. While abutters and abutters to abutters within 300 feet of a proposed development enjoy a rebuttable presumption of standing, as well as potentially compelling complaints about noise, light, etc., those who live more remotely to a proposed development typically must rely on concerns like increased traffic in an attempt to establish aggrieved person status.

Yet courts have sensibly limited the class of plaintiffs who may be heard to complain about potential impacts from developers. Only where the plaintiff can articulate specific, non-speculative facts establishing a legally cognizable injury that will be "'*special and different* from the concerns of the rest of the community,'" may the plaintiff proceed. *Bell v. Zoning Board of Appeals of Gloucester*, 429 Mass. 551, 554 (1999) (quoting *Barvenik v. Aldermen of Newton*, 33 Mass. App. Ct. 129, 132 (1992)) (emphasis added).

The rationale is that where the community as a whole may generally feel potential impacts, the local zoning board is in the best position to balance the needs of the community against those of the developer. The courts should be made available only to those with injuries distinct from the particular plaintiff.

In examining the "special and different" requirement here the alleged impact is traffic-related, courts have typically looked first at the distance the plaintiff lives from the proposed development.

The traffic impact on direct abutters – those obviously living closest to a proposed development – was examined by the SJC in *Marashlian v. Zoning Board of Appeals of Newburyport*, 421 Mass. 719 (1996). The SJC held that the Superior Court had not abused its discretion in finding that plaintiff abutter's showing that a proposed new hotel would result in "increase[d], if minimal" traffic on the street, was sufficient to confer standing. However, the SJC did not discuss how such an impact would be "special and different" from those of the community at large.

At the other end of the spectrum is *Nickerson*. The Appeals Court found that

Continued on page 16

Daniel P. Dain is senior counsel for real estate and land use litigation at Goodwin Procter in Boston.

Massachusetts courts continue to narrow standing for claims based on traffic impact

Continued from page 4

a member of the community living a mile from the proposed development could not establish a "special and different" injury, even if the plaintiff frequently used the roads likely to be impacted by the proposed development.

Thus, as of the Appeals Court's decision in *Nickerson*, it appeared that there was a line that existed somewhere between the distance of a direct abutter and a mile away, such that if the plaintiff lives closer to the proposed development than the line, the plaintiff could state a claim for standing based on traffic, but a plaintiff living further away could not.

The SJC's 1977 observation in the *Boston Edison* case, quoted in *Nickerson*, about "grave doubts" about a plaintiff living a third of a mile away may have given the traffic standing line further definition.

Post-*Nickerson* cases

Even abutters must articulate specific, non-speculative, facts to establish standing based on traffic concerns. Several post-*Nickerson* cases have held abutters to the requirement that they articulate specific, non-speculative, facts to establish an impact from traffic as a basis for standing.

For example, in *Chin Kwee Quek v. Armendo*, No. 03-2262A (Super. Ct. June 30, 2004) (Agnes, J.), Superior Court Judge Peter Agnes held that because the plaintiff-abutter could offer no more than "unsubstantiated opinions" that the proposed development would "contribute to traffic problems" on the street, plaintiff lacked standing.

By contrast, in *Quigly v. Mulhern*, Misc. Case No. 281991 (Land Court May 1, 2003) (Piper, J.), abutters offered specific facts that made an inference of increased traffic reasonable. Land Court Judge Gordon H. Piper said it was reasonable to conclude that an expansion of Winchester Hospital's emergency department would exacerbate an existing problem of hospital traffic queuing on plaintiff's street, and using residents' driveways to turn around while searching for parking.

Similarly, in *Brida Realty, LLC v. Planning Board of the Town of Holliston*, No. 995920 (Super. Ct. Nov. 1, 2002) (Graham, J.), Superior Court Judge R. Malcolm Graham said the fact that the plaintiff-abutter and the developer shared the same driveway was sufficient to establish that concerns about increased traffic using the shared driveway was a special and different injury. The judge observed, "[t]he general public, which does not abut the [proposed development] property, would not incur those impacts."

In non-abutter cases, the courts have continued to draw the line closer beyond which plaintiffs cannot establish a "special or different" traffic-related injury. Several non-abutter cases have demonstrated the courts' skepticism that members of the community living remotely from the proposed development can establish "special or different" injury related to increased traffic.

For example, in *Moot v. Planning Board of the City of Cambridge*, Misc. Case No. 292244 (Land Court Sept. 15, 2003) (Trombly, J.), a group of housing advocates in Cambridge appealed a zoning decision by the planning board that would have permitted Forest City, developer of University Park in Cambridge, to proceed with a development in one corner of University Park.

The planning board and Forest City (represented by the author of this article) moved for summary judgment on standing grounds, presenting excerpts from the depositions of each of the plaintiffs.

Focusing on the plaintiff living closest to the proposed development, Land Court Judge Charles W. Trombley Jr. found that although the plaintiff was an abutter to University Park (although not directly across the street from the proposed site), her concerns about traffic on her street were insufficient.

"Other than a general concern of increased traffic on Brookline Street, plaintiff Lynch is unable to articulate any harm that is specific to her," Trombley wrote.

Similarly, in *Henry v. Andover Planning Board*, Civ. Action No. 03-0047D (Super. Ct. April 8, 2004) (Riley, J.), plaintiffs appealed a special permit for the construction of an office/warehouse building.

To establish standing, plaintiffs, one living as close as a half-mile from the project, offered evidence that the proposed development would increase traffic on the streets on which plaintiffs lived. They argued that that their injuries were distinct from the rest of the community because they lived on the roads that would be most affected by the potential increase in traffic.

But Superior Court Judge Patrick J. Riley found that while at least one plaintiff lived closer than the plaintiff in *Nickerson*, plaintiffs could not meet the requirements for standing.

Greater guidance

Thanks to these post-*Nickerson* trial court cases, we have greater guidance from the courts as to when a plaintiff can satisfactorily claim aggrievement from increased traffic. Cases like *Moot* and *Henry* appear to mean that unless one lives on the street of the proposed development, concerns about increased traffic are likely not to be sufficiently special and different from those generally felt by the community.

Yet, cases like *Chin Kwee Quek* and *Quigly* mean that abutter status alone is not sufficient to make a claim of increased traffic "special and different." Rather it must be accompanied by showings specific to the plaintiff, such as interference with plaintiff's driveway by likely users of the proposed development.