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A call for a new Superior Court standing order in zoning cases

By Daniel P. Dain

Standing is jurisdictional in zoning appeals. Unless the plaintiff project-opponent has standing, the court lacks subject matter jurisdiction and cannot address the merits of a zoning appeal.

In zoning cases, such as those under G.L.c. 40A, §17, standing is an inquiry routinely addressed through summary judgment motions, particularly because protracted litigation on the merits of zoning decisions can cause delays that can kill real estate development projects.

Unlike the typical summary judgment motion, however, adjudication in standing cases does not turn on whether or not there are material facts genuinely in dispute, because the standing inquiry is jurisdictional and not merit-based.

Rather, the standing inquiry is a two-step process under which the defendant project-proponent has a burden of production to come forward with some evidence to make standing an issue, and the plaintiff project-opponent has the burden of persuasion to establish standing.

This sequencing, under the first step of which the court focuses solely on the defendant's presentation, and under the second step of which the court focuses principally on the plaintiff's presentation, as set forth in cases such as *Standerwick v. Zoning Board of Appeals of Andover*, 447 Mass. 20, 34-35 (2006), and *Michaels v. Zoning Board of Appeals of Wakefield*, 71 Mass. App. Ct. 449, 453 (2008), does not fit neatly under the Superior Court Rule 9A framework.

Under current Superior Court

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Rule 9A(b)(5), the party moving for summary judgment must prepare a motion, brief and "a concise statement, in consecutive numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried." The non-moving party then serves an opposition together with a paragraph by paragraph response to the moving party's statement of material facts (the non-moving party can also add additional material facts). Reply memoranda by the moving party are not allowed without leave of court, which cannot be obtained until after the filing of the motion/opposition 9A package.

The requirements of the Rule 9A package should be modified for summary judgment motions in standing cases before the Superior Court. This could be effectuated via a new Superior Court standing order that eliminates the need for a separate statement of undisputed material facts and allows the moving party to add a reply brief to the Rule 9A package.

The new contents of the Rule 9A package would include: the moving party's initial brief, affidavits and a concise description of the project; the non-moving party's opposition brief, affidavits, and a concise statement identifying each alleged aggrievement and the evidence supporting each aggrievement; and the moving party's reply brief, affidavits and comments on the non-moving party's identification of aggrievements.

The moving party's initial submission — brief, affidavits and concise description of the project — would address the defendant's burden of production to raise standing as an issue in zoning cases. If the plaintiff is not a party in interest under G.L.c. 40A, § 11 ("abutters, owners of land directly opposite on any public or private street or way, and abutters to the abutters within three hundred feet of the property line") and hence enjoys no presumption of standing, then the moving party's initial submission should be very short, establishing only that plaintiff does not fit as a party in interest. If the plaintiff is a party in interest, then the moving party's submission would need to present "some evidence" to rebut plaintiff's presumption of standing. As the SJC explained in *Standerwick*, at the summary judgment stage, "a defendant is not required to present affirmative evidence that refutes a plaintiff's basis for standing." Rather, the defendant need only come forward with some evidence sufficient to warrant "a finding contrary to the presumed fact." 447 Mass. at 34-35.

This submission does not necessitate a statement of "material facts" with which the moving party believes there is no genuine issues. It would, however, require at least a description of the project; an identification of potential impacts that the plaintiff has raised or is likely to raise, based on statements by the plaintiff at the zoning or planning board hearing or in the media, testimony from the plaintiff at a deposition, or common sense; and, depending on the types of impacts identified, possibly expert affidavits.

The plaintiff, under the revised 9A package, would serve on the moving party a brief, affidavits, and a statement identifying the plaintiff's claimed aggrievements and the evidence supporting each aggrievement. At this stage of the inquiry, the plaintiff has the burden of persuasion that it must try to meet by introducing affidavits that establish that it will suffer a "legally cognizable," "substantial" and "special and different" injury. The evidence presented must not be speculative or conclusory.

On summary judgment, the court's inquiry is whether or not the plaintiff has shown a "reasonable expectation of proving a legally cognizable injury" at trial." *Standerwick*, 447 Mass. at 35. This inquiry "requires consideration solely of the quantity and quality of evidence the plaintiffs have presented, not the comparative weight of the plaintiffs' testimony and the defendants.'" *Michaels v. Zoning Board of Appeals of Wakefield*, 71 Mass. App. Ct. 449, 453 (2008).

The court may, however, examine affidavits submitted by the defendant that

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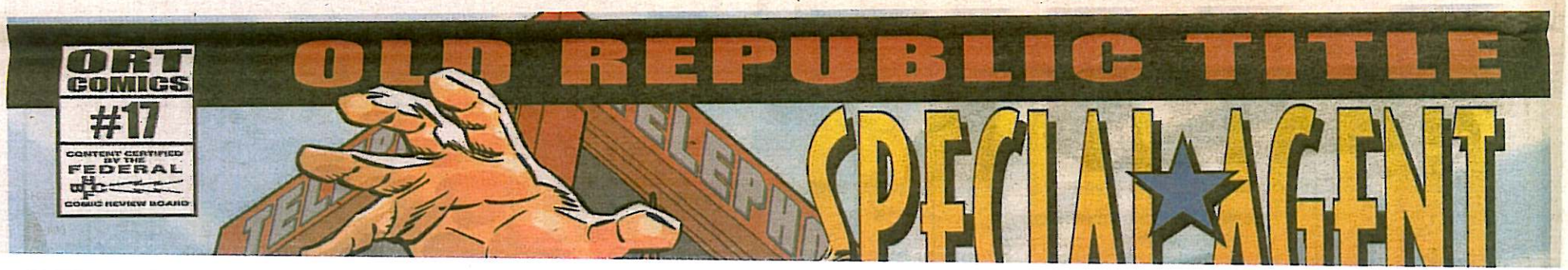
Dan Dain, a founder and managing partner of Brennan, Dain, Le Ray, Wiest, Torpy & Garner, is a trial lawyer who represents real estate developers and property owners, with a particular expertise in zoning disputes. He also maintains a commercial litigation practice and represents clients in insurance coverage disputes. Dan can be contacted at ddain@bdlwtg.com.



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challenge whether the plaintiff has the "reasonable expectation of proving a legally cognizable injury" at trial. *Michaels*, 71 Mass. App. Ct. at 453 n.7. The court can consider the defendant's arguments that the plaintiff's evidence is speculative or conclusory.

Thus, the *Michaels* analysis contemplates — and perhaps requires — an opportunity for the defendant moving party to respond to the plaintiff's summary judgment submission. The defendant should be provided an opportunity to argue that plaintiff's affidavits are speculative or conclusory, or describe injuries that are not "legally cognizable," "substantial" or "special and different."

It cannot be expected that the defendant moving party's initial summary judgment submissions would have fully anticipated and addressed all potential aggrievements that the plaintiff will claim during the second step of the standing inquiry. Further, until the defendant moving party sees the plaintiff's summary judgment submission, the defendant will not be able to comment on the "qualitative" aspect of the plaintiff's standing submissions — whether they are speculative or conclusory.

Thus, for the court to take advantage of the defendant moving party's commentary on the plaintiff's efforts to meet its burden of persuasion on standing, there needs to be an opportunity to submit a reply brief. Requiring leave of court in every motion for summary judgment on standing grounds in zoning cases is cumbersome and inefficient.

In short, a new Standing Order could adapt Superior Court Rule 9A(b)(5) to better fit the summary judgment standing inquiry, focusing the "concise statements" on a description of the project and an identification of alleged aggrievements, and permitting reply briefs without leave of court.

closure and tolerance requirements by allowing 30 days from the date of the closing to correct errors or violations and repay consumers over any charges.

HUD received an excess of 12,000 comment letters after the issuance of the initial rule, which was issued in March 2008. In addition to reviewing the comments from brokers, bankers, attorneys, ALTA and settlement service providers, the OMB met with industry trade groups in Sep-

may reconvene for just a few days, it would appear that fewer than 60 legislative days remain in the current Congress. Under law, that would give the new Congress a new 60-day legislative window in 2009.

Although certain sections of the law will take effect immediately, the new standardized GFE and revised HUD-1 will not be required until Jan. 1, 2010, although they may be used at any time before then.