COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

SUFFOLK, ss. No. 23 PS 000622 (KTS)

ROBIN E. FABIANO, *et al.*,	)
Plaintiffs,	)
v.	)
DAVID COLLINS, *et al.*,	)
Defendants.	)

DECISION ON MOTION TO COMPEL BOND

Defendant, Upton Belgrade Investment Partners, LLC, ("Upton Belgrade") received approval from the City of Boston Zoning Board of Appeal (the "Board") to construct a five-story mixed-use building with underground parking on property located at the intersection of West Roxbury Parkway and Belgrade Avenue in Roslindale. The seven Plaintiffs, who are neighbors to the project, have commenced this action seeking judicial review of the Board's approval. They oppose the project because they contend that it is too big for the neighborhood and will create a variety of problems for them.

Upton Belgrade contends that the Plaintiffs' appeal lacks merit and has moved to compel them to post a bond as a condition of proceeding with this case. The motion came on for a hearing on January 16, 2024, and I took the matter under advisement. For the reasons set forth in this decision, the motion is ALLOWED, and the Plaintiffs are ordered to post a bond.

Background

Upton Belgrade proposes to construct its project on an assemblage of three parcels that are currently improved with an obsolete industrial building and a surface parking area.[1] The property is located in two different zoning subdistricts under the Boston zoning code. For many years prior to Upton Belgrade's involvement, the property was the site of several automobile-related businesses, including a car dealership and a National Tire & Battery outlet. In 2016, Upton Belgrade entered into a ninety-nine year land lease of the property and set about to develop it. At the outset, Upton Belgrade proposed to construct a multifamily project consistent with the "transit-oriented" housing developments that the Commonwealth of Massachusetts was encouraging at the time. However, after engaging with members of the community who expressed opposition to such a development, Upton Belgrade turned to an alternative development concept when it began discussions with the Roxbury Prep Charter School to construct a high school facility.

In 2017, Upton Belgrade and Roxbury Prep started the Article 80 review process before the Boston Planning and Development Agency ("BPDA") for the new high school facility project. After approximately four years of engagement in the various aspects of that process, much of which involved opposition from the community, Roxbury Prep decided not to pursue the project and terminated its relationship with Upton Belgrade.

In 2022, Upton Belgrade returned to its original concept of a multifamily development and started the Article 80 review process of this project before the BPDA. Like the Roxbury Prep proposal before it, Upton Belgrade's multifamily development proposal was met with community opposition. The crux of the opposition appeared to be that members of the

[1] Upton Belgrade's application Board also sought permission to combine the three parcels for zoning purposes. The three parcels are known as 355 Belgrade Avenue, 361 Belgrade Avenue, and 371 Belgrade Avenue.

community thought that the proposed project was too big for the neighborhood. At the close of the Article 80 review process, the BPDA approved the project. Upton Belgrade, then, applied to the Board seeking the zoning relief that would be necessary to construct the project that came out of the BPDA process.

The project proposed to the Board is a five-story, 124-unit multifamily building with 2,950 square feet of retail on the first floor and underground parking for eighty-three vehicles. In order to build this project, Upton Belgrade needed several dimensional variances and other zoning relief from the Board.[2] Community members reiterated their opposition to the project before the Board. Nonetheless, the Board granted the requested relief and approved the project in a written decision dated September 8, 2023. The Plaintiffs appealed the Board's decision, arguing that the Board committed legal error when it granted Upton Belgrade the relief necessary to construct the project.

Standard - Motion to Compel Bond

Upton Belgrade now requests that the court compel the Plaintiffs to post a bond as a condition to their proceeding with this appeal. This is a discretionary call for the court. Section 11 of the Boston Zoning Enabling Act, St. 1956, c. 665, as amended, provides that upon the filing of an appeal of the Board's decision:

> "The Court may in its discretion require the person or persons so appealing to file a bond with sufficient surety, for such a sum as shall be fixed by the court, to indemnify and save harmless the person or persons in whose favor the decision was rendered from damages and costs which he or they may sustain in case the decision of said board if affirmed……."

[2] Most of the property is in the Neighborhood Shopping Subdistrict of the Roslindale Neighborhood District, with a smaller parcel in the 2F-5000 Subdistrict.

The court's decision whether to require the posting of a bond as a condition of allowing an appeal from a decision of the Board must be exercised with due regard for the "discouragement of frivolous and vexatious appeals," while taking care not to impose a bond that "might have the practical effect of barring from courts owners of property adjacent to a parcel concerning which a variance has been granted." *Damaskos v. Bd. of Appeal of Boston*, 359 Mass. 55, 58, 61 (1971). These "countervailing considerations which are to guide judicial discretion in determining the amount of a bond are: (1) the objective of inhibiting frivolous and vexatious appeals, as already mentioned, versus (2) not unreasonably inhibiting meritorious appeals from variances or conditional uses . . . . which are unlawfully granted." *Feldman v. Bd. of Appeal of Boston*, 29 Mass.App.Ct. 296, 298 (1990).

The Plaintiffs' Appeal

Upton Belgrade contends that the Plaintiffs' appeal lacks merit in the first instance because they lack standing. The right to appeal the decision of the Board is governed by the Boston Zoning Enabling Act, St. 1956, c. 665, as amended. It allows any person aggrieved by the decision to bring suit seeking judicial review. Where the appeal is taken by a person who objects to the project in question, the court must make two fundamental determinations, namely: (1) whether the objecting person has standing to maintain the appeal; and, if so, (2) whether the board's decision was "based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary." *MacGibbon v. Bd. of Appeals of Duxbury*, 356 Mass. 635, 639 (1970). See *Jepson v. Zoning Bd. of Appeal of Ipswich*, 450 Mass. 81, 96 (2007).

To have standing to appeal, one must be "aggrieved" by the decision under review. "Parties in interest" entitled to notice of the local board hearing under G. L. c. 40A, § 11, are

presumed to be "persons aggrieved" and include abutters to the property.[3] *Standerwick v. Zoning Bd. of Appeals of Andover*, 447 Mass. 20, 33 (2006); *Denneny v. Zoning Bd. of Appeals of Seekonk*, 59 Mass.App.Ct. 208, 212 (2003). However, the presumption recedes when the party defending the decision challenges the plaintiff's standing with "any additional evidence" showing that the plaintiff is not aggrieved. *Standerwick*, 447 Mass. at 33; *Barvenik v. Bd. of Aldermen of Newton*, 33 Mass.App.Ct. 129, 131 (1992). Once the defendant offers evidence rebutting the presumption, the burden shifts to the abutter to prove standing, "which requires that the plaintiff 'establish – by direct facts and not by speculative personal opinion – that his injury is special and different from the concerns of the rest of the community.'" *Standerwick* at 33, quoting *Barvenik*, 33 Mass.App.Ct. at 131; *Sweenie v. A.L. Prime Energy Consultants*, 451 Mass. 539, 545 (2008). Such evidence must have

> "both a quantitative and a qualitative component . . . Quantitatively, the evidence must provide specific factual support for each of the claims of particularized injury the plaintiff has made. Qualitatively, the evidence must be of a type on which a reasonable person could rely to conclude that the claimed injury likely will flow from the board's action. Conjecture, personal opinion, and hypothesis are therefore insufficient."

Butler v. City of Waltham, 63 Mass.App.Ct. 435, 441 (2005) (citations omitted). See *Kenner v. Zoning Bd. of Appeals of Chatham*, 459 Mass. 115 (2011) (finding no standing for abutter who alleged harm in the form of an obstructed view of the ocean, a diminution in property value, and increased traffic because the alleged harms were either *de minimis* or speculative). The degree of "aggrievement" necessary to sustain a standing challenge was described in *Kenner* as follows:

> "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,

[3] General Laws c. 40A, § 11 defines "[p]arties in interest" as including "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 of the petitioner."

> objectively speaking, truly and measurably harmed. Put slightly differently, the analysis is whether the plaintiffs have put forth credible evidence to show that they will be injured or harmed by proposed changes to an abutting property, not whether they simply will be 'impacted' by such changes."

Id. at 122.

Courts have interpreted the term "aggrieved" to be a person "who can plausibly demonstrate that a proposed project will injure [his or her] own personal legal interests *and* that the injury is to a specific interest that the applicable zoning statute, ordinance, or bylaw at issue is intended to protect." *Standerwick*, 447 Mass. at 30 (emphasis in original). While the term "person aggrieved" is not to be narrowly construed, the plaintiff's injury must be more than "minimal or slightly appreciable." *Murchison v. Zoning Bd. of Appeals of Sherborn*, 485 Mass. 209, 213 (2020). But a plaintiff may not establish standing by merely alleging a zoning violation. *Sweenie*, 451 Mass. at 545. "The language of a bylaw cannot be sufficient in itself to confer standing: the creation of a protected interest (by statute, ordinance, bylaw, or otherwise) cannot be conflated with the additional, individualized requirements that establish standing." *Id*. In other words, to show that he or she is aggrieved, a plaintiff must demonstrate both that the legal right violated is intended to be protected by the applicable zoning bylaw and that the alleged violation caused specific injury to his or her personal legal interest. *Standerwick*, 447 Mass. at 30.

Aggrievement sufficient to confer standing also cannot be based purely on a matter of general public interest or concern. *Harvard Sq. Defense Fund. v. Planning Bd. of Cambridge*, 27 Mass.App.Ct. 491, 493 (1989). One's general civic interest in the proper enforcement of a zoning bylaw is not enough to support a finding that the party challenging a zoning decision has standing. *Id*. See, e.g., *Godfrey v. Bldg. Comm'r of Boston*, 263 Mass. 589, 593 (1928);

Chongris v. Bd. of Appeals of Andover, 17 Mass.App.Ct. 999, 999-1000 (1984); *Waltham Motor Inn, Inc. v. LaCava*, 3 Mass.App.Ct. 210, 218 (1975).

Here, the Plaintiffs are "parties in interest" as they are abutters to the property or abutters to abutters within three hundred feet of the property. Thus, they are presumed to be aggrieved by the Board's decision.[4] In their complaint, they contend that they will suffer harm from the project because it is incompatible with the neighborhood due to its size (Complaint, ¶ 30) and will cause harm that they describe in Paragraph 33 of their complaint as follows:

> "(1) increased traffic that will jeopardize pedestrian and vehicular traffic for residents and visitors of Belgrade Avenue and Anawan Avenue; (2) harmful impacts on the environmental conditions at the Plaintiffs' properties; and (3) because the proposed FAR very significantly exceeds the Boston Zoning Code's dimensional limitations for the Property, the Project's density is harmful to its neighbors. Finally, contrary to the Board's unsupported finding that granting the requested relief will be in harmony with the general purpose and intent of the Code, the Defendant's Proposed Project will be injurious to the neighborhood and otherwise detrimental to the public welfare."

Upton Belgrade contends that none of the Plaintiffs will, in fact, be harmed by the project in any way that establishes their standing to appeal. To that end, Upton Belgrade has submitted affidavits from its design consultants in an effort to rebut the Plaintiffs' claims of aggrievement. Those affidavits – from David Bois, the project architect, and Keri Pyke, P.E., the project traffic engineer – describe the design of the project and the anticipated impact that it will have on the abutters and the neighborhood at large. I will address the specifics of the affidavit testimony from each expert as they relate to the harms that the Plaintiffs have alleged will result from the project. However, it is important to note that, in most respects, the Plaintiffs have failed to distinguish their personal concerns from those of the rest of the community.

[4] Five of the Plaintiffs live at the Belgrade Crossing Condominium, which is directly across the street from the project. The two other Plaintiffs who live on Rhoda Avenue and Anawan Avenue do not appear to be direct abutters to the property but may live within 300 feet of the property as the crow flies.

(i) Project is Incompatible with Neighborhood

The Plaintiffs assert that the project is "incompatible" with the neighborhood due to the fact that it will be taller and larger than the surrounding structures and, therefore, is too dense for the project site and the neighborhood. To rebut that assertion, Upton Belgrade has offered the affidavit testimony of its project architect, David Bois. The Bois affidavit provides a detailed description of the project, with particular attention to the dimensions of the proposed structure in light of the limitations imposed on the property by the Boston zoning code, the location of the proposed driveway/parking entry, the introduction of green space along the frontage on West Roxbury Parkway, and the implementation of certain intersection enhancements, including improved sidewalks, that are intended to enhance traffic and pedestrian safety.

In response, the Plaintiffs have described their concerns about the project in their respective affidavits. They fear that the project will cause an "overcrowding of land," "congestion in the streets," "undue concentration of population," and will cast shadows on the condominium property that are not cast by the existing buildings.[5] To the extent that these concerns are the product of the density of the proposed building, the Plaintiffs have not proffered credible evidence of how that density will harm them or their respective properties. Although density concerns are squarely within the scope of the Boston zoning code, the Plaintiffs may not merely allege harm caused by "increased density" to establish standing. See *Sheppard v. Zoning Bd. of Appeal of Boston*, 74 Mass.App.Ct. 8, 12 (2009). Rather, they must identify the manner in which the density of the permitted development would negatively affect their property directly and with specificity. *Dwyer v. Gallo*, 73, Mass.App.Ct. 292, 295 (2008). They have failed to identify such harms that are particular to them, as opposed to harms to the neighborhood at large.

[5] These alleged harms appear to be a recitation of the stated purposes contained in Article 1 of the Boston Zoning Code.

Indeed, concerns that can be characterized as an "impact to the neighborhood" are not sufficient to confer standing. *Barvenik*, 33 Mass.App.Ct. at 132-133 ("Subjective and unspecific fears about the possible impairment of aesthetics or neighborhood appearance, incompatible architectural styles, the diminishment of close neighborhood feeling, or the loss of open or natural space" are all considered insufficient bases for aggrievement under Massachusetts law.").

On the record before me, the Plaintiffs' assertion that the project is incompatible with the neighborhood is not sufficient to establish their standing to challenge the Board's decision.

(ii) Increased Traffic Will Jeopardize Residents

The Plaintiffs suggest that the project will cause an increase in traffic in the area, which will create a safety concern to pedestrians and other drivers. They do not make the more traditional traffic claim that the project will cause a shortage of parking for them or an increase in traffic that will harm their ability to enter or exit from the respective properties.

Upton Belgrade has offered the affidavit of its traffic engineer, Keri Pyke, P.E., to address the Plaintiffs' concerns about traffic. Pyke evaluated the impact the project will have on the surrounding roadway infrastructure. According to her analysis, the project will cause an incremental increase in the number of vehicles that enter or exit on the side street that separates the project from the Belgrade Crossing Condominium during peak hours. However, the study area intersections and approaches will continue to operate at similar levels of service during peak hours after the project is constructed. She then analyzed the impact on traffic of a commercial development of a size and scope that is allowed by right as a means of comparison to the project. That analysis predicted that an as of right commercial development would generate as much as ten times more vehicle trips than as predicted for the project. While not dispositive, the difference in traffic expected by an as of right commercial use compared to the project suggests

that the Plaintiffs' nonspecific fears of an increase in traffic are speculative. With the Pyke affidavit, Upton Belgrade has rebutted the presumption that the Plaintiffs will be harmed by traffic.

The Plaintiffs have not offered any expert evidence to respond to the findings made by Pyke. Instead, they have relied on their own personal opinions and speculation about how the project will change the neighborhood. More importantly, the concerns they express about traffic are not special to any of them. Rather, they are concerns that, if supported by credible evidence, would affect the entire neighborhood. For those reasons, the Plaintiffs' alleged concerns about traffic are insufficient to establish standing.

(iii) Harmful Impacts on Environmental Conditions

This allegation by the Plaintiffs is not specific as to the aspects of the project that will be harmful to the "environmental conditions" at their respective properties. However, it appears that this alleged harm is related to new shadows that the Plaintiffs allege will be cast on the condominium property by the project.

On this issue, Bois prepared a shadow study that was presented to the BPDA and the Board as part of the regulatory process. The shadow study predicted how the new building will impact sunlight and cast shadows on the surrounding properties at different times of day, on different days of the year. The Bois Affidavit summarized that study, *with supporting exhibits*, predicting that the project will have "no impact on the direct, natural sunlight reaching the condominium properties" and that the new building will have "limited shadow impact on the condominium building and de minimis impact on part of the condominium parking area." This evidence rebuts the presumption that the Plaintiffs will be harmed by a change in shadows as a result of the project.

In response, the Plaintiffs have not offered their own shadow study or any expert testimony that would call into question the results of the Bois shadow study. Instead, they simply reject the conclusions of the Bois Affidavit as inaccurate based on their "familiarity with the location and the sun patterns" in the area. This assertion of harm caused by shadows is not supported by credible evidence and, thus, does not support their standing to maintain this appeal.

Amount of Bond

Having found for the purposes of Upton Belgrade's motion that it is likely to rebut the Plaintiffs' presumption of standing to maintain this appeal, I find that the appeal is not "highly meritorious." Thus, the requirement of a bond is appropriate.

Unlike a zoning appeal under G. L. c. 40A, § 17, Section 11 of the Boston Zoning Enabling Act allows this court to consider "damages and costs" to the applicant in setting the amount of the bond. The court is not limited to considering only "costs" to the applicant, as the SJC decided in *Marengi v. 6 Forest Road, LLC*, 491 Mass. 19, 20 (2022).

In deciding the amount of the bond that is appropriate in this case, the court must balance the Plaintiffs' resources against the potential harm to Upton Belgrade caused by the delay engendered by this appeal. *Feldman*, 29 Mass.App.Ct. at 298-299. However, this is just one factor in the equation that sets the bond amount. *Id*.

Here, Upton Belgrade offered the affidavit of John R. Upton in support of the amount of the bond requested in its motion. Upton estimates that this case, plus any appeal that may ensue, will likely span eighteen months. As a result of the delay, Upton has calculated the expected damages and costs to exceed $15,000,000 and will include: (1) $200,000 in legal fees; (2) $4,900,000 in increased labor and construction costs; (3) $5,510,000 in payments for additional debt service; (4) $450,000 in additional ground lease expenses (over 18 months); and (5)

$4,323,960 of lost net income. Faced with these possible "damages and costs," Upton Belgrade requests a bond in the amount of $700,000 (less than 5% of the projected damages and costs) as a condition to the Plaintiffs continuing with this appeal.

The Plaintiffs have not provided any evidence of their resources, individually or as a group, for the court's consideration in the setting the bond amount, nor have they challenged the amount of the damages and costs which Upton claims will be occasioned by their appeal. Instead, they argue that the court should not consider the damages alleged by Upton based on the holding in *Marengi v. 6 Forest Road, LLC*. But *Marengi v. 6 Forest Road, LLC* does not control an appeal under the Boston zoning code, as its holding is expressly limited to appeals brought under G. L. c. 40A § 17. *Marengi*, 491 Mass. at 34.

I find Upton's estimate of eighteen months as the likely track of this litigation to be reasonable. Likewise, I find his estimate of $200,000 in legal fees and $450,000 in additional ground lease expenses as a direct result of this appeal to be reasonable. The remaining damages and costs – increased labor and construction costs, increased borrowing costs, and loss of net income – are too speculative to serve as the basis for setting the bond amount.

Accordingly, I credit Upton's affidavit that Upton Belgrade will incur damages and costs of, at least, $650,000 as a result of the delay caused by this appeal. Taking into account the balancing of interests required by *Damaskos* and *Feldman*, I find that a bond should be required in the amount of $200,000. Therefore, it is

ORDERED that the Motion to Compel Bond filed by Defendant Upton Belgrade is ALLOWED; and it is further

ORDERED that within twenty days of the date of this Order, the Plaintiffs shall file a bond with sufficient surety, for the sum of Two Hundred Thousand ($200,000) Dollars, to

indemnify and save harmless the Defendant, Upton Belgrade, from the damages and costs which it may sustain in case the decision of the Board is affirmed.

By the Court. (Smith, J.)

/s/ Kevin T. Smith

Attest: */s/ Deborah J. Patterson*
Deborah J. Patterson
Recorder

Dated: February 14, 2024